COMMUNITY COURT OF JUSTICE, ECOWAS

[2004 - 2009]

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

COMMUNITY COURT OF JUSTICE, ECOWAS

(2004 - 2009)
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To be Cited as : (2004 - 2009) CCJELR

2004 - 2009
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Abuja, March 2011

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Published by
COMMUNITY COURT OF JUSTICE, ECOWAS
ABUJA, NIGERIA

10 Dar Es Salaam Crescent,
Off Aminu Kano Crescent,
Wuse II,
Abuja, NIGERIA

website: courtecowas.org

ISBN -13 978-978-50385-0-7

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Foreword

I am privileged and have the pleasure, of introducing to the general public, the maiden edition of the Community Court of Justice, ECOWAS Law Report. The present edition is a compilation of the Decisions and Opinions of the Court since its effective date of functioning in 2004.

The publication of this edition offers me an opportunity to recall the progress of the Court, which had to surmount obstacles and inadequacy of Texts, in order to establish its own jurisprudence, as could be seen in this edition.

Indeed, the Community Court of Justice, ECOWAS, the Main Judicial Organ of the Community started functioning in 2001, by the entry into force of Protocol A/P.1/7/91 on the Court. By the provisions of the said Protocol, the primary mandate of the Court was the resolution of disputes relating to the interpretation and application of the provisions of the Revised Treaty, and the other Texts of the Community. It was also empowered, to give Advisory Opinion to Member States and Institutions of the Community. In the exercise of its mandate, the Court ensures the respect for the law and the principles of equity, in the interpretation of the ECOWAS Community Law. Thus, from inception, the scope of the jurisdiction of the Court was very narrow and its access very restrictive as well.

This narrowness of the jurisdiction of the Court, which was its major problem at inception, came to the fore, in the case concerning OLAJIDE AFOLABI v. FEDERAL REPUBLIC OF NIGERIA, the first case brought before the Court. As at the time this case was lodged at the Court, access was not yet open to individuals. There was therefore the need to correct this anomaly, if we were to have a Court that ensures the respect for the law, in the service of the Community and its Citizens. The stakes were high, for, it was a matter of

opening the floodgates, and to take new initiatives, if really we were to enable ECOWAS to transform from a Community of States to a Community of Peoples.

That explains the reason why Protocol A/P.1/7/91 was amended by the Supplementary Protocol A/SP.1/01/05 of January 2005. The latter opened access of the Court to individuals and corporate bodies, and widened the Court's jurisdiction to cover cases of human rights violations that occur in any Member State. Better still; the Supplementary Protocol does not require Applicants to exhaust local remedies, as a condition precedent, for bringing actions relating to human rights violation before the Court. Since then, the Community Court of Justice, ECOWAS has not failed in proving that it is an essential Institution in the process of integration in West Africa. As a Community Court in the West African region, it is occupying a privileged position to promote the values of democracy, good governance, the primacy of the law and the respect for human rights, and reminding State Parties of their responsibilities towards their Treaty obligations.

In carrying out its judicial mandate, the Community Court of Justice has creditably acquitted itself by its proactive and bold judgments, some of which have received international acclaim, thereby making the Court a source of pride to the Community. It is therefore necessary, that the judgments of the Court be made readily available to the general public, by any means of communication possible, one of which is the present publication. Grouped therein are Opinions, Decisions and Rulings on passionate cases, between 2004 and 2009

As a document on Community derived law, this Compendium should be of great interest to the Community citizens of ECOWAS and the general public, and an invaluable companion to lawyers, judges and scholars, as well as specialists of human rights and Community law. This is because, the importance of a Compendium, in the consolidation of law, can not be over emphasised. Without doubt, it is hoped that the reader will find the Community Court of Justice Law Report extremely useful. The Court has been forced by material constraints to publish Judgements given over six years in a single volume.

But, the Court shall make it possible that in subsequent years, this Law Report is published on an annual basis. In order to improve upon subsequent editions, the Court shall favourably welcome observations and suggestions from the readers and users, with a view to improving upon subsequent editions.

For the Court,

Hon. Justice Awa NANA DABOYA
President.

JUDGES OF THE COURT (2001 - 2009)

1. **HON. JUSTICE HANSINE NAPWANIYO DONLI**
2. **HON. JUSTICE EL MANSOUR TALL**
3. **HON. JUSTICE BARTHELEMY TOE**
4. **HON. JUSTICE AWA DABOYA NANA**
5. **HON. JUSTICE ANTHONY ALFRED BENIN**
6. **HON. JUSTICE SOUMANA DIRAROU SIDIBE**
7. **HON. JUSTICE SANOGO AMINATA MALLE**
8. **HON. JUSTICE MOSSO BENFEITO RAMOS**
9. **HON. JUSTICE CLOTILDE NOUGBODE MEDEGAN**
10. **HON JUSTICE ELIAM MONSEDJOUENI POTEY**

(CHIEF REGISTRAR)
TONY ANENE-MAIDOH

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 27TH OF APRIL, 2004

SUIT N°: ECW/CCJ/APP/01/03
JUDGMENT N°: ECW/CCJ/JUD/01/04

BETWEEN
MR. OLAJIDE AFOLABI - *Plaintiff*
V.
FEDERAL REPUBLIC OF NIGERIA - *Defendant*

COMPOSITION OF THE COURT
1. **HON. JUSTICE H.N. DONLI** - PRESIDENT
2. **HON. JUSTICE AWA DABOYA NANA** - MEMBER
3. **HON. JUSTICE AMINATA MALLE** - MEMBER

ASSISTED BY
TONY ANENE-MAIDOH - CHIEF REGISTRAR

COUNSEL TO THE PARTIES
1. *Mr. Alex Ikay Molokwu - for the Plaintiff*
2. *Mr. R. J. K. Ehicheoya - for the Defendant*

JUDGMENT OF 27TH APRIL, 2004

Jurisdiction, Principles of interpretation. Access to Court by individuals (Article 9 of the 1991 Protocol of the Court)

SUMMARY OF THE FACTS

On August 9 2003, the Applicant, Mr. Afolabi Olajide, a national of the Federal Republic of Nigeria and a businessman, concluded arrangements with his customers in Benin Republic for him to purchase goods. In the course of his normal and legitimate business, he set out on his journey and upon reaching the border at Seme, he realized that the border had been closed by the Federal Republic of Nigeria. Despite his pleas to the Nigerian authorities at the border, he was not allowed to cross the border, and so he returned home afterwards. The Applicant avers that as a result of the closure of the border he incurred heavy financial losses whereupon he sued the Federal Republic of Nigeria for a declaration that the unilateral closure by the Federal Republic of Nigeria of her border with Benin Republic is unlawful, a breach of Article 4(g) of the ECOWAS Treaty and a violation of the Plaintiff's right to freedom of movement of his person and goods as guaranteed by the Revised Treaty of ECOWAS.

LEGAL ISSUE

Whether the Community Court of Justice has jurisdiction to entertain a suit filed by a Community citizen alleging a breach of his right of freedom of movement against a Member State.

DECISION OF THE COURT

Article (3) of Protocol A/P1/7/91 under which the Plaintiff instituted his action is unambiguous and does not grant direct access to individuals for breach of their fundamental human rights. The Court has to give effect to the plain words or terms of the Protocol, irrespective of its consequences. The Court lacked jurisdiction to hear the suit on its merits.

JUDGMENT OF THE COURT

FACTS OF THE CASE

1. On August 9, 2003, the Applicant, Mr. Afolabi, a businessman, concluded arrangements with his customers in Benin Republic wherein, he agreed with them to purchase goods and take delivery of them on the date stated.

2. He set out on his journey and upon reaching the Seme border, between the Republic of Nigeria and Benin Republic, he found that the Border had been ordered closed, by the Federal Ministry of Foreign Affairs through a press statement that the Federal Government of Nigeria had deemed it necessary to close the border until the condition precedent for the opening of the border had been fulfilled by the Republic of Benin.

3. The Applicant, Mr. Olajide Afolabi could not proceed on his journey to Benin Republic despite his pleas to the security agents at the border about his firm commitment pursuant to his contractual obligation in Benin Republic, he was turned back.

4. Having had heavy loss for the said failure to fulfil his bargain, he as a Community citizen, filed the action in this Court of Justice, pursuance of Article 9 of the Protocol A/P.1/7/91 and Article 56 (now Article 76) of the Revised Treaty.

5. Article 15 (2) of the Revised Treaty stated that the status, composition, powers, procedure and other issues concerning the Court of Justice shall be set out in a Protocol relating thereto.

6. Also Article 9 of Protocol A/P.1/7/91 of the Community Court of Justice relating to the competence of the Court provides thus:

   "1. The Court shall ensure the observance of law and the principles of equity in the interpretation and application of the provision of the Treaty.

2. The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the institutions of the Community on the interpretation or application of the provisions of the Treaty.

3. A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed.

4. The Court shall have any power conferred upon it, specifically by the provisions of this Protocol."

7. With the requirements boldly stated in Article 9 of the said Protocol the Applicant, Mr. Olajide Afolabi, being aggrieved instituted this action, claiming the relief stated hereunder:

(a) Declaration that the unilateral closure by the Federal Republic of Nigeria of her border with Benin Republic from 9th to 15th of August, 2003, is unlawful and a breach of Article 3(2)(d)(iii) and Article 4 (g) of the Revised Treaty of the Economic Community of West African States (ECOWAS) dated 24th July, 1993, and to which Nigeria is a signatory.

(b) A Declaration that closure by the Federal Republic of Nigeria of her border with Benin Republic from the 9th to 15th of August, 2003, is a violation of the Plaintiff's Right to Freedom of movement of his person and goods, Rights of egress and ingress as guaranteed by the Revised Treaty of the Economic Community of West African States, 1993, the Protocol on the Free Movement of Persons and Goods and Article 12 of the African Charter on Human and Peoples' Rights adopted by the Federal Republic of Nigeria in 1990.

(c) A Mandatory Order of injunction restraining the Federal Republic of Nigeria from further closure of her border with Benin Republic.

(d) Costs of N5,000,000.00 (Five Million) Naira against the Applicant/ Defendant, the Federal Republic of Nigeria"

PRELIMINARY OBJECTION AND SUBMISSION OF COUNSEL

8. The Respondent upon the receipt of the claim so filed against it, by the Applicant/Plaintiff, filed a Preliminary Objection dated November 27, 2003 and stated the terms of the objection thus:

    "An order striking out the suit for want of jurisdiction. And such further order or other orders as this Honourable Court may deem fit to make in the circumstance"

9. In support of the Preliminary Objection, are documents marked A, and C, amplifying the terms in their written submission which brought out more explicitly the concerns of the Applicant and their positions regarding the propriety of the suit in question. He emphasized on the strict application of Article 9 (3) of the Protocol that gives the Court the competence to adjudicate upon the matter.

10. The Learned Counsel to the Respondent Mr. J. K. Ehicheoya, submitted in the Reply to the written submission of the Respondent that their objection was not on locus standi but the jurisdiction of the Court to entertain the suit filed by Olajide Afolabi, the Applicant.

11. He reiterated that the Applicant has no right of direct access to this Court. He further submitted that the right of access is not the same as right or interest in the subject matter in dispute and lack of access to Court is not only in relation to lack of *locus standi*. He relied on **Faloye *v.* Omoseni (2001) 9 NWLR (PT717) 190**; **Lawal *v.* Oke (2001) 7 NWLR PT (711) 88**.

12. He further contended that under Article 9 of the Protocol, the only instance a national will have access to the Court is when his Country brings action on his behalf. He sealed his argument when he punctuated the argument of the Respondents submission by stating that

no specific provision of the Protocol vested the Court with powers to adjudicate in respect of suits filed by nationals or individuals except as provided by Article 9 of the Protocol.

13. On the point relating to inherent jurisdiction, he emphasized that jurisdiction is statutory and specifically conferred. He submitted that the Court cannot under inherent jurisdiction exercise powers not otherwise expressly stated in the Treaty or the Protocol. He urged the Court to strike out the suit for want of jurisdiction with substantial cost.

14. The Reply to the Preliminary Objection by the Learned Counsel to the Applicant Mr. Alex Ikay Molokwu brought out novel points for consideration, in view of the complex situation of the suit. Learned Counsel opposed the Preliminary Objection and set out the pleas of facts and law dated November 28, 2003 with particular reference to the use of the word "may" in Article 9 (3) of Protocol A/P.1/7/91. He submitted that the use of the word "May" in Article 9 (3) was directory and not mandatory.

15. He stated that a situation where a party is instituting action against his Country, the Member State cannot represent the party because the Member State cannot be both the Plaintiff and the defender and that the provision of Article 9 (3) will only apply as it is where the Member State is not his country.

16. In his written submission dated February 12, 2004, Learned Counsel, relying on Article 9 (3) submitted that the Applicant has right of appearance in this Court to litigate the claim.

17. He argued that the issue which borders on jurisdiction is predicated upon the legal issue of *Locus Standi* as to whether the Plaintiff has a *Locus Standi* to maintain this action.

18. He argued that the issue of Article 9 (3) of the Protocol calls for the interpretation of the word **"may"** as to determine whether the peculiar case of the Applicant is outside the ambit of the provision or open to interpretation in favour of the Respondent. He referred to

the canons of interpretation and the case of **R *v.* Banbury** *(inhabitants)* **1834 1A & E 136 at 142** wherein Parke J ruled:

> *"The rule of construction is* ***"to intend the Legislature to have meant what they actually expressed."***

19. According to Lord Green M.R. There is one rule of construction for statutes and other documents; it is that you must not imply anything in them which is inconsistent with the words expressly used. He further referred to **Re A Debtor N° 335 of 1947, 1948 2 All ER 533 at 536.**

20. On the meaning of the word 'May', Learned Counsel submitted that "May" always mean permissive or enabling expression and referred to **Bakare *v.* The Attorney General of the Federation & 2 ORS (1990) 5 NWLR (PART 152) page 516 at 545 paragraphs E-G** held that:

> ***"Although the word may always means 'May' it is a permissive or enabling expression... Also as pointed out in Halsbury's Laws of England 3rd Edition Volume 433 the use of the word 'may'*** *prima facie* ***conveys that the authority which has the power to do such act has an option either to do it or not to do it"***

21. He submitted that the interpretation adopted by the Respondent would amount to shutting out the Applicant with legitimate claim from pursuing his entitlement before a Court. He submitted that this is the appropriate Court as a Community citizen.

22. On the issue of jurisdiction, he submitted that jurisdiction is usually a creation of statute. He urged the Court to hold that the Court has jurisdiction to hear the case.

23. On the issue of whether only Member States may maintain an action before the Court, Learned Counsel submitted that the provision of Article 9(3) of the Protocol did not specify that only Member States have access to the Court and referred us to Article 34 of the Statute of the International Court of Justice which specified that only Member States have access to the Court.

24. He urged the Court to hold that since Article 9 (3) of the Protocol did not specify clearly as stated in Article 34, the framers of Article 9 of the Protocol intended to exclude such inclusion of the words in Article 9 (3) of the Protocol.

25. On the application of Article 9 (1) of the Protocol regarding ensuring the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty, Learned Counsel brought into focus that this Court possessed an inherent jurisdiction to take such action as may be required in order to ensure settlement of the matters in dispute.

DELIBERATION

26. The Court examined all the issues canvassed by the parties including the salient points in relation to the Preliminary Objection herein.

27. We are not in doubt that on the point arising from the application of Article 9(1) of the Protocol with particular reference to the application of equity, the well stated principle of law that cannot be faulted is that equity follows the Law but not otherwise.

28. The position stated above being so apt, that equity cannot stand where there is a law on the matter and that inherent jurisdiction confers no jurisdiction on the Court, the argument on the application of Article 9(1) is devoid of substance.

29. Consequently, the question which we have now to determine in order to resolve the controversy in the Preliminary Objection is whether this Court has jurisdiction to adjudicate on the substantive matter instituted by Mr. Olajide Afolabi, the Applicant, in this case.

30. Let it be stated that the question of competence is a serious one and the Courts which guard their jurisdiction jealously would always examine an application of this nature carefully as not to allow arbitrary ousting of its powers.

31. In clear terms the only question for us to determine herein is whether this Court has jurisdiction to adjudicate on the suit instituted by the Applicant.

32. It is a well established principle of law that a Court is competent when:
    1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
    2) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and
    3) the case comes before the Court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

33. The position of law which cannot be overstated is that any defect in competence is disastrous, for the proceedings are nullities, no matter how well conducted and decided, the defect is extrinsic to the adjudication. In the instant case the action was filed by the Applicant who is an individual and the contention of the respondent is that only a Member State may file the action on his behalf.

34. This contention brings us to examine Article 9 (3) of the Protocol of the Court. Looking at the cardinal principles of interpretation in relation to the said Article, does it call for resort to interpretation? When does the Court fall back on the rules of interpretation particularly the interpretation of Treaty?

35. In a study by **FITZMAURICE** of the decisions of the International Court of Justice involving the interpretation of Treaties, his analysis detects five principles as follows:
    i) Actuality (or textual interpretation)
    ii) Natural or ordinary Meaning;
    iii) Integration (or interpretation of the treaty as a whole);
    iv) Effectiveness (*ut res magis valeat quam pereat*);
    v) Contemporaneity (interpretation of texts and terms in the light of their normal meaning at the date of the conclusion) *see* Law of Treaties by McNair at page 364.

36. A very full statement on the first and second principles enunciated above from Cross on Statutory Interpretation, third edition by John Bell and George Engle in the Sussex Peerage Case page 50 stated:

    "... if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense… But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting that intention to call in aid the ground and cause of the making of the statute ..."

37. This point leads us to consider the principles of another rudiment of interpretation called the Mischief Rule. This rule allows for a departure from the literal rule when the application of the statutory words in the ordinary sense would be repugnant to or inconsistent with some other provision in the statute or even when it would lead to what the Court considers being an absurdity. The usual consequence of applying the mischief Rule is that words which are in the statute are ignored or words which are not there are read in.

38. Apart from absurdity that the expounding of the legislation may produce in applying the literal rule, it may be contradictory and inconsistent therefore the aid of the rule will apply. In **Mitchell *v.* Torup (1786) Park 227 at 233 Parker CB** said:

    " in expounding Acts of Parliament where words are expressed, plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the Act by reason of some subsequent clause, from whence it might be inferred that the intent of the Parliament was otherwise."

39. The Learned counsel to the Applicant in this case made it clear that the provision of Article 9 (3) was clear and unambiguous which was conceded by Learned Counsel to the Respondent. However, the

contention of the Applicant, when he placed premium on the word 'May' was that the word in its literal and natural sense is directory and not mandatory.

40. His further contention that where the Applicant is suing his Member State, to give the words their natural connotation would produce a situation where the Member State is the Plaintiff and the Defendant.

41. He continued that such a situation would not be legally possible. He then called for the aid of the principles of equity in Article 9 (1) of the Protocol. On the other hand, Learned Counsel for the Respondent urged the Court not to resort to redrafting of the provision that is clear that only Member States are parties before the Court by the provision of Article 9(3) of the Protocol.

42. In this regard, reference was made to Article 34 of the Statute of the International Court of Justice wherein it specified that **"Only States may be parties in cases before the Court."** For him, where in Article 9 (3) it is not so stated, such provision may not be read into the provision of the Article in question, as the Applicants Counsel tried to do in this case.

43. The Applicant also referred to Article 9 (1) of the Protocol to ensure the Respondent is not shut out before this Court, when he has a substantial claim against the Respondent.

44. Learned Counsel made a point on the application of the principles of equity to the case. What is the import of Article 9(1) of the Protocol in respect of the application of the principles of equity to aid a situation that is not within the perimeters of the provision of Article 9 (3) of the Protocol?

45. Article 9 (1) of the Protocol states:

> ***" 1. The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty."***

46. It is trite law that, Equity aids the vigilant and follows the law and acts as shield not a sword. In Black's Law Dictionary Seventh Edition, the word **'equity'** is defined thus:

> ***"1. Fairness; impartiality; evenhanded dealing......***
>
> ***2. The body of principles constituting what is fair and right; natural law;***
>
> ***3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances. The judge decided the case by equity because the statute did not fully address the issue..."***

FINDINGS OF THE COURT

47. By the question put to this Court, the Respondent seeks for an Order to strike out the suit instituted by the Applicant on the grounds that the suit having been filed by a national of the Federal Republic of Nigeria against the Federal Republic of Nigeria as a Community citizen in pursuant to Article 9(3) of the Protocol of the Court, that requires only a Member State to institute action on behalf of its nationals, gave course for this proceedings and the arguments as to whether the Court lacks jurisdiction to hear and determine the suit.

48. The said Article states that

> ***" A Member State may, on behalf of its nationals, institute proceedings against another Member State or institution of the Community... "***

Are these words ambiguous or obtuse as to warrant the resort to the rules of interpretation?

49. The use of the word **'May'** connotes an elective/permissive stance that would enjoin the State to exercise its discretion either to act on behalf of the nationals or not. As it was put in the case of **Becke *v.* Smith, Parke B** *(as he then was)* said;

> ***" it is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the***

> ***words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further"***

50. In 1992, **Lord Griffiths, in Pepper *v.* Hart (1993), All ER 42 at 50** stated:

> ***"The days have long passed when the Court adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Court now adopts a purposive approach which seeks to give effect to the true purpose of legislation and is prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. In Stradling versus Morgan, a restrictive interpretation of statute was adopted, whereas, in Heydon's case, extensive interpretation was applied to give way for other interpretations."***

51. In **Beck *v.* Smith, Park B** (as he then was) said:

> ***"It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the word used and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself."***

52. The contracting parties to the Protocol are the Member States of the Economic Community of West African States (ECOWAS). The Court is to collect from the nature of the subject, from the words and from the context of the Protocol, the true intent of the contracting parties, when the provisions of a statute are apt and clear.

53. Would a reasonable man say from reading Article 9(3) of the Protocol that the nationals are prima facie excluded from instituting

proceedings against Member States? Strictly speaking, when the meaning of the Treaty is clear, it is applied not interpreted. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the Treaty, or when they are susceptible of different meanings.

54. The context of the Article in question, as a whole, being so clear even though giving effect to the words used in their natural and ordinary sense, that is Fitzmaurice principles No. 2 stated in the preceding paragraph, the Contracting parties in our view envisaged only Member States, despite what may look like being harsh on individuals or nationals of the Community.

55. The Court is not here to change the provision of the Protocol but to apply it when it is clear or interpret it when it is abstruse and ambiguous. The Applicant from his application is raising a serious claim touching on free movement and free movement of goods and his rights to challenge an infringement upon his person.

56. What the Applicant's counsel is asking us in the given circumstance relates to his urging us to adopt not a narrower purposive approach, but to hold that the provision if applied as it is would exclude him from pursuing his case before this Court. His reference to Article 9 (1) of the Protocol which has bearing with Article 164 of the Statute of Court of Justice of the European Communities is a general provision which activist judges apply to shape a Statute to define the role of the Court very broadly in the interest of justice. Article 164 provides that

> ***"the Court of justice shall ensure that in the interpretation and application of this Treaty, the law is observed."***

The Court has applied this provision to extend its review on jurisdiction to cover bodies which were not listed in the Treaty. The provision has also been used to fill in gaps in Treaties but some of the decisions attracted criticisms. We therefore do not want to tow the same line.

57. On the application of equity, the Court commented generally on the point supra and in addition the Court now holds that the application of the principles of equity in the sphere of international law is unclear. In Cases and Materials on International Law by Martin Dixon & Robert McCorquodale page 45, it is observed that:

> ***"The fact that tribunals often invoke equity does not necessarily mean that equity is a formal source of law and that it is desirable to apply equity. As stated in Hansbury and Martin on Modern Equity 16th Edition by Jill E. Martin page 27 "Clearly equity may not depart from statute law ...save in exceptional circumstances"***

58. Consequently, the Court rejects the arguments on the application of equity in the instant case for the reasons stated herein.

THE GROUNDS FOR THE DECISION

THE DECISION OF THE COURT

59. The counsel to the Applicant contended that this Court has jurisdiction to hear the substantive case on the ground of the peculiar nature of the suit wherein the Applicant instituted proceedings against his State which hitherto would have represented him. Article 9 (3) being unambiguous requires that the Court gives effect to the plain words or terms of the Protocol, irrespective of the fact that it failed to meet the circumstances of the Applicant's case.

60. Finally, every provision of the Community law must be placed in its context and applied or interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

61. In the light of all those considerations, the answer to the question submitted to the Court must be that the first paragraph of Article 9(3) of the Protocol is to be applied as meaning that this Court is

competent to hear disputes instituted by a Member State on behalf of its nationals against another Member State or institution of the Community and not otherwise, as in the case.

62. By the examination of the said Protocol, the Applicant cannot bring proceedings other than as provided in Article 9(3) of the Protocol. This view proves the point that the Applicant in this case cannot bring the proceedings against his Country or Member State which by law is saddled with the responsibility of instituting proceedings on his behalf.

63. Even though the said Article 9 (3) is not in pari materia with Article 34 of the International Court of Justice Statute, the clear intendment excludes persons not mentioned therein.

64. The Court in answer to the application for striking out the proceedings instituted by the Applicant on October 10, 2003 must grant same. In the circumstance, the Preliminary Objection is upheld based on the consideration above.

65. After examining the arguments of both Learned Counsel and the authorities regarding the issue, the Court states that the issue before it is that of competence to adjudicate on the proceedings instituted by the Applicant against the Respondent and not on Locus standi per se, which the Applicant's Counsel contended vigorously before us.

66. In the final analysis, the opposition to the Preliminary Objection cannot stand. Consequently, the proceedings instituted by the Applicant must fail.

COSTS

67. By Article 66 of the Rules of the Court, an order may be made regarding the award of costs. The Court hereby exercises its discretion not to make an order as to cost.

Costs shall be borne by the parties.

THE OPERATIVE PART OF THE JUDGMENT
THE COURT (FIRST CHAMBERS)

DECLARATION AND DECREE

68. Consequently the substantive proceedings instituted by the Applicant, Afoiabi against the Federal Republic of Nigeria, Respondent, as set hereunder have failed in their entirety;

    a) The application wherein the Applicant sought the declaration that the unilateral closure by the Federal Republic of Nigeria of her border with Benin Republic from the 9th to 15th of August 2003 is unlawful and a breach of Article 3(2) (d) (iii) and Article 4 (g) of the Treaty of the Economic Community of West African States (ECOWAS) dated 24 July, 1993, and to which Nigeria is a signatory; and

    b) A declaration that the closure by the Federal Republic of Nigeria of her border with Benin Republic from the 9th to 15th of August 2003, is a violation of the Plaintiffs rights to freedom of movement of his persons and goods, rights of egress and ingress as guaranteed by the Revised Treaty of the Economic Community of West African States 1993, the Protocol on the free movement of persons and goods and Article 12 of the African Charter on Human and Peoples' Rights adopted by the Federal Republic of Nigeria in 1990.

    c) A mandatory order of injunction restraining the Federal Republic of Nigeria from further closure of her borders with Benin Republic;

    d) Costs of N5,000,000.00 (five Million) Naira against the Applicant/ Defendant, the Federal Republic of Nigeria.

69. Costs shall be borne by the parties.

The Court strikes the proceedings for lack of jurisdiction to hear the parties on the suit.

Members of the Court who participated in the judgment.

HON. JUSTICE H. N. DONLI - PRESIDING

HON. JUSTICE AWA DABOYA NANA - MEMBER

HON. JUSTICE AMINATA MALLE - MEMBER

JUDGMENT READ IN OPEN COURT AT ABUJA, NIGERIA,

ON 27TH APRIL 2004.

HON. JUSTICE HANSINE NAPWANIYO DONLI
(PRESIDENT)

TONY ANENE-MAIDOH
(CHIEF REGISTRAR)

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA, NIGERIA

ON THE 27TH DAY OF MAY, 2005

SUIT N°. ECW/CCJ/APP/01/04
JUDGMENT N°. ECW/CCJ/JUD/01/05

Between

CHIEF FRANK UKOR - *Plaintiff*

V.

RACHAD AWODIOKE LALEYE - *Defendant*

And

CHIEF J. I. ALINNOR - *Intervener/ Applicant*

COMPOSITION OF THE COURT:

1. **Hon. Justice H. N. Donli** - Presiding
2. **Hon. Justice S. D. Sidibe** - Member
3. **Hon. Justice Awa Daboya Nana** - Member
4. **Hon. Justice A. A. Benin** - Member
5. **Hon. Justice Aminata Malle** - Member

ASSISTED BY

Tony Anene-Maidoh - Chief Registrar

Counsel to the Parties

1. **Mr. Wilson Esangbedo** - *for the Plaintiff*
2. **Anthony Onuora** - *for the Applicant/Intervener*

JUDGMENT OF 27TH MAY, 2005

Direct access to the Court – non-retroactivity – lack of jurisdiction – intervention – time-limit for intervention – inadmissibility –

SUMMARY OF THE FACTS

Chief Frank Ukor, a Nigerian businessman, sought the services of Mr. Rachad Laleye, a freight forwarder and a national of Benin, for the purposes of carrying out customs clearance formalities on his goods at the Port of Cotonou so that the goods would be transported to Nigeria. He averred that Mr. Rachad Laleye failed to deliver his goods. Chief Frank Ukor also affirmed that Mr. Rachad Laleye was the cause of the detention of the said goods as well as the truck transporting them, at Seme-Krake, on the Benin-Nigeria border. According to the Applicant, the goods were detained for the purposes of protection, following an order of seizure by a Cotonou Court of First Instance. The Applicant therefore brought the case before the Court of Justice of ECOWAS for violation of his fundamental human rights in respect of the free movement of his goods.

Mr. J. I. Alinnor, a Nigerian, applied to be joined as intervener in the substantive case, on the grounds that he is the owner of the goods in question.

LEGAL ISSUES

1. *Does the Supplementary Protocol No: A/SP.1/01/05 have retroactive effect?*

2. *Is the application for intervention filed by J.I Alinnor pursuant to the provision of the Supplementary Protocol of 2005 admissible, in view of Article 89 of the Court's Rules of Procedure?*

DECISION OF THE COURT

On the question of retroactivity of the provisions of the Supplementary Protocol, the Court held that the provisions of the Supplementary Protocol cannot have retroactive effect so as to be applicable to the present suit filed before the adoption of that Supplementary Protocol.

On the Application for Intervention by Mr. J. I. Alinnor, the Court held that it was filed outside the time-limit provided for in Article 89 of the Rules of the Court and was accordingly declared inadmissible.

JUDGMENT OF THE COURT

1. The Plaintiff, Chief Frank Ukor is a citizen of Nigeria and a businessman resident in Lagos. The Defendant is a citizen of the Republic of Benin, and a Clearing and Forwarding Agent resident in Porto Novo. The Intervener-Applicant, Chief Josephat Iheangichukwu Alinnor is also a citizen of the Republic of Nigeria, and a businessman resident in Lagos. Thus all the parties are Community citizens, that is, citizens of Member States of the Economic Community of West African States (ECOWAS). The Defendant, even though he has been served with all the processes, has never appeared in this Court either in person or by representation. Consequently the Court proceeded in default of appearance.

2. The Plaintiff and the Intervener-Applicant were both respectively represented by Lawyers namely, Mr. Wilson O. Esangbedo and Mr. Anthony Oseloka Onuora and they complied with Article 28(3) of the Court's Rules of Procedure.

SUMMARY OF THE FACTS

3. The Plaintiff claims to have engaged the services of the Defendant to take delivery of certain items he had imported. He claims further that the Defendant did not meet his obligations. He claims also that the Defendant took an action in a Cotonou local court in Benin Republic which ordered the seizure of the goods. The Plaintiff therefore complained about the violation to his fundamental human rights to free movement of goods, inter alia. As pointed out earlier, the Defendant never responded to the application filed against him in this Court even though there is evidence certifying that he was served.

4. The Intervener-Applicant applied to be allowed to join the proceedings on the main ground that he is in fact the owner of the goods in question and that he entrusted the Plaintiff as an agent with the clearing of the goods from the Port of Cotonou. The Intervener requires damages for the losses he has incurred.

ARGUMENTS OF PARTIES

5. Counsel for the Plaintiff Mr. Esangbedo said that he filed the case under the Court's Protocol of 1991. He made reference to the fact that a Supplementary Protocol has amended Article 9 of the 1991 Protocol. The Supplementary Protocol is dated 19th January, 2005. According to Counsel, Articles 9 and 10 of the Supplementary Protocol have given access to the Court to individuals in as far as the issue of their fundamental Human Rights is concerned. Counsel conceded that his action was filed before the adoption of the Supplementary Protocol and posed the question whether individuals now enjoy direct access to this Court which has been expressly provided for by the Supplementary Protocol. His answer was in the affirmative.

6. Counsel's submission was that in law the presumption against retrospective effect of statutes does not apply to matters of procedure. He cited some authorities in support particularly Halsbury's Laws of England, 4th Edition, Vol. 44(1) paragraph 1287. He contends that the Supplementary Protocol has retrospective effect, therefore by virtue of that fact the Plaintiff can benefit from the Court's expanded jurisdiction.

7. Counsel's further submission was that where a statute relates to a matter of procedure only, it affects proceedings taking place after its commencement regardless of the date of the events to which the proceedings relate. He again cited **Halsbury's Laws of England, 3rd Edition Vol. 32, paragraph 397 - 400**, and **R *v.* Chandra Dharma (1905) 2 KB 335**.

8. Counsel concluded that the former Article 9 in the 1991 Protocol which governed the Court's competence no longer existed, the same having been replaced by the new Articles 9 and 10 of the Supplementary Protocol, so the latter should govern this case. That there was nothing on the face of the Supplementary Protocol that says that it should not have a retrospective effect.

9. Counsel for the Intervener-Applicant associated himself with all the submissions made by his learned friend. He stated that a cardinal principle of law is to actualize the intention of the lawmaker. He also said that in the area of substantive law there was presumption against retrospectivity. He referred to the definition of 'substantive law' and 'procedural law' as contained in Black's Law Dictionary, 6th Edition at page 1429. He drew attention to the fact that "the only platform on which to determine whether a statute will be interpreted to have retrospective effect is by determining to which area of law it belongs - substantive or procedural."

10. He submitted that a close examination of the Supplementary Protocol shows that it merely seeks to regulate the proceedings of this Court. There is no place in the Protocol where any relief is provided for, nor does it regulate any rights and obligations. It merely spells out steps to be followed in actions before the Court. That those steps which belong to the area of procedural law must have retrospective effect.

Consideration of arguments of parties.

11. Mr. Esangbedo argued that the Supplementary Protocol should have retrospective effect, as nothing prima facie is indicative of a converse construction.

12. It is undeniable that the principles of law as stated by both Counsel regarding retrospectivity of laws are correct. These have been applied in national courts for a long, long while. They have also been accepted in international courts and tribunals.

13. In the Ambatielos case decided by the International Court of Justice (ICJ) on 1st July 1952, see page 40 of the ICJ law reports of 1952, the principle of non-retrospective-effect of statutes was accepted. This principle had earlier been recognized by the Permanent Court of International Justice (PCIJ) in the Mavromatis Palestine Concession case of August 1924, PCIJ Series A number 2, page 34, where it was stated that the Treaty of Lausanne had expressly provided for it to have retroactive effect in Protocol number 12.

14. One of the issues that came up for determination in the Ambatielos case was on jurisdiction. Two Treaties were concluded between Greece and the United Kingdom of Great Britain and Northern Ireland. One was in 1886 and the other in 1926. Ambatielos' claim was that he had suffered considerable loss as a result of a contractual arrangement he had with the Government of the United Kingdom (UK) in 1919, and also in consequence of certain judicial decisions in the English Courts in connection with the said contract. His government, the Hellenic Government, on his behalf, he being one of its nationals, as was required by the Treaty establishing the PCIJ, took up Ambatielos' case. The Hellenic Government's claim was that in accordance with the 1826 and 1926 Treaties, the matter should be referred to arbitration. The UK government, in a preliminary objection, argued that the Court lacked jurisdiction to decide on that question. But the Court rejected the preliminary objection by holding that it had jurisdiction to decide whether the UK was under an obligation to submit to arbitration, the difference as to the validity of the Ambatielos' claim, in so far as it was based on the Anglo-Hellenic Treaty of 1886.

15. On the applicability of the 1926 Treaty, the Court stated that it was not given retroactive effect. Under Article 29 of the 1926 Treaty, either party could submit to the Court any dispute as to interpretation or application of any of the provisions of that Treaty. The Court rejected the Hellenic Government's argument that in the 1926 Treaty there were substantive provisions similar to substantive provisions of the 1886 Treaty, so by Article 29 of the 1926, Treaty the Court could adjudicate upon the validity of a claim based on an alleged breach of any of these similar provisions, even if the alleged breach took place wholly before the new Treaty came into force. The Court, having decided that the 1926 Treaty was not given retrospective effect, concluded that it was impossible to hold that any of its provisions were deemed to have been in force earlier.

16. The European Commission on Human Rights also recognized that this principle of non-retrospectivity of statutes and treaties is generally applicable to all international jurisdictions. This was in the case of De Becker, case No. 214/56 decided on 9 June 1958, *see* Annual Index Vol. II p. 231.

17. In the instant case, Counsel did not say how the Supplementary Protocol, expressly or impliedly, was given retrospective effect. The thrust of their argument is that the Supplementary Protocol is procedural in nature and effect, and for that reason it has retrospective effect in law.

18. In the case of **Barbieri *v.* Morris, Mo; 315 S.W. 2d 711 at page 714**, it was said that retroactive laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty or attach a new disability in respect to the transactions or considerations already past. In other words it is a law that is intended to act on things, which are past.

19. Another important definition is to be found in the case of **Bear Val Mutual Water Co. *v.* San Bernardino County, 242 Cal. App. 2d, 68**, where it was stated that a retrospective law is one which looks backward or contemplates the past, one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One which relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.

20. Counsel submitted that the intention of ECOWAS was to make the Supplementary Protocol have retrospective effect. Rather unfortunate to recall, Counsel did not refer to even a single word in the entire Supplementary Protocol from which the remotest implication could be made that it should have retrospective effect. Counsel did not say in what way it was procedural. From Counsels' own submission, the Supplementary Protocol is a law that creates rights, albeit the right of access to the Court to individuals, thus it is substantive law. By implication too, since there is nothing on the face of the Supplementary Protocol that it should be retrospective, it should not be given that effect.

COMPETENCE.

21. The Revised Treaty of 1993 is the supreme law of ECOWAS, and it may be called its Constitution. By Article 89 of the Revised Treaty, Protocols made pursuant thereto shall form an integral part thereof.

22. The Community Court of Justice (CCJ) was established by virtue of Article 15 (1) of the Revised Treaty. The status, composition, power, procedure and other issues concerning the Court are contained in its 1991 Protocol. The competence of the Court is set out in Articles 9 and 10. By Article 32 of the 1991 Protocol, the Court was empowered to establish its own Rules of Procedure.

23. The 1991 Protocol and the Supplementary Protocol both set out what jurisdictional competence the Court shall have. The difference in the two is that the competence is more expansive in the Supplementary Protocol than in the 1991 Protocol. The Supplementary Protocol did not touch any of the processes set out in the Court's Rules of Procedure in invoicing the Court's competence.

24. Mr. Onuora rightly set out the distinction between substantive and procedural laws when he said that:

    "as a general rule, laws which fix duties, establish rights and responsibilities among and for persons natural or otherwise are substantive laws in character while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a Court are procedural law."

25. Thus a distinction is to be drawn between the Protocol that establishes the Court and defines its competence which is substantive and the Rules of Procedure which is procedural.

CONCERNING THE APPLICATION FOR VOLUNTARY INTERVENTION

26. On 30th November, 2004 J.I. Alinnor, represented by his Counsel, filed an application to be allowed to intervene in the instant case. The ground for the application was that he is the owner of the seized goods.

The party was heard on 8th February, 2005 in support of his application. The Plaintiff's Counsel argued that the application was filed out of time in view of the Court's Rules.

27. Article 13(6) of the Court's Rules stipulates that 'Notice shall be given in the Official Journal of the Community of the date of registration of an application initiating proceedings...'

28. And Article 89(1) of the Rules of Court requires an application for intervention to be made within six weeks from the date of publication of the notice referred to in Article 13(6).

29. The Plaintiff's application was filed on 19th April, 2004 and was published in the May 2004 edition of the Official Journal. It is thus clear that the application for intervention that was filed on 30th November, 2004 was out of time.

DECISION OF THE COURT

30. On these grounds The Community Court of Justice, in applying the legal provisions cited above;

31. In delivering this Judgment publicly, as addressed against Chief Frank Ukor and Rachad Laleye and Chief J.I. Alinnor, and by default with regard to Rachad Laleye, in first and last resorts.

32. In the form, the Court adjudges and declares the main application of Chief Frank Ukor inadmissible for lack of merit.

33. Adjudges and declares the voluntary application for intervention from J.I. Alinnor as inadmissible, for lack of merit and non-observance of time-limit.

34. Parties are to bear their own costs.

35. Thus pronounced as judgment in this public sitting at Abuja the 27th day of May, 2005.

JUSTICE HANSINE N. DONLI, *PRESIDENT OF THE COURT*

TONY ANENE-MAIDOH, *CHIEF REGISTRAR*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

JUDGMENT OF 4TH OCTOBER, 2005

SUIT N°: ECW/CCJ/APP/03/05
JUDGMENT N°: ECW/CCJ/JUD/02/05

BETWEEN
PARLIAMENT OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES ***- Plaintiff***

V.

1. **THE COUNCIL OF MINISTERS OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES.**
2. **EXECUTIVE SECRETARIAT OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES.**

Defendants

COMPOSITION OF THE COURT
1. **HON. JUSTICE H.N. DONLI** - PRESIDING
2. **HON JUSTICE SOUMANA DIRAROU SIDIBE** - MEMBER
3. **HON JUSTICE SANOGO AMINATA MALLE** - MEMBER

ASSISTED BY
TONY ANENE-MAIDOH -CHIEF REGISTRAR

COUNSEL TO THE PARTIES
1. *Chief F.O. Offia* - *for the Plaintiff*
2. *Okechukwu Ajunwa Esq.* - *for the Defendants*

JUDGMENT OF 4TH OCTOBER, 2005

Access to Court – Non-compliance with the condition precedent in Article 76(1) of the Revised Treaty – Interpretation of Article 76(1) of the Revised Treaty

SUMMARY OF FACTS

The Council of Ministers of ECOWAS adopted rule C/REG/20/01/05 which sought to regulate the organogram of the ECOWAS Parliament and also grant the Executive Secretary of ECOWAS supervisory power over the Parliament. Consequently, upon directives from the Council, the Executive Secretary wrote letters to the Speaker of Parliament asking him to restructure his staff and to suspend payments that had not been authorized by the Executive Secretary.

The Parliament brought the instant action to the Community Court of Justice seeking a declaration that rule C/REG/20/01/05 was null and void as the Council had exceeded the power conferred upon it by the Revised Treaty of ECOWAS.

The Defendants raised a preliminary objection to the jurisdiction of the Court to hear and determine the suit, alleging that the Community Court of Justice lacked jurisdiction to entertain same because the Applicant did not have the requisite locus standi to maintain the action as a mandatory condition stated in Article 76 (1) of the Revised Treaty had not been satisfied by the Applicant.

LEGAL ISSUE

Whether the Community Court of Justice is competent to entertain the action by the Applicant filed without fulfilment of the provisions of Article 76 (1) of the Revised Treaty.

DECISION OF THE COURT

The Community Court of Justice lacked jurisdiction to entertain the suit as a mandatory condition precedent for the attainment of a locus

standi under Article 76 (1) of the Revised Treaty of ECOWAS had not been fulfilled by the Applicant. Article 76 (1) of the Revised Treaty made recourse to amicable settlement a condition precedent to the institution of an action before the Community Court of Justice. In the present case, nothing indicates that the parties tried to resolve their differences amicably.

Consequently, it is mandatory for the Applicant to go and fulfil the condition precedent.

JUDGMENT OF THE COURT

1. By the application dated 12th May, 2005 lodged at the Registry of the Community Court of Justice on the 17th of May, 2005, the ECOWAS Parliament brought the ECOWAS Council of Ministers and the Executive Secretariat before the Court so as to declare;

   - Null the Rule C/REG.20/01/05 of 18th January, 2005 for lack of competence and violation of the Revised Treaty
   - Null the letters with reference number ECW.INST/9.ES.28 of 18th February, 2005 and ECW/REL/Desaf/012/hnb of 21st February, 2005 for excess power and the violation of the provisions of the Revised Treaty.
   - Order the defendants to desist from implementing the Rules and the above mentioned letters.
   - Stating that the Parliament enjoys Financial Autonomy.

2. The ECOWAS Council of Ministers and the Executive Secretariat were notified of the application through a letter dated 19th May, 2005.

3. The Parties in the suit are represented by lawyers Chief F.O. OFFIA and Okechukwu AJUNWA ESQ. & CO respectively pursuant to Article 28.3 of the Rules of the Court.

4. Through a second application dated 10th June 2005, the Community Parliament enjoined the Court to take interim measures so as to preserve the merits of the case before it by asking the Council of Ministers to abstain from debating on the memorandum concerning the restructuring of the Community Parliament.

SUMMARY OF THE FACTS OF THE CASE

5. According to the Applicant, the ECOWAS Council of Ministers adopted Rule C/REG/20/01/05 which indicates the type of relation that should exist between the Speaker of the Parliament and the office of the Parliament, the mode, nature and structure of his staff.

Due to this, the Council requested that the Executive Secretary of ECOWAS implement this Rule, which confers on the latter the powers of supervisor of the Parliament. Thus, on the 21st of February 2005, the Executive Secretary sent a letter to the Speaker of the Parliament asking him to restructure his staff. In addition, through a letter dated 18th February, the Executive Secretary invited the Speaker of the Parliament to suspend the payment of non authorized salaries and benefits.

ARGUMENTS ADVANCED BY THE APPLICANT

6. In fact, according to the Applicant, the Council of Ministers is not competent to enact a Rule as this is contrary to the Rule of the Parliament. By doing this, the Council of Ministers has gone beyond the limit of the powers conferred on it by Article 10.3 of the Revised Treaty. Furthermore, the procedure provided by Articles 12.2 and 3 of the Revised Treaty was not followed because the Rule was not adopted by 2/3rd majority of ECOWAS Member States. That moreover, given that the Community Parliament ceases to be under the authority of the Council of Ministers, it is not for the latter to enact Rules of which the aim is in relation to the organogram of this Institution. On the two above-mentioned letters, the Applicant is contesting their validity, stating that-the Executive Secretary is not qualified to send such letters to the Speaker of the Parliament; that by so doing, he is exceeding the powers conferred on him by the Revised Treaty.

   Finally, that the independence and autonomy of the Community Parliament forbids any interferences by the Council of Ministers and Executive Secretary in the functioning of the Parliament.

   These different measures taken are seen by the Applicant as illicit and unjustified interference by the Council of Ministers and the Executive Secretary in the functioning of the Parliament.

PLEAS IN LAW INVOKED BY THE DEFENDANTS

7. The Defendants represented by their lawyers raised in limine litis, a plea for lack of jurisdiction of the Court in hearing this case. The plea of the Defendants is based on locus standi of the Applicant and on the non observance of the suspensive condition required for the validity of this suit.

   They based their arguments on the provisions of Articles 7 (3) g, h and i 10 (3) 19 (3) 76 (2) of the ECOWAS Revised Treaty, Articles 3 and 4 of the Supplementary Protocol.

CONSIDERATION OF THE PLEAS INVOKED BY THE PARTIES

8. The lawyer representing the Parliament objected to the argument by the Defendants whereby the text obliges the Applicant to try settling the dispute amicably before instituting a case before the Community Court of Justice.

   According to him, the question here is not to know whether the Applicant has the right to come before this Court, because he has the right pursuant to Article 15.4 of the Revised Treaty which states that judgment by the Court shall be binding on Institutions of the Community. If the judgments are binding on it for the same obvious reasons, it equally has the right of access to this Court. The question at this moment is to know if the Court is competent to consider the application in question.

   He concludes that the Defendants are confusing competence of the Court with the right of access to the Court. That therefore, their argument should be rejected because it is contrary to the letter and spirit of the Revised Treaty and Protocols. The Defendants made their plea by supporting their arguments with the provisions of Article 88 of the Rules of the Court.

CONCERNING THE PRELIMINARY OBJECTION RAISED BY THE DEFENDANTS.

9. Chapter XV of the Revised Treaty on settlement of disputes provides in Article 76:

    1. Any dispute regarding the interpretation or the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols.

    2. Failing this, either party or any other Member State or Authority may refer the matter to the Court of the Community whose decision shall be final and shall not be subject to appeal.

10. This Article provides a condition which is to be satisfied above all, prior to appearing before the Community Court of Justice.

11. Close consideration of the said Article brings out the expression "either party" includes not only Member States or the Authority of Heads of States but also Institutions of the Community such as provided in Article 6 of the Revised Treaty.

DECISION OF THE COURT.

12. The allusion made by Article 76 paragraph 2 to "either party" must be extended in a large sense and not restricted only to citizens/ litigants who could come before the Court; in this context, we have the Institutions of the Community.

13. The said Article compels the parties to have recourse to amicable settlement before coming to the Community Court of Justice.

14. In the Present case, nothing indicates that amicable resolution was tried. Consequently, it is proper to send the Applicant to accomplish this first formality.

FOR THESE REASONS

15. The Community Court of Justice in applying the legal provisions cited above:

    - **INTERLOCUTORY JUDGMENT**

16. Orders the Applicant to fulfil the formalities provided in Article 76.1 of the ECOWAS Revised Treaty.

17. Reserve cost

Thus pronounced as Judgment at Abuja on the 4th of October, 2005.

Signatures:

HON. JUSTICE H. N. DONLI - PRESIDING

HON. JUSTICE SOUMANA DIRAROU SIDIBE - MEMBER

HON. JUSTICE SANOGO AMINATA MALLE - MEMBER

TONY ANENE-MAIDOH - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 7TH OCTOBER, 2005

SUIT N°. ECW/CCJ/APP/02/05
JUDGMENT N°. ECW/CCJ/JUD/03/05

BETWEEN
HONOURABLE DR. JERRY UGOKWE - ***Plaintiff***

V.
1. THE FEDERAL REPUBLIC OF NIGERIA - ***Defendant***

2. HONOURABLE DR. CHRISTIAN OKEKE
(Applicant for intervention)

COMPOSITION OF THE COURT
1. **HON. JUSTICE HANSINE N. DONLI** - PRESIDING
2. **HON. JUSTICE AWA NANA DABOYA** - MEMBER
3. **HON JUSTICE EL MANSOUR TALL** - MEMBER

ASSISTED BY
Mr. Tony Anene-Maidoh - **Chief Registrar**

COUNSEL TO THE PARTIES
1. **Wale Adebayo, Kayode Ajulo** - ***for the Plaintiff***
2. **Ayodele Akande** - ***for the Defendant***
3. **Fedelie A. Obateru** - ***for the Intervener***

JUDGMENT OF 7TH OCTOBER, 2005

- Jurisdiction of the Court on election matters, Intervention, Community Legal Order.

SUMMARY OF FACTS:

The Applicant Dr. Jerry Ugokwe was declared the winner of the House of Representative seat of Idemili North-South Federal Constituency by the Independent National Electoral Commission. Following this, Dr. Christian OKEKE contested with success, the results of this election before competent courts in Nigeria. The Applicant came before the Court seeking the annulment of the Decisions delivered by the Nigerian Court, and for an order to stay execution of the said decisions invalidating his election.

In reply, the Federal Republic of Nigeria raised a preliminary objection on the inadmissibility of the application on grounds of lack of jurisdiction of the Court.

Dr. Christian Okeke filed an application to be joined to the action as Intervener to enable him defend his Interest.

LEGAL ISSUES

1. *Whether the Court has jurisdiction to entertain petitions on electoral disputes in Member States.*

2. *Whether the Community Court of Justice can sit on appeal over the decision of a municipal Court.*

3. *What are the conditions of admissibility for an intervention?*

DECISION OF THE COURT

The Court dismissed the Initiating Application and the Joinder, for lack of jurisdiction and held that there is no provision whether general or

specific, which gives the Court powers to adjudicate on electoral issues, which ordinarily is subject to the jurisdiction of National Courts.

The Court further held that it is not an appellate Court of National Courts, therefore, it cannot re-examine a decision made by the Nigerian Courts, let alone order a stay of their execution.

From the foregoing reasons, the Court rejected the application for intervention also.

JUDGMENT OF THE COURT

1. The Applicant, Hon. Dr. Jerry Ugokwe, a Nigerian Member of Parliament, resident at Zone B - Block 22, Flat 1, Apo Legislative Quarters, at Abuja - Nigeria, is represented by his counsel Adebayo Adewole Esq., living at 1st Floor Maina Court - Plot 252 A, Herbert Macaulay Way, Central Business District, Abuja - Nigeria.

2. The Defendant, the Federal Republic of Nigeria, admitted in the person of the Hon. Attorney General and Federal Minister of Justice, is represented by Mr. Ike Chukwu Maledo of the Office of the Attorney General and Minister of Justice - Federal Secretariat, Maitama, Abuja; and by Akande Ayodeji Esq.

3. The intending Intervener, Hon. Justice Okeke, living at No. 8 Eket Close, Area 8, Garki, Abuja - Nigeria, has as his counsel, Jude Okeke Esq., the latter having chosen as residence the same address as his client, i.e. No. 8 Eket Close, Area 8, Garki, Abuja - Nigeria.

4. All the Parties have appeared in Court with their respective lawyers or were duly represented. It shall be appropriate to adjudicate upon their submissions, after all the Parties involved in the case have duly been heard just like the lawyers, all the parties have acted in accordance with Article 28 (3) of the Rules of the Court.

Summary Presentation of the Facts

5. By Application dated 9th May, 2005, lodged at the Registry of the Court on 12th May, 2005, and served on all the opposing Parties, the Applicant asserts having been declared elected as a Member of the House of Representatives of Idemili North, South Federal Constituency of Nigeria, on the 16th of April, 2003 by the Independent National Electoral Commission; that not satisfied with the said declaration, Dr. Christian Okeke filed a petition (an appeal) at the Governors' and House of Representatives Tribunal (Electoral Tribunal) at Awka to contest the declaration that Jerry Ugokwe was duly elected by the Independent National Electoral Commission.

6. The aforementioned Tribunal, before which the matter was brought, delivered its judgment on 30th November, 2004, annulling the election of the Applicant. The latter filed an appeal dated 10th December, 2004 against the Decision of the Tribunal; the Appeal Court, by its Judgment of 5th May, 2005, dismissed the Appeal and confirmed the earlier decision against which the appeal was filed. This is the reason why the Applicant, Dr. Jerry Ugokwe has brought the case before the ECOWAS Community Court of Justice that his right to fair hearing has been infringed upon by the Electoral Tribunal and by the Federal Appeal Court of Nigeria.

7. By a second Application dated the same day, on 9th May, 2005, and lodged at the Registry of the Court on 12th May, 2005, the Applicant asked for a special interim Order for restraining the Independent National Electoral Commission (considered hereby under the person of the Federal Republic of Nigeria) from invalidating the certificate of attestation declaring him elected as Member of the National Assembly for his electoral constituency; nor grant the said certificate to another person; nor, take any steps towards replacing him with another person, under the pretext of executing any decision pending the determination of the case. Furthermore, he is seeking an order preventing the Federal National Assembly from relieving him of his position as Member of the said Assembly representing Idemili North Zone of the constituency.

8. The lawyer of the Defendant, Mr. Ayodeji Akande Esq., filed an Application dated 13th June, 2005, whereby he raised the issue concerning the incompetence of the Court to adjudicate on the matter.

9. The Counsel of the Intervener, Mr. Jude Okeke Esq., filed his Application dated 1st June, 2005, applying to be joined to the suit as a defendant. He stated therein that on 12th and 16th April, 2003, he stood for office for the election of Members of the House of Representatives to the Idemili North Zone, in the South Federal Constituency of the Anambra State of Nigeria; that he won the elections, and that he received from the hands of the Electoral

Officer in charge of the constituency in question, a certificate of return proving that he had been elected; but that this certificate of return was later invalidated by the Permanent Representative of the Electoral Commission for Anambra State. That he was replaced by the latter, whereas the Applicant was not a candidate to the said elections.

10. The Intervener contends that he filed an appeal at the Elections Tribunal, against the cancellation of his certificate of attestation, and against his replacement by the Applicant; that the Tribunal decided the case in his favour by declaring him elected; but that, not satisfied with the Judgment delivered by the Elections Tribunal, the Applicant filed an appeal at the Court of Appeal on the same matter. That the Court of Appeal delivered a Judgment confirming the decision of 5th May 2005; that it is against this particular decision of the Federal Court of Appeal, which sat at Enugu, that the Applicant appeared before the ECOWAS Community Court of Justice - to make claims against the Federal Republic of Nigeria. That, following these facts, the Attorney General and Minister of Justice of Nigeria addressed a letter to the Speaker of the House of Representatives, informing him of the order not to swear him in until the case is fully settled by the Community Court of Justice, ECOWAS.

11. In not being served as a Party to the present case, the Intervener submits being affected by the filing of this suit before the Court, and requests to be joined to the proceedings as Intervener-Defendant.

Arguments of the Parties

12. The lawyer for the Applicant, Wole Adebayo *Esq.*, claimed that the Applicant appeared before the Court on the strength of several Articles reflected in its legal document and contained in (i) the Protocols on the ECOWAS Court of Justice, (ii) African Charter on Human and Peoples Rights (iii) Universal Declaration of Human Rights (iv) Section 36 of the 1999 Constitution of the Federal Republic of Nigeria. He submitted the following grievances:

13. The Federal Republic of Nigeria has infringed upon his right to fair hearing, which is a human right guaranteed by Article 7 of the African

Charter of Human and Peoples' Rights, on one hand, and by the Universal Declaration of Human Rights, on the other hand; and finally, by Section 36 of the 1999 Constitution of the Federal Republic of Nigeria.

According to the lawyer, this violation has been committed by the National Assembly of the Federal Republic of Nigeria and the Tribunal, by refusing to grant to the Applicant the right to fair hearing in the Case Concerning **Dr. C. C. Okeke *v.* Independent National Electoral Commission and Others, No.EPT/AN/NA/6/2003**;

14. The lawyer for the Applicant draws attention to the provisions set out in Article 9 (4) of the Supplementary Protocol, to the effect that ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"***; as well as to Article 10 (d) which provides that ***"Access to the Court is open to ... individuals on application for relief for violation of their human rights;..."***; as well as to provisions contained in Article 7 of the African Charter on Human and Peoples' Rights, in the Universal Declaration of Human Rights, and in Article 36 of the 1999 Constitution of Nigeria. To buttress the arguments, the Applicant is asking the ECOWAS Community Court of Justice to:

    1. Declare null and void, the procedures and the Judgment delivered by the Elections Tribunal and by the Court of Appeal of Nigeria;

    2. Enjoin the National Electoral Commission not to invalidate his election as a Member of the National Assembly of Nigeria;

    3. Enjoin the National Assembly not to proceed to replace him with another person.

    From all the foregoing, the Applicant is requesting the ECOWAS Community Court of Justice to consider the various instances of violation, and to grant him relief.

15. In reply to the arguments of the Applicant, the counsel to the Defendant, Mr. Akande Ayodeji Esq., raised a **Preliminary Objection**, describing

the Application as misconceived. He cited Articles 9 and 10 of the Supplementary Protocol and made it known that the case in point is an electoral dispute, with another Application still pending before the High Court of Nigeria.

The lawyer to the Federal Republic of Nigeria thus raises the issue of incompetence of the application on grounds of lack of jurisdiction of the Court.

16. The lawyer to the Intervener, Mr. Jude Okeke, observed that the Applicant, Jerry Ugokwe took part in all the proceedings of the Tribunal, and of the Court of Appeal; that he was never deprived of a fair hearing; that the Tribunal of the National Assembly and of the House of Representatives is a legal jurisdictional institution; he relied on the Case Concerning **Al Haji Aminu Mohammed Dan Bauchi *v.* Al Haji Usman Matori, No. FHC/J/C5/68/2004**. Equally cited by the Intervener to show the bad faith; the Intervener asserts that the suit filed by the Applicant is vexatious, because it is made with the intention of obstructing his swearing in, whereas he, the Intervener, is the true winner of the election, as confirmed by the Court of Appeal in Nigeria responsible for resolving electoral disputes. That in this regard, the Community Court of Justice is without jurisdiction to adjudicate upon the case.

    The Intervener therefore requested to be joined to the proceedings as Intervener-Defendant, and cited to support his Application for Joinder, Article 10 (c) and (d) of the Supplementary Protocol which provides as follows:

> ***"(c) Individuals and corporate bodies in proceedings for the determination of the legality of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;***
>
> ***d) Individuals on application for relief for violation of their human rights; the submission of application for which shall:***
> ***i) not be anonymous; nor***
> ***ii) be made whilst the same matter has been***

instituted before another International Court for adjudication;"

Consequently, he urged to join the action as an interested party.

17. To support his argument, the Intervener cites the Case Concerning **ODELEYE *V.* ADEPEGBA, 2001 5 NWLR PT 706, P33** of the Court of Appeal of Nigeria where it was stated that there is an interest in the action as follows;

    There is an interest in the case, whenever;

    (a) The examination of a dispute between two parties directly and adversely affects the legitimate rights of a third party or his pecuniary interests; it is within the powers of the Court to allow that party to be joined as an intervener.

    (b) A person may be authorised to join a proceeding whenever he deems himself as having suffered a wrong or when he has been wrongfully deprived of something, or when the decision of a court is likely to affect him or infringe upon his rights.

    (c) A person is deemed to have an interest in a case, sufficient enough for him to intervene as a party, when it has been established that there exists a connection, a correlation or inter-dependence between the applicant and the case to which the application is related.

    (d) A person may be authorised to join a proceeding as a defendant, against the will of the applicant

        (1) When the circumstances surrounding the case oblige the party to be authorised to join the proceedings, in order for the case to be duly examined; or

        (2) When the request of the applicant or defendant, as regards the dispute, may not be examined in an efficient and efficacious manner without the involvement of the intervener"

ANALYSIS OF THE COURT

CONCERNING THE JURISDICTION

18. The close examination of the various pleas of action of the parties lead to the questions on whether electoral disputes, which is the main issue at the centre of the litigation, is subject to the legal order applicable to the community. In other words, the Court will delve into the provisions of ECOWAS Treaty, Protocols, Conventions and text relating thereto to examine same so as to know if the Court can adjudicate on issues relating to elections and disputes arising thereof.

19. Research shows that, in the current stage of legal texts applicable to ECOWAS, no provision, whether general or specific, gives the Court powers to adjudicate on electoral issues or matters arising therefrom. However, a dispute having a bearing on other rights of the parties may be referred to in any internal or related dispute relating to electoral issues like the present one. In such an instance, the ECOWAS Court of Justice, in accordance with Article 19 (1) of the 1991 Protocol, and particularly with reference to Article 38 (1) (c) of the Statute of the International Court of Justice could apply the general principles of law recognized by civilized nations.

20. But the Treaty, which is the fundamental law of ECOWAS, particularly the Protocols relating to the ECOWAS Court of Justice, only invests the Court with specific powers and prerogatives, insisting always on its mandate concerning the observance of law in their interpretation and application.

21. This is why, besides the electoral problem, there are grounds for us to ponder, in a second instance, on the competence of the Court when the Applicant raises the legal plea on right to fair hearing. The right to fair hearing is a human right derived from the concept of fair hearing; in this regard,

> ***"A fair trial is not only seen as an additional instrument for the protection of the rights of defence, largo sensu, but also in a political context, where the legislative and jurisdictional activity, the judicial***

organization, and even the Judicial Institutions of the Signatory State are subjected to scrutiny, as regards requirements of the Community."

Professor Thierry Arnaux - Cours sur la Protection des Libertès et Droits Fondamentaux *(Course on the Protection of Freedoms and Fundamental Rights)*, Montchretién.

22. In arguing from this statement, and as applied to the present case, does the fact that the Nigerian Courts invalidated the election of the Applicant constitute a human right violation? The Applicant argued that he had not been given a fair hearing before the Electoral Tribunal. He appealed to the Court of Appeal which confirmed the earlier decision thereby perpetuating the infringement of his right to fair hearing.

23. In the Case Concerning **Bryan *v.* United Kingdom, 22 November 1995, paragraph 44**, the European Court held that

    "A fair trial is a right which does no more than enable an aggrieved person to have recourse to a supra national court, so that the one who governs him may be condemned if the proof of a violation of his rights is established; the court must have jurisdiction to examine the points of fact and of law in the case which has come before it, in order that it may reform it..."

    In this particular case, does the ECOWAS Court of Justice have the competence to legally entertain the claims of the Applicant when he requests the ECOWAS Court to declare null and void : (i) the proceedings of the national Courts of a Member State of the Community (Nigeria); (ii) or to enjoin the I.N.E.C. of Nigeria to refrain from invalidating his election; (iii) or still, to enjoin the Federal National Assembly of Nigeria not to relieve him of his position as a Member of Parliament?

24. Article 76-2 of the Revised Treaty and Articles 9, 10 and 11 set out the extension of the powers of the Court. But the provisions of all these Articles do concern appeals which are only possible within the following contexts:

    a. Appeals against the legality of acts, instruments and other decisions of the Community;

    b. Appeals against failings in the obligations of a Member State of the Community;

    c. Disputes relating to the interpretation and application of the Treaty and related instruments.

25. For clarity, the Defendant and the Intervener raised a serious issue of lack of competence of the Court to adjudicate on the matter. It is trite law that a judgment given without jurisdiction amounts to a nullity no matter how well detailed or conducted the proceedings are.

26. The bone of contention on the issue of lack of jurisdiction relates to the subject matter of the dispute before the Court. Counsel to the defendant argued that the case concerns an election petition under the domain of the national law and the Court of Appeal of Nigeria which concluded on the rights of the parties. The Court of appeal is the final Court in respect of that matter. On the contrary, Counsel to the Applicant was of the view, based on the strength of the facts of the case and the complaint about the contravention of fair hearing, emanating from the election petition, that the Court of Justice is jurisdictionally competent to deal with the matter. Learned Counsel relied on the provisions of the Supplementary Protocol to substantiate his argument and urged the Court to dismiss the objection and allow the applicant to proceed with the matter.

27. The Court has examined the documentation filed and exchanged by the parties particularly the record of proceedings from the Courts in Nigeria in respect of the adjudication of the matter together with the claims before the Court. There is no doubt that the subject matter relates to an Election matter which ordinarily is subject to the

jurisdiction of the National Court. On this note and after a thorough examination of the claim of the Applicant that the clarity of the issue for determination is magnified for the proper understanding that the complaint is in respect of the non compliance with fair hearing in the adjudication of the case before the Election Tribunal and the Court of Appeal that heard the suit.

28. In Articles 9 and 10 of the Supplementary Protocol of the Court regarding the Jurisdiction of the Court or Competence and Access to the Court, these paragraphs of the articles show what areas the competence of the Court extend to.

In paragraph 4 of Article 9 of the Supplementary Protocol, it states:

> ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."***

In paragraph (d) of Article 10, it is stated therein that:

> ***"Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies....;"***

The combined effect of the provisions indicates that any violation of human rights in any Member State may be brought by individuals or corporate bodies before this Court for adjudication.

The thorny question to pose for consideration is whether there was such violation of fair hearing.

29. In Articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provision of Article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.

30. For further clarity, Article 19 of the Protocol of the Court provides that:

> ***"The Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure. It shall also apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice."***

In Article 38 of the Statute of the International Court of Justice, it is provided therein as follows:

<u>Article 38</u>

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> ***a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;***
>
> ***b. international custom, as evidence of a general practice accepted as law;***
>
> ***c. the general principles of law recognized by civilized nations;***
>
> ***d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.***

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto. "

31. The vital paragraph in the quotation above is paragraph (c) wherein the Court is empowered to apply the general principles of law recognized by civilised nations. In *Les Verts* case 1998, 97 the European Court of Justice per R. Dehousse, held inter alia that the European Economic Community is a Community based on the rule of law and that the acts of the Member States shall be reviewed, and measures adopted shall be in conformity with the basic constitutional charter, the Treaty. In the case of Aegean Sea Continental Shelf (**GREECE V. TURKEY**) **ICJ Reports 1976 at 15-16** the Court applied the provision of Article 38 (1) (c) of the Statute of the International Court of Justice to protect the rights of an individual in the interim where the rights are infringed upon in accordance with the principles of law recognised in municipal systems, and jurisprudence of the Court. Applying the above authority by the application of Article 38 (1) (c) and (d) of the said Statute and upon the examination of the provision of Section 36 of the 1999 Constitution of the Federal Republic of Nigeria - the municipal law wherein it granted protection to the Right to fair hearing to an individual and so on. The authorities relied upon by Counsel for the parties include, the **ATTORNEY GENERAL AND 2 ORS V. P.L.A AIDEYAN 1989 4 N.W.L.R PART 118 PAGE 646 AT 666**; wherein the doctrine of fair hearing was adumbrated therein.

32. Appealing against the decision of the National Court of Member States does not form part of the powers of the Court; the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And, if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these national courts of Member States are not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order.

    The ECOWAS Court of Justice is not a Court of Appeal or a Court of cassation.

33. From all the pleas in law invoked by the Applicant, i.e. regarding the Court entertaining matters dealing with electoral disputes or the violation of his right in having his election annulled; and furthermore, as to the orders being sought against the execution of the Judgment already made by the Federal Appeal Court of the Member State of Nigeria - the Court is incompetent

CONCERNING THE VOLUNTARY APPLICATION FOR INTERVENTION

34. The Intervener asserts that he requested to be joined to the proceedings before the present Court, as a Defendant, on the basis of the principle that he had an interest in the case.

    In procedural law, having an interest in a case consists of the advantage the Applicant derives from the recognition that the Judge gives to the legitimacy of his claim; the Supplementary Protocol of the ECOWAS Court of Justice also states this principle when in Article 10 (c) and (d) it provides that ***"Individual and cooperate bodies … may appear before the Court"***;

    In general, "interest in an action" is appreciated with reference to the orders sought in the applications of an Intervener possessing an interest in the resolution of the dispute submitted to the court, and when these orders have no other purpose than to support or reject the orders sought by another party" **T.A.O.I.T JUDGMENT NO 1368, AYMON AND OTRS, 77TH SESSION 13 JULY, 1994**.

35. In the instant case, the Intervener has sufficient interest in the Application of the Plaintiff, and his interest in the outcome of the dispute appears certain. This is because validating the Applicant's election, if sanctioned by an Order, results *ipso facto* in the invalidation of the election of the Intervener's election. The interest manifested by the Intervener resides in the outcome of the suit.

36. In the present case, and according to the principle that the subsidiary follows from the principal; or still, according to the relationship of cause and effect, the Principal Application communicates its condition to the Intervener's application.

Consequently, since the Court does not have the jurisdiction to consider the Principal Application, the Intervener's Application must fail.

DECISION OF THE COURT

37. The Community Court of Justice, in applying the legal provisions mentioned above;

38. In adjudicating in a public hearing, after all the parties have been duly heard, in the first and last resorts;

INFORM

39. The Court Declares itself incompetent to adjudicate on the principal Application of Jerry Ugokwe.

40. Consequently, the Court dismisses the Application for Joinder of Dr. Christian Okeke and all other similar Applications.

41. The Parties shall bear the costs.

42. Thus pronounced as Judgment at this public hearing, at Abuja on 7th October, 2005.

43. The following Members of the Court participated in the deliberations of the case:

HON. JUSTICE HANSINE DONLI - PRESIDING

HON. JUSTICE AWA NANA DABOYA - MEMBER

HON. JUSTICE EL MANSOUR TALL - MEMBER

MR. TONY ANENE-MAIDOH - CHIEF REGISTRAR

DONE AT ABUJA ON 7TH OCTOBER, 2005

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 5TH OF DECEMBER, 2005,

SUIT N°: ECW/CCJ/ADV.OPN/01/05
ADVISORY OPINION N°: ECW/CCJ/ADV.OPN/01/05

(HOLDEN IN CAMERA AND THE OPINION IN PUBLIC)

BEFORE THEIR LORDSHIPS

HON. JUSTICE HANSINE N. DONLI	**- PRESIDING**
HON. JUSTICE SOUMANA D. SIDIBE	**- MEMBER**
HON. JUSTICE BARTHELEMY TOE	**- MEMBER**
HON. JUSTICE AWA DABOYA NANA	**- MEMBER**
HON. JUSTICE AMINATA M. SANOGO	**- MEMBER**

ASSISTED BY
TONY ANENE-MAIDOH - CHIEF REGISTRAR

Request for advisory opinion from the Executive Secretary of ***ECOWAS, relating to Article 23(11) of the Rules of Procedure of the Community Parliament and the provisions of Article 7(2) and 14 (2)(f) of the Protocol on the Community Parliament.***

ADVISORY OPINION OF 5TH DECEMBER, 2005

Request for Advisory Opinion – Determination of the legality of a decision by the Speaker of Parliament – Determination of the legality of Rule 23(11) of the Rules of Procedure of the Parliament – Contrary norms – Transitional period – Autonomy in management

SUMMARY OF FACTS AND OBSERVATIONS

The Speaker of the Community Parliament, acting in the capacity of Head of his Bureau, decided to remain in office and manage the day-to-day affairs of the Institution beyond 15th November, 2005, the expiry date of the first legislature.

By letter dated 21st November, 2005, the Executive Secretary of ECOWAS requested an Advisory Opinion from the Court, on the legality of this Decision by the Speaker of Parliament.

LEGAL ISSUE

Whether or not the Decision of the Speaker of the Parliament to continue to manage the affairs of the Institution after 15th November, 2005, and up to the second legislature, is legal.

OPINION OF THE COURT

The Rules of Procedure of the Parliament has resolved issues relating to the transition from one legislature to another, in accordance with Article 19 of the Protocol on the Community Parliament. The provisions of the Rules of Procedure which deal with these issues, notably Article 23(11), complement the Protocol and cannot therefore be considered as contrary to the latter. It is therefore justifiable that the Speaker of Parliament relied on Article 23(11) of the Rules of Procedure to remain in office during the transition.

IN THE MATTER OF ADVISORY OPINION RELATING TO RULE 23 (11) OF THE RULES OF PROCEDURE OF THE COMMUNITY PARLIAMENT AND THE PROVISIONS OF ARTICLES 7(2) AND 14 (2) (f) OF THE PROTOCOL RELATING TO THE COMMUNITY PARLIAMENT.

THE REVISED TREATY OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES, 24TH JULY, 1993,

PROTOCOL ON COMMUNITY COURT OF JUSTICE, 6TH JULY, 1991,

SUPPLEMENTARY PROTOCOL (A/SP.1/01/05) OF THE COMMUNITY COURT OF JUSTICE, 19TH JANUARY, 2005,

RULES OF PROCEDURE OF THE COURT, 3RD JUNE, 2002,

PROTOCOL A/P2/8/94 RELATING TO THE COMMUNITY PARLIAMENT, 6TH AUGUST, 1994

RULES OF PROCEDURE OF PARLIAMENT, 21ST - 27TH JANUARY, 2001.

REQUEST NO: ECW/INST/CCJ/ES/220

FOR INTERPRETATION, 21ST NOVEMBER, 2005.

IN THE FORM

1. By a letter, the Executive Secretary of the Economic Community of West African States requested the Court to determine the legality of the decision of the Speaker of the Community Parliament as the Head of the Bureau of that institution to continue to run the affairs of that institution after the 15th day of November, 2005.

2. The request was based on Article 10(b) of the Supplementary Protocol relating to the Court which provides that access to the

Court is open to Member States, Council of Ministers and Executive Secretary in the determination of the legality of an action in relation to any Community text.

3. The request for advisory opinion is based on the fact that Rule 23(11) of the Rules of Procedure of the Community Parliament which the Speaker of Parliament justified his continuous stay upon is contrary to Article 7(2) and Article 14(2)(f) of the Protocol relating to the Community Parliament.

4. The request of the Executive Secretary also is that Rule 23(11) of the Rules of Procedure is clearly in conflict with Article 7(2) and 14(2)(f) of the Protocol relating to Community Parliament and that same should be declared null and void of no effect.

5. Even though the request was directed to the President of the Court, the substance relates to the powers of the Court itself because it is the Court which can interpret and determine the provisions of the Community text as to whether same is illegal, or null and void. Hence, the President composed the Panel to give the advisory opinion in respect of the request made in accordance with Article 10 of the Protocol.

6. In Pursuance of the above, the request by the Executive Secretary was served on the Community Parliament.

   On 5th December, 2005, the Community Parliament lodged its reply with the permission of the Court.

ON THE SUBSTANCE

7. In his request, the Executive Secretary requests the opinion of the Court on the following:

   1. Whether or not the Bureau of the Parliament is justified by continuing to manage the Parliament up to the second legislature as claimed by the Speaker of the Community Parliament.

2. Whether Rule 23(11) of the Rules of Procedure of the Community Parliament conforms with the provisions of Articles 7(2) and 14(2) (f) of the Protocol relating to the Parliament of the Community.

8. On the first question, the Executive Secretary stated that Rule 23(11) is null and void because it conflicts with Article 7(2) and 14(2) (f) of the Protocol of the Parliament. In reply, the Community Parliament stated that Article 19 of the Protocol provides that any matter not stated in the Protocol shall be governed by the Rules of Procedure. Furthermore, it stated that based on Article 19, Rule 23(11) was made as complementary to Article 19 that the Bureau shall continue to operate until the first sitting of the new Parliament. It is also of common ground that the Speaker is the Head of the Bureau and the Bureau is charged with the responsibility of running and managing the affairs of the Community Parliament as provided therein. The issue of the transitional period is not provided in the Protocol except in Article 7(2) (ii) wherein it is stated:

9. ***"For the duration of the transitional period, representatives who are not elected at the national level shall remain in office until the new representatives from their respective Member States take up their positions."***

10. The submission of the Parliament is that the said period referred in Article 7(2) does not refer to the period between the terms of office of the Representatives and the succession by others.

11. It is submitted that in the absence of any such provisions, the Rules of procedure should apply to resolve the lacuna. It is submitted that Rule 23(11) resolved the lacuna in favour of the continuity of the Bureau of the Parliament until the first sitting of the new Parliament.

12. On the second question, the Executive Secretary stated that Rule 23(11) is in material conflict with the provisions of Articles 7(2) and 14(2) (f) of the Protocol of the Community Parliament. In reply, the Community Parliament stated that there is no reasonable basis to hold that Rule 23 (11) of the Rules of Procedure of the Community Parliament is contrary to Article 7(2) and 14(2) (f) of the Protocol of the Community Parliament and the Court should so hold on the matter.

THE ANALYSIS OF COURT

13. On the analysis of the material put forward in this case, the Court considered the two issues submitted before it by both sides as very important in relation to the question of interpretation. It is a cardinal principle of law that the question of interpretation would arise when the meaning is not clear. But when the meaning is clear, the question would not arise. *(See the Case of* **Mr. AFOLABI OLAJIDE V. FEDERAL REPUBLIC OF NIGERIA)**. It is further stated that the literal meaning of Article 19 of the Protocol gives strength and effect to the provisions of Rule 23 (11) of the Rules of Procedure of the Community Parliament.

14. It is a fundamental principle of law that the superior statute prevails over an inferior statute. In the present case the Protocol of the Community Parliament prevails over the Rules of the Community Parliament when there is conflict. When there is no conflict, the question of hierarchy does not arise, mainly when the latter is complementary to the former.

15. On the issue of transition between one regime to the other, the Court is of the view that the Rules of Procedure has sufficiently covered the point. And any lacuna created in the Protocol of the Community parliament is sufficiently provided for in the Rules. In Article 19 of the Protocol, the said position was explicit that the Rules are complementary to the provisions of the Protocol.

    For clarity, Article 19 of the Protocol of the Community Parliament states:

16. ***"All matters not provided for in this Protocol shall be determined by the Rules of Procedure."***

    This provision has sufficiently covered the legality of Rule 23(11) of the Rules of Procedure of the Community Parliament. This Article confers on .the Parliament a self organizational power.

    Consequently, Rule 23 (11) is in compliance with Article 19 of its Protocol. From this point of view, the provisions of the Rules

mentioned herein are in consonance with the provisions of the Protocol. The Court is persuaded by Article 4(2) of the Rules of the European Community Parliament which states:

> ***"Each representative should stay in function until the opening of the first session of the Parliament following the elections."***

17. This provision is in *pari materia* with the provisions of Article 23 (1.1) of the Rules of procedure of the Community Parliament. Akin to the above, is the fact that the spirit of this Article shows that all the Representatives including the Speaker should remain in office until the new representatives from their respective Member States take up their positions. The spirit of the Article also applies to include all the representatives, members of the Bureau and the Speaker.

CONCLUSIONS

18. The Court holds that:

1) Rule 23 (11) of the Rules of Procedure of Community Parliament is in conformity with Articles 7(2) (ii), 14(2) (f) and 19 of the Protocol relating to the Community Parliament.

2) The Bureau of the Parliament shall continue to run the affairs of the Parliament till the first sitting of the new Parliament.

THIS 5TH DAY OF DECEMBER, 2005, AT ABUJA, NIGERIA.

HON. JUSTICE HANSINE N. DONLI, - PRESIDING

HON. JUSTICE S. DIRAROU SIDIBE. - VICE PRESIDENT

HON. JUSTICE BARTHELEMY TOE, - MEMBER

HON. JUSTICE AWA DABOYA NANA, - MEMBER

HON. JUSTICE AMINATA MALLE SANOGO, - MEMBER

TONY ANENE- MAIDOH- CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT BAMAKO, MALI

ON THE 22ND DAY OF MARCH, 2007

SUIT N°: ECW/CCJ/APP/05/06
JUDGMENT N° : ECW/CCJ/JUD/03/07

BETWEEN
MR. MOUSSA LEO KEITA - ***Plaintiff***

V.
THE REPUBLIC OF MALI - ***Defendant***

COMPOSITION OF THE COURT
1. **HON. JUSTICE HANSINE N. DONLI** - PRESIDING
2. **HON. JUSTICE AWA NANA DABOYA** - MEMBER
3. **HON. JUSTICE DIRAROU S. SIDIBE** - MEMBER

ASSISTED BY
ATHANASE ATANNON, ESQ. - REGISTRAR

COUNSEL TO THE PARTIES:
1. ***Maitre Mamadou Konate***, Jurifis Consult - *for the Plaintiff*
2. ***Mr. Moussa Kodio*** (Judge) Directorate
   General of the State Department for Disputes - *for the Defendant*

JUDGMENT OF 22ND MARCH, 2007

Human rights violation - right to property - incompetence - inadmissibility

SUMMARY OF FACTS

Moussa Leo Keita, as Mali's Ambassador to the United States of America, had exhibited a collection of artefacts, for the purposes of making his country known to the Americans. When he was sent on transfer to Cairo, he left his items behind, within the premises of the Embassy. In 1972, when he laid claim to the said items, he was faced with the refusal of the Government of Mali. When the Government of Mali finally agreed to hand them over to him, they were already damaged. He asked for compensation from the Republic of Mali, which was refused. By Judgment delivered on 8 March 2001, the Administrative Chamber of the Supreme Court of Mali granted him 30 Million CFA Francs as damages, which Mali refused to pay, after filing before the same Chamber an application for revision. By another Judgment dated 21 October 2005, the Court reduced the amount to 7 Million CFA Francs, which was never paid. Moussa Leo Keita brought his case before the Court in order to seek redress.

The Republic of Mali raised the issue of incompetence of the Community Court of Justice and argued that Moussa Leo Keita is not the proper party before the Court. It furthermore contended that the Applicant only raised the issues of human rights in his Rejoinder for the first time.

LEGAL ISSUES

1. *Can an issue of human rights violation be invoked in a Rejoinder whereas it was not mentioned in the Initiating Application?*

2. *Can the Court re-examine decisions made by the courts of Member States?*

DECISION OF THE COURT

The Court reaffirmed its competence to adjudicate on cases of human rights violation in accordance with Articles 9(4) and 10(d) of its 2005 Supplementary Protocol. Also, the specific human right that is violated must be clearly stated. In his Initiating Application, the Applicant did not cite any human right that may have been violated, but rather complained of the malfunction of the justice system of his country. The Court declared that it had no jurisdiction to adjudicate on a judgment delivered by the court of a Member State, namely the Supreme Court of Mali. His Application is declared inadmissible

JUDGMENT OF THE COURT

1. On 15th May, 2006, Moussa Leo Kéita, a retired civil servant whose address is BP 757, Bamako Mali, filed an Application at the Court of Justice of ECOWAS. The Application was registered at the Registry of the Court on 12th July, 2006.

2. This Application was accompanied by the following exhibits:
   - An extract from the 11th May, 1969 issue of the Washington Post newspaper containing some specimens of artefacts belonging to the Applicant and an evaluation of the artefacts as done by James M. Silberman, valued at $65,960.
   - Certification No. 9/Dir.R/MN dated 24th November, 1972, from the National Museum of Mali relating to the collection of artefacts in the custody of Moussa Leo Keita.
   - A letter from Moussa Leo Keita dated 4th September, 1972, addressed to Mali's Minister of Foreign Affairs and Cooperation; another, dated 9th January, 1978 addressed to the same Authority; and then that of 3rd August, 1989, for the same purposes. Through these letters, the Applicant sought to reclaim his collection of artefacts.

3. The Application as well as the exhibits accompanying it was served on the Secretariat of the Directorate General of the State Department for Disputes on 11th September, 2006, by the Chambers of Diawoye Kante Esq., a Court Bailiff at Bamako.

4. Through this Application, Moussa Leo Keita set out his submissions that he was the owner of a collection of artefacts from his country, which he exhibited at the Embassy of Mali, to make Mali more known to the Americans at the time he was representing his country as Ambassador Extraordinary Plenipotentiary from 1965 to 1969. According to the Applicant, the collection contained 110 articles originating from all the regions of Mali. These artefacts were evaluated in 1965 at 65,960 US Dollars by an expert known as Silberman of the Smithsanian Institute, USA.

5. Posted to Egypt in 1969 in the same capacity, he had to leave his materials at the Embassy. In 1972, he demanded these materials, but was met with a refusal from the Government of Mali, the latter challenging the ownership of the materials.

6. After several complaints in 1972, 1978 and 1989, the Government of Mali finally consented to acknowledge the Applicant's ownership of the artefacts and to hand them over to him.

7. But as time went on, they became damaged by bad weather and exposure at the basement of the Embassy.

8. That was why he asked for remedy from the State of Mali. The latter maintained total silence and did not react to his request. He also had to approach the Judiciary of his country, to seek reparation for the injury suffered.

9. Having taken note of the damage done to his materials, and faced with the tacit refusal of the Government of Mali to grant him remedy, Moussa Leo Keita decided to bring his case before the Administrative Chamber of the Supreme Court, by Application dated 19th April, 1999.

10. The State of Mali believed it was not under an obligation to appear before this Court, in the course of the preliminary procedure, and was ordered by the Judgment of 8th March, 2001 to pay the sum of 30 million CFA Francs as damages to the Applicant.

    Four years after the issuing of this Order, Mali had not paid the amount ordered.

11. Rather, it contended having filed on 9th April, 2001, before the Administrative Chamber, an Application for revision of the Judgment ordering the payment of damages. By another Judgment dated 21st October, 2001, the Administrative Chamber of the Supreme Court of Mali reduced the initial amount of 30 million CFA Francs to the sum of seven (7) million, for the following reasons:

- That Mali, which had its own currency, joined the CFA Zone in 1985.
- That there was also a devaluation of the CFA Franc in 1994.

12. Even then, the latter amount was not paid to the Applicant, who thought that he had to bring his case before the Community Court of Justice for the purposes of remedying the wrongs caused him.

13. Reacting to the Application of Moussa Leo Keita, Mali's State Department for Disputes rejected his allegations, claiming that if the items had remained in the basement of the Embassy of Mali, it was because Moussa Leo Keita did not possess an official document from the State of Mali for repatriating his collection, whereas American legislation required such document for the movement of the artefacts on its territory.

14. Moreover, the said State Department explains that in reality, the Applicant had abandoned his collection in the basement of the Embassy and did not entrust it to anybody's care, not even to his successor.

15. It was therefore by mere chance that the collection was discovered in 1971 during a mission of the Inspectorate General of the Administrative, Financial and Economic Affairs, at Washington.

16. Thus, after an auditing, the administrative authorities handed over the said items to the Applicant against an acknowledgement of receipt.

17. As regards the Application, the State Department for Disputes concluded its views that it should be purely and simply rejected on the grounds that:

    - ***The Court of Justice of ECOWAS is incompetent to adjudicate on the case, having regard to Articles 9 and 10 of the 2005 Supplementary Protocol on the said Court.***
    - ***The defect of status of the Applicant***

18. A first transit session of the Court on this Case was held at Bamako on 2nd October, 2006. On preliminary grounds, the issue of competence of the Court was put forth by the State Department for Disputes, which asked for a written Reply from the Applicant. The latter applied for adjournment for that purpose. The Case was thus adjourned to 4th October, for a Rejoinder from the Applicant, who on that date, was represented by a lawyer.

19. From the Application instituting proceedings, founded on the remedying of wrongs caused him by the State of Mali, the resultant Rejoinder opted for the violation of Human Rights which had allegedly been committed by the State of Mali against the Applicant.

APPRECIATION OF THE ARGUMENTS OF THE PARTIES

20. In his Application instituting proceedings, Moussa Leo Keita does not found his claims on a precise text of law nor on the positive law of the Community. He simply invoked the wrongs caused him by the State he had loyally served in the course of his whole active life. He deemed himself victim of an injustice caused him by the said State and asked for reparation.

21. The Reply of the State of Mali sets forth, for the first time, issues of law in that it raises the question of incompetence of the Court to adjudicate on the dispute submitted before it, and on the point that, it refuses to recognise Moussa Leo Keita as being qualified to appear before the Community Court.

22. The said Rejoinder of the Applicant (who was represented by a lawyer during the first hearing of the Court) shifted the terrain of the legal debate to that of violation of Human Rights as provided for in Articles 9 and 10 of the 2005 amended Protocol.

A) AS TO THE COMPETENCE OF THE COURT OF JUSTICE OF ECOWAS

23. The Application instituting proceedings does not talk about the personal or material competence of the Court. Only the Reply, the

Rejoinder, and the Reply to the Rejoinder do mention it. Hence, one needs to ask whether the Court of Justice of ECOWAS can adjudicate upon the Application thus filed, or else, whether it has to take account of the supplementary Application deposited at the hearing of the 4th October, 2006 in the form of a Rejoinder from the Applicant.

24. The reply to this question can be found in Article 37 of the Rules of the Court of Justice, which provides as follows:

    a) ***In Reply to a Rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.***

    b) ***No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.***

25. The Defendant's Reply and his further Reply to the Applicant's Rejoinder conclude upon the inadmissibility of Moussa Leo Keita's appeal, as drawn from the incompetence of the Court, within the meaning of Articles 9 and 10 of the 2005 Supplementary Protocol, which provide as follows:

New Article 9: Jurisdiction of the Court

1. The Court has competence to adjudicate on any dispute relating to the following:

a) the interpretation and application of the Treaty, Conventions, and Protocols of the Community;

b) the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;

c) the legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS;

d) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS;

e) the provisions of the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS Member States;

f) the Community and its officials; and

g) the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.

2. The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions.

3. Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.

4. The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.

5. Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty, the Court shall have power to act as arbitrator for the purpose of Article 16 of the Treaty.

6. The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.

7. The Court shall have all the powers conferred upon it by the provisions of this Protocol as well as any other powers that may be conferred by subsequent Protocols and Decisions of the Community.

8. The Authority of Heads of State and Government shall have the power to grant the Court the power to adjudicate on any

specific dispute that it may refer to the Court other than those specified in this Article.

Article 10: Access to the Court

Access to the Court is open to the following:

d) Individuals on application for relief for violation of their human rights; the submission of application for which shall:

i) not be anonymous; nor

ii) be made whilst the same matter has been instituted before another International Court for adjudication.

26. Thus, as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions, and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies and founds the legal proceedings brought before the Court. From this standpoint, the Court has to determine the extent to which the Application instituting proceedings makes a demand on the application of these texts. In reality, it makes no demand on any Community text. Moussa Leo Keita complains of being a victim of injustice committed by his State, and of the malfunction or poor running of the justice system of his country. In this perspective, the Community Court of Justice is powerless: it cannot adjudicate upon the decisions of the national courts. Within the meaning of the aforementioned Article 10, the Community Court of Justice can only intervene when such courts or parties in litigation expressly so request it within the strict context of the interpretation of the positive law of the Community. Hence, the objection raised by the Defence regarding the *ratione materae* competence of the Court must be declared admissible.

B) AS TO THE STATUS OF THE APPLICANT

27. Moussa Leo Keita is a natural person in Private Law, an ordinary citizen of the State of Mali.

28. Having regard to Articles 9 and 10 cited above, the persons qualified to appear before the Court of Justice of ECOWAS - in other words, the persons who have the status to bring cases before the Court, are:

    - The Member States of ECOWAS
    - The Institutions of ECOWAS
    - The Staff of ECOWAS
    - Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies
    - Individuals and corporate bodies for the violation of Human Rights
    - The national courts or the parties concerned, when the Court has to adjudicate on preliminary grounds upon the interpretation of the Treaty, Protocols or Rules.

29. Can Moussa Leo Keita justify his existence with respect to these persons and thereby enter into one of the above-mentioned groups?

    Yes, in the sense that Moussa Leo Keita is a natural person in Private Law.

30. But does this status empower him to bring an action, such as this, before the present Court?

    Unlike other international courts of justice, such as the European Court of Human Rights, the Community Court of Justice, ECOWAS, does not possess, among others, the competence to revise decisions made by the domestic courts of Member States; it is neither

a court of appeal nor a court of cassation {cow de cassation) vis-a-vis the national courts, and as such, the action of the Applicant cannot thrive.

31. All the same, doesn't the fact that a court, adjudicating in two contradictory decisions, awarding compensation for damages to a party, and thereafter reducing the said compensation, constitute a sufficient ground for requesting for a just and fair reparation? This is what the Lawyer for the Applicant, Me Mamadou, affirms when he calls to mind, in his Memorial in Defence, the issue of Human Rights.

C) COMPETENCE OF THE COURT AS TO THE PLEAS-IN LAW DRAWN FROM HUMAN RIGHTS VIOLATION

32. The Protocol on the Community Court of Justice, ECOWAS as amended, sets out in its Articles 9(4) and 10(d), the competence of the Court to entertain matters dealing with the violation of Human Rights (cf. supra).

    Article 19 of the 1991 Protocol on the Court of Justice of ECOWAS provides that: **"... The Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure...".**

    Article 4(g) of the Revised Treaty stipulates that: **THE HIGH CONTRACTING PARTIES, in pursuit of the objectives stated in Article 3 of the Treaty, solemnly affirm and declare their adherence to the following principles:**

    g) recognition, promotion, and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

33. The Court consequently affirms its competence to adjudicate upon questions dealing with the violation of Human Rights.

    All the same, should one specify the particular human right which has been violated? The African Charter on Human and Peoples' Rights has enshrined rights, which the International Community today

agrees to classify into civil and political rights on one hand or economic, social and cultural rights on the other hand, not forgetting other rights regarded as being of the third and fourth generations. Each of these rights have been so described as to bring out clearly their content, import, and extent of enjoyment so that any act of their violation may be qualified or not as a 'Human Right violation'.

34. In the instant case, the Counsel for the Applicant does not pin point any given right; he does not specify the rights whose violation may have been committed by the State of Mali. At most, he talks of the behaviour and attitude of the said State.

35. However, the Court rather deduces from the decision made by the Supreme Court of Mali that, what we have at hand is a case of damages suffered by the Applicant as it regards his artefacts, and for which he was granted reparation. The Court also holds that the said reparation granted by the Supreme Court of Mali which may not have been to the satisfaction of the Applicant constitutes a different issue. In any case, the Court has already responded that it has no jurisdiction to adjudicate upon decisions made by the domestic courts of Members States of the Community.

36. Hence, even if the Community Court of Justice were competent to adjudicate in cases on Human Rights violation, the Applicant has not indicated any proof of a characteristic violation of a fundamental Human Right; and in the absence of any such violation, the Application must be declared inadmissible.

37. All the same, the Applicant's situation as a retired civil servant gives the Court the possibility of exempting him from bearing the costs.

38. FOR THESE REASONS

39. The Community Court of Justice, ECOWAS, in a public sitting, after hearing both Parties, in a last resort;

HAVING REGARD to the Revised Treaty of ECOWAS;

HAVING REGARD to Protocol A/P1/7/91 on the Court; Having regard to the January 2005 Supplementary Protocol; Having regard to the August 2003 Rules on the Court; Having regard to the 1948 Universal Declaration on Human Rights;

HAVING REGARD to the 1981 African Charter on Human and Peoples' Rights.

THE COURT

DECLARES that it is incompetent to adjudicate upon the decision made by the Supreme Court of Mali, as to violation of Human Rights;

DECLARES the Application inadmissible, in regard to an infringement which may be characterised as a fundamental Human Right violation;

EXEMPTS the Applicant from costs.

DONE AT BAMAKO,
ON THE 22ND DAY OF MARCH, 2007

The following Members of the Court participated in the deliberation:

HON. JUSTICE HANISNE N. DONLI - PRESIDING

HON. JUSTICE AWA NANA DABOYA - MEMBER

HON. JUSTICE DIRAROU S. SIDIBE - MEMBER

HON. JUSTICE HANSINE N. DONLI
PRESIDING

ATHANASE ATANNON Esq.
REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 28TH DAY OF JUNE, 2007

SUIT N°: ECW/CCJ/APP/01/06
JUDGMENT N°: ECW/CCJ/JUD/04/07

BETWEEN
ALHAJI HAMMANI TIDJANI - *Plaintiff*

V.
1. **FEDERAL REPUBLIC OF NIGERIA**
2. **REPUBLIC OF MALI**
3. **REPUBLIC OF BENIN**
4. **ATTORNEY-GENERAL OF LAGOS STATE**
5. **ATTORNEY-GENERAL OF OGUN STATE**

} *Defendants*

COMPOSITION OF THE COURT
HON. JUSTICE ANTHONY ALFRED BENIN - PRESIDING
HON. JUSTICE BARTHELEMY TOE - MEMBER
HON. JUSTICE EL MANSOUR TALL - MEMBER

ASSISTED BY
TONY ANENE-MAIDOH - CHIEF REGISTRAR

COUNSEL TO THE PARTIES
1. ***Mr. Tunji Abayomi, Mrs Thelma Baba, Miss Nancy Magomya, and Shola Euzebro*** *- for the Plaintiff*
2. ***Mr. R.N. Chenge, Mr. W.J. Ashu, & N.O. Ibom*** *- for 1st Defendant*
3. ***Seydou Sidiki Coulibaly*** *- for 2nd Defendant*
4. ***Mr. Leopolde Olory Togbe, Mr. Hypolyte and Mr. Prosper Ahounou*** *- for 3rd Defendant*
5. ***Mr. J.E. Gbadebo (DPP Lagos State), Mrs O.O. Rotimi*** *- for 4th Defendant*
6. ***Mrs A.A. Babawale*** *- for 5th Defendant*

JUDGMENT OF 28TH JUNE, 2007

Jurisdiction of Court — Article 9(4) Supplementary Protocol, Cause of action – tortious act- subsistence thereof-effect, Issue estoppel-meaning, Limitation of action- computation of time, Interpretation of statute- Article 6 ACHPR

SUMMARY OF FACTS

The Plaintiff was arrested and arraigned in Cotonou for receiving a Mercedes Benz 500 SEL allegedly stolen from Nigeria. He was flown to Nigeria and arraigned in the High Court of Lagos for receiving stolen property. The High Court of Lagos found that it has no jurisdiction to try him and so discharged him. He alleged that he was being tried for the same offence by other Courts in Nigeria and so instituted this action alleging that Nigerian Courts do not have the jurisdiction to try him and that his detention is unlawful and a violation of his right to fair trial and to property.

The Defendants raised a Preliminary Objection to the Court's jurisdiction to hear the matter on the ground that the Plaintiff had raised an objection against the jurisdiction of the Nigerian Courts which was overruled and the Plaintiff's appeal against the decision is still pending and that the arrest, detention and trial of the Plaintiff are in accord with laid down law.

LEGAL ISSUES

1) *Whether or not the present suit constitutes an abuse of the Court's process.*

2) *Whether the Court has the jurisdiction to determine the case.*

DECISION OF THE COURT

The Court held, dismissing Plaintiff's Application, that: the question of the competence of the courts in the Federal Republic of Nigeria, having already been raised by the Plaintiff and determined by the domestic courts, it raises what we call in law ***"issue estoppel"*** *and is binding on all parties to that decision. Any contrary decision by this Court will amount to acting on appeal in respect of the decision by Nigerian domestic Courts, which this Court has no power to do. Article 6 of the African Charter on Human and Peoples' Rights duly recognizes the right of States to prosecute suspects for criminal offences and does not seek to interfere with that except where the suspect has been arrested, detained and / or tried under a non-existing law.*

Having regard to the facts of this case, the Court held that there was no violation of Article 6 of the African Charter on Human and Peoples' Rights since the Plaintiff was duly arrested and prosecuted before properly constituted courts under laws previously laid down.

JUDGMENT OF THE COURT

1. The Plaintiff is a Community citizen, a national of the Republic of Niger. The first three Defendants are Member States of the Economic Community of West African States, ECOWAS. The fourth and fifth Defendants are Representatives of Lagos State and Ogun State respectively, of the Federal Republic of Nigeria.

   Dr. Tunji Abayomi with Mr. S. A. Alao, Mrs. Thelma Baba, Miss Nancy Magomya, Miss Comfort Emessiri and Miss Bintu Bwala appeared for the Plaintiff.

   Mr. K. O. Olodeoku appeared for the 1st Defendant.

   Mr. Coulibaly Seydou Sidiki appeared for the 2nd Defendant.

   Mr. Leopold Olory-Togbe with Hippolyte Yede, Prosper Ahounou appeared for the 3rd Defendant.

   Mrs. J. E. Gbadebo with Mrs. O. O. Rotimi appeared for the 4th Defendant.

   Mr. B. A. Adebayo appeared for the 5th Defendant.

2. Defendants are seeking an Order of this Court striking out Plaintiffs Application for want of jurisdiction and an abuse of the process of the Court.

   Plaintiff on the other hand is seeking an Order granting jurisdiction to the Court to hear and determine his Application against the Defendants.

3. The parties have been heard and given every opportunity to present their case through their learned counsels.

(A) SUMMARY OF THE FACTS

4. Plaintiff, a national of the Niger Republic was resident in the Republic of Benin. He held various business interests in the Franco-phone sub-region especially in Benin Republic.

5. Among his various business interests was the sale of cars. The Plaintiff avers that on 22nd July, 2003, at about 5:30 am, some Beninois Police Officers visited his premises at plot 117, Zone Ambassade enquiring about a Mercedes Benz 500 SEL Saloon car, which was suspected to be in his possession. Plaintiff confirmed that the said Mercedes Benz saloon car was indeed in his possession and that he bought it from one Nigerian businessman, Alhaji Bello Mohammed. The said car was retrieved from the Plaintiff and taken to the police station. Plaintiff's house was subsequently searched, and the other cars in his house were taken to the police station at the request of officers of the Nigerian Police whom he met at the police station.

6. He was subsequently arrested and arraigned before a Court in Cotonou for having received stolen property i.e. the Mercedes Benz 500 SEL. Plaintiff says he showed the Court all the genuine documents relating to the sale. The Court on 24th July, 2003 ruled that he was a bona fide purchaser for value; that the car be impounded and not released to the Nigerian police authorities until the purchase price was refunded by the said Alhaji Bello Mohammed. Plaintiff travelled to Mali on a business trip where he was summoned by the Malian President who gave him a special flight back to the Benin Republic. He was detained for two weeks at the official residence of the President of the Republic of Benin and then flown to Nigeria.

7. Plaintiff states that he was driven to the Police Headquarters in Nigeria where he was detained and interrogated for over three months. Plaintiff states that he was neither offered the services of a legal practitioner nor a French interpreter though the Nigerian police authorities knew he was a French speaking national. Further, he was ridiculed and threatened with death to sign several documents which were all in English. He was later given a Hausa interpreter as he partially understands Hausa. The interpreter never explained any written statements to him as he always spoke with Plaintiff in the presence of his superiors.

8. Plaintiff states that at least seven of his vehicles have been seized and retained by the Nigerian Police though the ownership of the vehicles is not in dispute. Further, his accounts in Benin Republic have been frozen at the request of Nigeria without any legal basis and thus putting a heavy strain on his finances.

9. Plaintiff says he was subsequently arraigned before Court for receiving stolen property. The High Court of Lagos State presided over by Justice Kayode Oyewole discharged him on the 20th December 2004, having found that the Court lacked jurisdiction to try him. Plaintiff says that notwithstanding the ruling of the High Court of Lagos State, he is still being tried for the same offence by Courts in Lagos, Abeokuta and Ijebu.

10. Plaintiff brought an action before this Court against the Federal Republic of Nigeria, the Republic of Mali, the Republic of Benin, the Attorney-General of Lagos State and the Attorney-General of Ogun State seeking the following reliefs:

    a) A Declaration that a Nigerian Court has no jurisdiction to try the Applicant or any citizen of a Member State for receiving stolen property, which is alleged to have taken place in another Member State outside Nigeria.

    b) A Declaration that the arrest, detention and trial of the Applicant by the 1st Respondent violate his right to fair trial in the absence of available provable and material evidence of the crime alleged against him.

    c) A Declaration that the arrest and continued detention of the Plaintiff since 25th of September, 2003 is unlawful and a breach of the African Charter on Human and Peoples' Rights adopted by the Federal Republic of Nigeria in 1990.

    d) A Declaration that the unlawful seizure of the Plaintiff's vehicles which are not subject of any claim in any Member Country by the Defendants without release is a violation of the Plaintiff's right to property.

e) A mandatory Order directing the Federal Republic of Nigeria to release the Plaintiff forthwith along with the vehicles that were seized and are not subject of any claim.

f) An Order restraining the Federal Republic of Nigeria and its several states, from further arrest, detention and trial of Plaintiff.

(B) (11) The Defendants filed a Preliminary Objection to the suit brought by the Applicant on two grounds:

i) That the Plaintiff's Application is an abuse of Court Process,

ii) That this Court lacks the jurisdiction to entertain and determine the suit.

ISSUE 1: ABUSE OF PROCESS OF COURT

12. The Defendants contend that Plaintiff's Application to this Court should be dismissed because it is an abuse of the process of the Court. This argument is in two parts, namely, (i) that the Plaintiff raised an objection against the jurisdiction of the Nigerian Courts and the objection was overruled. He has subsequently appealed against the decision overruling the Preliminary Objection raised by him in respect of the competence of the Courts to try him and that the appeal is still pending; and (ii) that as at 2003, when Plaintiff was arrested, and thus his cause of action arose, the Plaintiff had no right of individual access to this Court. Under Article 9 of the Protocol on the Community Court of Justice, individuals did not have direct access to the jurisdiction of the Court. Article 9 of the Protocol read as follows:

1. The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.

2. The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such

disputes arise between the Member States or between one or more Member States and the Institutions of the Community on the interpretation or application of the provisions of the Treaty.

3. ***A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed.***

4. ***The Court shall have any powers conferred upon it, specifically by the provisions of this Protocol.***

13. The fact that individuals did not have direct access to the Court was affirmed and explained by this Court in the case of **AFOLABI OLAJIDE *V.* FEDERAL REPUBLIC OF NIGERIA** (2004/ECW/CCJ/04). This provision has since been amended in 2005 to allow individuals access the Court.

14. (i) The first part of the argument of the Defendants is valid in the sense that the question of the competence of the Courts in the Federal Republic of Nigeria, having been already raised by the Plaintiff and determined by the domestic courts, it raises what we call in law **'issue estoppel'** and is binding on all parties to that decision. Plaintiff's only recourse is to appeal against the decision which he has done. Any contrary decision by this Court will amount to this Court acting on appeal in respect of the decision by Nigerian domestic courts, which this Court has no power to do and will at any rate not embark on any such venture for the sake of judicial comity. The Plaintiff having raised the issue and lost the argument cannot be allowed to re-litigate it again in another forum. It is a clear case of an abuse of Court process.

15. (ii) The Defendants contend that Plaintiff's cause of action arose in 2003 when he was arrested and therefore the Supplementary Protocol which grants individuals direct access to the jurisdiction of this Court cannot be applied as it was not in force in 2003.

16. The Supplementary Protocol came into effect in 2005. Plaintiff contends that at the time he filed his Application to this Court in 2006, the Supplementary Protocol was in effect and therefore he had direct access to the jurisdiction of this Court.

17. The Plaintiff was arrested and detained in 2003. He was still in detention at the time he filed his Application to this Court in 2006. The alleged breach was continuing at the time he filed his Application to this Court. False imprisonment is a tortious act, and therefore a cause of action will lie any day or time as long as the alleged tort continues. In such a circumstance, the person against whom the alleged tort is committed will continue to have a cause of action until such time that the act complained of is curtailed.

18. It is clear from the above that it is wrong to say that the Plaintiff's cause of action arose in 2003 and therefore he had no cause of action in 2006. The Plaintiff had a cause of action in 2006 when he filed his Application to this Court. Since the Plaintiff had a cause of action in 2006, the provisions of the Supplementary Protocol on this Court granted him a right of direct access to the jurisdiction of the Court.

19. Further, Article 9(3) of the Supplementary Protocol sets up a period within which actions by or against a Community Institution or any Member of the Community shall be instituted. Article 9(3) states thus:

    "Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose."

    From the provision above, even if the cause of action arose in 2003 it only became barred in 2006, and so at the time this action was filed the Supplementary Protocol was in place and that gave Plaintiff the right of direct access to this Court.

ISSUE 2: THE COURT'S COMPETENCE

20. The Defendants contend that this Court lacks the jurisdiction to hear and determine the present suit. They state that the Plaintiff was suspected by the Nigerian Police of being the mastermind of trans-border armed robbery activities in Nigeria, especially within Lagos and Ogun States. Police investigations showed that vehicles robbed in Nigeria were being received by the Plaintiff at his residence in Cotonou in the Republic of Benin.

    Therefore, an undercover police officer was detailed to mount surveillance on the Plaintiff and his residence. It was confirmed by the officer instructed to mount surveillance on the Plaintiff and his residence that indeed Plaintiff had in his possession several cars with Nigerian registration numbers.

    Thereupon, a combined team of police from Nigeria and the Republic of Benin mounted a search in and around Plaintiff's house and recovered several vehicles with Nigerian registration numbers, including one Nissan Sunny with registration number FV 873 KJA and another vehicle with registration number AY 651 APP.

21. Consequently, the Government of the Republic of Benin released the Plaintiff together with the recovered vehicles to the Nigerian Police for further investigation and prosecution if necessary. The Plaintiff was subsequently charged with the appropriate offences by the Lagos and Ogun State Governments. The trials of the Plaintiff in the various Courts are on-going and that his rights have not been infringed upon in anyway as dictated by the African Charter on Human and Peoples Rights given effect by Cap. 10 of the Laws of the Federation of Nigeria 1990. They aver that Plaintiff himself has not made any complaint of bias against him by the Courts.

22. The Court's competence in this case is derived from Article 9 (4) of the Protocol on the Court of Justice, as amended. It reads thus:

    The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.

By this provision, individuals can only have direct access to the jurisdiction of the Court when their human rights are violated. The Plaintiff sought to establish that his right which is protected under the African Charter on Human and Peoples' Rights (ACHPR) has been violated by the Defendants, all of who belong to the Economic Community of West African States (ECOWAS), and therefore subject to the Revised Treaty and all other Community laws and conventions.

23. The Application of the Plaintiff was primarily premised on Article 6 of the African Charter on Human and Peoples' Rights which reads as follows:

> ***Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions <u>previously laid down by law</u>. In particular, no one may be arbitrarily arrested or detained.***
> *(Emphasis added).*

24. The Plaintiff also relied on Articles 2, 4, 7, 12 and 14 of the African Charter on Human and Peoples' Rights, though hardly did Plaintiff’s Counsel say anything about those Articles in the course of arguing against this Application.

25. Article 4(g) of the Revised Treaty of the Economic Community of West African States (ECOWAS) provides for the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

26. The effect of Article 6 of the African Charter on Human and Peoples' Rights as stated above is that no one shall have his right to liberty limited or restricted unless it is in accord with a law previously laid down. In other words the law under which a person is arrested and / or detained must have been valid and in force, before or at the time of such arrest and / or detention.

27. Plaintiff alleges that his rights under Article 6 of the African Charter on Human and Peoples' Rights have been violated and therefore the intervention of this Court is justifiable under Article 9 (4) of the Protocol on this Court, as amended.

28. The combined effect of Article 9(4) of the Protocol of the Court, as amended, Article 4(g) of the Revised Treaty and Article 6 of the African Charter on Human and Peoples' Rights is that the Plaintiff must invoke the Court's jurisdiction by (i) establishing that there is a right recognized by Article 6 of the African Charter on Human and Peoples' Rights; (ii) that this right has been violated by the Defendants or any of them; (iii) that there is no action pending before another international court in respect of the alleged breach of his right; and (iv) that there was no previously laid down law that led to the alleged breach or abuse of his rights.

29. As earlier stated, the Plaintiff's Application to this Court is rooted in Article 6 of the African Charter on Human and Peoples' Rights which guarantees the right of every individual to his liberty and freedom from arbitrary arrest and detention. Thus, the right that the Plaintiff complains about is one that is recognized by the African Charter on Human and Peoples' Rights, and 'a fortiori, by the Revised Treaty of Economic Community of West African States (ECOWAS).

30. The Plaintiff was arrested by Nigerian police authorities on the 25th September, 2003. He was detained, interrogated and subsequently charged with criminal offences by the Lagos and Ogun State Governments. The cases against Plaintiff are still pending whilst he remains in detention. Plaintiff says the whole proceedings against him violate his right protected by Article 6 of the African Charter on Human and Peoples' Rights.

31. The Defendants contend that the arrest, detention and trial of the Plaintiff are in accord with laid down law and they cited the relevant legislation under which Plaintiff was arrested and prosecuted. Plaintiff cannot succeed in invoking the jurisdiction of this Court unless he is able to satisfy this Court that no such law/s existed at

the time of his arrest. Article 6 of the African Charter on Human and Peoples' Rights on which Plaintiff relies clearly postulates that an individual's right to liberty may be denied for reasons and conditions previously laid down by law.

32. The Plaintiff in his narration of the facts supporting his Application stated that the events leading to his arrest and prosecution by the Nigerian Courts started on the 22nd July 2003 when some police officers of the Benin Republic came into his residence to enquire about a Mercedes Benz 500 SEL. He further states that he replied in the affirmative. Consequently, the car was retrieved from his residence.

33. Subsequently, another search was conducted in his residence and several other cars were seized. The 1st Defendant claims that several other cars were retrieved from the Plaintiff's residence which had Nigerian registration numbers, including one Nissan Sunny with registration number FV 873 KJA and another vehicle with registration number AY 651 APP. The Nigerian Police had facts which enabled them, if they were so mindful, to effect the arrest and prosecution of the Plaintiff.

34. After the arrest of the Plaintiff by the Nigerian Police, he was taken to the Police Headquarters and detained there for a period during which he was interrogated. The Plaintiff was taken to a place where persons suspected to have committed criminal offences are kept. He was detained and interrogated. Plaintiff himself admits that he was interrogated several times during the period that he was detained. He was thus detained for purposes of interrogation. Consequently, he was charged with criminal offences after his interrogation. He was arraigned before a duly constituted Court, a Court established by law and existing at the time of his arrest. The crimes for which he was charged were crimes recognized by law and in existence at the time he was arrested. These important and material facts have not been disputed.

35. It is on record that Plaintiff has a Counsel in the cases pending before the domestic courts of Nigeria. Plaintiff has not alleged that his Counsel is not the counsel of his own choice. Thus the Plaintiff is being

represented, and represented by Counsel of his choice in accordance with law. Plaintiff has complained of bias or unfairness against him. But it is clear that whatever bias or unfairness he alleges stems from his belief that the authorities are bent on incarcerating him at all costs. This fear is taken care of by the fact that the Courts in the Federal Republic of Nigeria are independent, which alone is a guarantee of fairness to the Plaintiff. Plaintiff has not alleged that the Nigerian Courts are not offering him sufficient opportunity to defend himself.

36. He has not been inhibited in any way with regards to the presentation of his side of the case, neither has he alleged that the Court is admitting any inadmissible evidence against him. He has not alleged that he has been prevented from presenting his witnesses, neither has he alleged that he has been denied the opportunity to cross-examine the witnesses presented by the prosecution.

37. Plaintiff has not been pronounced guilty without trial. Whether the Plaintiff is indeed guilty or not is a matter for the Courts trying him to decide. Plaintiff raised an objection against the jurisdiction of the Nigerian domestic courts to try him and the objection was overruled, which he has appealed against.

38. He was afforded the opportunity to appeal against that decision to the appellate courts in accordance with laid down rules of procedure. It is therefore clear that due process is being observed. And even if the processes are flawed or abused in some ways, there are still avenues open to him to seek redress within the established and recognized laws and procedures in the hierarchy of Courts of the Federal Republic of Nigeria. This is precisely what Article 6 of the African Charter on Human and Peoples' Rights envisages: the situation whereby it is possible to justify arrest and detention in accordance with previously laid down law.

39. Article 6 of the African Charter on Human and Peoples' Rights duly recognises the right of States to prosecute suspects for criminal offences and does not seek to interfere with that except where the suspect has

been arrested, detained and/or tried under a non-existing law, or a law made specifically after his arrest, or detention or for an offence which did not exist at the time of his arrest or detention.

40. The Plaintiff could have succeeded in invoking the jurisdiction of this Court by establishing that some right of his protected by the African Charter on Human and Peoples' Rights has been violated without due process. The facts above indicate that the arrest of the Plaintiff was not arbitrary.

41. His detention and subsequent trial were not carried out without due process of law. It was in accord with previously laid down laws and rules of procedure. The fact that the Courts trying him have refused to release him on bail pending trial does not constitute a violation of right within the meaning of Article 6 of the African Charter on Human and Peoples' Rights.

42. We have also considered Articles 2, 4, 7, 12 and 14 of the African Charter on Human and Peoples' Rights which Plaintiff cited in his amended Application. None of these provisions avails the Plaintiff in so far as all actions taken against him by the Defendants, either collectively or individually, were taken with a view to prosecute him in crime. The seizure of his vehicles which he complains about was done in the same pursuit. It is for those Courts trying him to decide which ones are not the subject of a crime, if any, involving him and thus order their release to him.

43. It is absurd to ask this Court which is not seized with the case, and which did not order the seizure of those cars, to order their release without this Court having the competence to deal with the issue. Be that as it may, if as the Defendants allege, the seizure of the cars was based on prima facie evidence that they were the subject matter of robbery and other criminal offences, public interest will dictate that the trial Courts should take hold of them until the matter was resolved and the ownership determined. This is in harmony with Article 14 of the African Charter on Human and Peoples' Rights, which guarantees right to property, with a

proviso that such right may be encroached upon in the interest of public need or in the general interest of the Community and in accordance with the provisions of appropriate laws.

44. The Plaintiff in his Application to this Court mentioned the Federal Republic of Nigeria, Ogun and Lagos States of the Federal Republic of Nigeria as well as the Republic of Benin and Mali as Defendants. However, in the Orders that he sought from this Court, he made no claim against the Republic of Mali and Benin. That is an indication that he had no case against them. The Plaintiff, in adding the Republic of Benin and Mali as Defendants, therefore abused the process of Court. And even if these States were said to have aided the Federal Republic of Nigeria in arresting the Plaintiff, so long as he is being tried before properly constituted Courts and under previously laid down laws, their action would also be justified.

45. Even though by Article 4(g) of the Revised Treaty, Article 9(4) of the Court's Protocol as amended, and Articles 6 and 14 of the African Charter on Human and Peoples' Rights, the Court will generally have competence, yet on the facts this Court cannot entertain this Application since the Plaintiff was arrested, detained and prosecuted under previously laid down criminal laws and rules of procedure before Courts of competent jurisdiction in the Federal Republic of Nigeria and has been afforded every opportunity to defend himself by the laws of the Federal Republic of Nigeria. Admitting this Application will amount to this Court interfering in the criminal jurisdiction of the Nigerian Courts, without justification.

46. The Court received no Application as regards costs as required by Article 66(11) of the Court's Rules of Procedure.

DECISION OF THE COURT

For these reasons, the Court sitting in public and after hearing both parties in a case of human rights violation, in the first and last resort, declares itself incompetent to entertain this case on merit. As regards costs, the Court decides that each party should bear its own costs.

DONE, JUDGED AND DELIVERED IN PUBLIC AT THE COMMUNITY COURT OF JUSTICE, ECOWAS ON THE 28TH DAY OF JUNE 2007.

HON. JUSTICE ANTHONY ALFRED BENIN - PRESIDING

HON. JUSTICE BARTHELEMY TOE - MEMBER

HON. JUSTICE EL MANSOUR TALL - MEMBER

TONY ANENE-MAIDOH - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA.

ON THE 14TH DAY OF MARCH, 2007

SUIT N°: ECW/CCJ/APP/05/05
RULING N°: ECW/CCJ/RUL/04/07

BETWEEN

PROFESSOR ETIM MOSES ESSIEN - ***Plaintiff***

V.

1. **THE REPUBLIC OF THE GAMBIA**
2. **UNIVERSITY OF THE GAMBIA**

} ***Defendants***

COMPOSITION OF THE COURT

HON. JUSTICE HANSINE N. DONLI - PRESIDING
HON. JUSTICE AMINATA MALLE SANOGO - MEMBER
HON. JUSTICE ANTHONY ALFRED BENIN - MEMBER
HON. JUSTICE AWA DABOYA NANA - MEMBER
HON. JUSTICE EL MANSOUR TALL - MEMBER

ASSISTED BY

TONY ANENE-MAIDOH - CHIEF REGISTRAR

COUNSEL TO THE PARTIES

1. ***JAMES A. KANYIP Esq.*** - *for the Plaintiff*
2. ***EMMANUEL O. FAGBENLE Esq.***- *for the Defendants*

RULING OF 14TH MARCH, 2007.

- ***Jurisdiction of the Court***
- ***Joinder of party***
- ***Human Rights Violation***
- ***Economic and Social Rights***
- ***Non exhaustion of local remedies***
- ***Applicability of Articles 50, 56 (5) and 68 of the African Charter on Human and Peoples' Rights***
- ***Preliminary objection***
- ***Arbitral clause.***

SUMMARY OF FACTS

The Commonwealth Secretariat recruited Professor Etim Moses Essien to teach for two years at the University of the Gambia. For his service, the Professor was receiving remuneration in Dollars, to be paid from the Commonwealth Fund for Technical Co-operation (CFTC). After two years, the University requested him to continue his service. Having decided to pay the Applicant in local currency and at the same rate as other lecturers, the Professor refused and came before the Court for the violation of his rights to equal pay for equal work.

The Defendant raised a Preliminary Objection on two grounds: that the Application is inadmissible for non-joinder of the Commonwealth Secretariat and for non-exhaustion of local remedies.

LEGAL ISSUES

1. *Whether the Applicant can bring a case before the Court without exhausting local remedies*

2. *Whether the non-joinder of the Commonwealth Secretariat renders the Application inadmissible.*

DECISION OF THE COURT

The Court held that the exhaustion of local remedy is not applicable in human rights applications before it having regard to the provisions of the Supplementary Protocol of the Court.

That the non-joinder of the Commonwealth Secretariat was not fatal to the application since there is no claim against them and therefore are not a necessary party.

RULING OF THE COURT

1. The Plaintiff, Professor Etim Moses Essien instituted the substantive action against the Defendants to wit, The Republic of The Gambia and the University of The Gambia, wherein the following reliefs are sought inter alia:

   a) **A DECLARATION** that the action and conduct of the Republic of the Gambia and University of the Gambia by engaging the Applicant to render expert technical services to them from 5th of February, 2004 to 26th of January, 2005 (a period of one (1) year) without an equal pay for the said services amounted to economic exploitation of the Applicant and a breach of his right to equal pay for equal work.

   b) **A DECLARATION** that the action and conduct of the Republic of the Gambia and University of the Gambia as aforesaid violated Articles 5 and 15 of the African Charter on Human and Peoples' Rights and Article 23 of the Universal Declaration on Human Rights, 1948 both of which the Republic of the Gambia signed and acceded to respectively.

2. Within the proceedings by the Plaintiff, the Defendants brought an application for Preliminary Objection seeking three reliefs in the main as follows:

   1) That the Plaintiff failed to join the Commonwealth Secretariat which is a necessary party to the claim and who were the architects of the employment relationship between the Plaintiff and the Defendants which is the main issue of the action.

   2) The Applicant in bringing this matter before this Court has failed to exhaust the local remedies available under Articles 50 and 68 of the African Charter on Human and Peoples' Rights which is the international norm under which this action is brought before this Court.

3) That the Applicant's claim for violation of his Fundamental Rights based upon facts showing unresolved/unrenewed contract of service, counter offers and claims based on quantum meruit is incompetent before the Court.

3. The Defendants further distilled from the above Reliefs the following issues:

1) Whether the non joinder of the Commonwealth Secretariat as a party to the suit did not affect its competence and consequently the jurisdiction of the Court to adjudicate thereon.

2) Whether the Applicant's claim is competent before the Court having failed to exhaust local remedies available to him as stipulated by Article 56 (5) of the African Charter in view of his claim being based on Articles 50 and 68 thereof.

3) Whether the Applicant's claim for violation of his Fundamental Rights based upon facts showing unresolved/unrenewed contract of service, counter offers and claims based on quantum meruit is competent before the Court.

4) Whether in the circumstances of paragraphs 1 to 3 above the Court can properly exercise jurisdiction on Applicant's suit as constituted.

With these Reliefs and issues, Learned Counsel to the parties put in their Written Addresses and adopted same for the consideration of this Preliminary Objection.

THE LEGAL ARGUMENTS BY THE PARTIES.

4. Learned Counsel for the Defendants made his submission on three main issues upon which the Preliminary Objection should be resolved in their favour. He submitted on issue one that the basis of the Plaintiffs

claim was the contract of service granted him by the Commonwealth Secretariat and it was essential for an action based on such contract to join the Commonwealth Secretariat as a necessary party and where the Plaintiff failed to join such a necessary party, the action should fail as the Court is divested of its jurisdiction to adjudicate on the matter. In furtherance of the above justification, Counsel reiterated the fact that the contract with Commonwealth Secretariat had a clause for arbitration which had not been pursued when the dispute arose before the Plaintiff accessed this Court. Another point Counsel canvassed related to the violation of the doctrine of *'audi alteram partem'* and that the said violation rendered the suit incompetent and relied on the case of **OLAJIDE AFOLABI V. FEDERAL REPUBLIC OF NIGERIA, 2004 ECW/CCJ/04 at pages 65-66** wherein this Court stated thus:

> ***' it is a well established principle of law that a Court is competent when it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction and the case comes before the Court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.'***

5. In reply, Learned Counsel to the Plaintiff made submissions on several issues on these terms. On the first issue, he contended that the non joinder of the Commonwealth Secretariat as a party did not violate the doctrine of *'audi alteram partem'* and consequently, same cannot render the suit improperly filed as to affect the jurisdiction of the Court. He referred to the cases of **AFOLABI V FEDERAL REPUBLIC OF NIGERIA (2004)** supra; **MADUKOLA V. NKEMDILIM (1962) 2 SCNLR 341** ; **A. G. LAGOS STATE V. ATTORNEY GENERAL OF THE FEDERATION (2003) NWLR (PT 833) AT PAGE 74.** and submitted that the ratio decidendi of the cases cited by the Defendants are not on all fours with the case at hand. On the non-joinder of Commonwealth Secretariat, Counsel submitted that the Commonwealth Secretariat is not a necessary party to this suit and that the non-joinder did not divest

this Court of its jurisdiction to hear and determine the suit on merit. Furthermore, Counsel stated that, the relationship between the Plaintiff and the Commonwealth Secretariat ended/expired on 04/02/2004 when the contract between them came to an end and that made the Commonwealth Secretariat an unnecessary party to warrant the joinder as a party. Still on the joinder, Counsel to the Plaintiff stated that since there is no relief sought against the Commonwealth Secretariat and the Commonwealth Secretariat became an unessential party for them to be joined as a party to the action. He urged the Court to dismiss the Preliminary Objection on that ground.

6. On issue two, Counsel to Defendants contended that the Plaintiff's claim was incompetent for failure to exhaust local remedies available to him as stipulated in Article 56(5) of the African Charter on Human and Peoples' Rights on the grounds that his claim is based on Articles 50 and 68 thereof. He contended that the Court cannot exercise jurisdiction over the Plaintiff's claim in violation of Articles 56(5) and 60 of the African Charter which provides that a Plaintiff shall exhaust local remedy before he can access the Court as provided under Article 10(5) of the Supplementary Protocol. He stressed that Article 4(g) of the Revised Treaty enjoined that the Member States of the Economic Community of West African States (ECOWAS), to ensure the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

   In reply, Counsel to the Plaintiff was of the view that this arm of objection was misconceived and that the provisions of Articles 30 to 68 of the African Charter on Human and Peoples' Rights are not synonymous with the Community Court of Justice and are therefore inapplicable to this Court. He urged the Court to dismiss the objection.

7. On issue three, Counsel to the Defendant submitted that the case bordered principally on unlawful or wrongful termination of the Respondent's appointment and not human rights violation.

   On the contrary, Counsel to the Plaintiff submitted that the Plaintiff's claim is not predicated on a breach of contract of employment with the Defendants but the breach of fundamental rights to equal pay for equal work done. He reiterated that Human Rights are political, social,

economic and cultural rights. He submitted that rights falling under the above stated breakdown of human rights are justiciable and the Preliminary Objection should be dismissed.

DELIBERATION OF THE COURT

8. The Court gave every issue arising from the application a thorough examination except the matters touching on the substantive/main case. For clarity, these issues are summarised as follows: that the Plaintiff failed to join the Commonwealth Secretariat which is a necessary party to the claim and who were the architects of the employment relationship between the Plaintiff and Defendants, which is the main issue of the action.

9. On the issue of competence, it is trite that competence of the Court is enshrined in Articles 9 and 10 of the Supplementary Protocol, which gave the Court the competence to adjudicate on matters including the contravention of Human Rights. Article 10(d) of the Supplementary Protocol of this Court states:

'Access is open to the following:

d) individuals on application for relief for violation of their human rights; the submission of application for which shall:

i) not be anonymous; nor

ii) be made whilst the same matter has been instituted before another International Court for adjudication;'

Also, Article 4 (g) of the Revised Treaty states:

The High Contracting Parties, in pursuit of the objectives stated in Article 3 of this Treaty, solemnly affirm and declare their adherence to the following principles:

' recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

10. The principal question which is posed in the instant case, relates to whether the facts of the case did constitute a violation of the Human Rights of the Plaintiff. Are the rights being claimed by the Plaintiff fundamental human rights guaranteed by the African Charter on Human and Peoples' Rights and the U.N. Universal Declaration 1948? Finally, does the Plaintiff possess the right to come directly before the Court of Justice of ECOWAS?

11. While it can be stated right away that by Article 10 (d) of the Protocol of the Court the Plaintiff can access the Court, the issue as to whether the matters complained of are human rights or not should be left for determination at the trial. However by the combined effect of the said provisions as to the competence to adjudicate on the matters as human rights violation, same shall be determined at the trial, as provided in the African Charter on Human and Peoples Rights and the Universal Declaration on Human Rights which the Member States are signatory to.

THE NON-JOINDER OF PARTIES

12. The Court also considered that there are no grounds for the Defendants to constitute a demurrer out of the fact that the Commonwealth Secretariat was not summoned to the action. Indeed, the *audi alteram partem* rule targets a case of an indispensable party that cannot be omitted and such a party is described as a necessary party. The doctrine of jurisprudence states that **'a party directly involved in'** the litigation should be made a party as to allow his participation in the case, thus complying with the doctrine of *audi alteram partem*, which may not be the case in this Application. The Defendants stated their inability to establish contact with the Commonwealth Secretariat for the renewal of the contract in question. The complaint by the parties are made up in diversity of legal points and some of them relate to the connection of the parties to the Commonwealth Secretariat and why the failure to join them is fatal to the Plaintiff's claim.

13. On issue No 1, the Defendants relied on the Supreme Court case, in the case of **A-G LAGOS STATE V. A-G FEDERATION** and contended that the failure to join the Commonwealth as a party or proceed to

arbitration as required was fatal to the Plaintiff's case. Counsel to the Defendants further relied on the cases of **OLAJIDE AFOLABI V. FEDERAL REPUBLIC OF NIGERIA** (2004) (supra) and **MADOUKOTUM V. NKEMDELIM (1962) 2 SCNLR 341** wherein the condition for jurisdictional competence were relied upon.

14. On the converse, the Applicant referred to the authorities relied upon by the Defendants to submit that same are most irrelevant and inappropriate for the consideration of the instant case. He submitted that the non-joinder was never an issue in the cases relied upon, therefore the ratio decidendi are not on all fours with the instant case and urged the Court to discountenance them. As to the case of **OLAJIDE AFOLABI V. FRN** (supra), referred to by Counsel to the Defendant, which the Counsel to the Plaintiff contended that it was most irrelevant, and that in the face of the instant case is misconceived. The authority dealt inter alia on the competence of the Court to adjudicate in respect of a matter instituted by an individual as opposed to the provision of Article 9 of the original Protocol of the Court. In the instant case, the issue for the consideration of the Court is on the competence. The principles in the case of Afolabi therefore are on all fours with the instant case regarding the point on competence.

15 On the second point relating to non-joinder of parties, Counsel to the Plaintiff reiterated the fact that it is the claim of the Plaintiff or Applicant that determines the issue of jurisdiction of the Court, and not the Defendants to the case. It follows therefore that the non-joinder of Commonwealth Secretariat as a party cannot be fatal to the claim as to warrant the Court to uphold the Preliminary Objection. It is clear to the Court that there is no order sought against the Commonwealth Secretariat as to warrant their being joined as a party to the suit and it is safe to conclude that the non-joinder of the Commonwealth Secretariat did not divest this Court of its jurisdiction to hear and determine the matter before it. *See* **MABAL AYONKOYA AND 8 ORS V. E. AINA OLUKOYA AND ANOR (1991) 4 NWLR (PART 440) AT 31 PARA E TO F**; **ALHAJA REFATU AYORINDE & 4 ORS; ALHAJA AIRAT ONI & ANOR (2000) 75 LRCN 206 AT 234 TO 235 PARA H - D; JOSEPH ATUEGBU & 4 ORS V. AWKA**

SOUTH LOCAL GOVERNMENT & ANOR (2002) 15 NWLR (PT 791) 635 AT 653 TO 654 PARA H TO B which were relied upon by Counsel.

16. It is a well established position of law that the Court has jurisdiction to join a person whose presence is necessary for that purpose. The significance of the issue of jurisdiction is that where a matter is heard and determined without jurisdiction it amounts to a nullity no matter how well conducted the case may be. The matter of joinder of parties is of great importance to the cause of action and there is a plethora of decisions in municipal and Regional Courts on the matter. See the Supreme Court case of **A-G Lagos State v. A-G. Federation** (supra) held at pg 74. that

> ***"where the grant of a relief will affect the interest of other persons not parties to a suit, those persons are necessary parties and they must be heard or given the opportunity to be heard: otherwise, if they are not before the Court, the Court cannot grant the claim,"***

This Court states that the latter view has sufficiently hit the nail on the head in that a party who is not shown to have material connection with the matter cannot be joined. Further to this, is that the Commonwealth has not been shown to have renewed the contract at this stage. In the circumstance, a non joinder of the said Commonwealth Secretariat cannot be fatal. On that basis the objection is overruled.

17. Learned Counsel to Plaintiff further argued that there is no order sought against the Commonwealth Secretariat as to warrant their being joined as a party to the suit and concluded that the non-joinder of the Commonwealth Secretariat did not divest this Honourable Court of its jurisdiction to hear and determine the matter before it. On this note he relied on **MABAL AYONKOYA AND 8 ORS *V.* E. AINA OLUKOYA AND ANOR (1991) 4 NWLR (part 440) at 31 para E to F; ALHAJA REFATU AYORINDE & 4 ORS. ALHAJA AIRAT ONI & ANOR (2000) 75 LRCN 206 at 234 to 235 para H - D**; **JOSEPH ATUEGBU & 4 ORS *V.* AWKA**

SOUTH LOCAL GOVERNMENT & ANOR (2002) 15 NWLR (pt 791) 635 at 653 to 654 paragraphs H to B. Even though the Court appreciates the reliance on local authorities, Learned Counsel appearing before this Court should endeavour to expand their scope of legal authorities to authorities from International Courts. It is in consonance with the principles of law that the Plaintiff has not made a claim against the Commonwealth Secretariat; any joinder of the said Commonwealth would amount to bringing a party which is not concerned with a case to Court.

18. Without examining all the authorities because of their limitation as stated above, one cannot but rely on one of them for the purpose of emphasis. It is now widely acceptable position of law that the Court has jurisdiction to join a person whose presence is necessary for the determination of the suit before it.

19. Turning to the points expressed regarding necessary parties, the Court considers whether the Commonwealth Secretariat is a necessary party. It has been defined that a necessary party to a proceeding is the party whose presence is essential for effectual and complete determination of the claim before the Court. *See* **OJO *V.* OSENI 1987 3 NWLR PT 66 page 422** and **N.N.N.LTD *V.* ADEMOLA (1997) 6 NWLR Pt 76 page 76 at 83 paragraphs A-B**, wherein the Court decided that in considering whether a party has been properly joined in a suit or whether there is a cause of action against a party, a trial court can only look at the Plaintiff's claim and not the Defendant's defence.

    Applying these principles herein, it is the view that the disclosed facts in the application of the Plaintiff disclosed no necessary constituents to warrant the Court to accede to the prayer sought in the Preliminary Objection for non joinder of parties. All known jurisprudence states that a Plaintiff can choose which party it deems fit to bring as a Defendant; and he would only succeed on the strength of his own case and not on the weakness of the Defendant's case. Applying these authorities to the instant application, it is the position of this Court that it is not necessary to impose on the Plaintiff to join the Commonwealth Secretariat as a party to this suit and the failure to join

them cannot be said to divest the Court of its jurisdiction. The law cannot be clearer and fairer than the expression on the non joinder of Commonwealth Secretariat as a party. Consequently, the Application on this point fails.

NON EXHAUSTION OF LOCAL REMEDY

20. On issue two (2), Learned Counsel to the Defendants submitted that it is apparent that the Plaintiff has not exhausted local remedy as provided in Article 56 paragraph 5 of the African Charter. On that basis, he submitted that the Plaintiff cannot be permitted to enter through the window of Article 10 (d) of the Supplementary Protocol of the ECOWAS Court. He further contended that Article 4 (g) of the Revised Treaty of ECOWAS enjoined the Court to recognize, the promotion and protection of Human and People's Rights whenever same is contravened but that such a claim shall be entertained after the exhaustion of local remedy. He urged the Court to strike out the Application on the said grounds and direct the Plaintiff to exhaust the local remedy in The Gambia.

    For clarity, the provisions are herein produced:

'Article 50: ***The Commission can only deal with a matter submitted to it after making sure that all the local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.***

Article 56(5): ***Communications relating to human and peoples' rights referred to in 55 received by the Commission shall be considered if they:***

5) Are sent after exhausting local remedies, if any, unless it is obvious that this Procedure is unduly prolonged.

21. The Plaintiff drew the attention of the Court to the fact that the claim was not based on Articles 50 and 68 of the African Charter on Human and Peoples' Rights as submitted by the Defendants. It

is stated that Articles 50 and 68 of the African Charter on Human and Peoples' Rights did not require the exhaustion of local remedies, but the determination as to whether the suit so filed is competent and that the reference to Article 56 (5) was a misconception. He therefore urged the Court to discountenance the argument proffered in support of issue two (2).

22. On examination of the said Article 50, it is clear that the said Article refers not to any organization but the Commission. Consequently that provision of Article 50 can not be applied *stricto senso* to this case pertaining to the exhaustion of local remedy and its relevance to this Court.

23. On the question of Article 68 of the African Charter as raised by the Defendants, it is the position of this Court that its application has no relevance whatsoever in the consideration of the claim before it and therefore the objection is untenable.

24. On issue three (3), the Defendants relied on the case of **ABUBAKAR TATARI ALI POLYTECHNIC *V.* MAINA reported in (2005) AFWLR page 225** to submit that the Applicant having accepted part of integrated pay package and rejected the other part, the dispute revolves around whether his alleged claim of outstanding balance is enforceable, under the Commonwealth Salary Scale or the University of The Gambia integrated pay scale. This point raises some facts connected substantially to the main/substantive matter, *lis pendens*, in this Court. As always the Courts frown and discourage the consideration of substantive issues at the stage of interlocutory, on the ground that the Court would be determining matters of substance without fully hearing the parties and their witnesses, if any. This Court endorses the principles in this case as to preclude the consideration of arguments on the issue of part payment which is a matter for that main case. Article 87 (5) of the Rules of Procedure provides that:

> ***'The Court shall, after hearing the parties decide on the application or reserve its decision for the final judgment. If the Court refuses the application or reserves its decision, the President shall prescribe new time limits for the further steps in the proceedings.'***

25. At this juncture, it is necessary to mention a salient point raised by the Defendants in respect of the competence of the Court for the alleged violation of fundamental human rights of the Plaintiff. One of the innovations brought about by the Supplementary Protocol of January 2005 on the Court and the Community is the extension of its powers to cover human rights violations, as contained in Article 10(d). The Defendants maintain that the rights claimed by the Plaintiff are not positively conferred by Statute or Contract, but the Plaintiff countered by stating a contrary arguments.

26. The important question herein is whether the rights of the Plaintiff as discernible from the relationship of the parties are Human Rights as opposed to contractual Rights and so on. Without delving into the issues in depth, the two parties concur, in invoking the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights 1948. Article 10(d) of the Supplementary Protocol of the Court is a special provision and did relate to the parties accessing this Court on human rights contravention while those provisions of the African Charter on Human and Peoples' Rights relate to those cases under the purview of the Commission, particularly, the issue of local remedy as mentioned in Article 50 of the said Charter has no bearing with the cases under the premise of Article 10(d) of the Supplementary Protocol, on the grounds that the cases under Article 10(d) made it quite clear that the bar to bringing action to this Court must be those cases of Lis Pendens in another international Court for adjudication.

27. Consequently, the objection herein regarding the non exhaustion of local remedies has no bearing with the requirement in bringing this action before this Court. The objection therefore is untenable. The action in this case having been made under human rights violation falls under the ambit of human rights infringement and amount to a justiciable claim. The material put before the Court is in the realm of the main claim. To raise such an argument herein would entail the full deliberation of the case prematurely. In the circumstance, the objection on this ground also fails. For the foregoing reasons as amplified, the Preliminary Objection fails in its entirety.

DECISION OF THE COURT

1) **Whereas** the Defendants have failed to justify the facts in support of the Preliminary Objection; the Court hereby decides that the Preliminary Objection is dismissed on all the grounds argued except the points deferred for consideration in the main/substantive action as provided by Article 87 of the Rules of Procedure of this Court.

2) **Whereas** the Defendants argued that the Court is devoid of its competence to determine this case without the joinder of the Commonwealth Secretariat; the Court decides that it is competent to hear the substantive case on its merit despite the non joinder of the Commonwealth Secretariat and that the Commonwealth Secretariat is not a necessary party which must be joined by the Plaintiff.

3) **Whereas** the Defendant argued that the Court is devoid of its jurisdiction for non exhaustion of the local remedy as provided in Article 50 (5) of the African Charter on Human and Peoples' Rights, the Court decides that Article 50 (5) of the African Charter on Human and Peoples Rights are available in the proceedings before the Commission on African Charter on Human and Peoples' Rights; and that Article 10 (d) of the Protocol gave no condition precedent in accessing the Court except where the action *Lis pendens* before another International Court.

4) **Whereas** the Defendants argued the issues of the contract relating to the parties subsisting and involving the Commonwealth Secretariat and that the issues of payments which the Plaintiff accepted part of vitiate the action filed in breach of not exploring the settlement of same by arbitration and that the main Application was not properly instituted under the human rights violations and that the complaints of the Plaintiff are not justiciable as human rights violations, the Court decides that the issues stated herein touch on the substantive case which by Article 87(5) of the Rules of Procedure of this Court shall be taken in the substantive action.

COSTS

Whereas the Defendants made no specific application for cost in the Preliminary Objection proceedings and whereas the award of cost is usually made in the final judgment, with the award proceeding to the successful party, the Court decides that the award of costs shall be made at the final determination of the substantive proceedings. Consequently, no award of costs is made.

THE RULING IS READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT DATED 14TH MARCH, 2007.

CORAM

HON. JUSTICE HANSINE N. DONLI - PRESIDING

HON. JUSTICE AMINATA MALLE SANOGO - MEMBER

HON. JUSTICE ANTHONY ALFRED BENIN - MEMBER

HON. JUSTICE AWA D. NANA - MEMBER

HON. JUSTICE EL MANSOUR TALL - MEMBER

TONY ANENE-MAIDOH, CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 29TH OCTOBER, 2007

SUIT N°: ECW/CCJ/APP/05/05
JUDGMENT N°: ECW/CCJ/JUD/05/07

BETWEEN
PROFESSOR ETIM MOSES ESSIEN - ***Applicant***

V.
1. **THE REPUBLIC OF GAMBIA**
2. **UNIVERSITY OF GAMBIA**

} ***Defendants***

COMPOSITION OF THE COURT
1. **HON. JUSTICE HANSINE N. DONLI** - ***PRESIDING***
2. **HON. JUSTICE AMINATA MALLÉ SANOGO** - ***MEMBER***
3. **HON. JUSTICE ANTHONY A. BENIN** - ***MEMBER***
4. **HON. JUSTICE AWA DABOYA NANA** - ***MEMBER***
5. **HON. JUSTICE EL-MANSOUR TALL** - ***MEMBER***

ASSISTED BY
TONY ANENE-MAIDOH ***ESQ. - CHIEF REGISTRAR***

COUNSEL TO THE PARTIES
1. **Mr. J. A. Kanyip -** *for the Plaintiff*
2. **Mr. Emmanuel O. Fagbenle, Mrs Awa Bah,** *A.G. Chambers, The Gambia. - for the Defendants*

JUDGEMENT OF 29TH OCTOBER, 2007

Human rights violation- economic exploitation- jurisdiction- exhaustion of local remedy.

SUMMARY OF FACTS:

The Commonwealth Secretariat recruited Professor Etim Moses ESSIEN as a Technical Consultant for two (2) years to teach at the Faculty of Medicine, University of The Gambia and his remuneration to be paid from the Commonwealth Fund for Technical Co-operation in US Dollars.

At the end of the contract, the Professor continued with his duties at the request of the authority of the University of Gambia. On the 13th of October, 2004 he wrote to the University of The Gambia claiming his salary arrears but they replied that steps being undertaken with the Commonwealth Secretariat towards the renewal of his contract did not succeed and due to this, the University would only pay him from its purse in local currency, the "dalasis", and at the rate applicable to University lecturers in The Gambia . He then filed this action against the Defendants for the violation of his economic and social rights especially that of receiving equal payment for equal service.

LEGAL ISSUES

1. *Whether from the totality of the facts the Plaintiff's economic right has been violated under Article 15 of the African Charter on Human and Peoples' Rights. (ACHPR)*

2. *Whether the plaintiff's action is justiciable.*

DECISION OF THE COURT

1. *The principle of the right to equal salary for equal work does not apply in the instant case on the ground that the sources of finance for the remuneration of the Plaintiff are not the same as those of the Commonwealth Secretariat. Therefore the Plaintiff's economic rights have not been violated.*

2. *That the Plaintiff's action being founded on human rights violation is justiciable before this Court.*

JUDGMENT OF THE COURT

1. The Applicant, Professor Etim Moses, is a citizen of the Community, of Nigerian nationality. The 1st Defendant, the Republic of Gambia, is a Member State of the Community. The 2nd Defendant is a University of the said Member State.

2. The Applicant, who resides at Estate Housing D58, Eket, Uyo, Akwa Ibom State, Nigeria, is represented by his Counsel, James Kanyip. Albert & Co., Suite B58, Abuja Shopping Mall, Zone 3, Wuse.

3. The Defendants were represented by their Counsel, Dr. O. J. A. Olulana (DCIL) and Miss Nyalomy Sarr (SC), as well as the Attorney-General and the Department of State for Justice, Marina Parack, Banjul, Gambia.

4. The Applicant complained of the violation of his human rights. The Defendants raised a Preliminary Objection of inadmissibility of the action, for lack of competence of the Court. The Court adjudicated and joined the preliminary plea on the competence of the Court to the merits of the case, in accordance with Article 87 of the Rules of Procedure.

PRESENTATION OF THE FACTS AND PROCEDURE

5. The Applicant, who was a Lecturer at the University of Gambia, filed his Application on 18th November, 2005 at the Registry of the Community Court of Justice. He states therein that by a letter referenced FCTC/GTA/ASD/GAB/77 dated 24th September, 2001, he was recruited by the Commonwealth Secretariat, through the Commonwealth Fund for Technical Co-operation (FCTC), as a Technical Consultant, on a two-year lectureship contract at the University of Gambia, for the State of Gambia. The said employment consisted of giving lectures at the Medical School of the above university. The Applicant accepted the employment and exercised his function from 7th February, 2002 to 4th February, 2004.

6. As his contract was coming to an end, the Defendants approached the Applicant and proposed to him to continue with his services, promising him the renewal of his contract by the Commonwealth Secretariat.

7. The Applicant thus continued to exercise his functions to the benefit of the University of Gambia without being paid, and this situation persisted till the 13th day of October, 2004, when he addressed a letter to the University of Gambia claiming his salary arrears.

8. The University of Gambia then replied that the steps taken towards the renewal of his contract by the Commonwealth did not succeed, and as such, his salaries could not be paid to him upon the Commonwealth salary scale, but rather on the scale applicable to the University Lecturers, i.e. in Dalasis (the Gambian currency).

9. The Applicant stood against it, and the University of Gambia terminated his employment by notifying him of the non-renewal of his contract as from 26th January, 2005.

10. On 14th February, 2005, the University of Gambia wrote a letter to the Applicant concerning the settlement of the salary arrears, calculated in Dalasis, plus an amount of US$ 6,000 representing an additional salary.

11. The Applicant received the amount of US$ 6,000 and rejected the sums of money in Dalasis. On 18th November, 2005, he filed his Application at the Community Court of Justice, seeking from the Court the following orders:

    (a) A Declaration that the action and conduct of the Republic of Gambia and the University of Gambia, in engaging him (the Applicant) for the services of a Technical Consultant, from 5th February, 2004 to January 26th, 2005 (1 year), without equal salary for the said services, amounts to economic exploitation and a violation of his right of being paid for equal work.

(b) A Declaration that the Applicant is entitled to equal payment for equal work or services rendered to the Republic of Gambia and the University of Gambia, during the period from 5 February 2004 to 26 January 2005, upon the same terms and conditions as he was recruited by the Commonwealth Secretariat.

(c) A Declaration that the action and conduct of the University of Gambia as described in the facts of the case, violate Articles 5 and 15 of the African Charter on Human and Peoples' Rights, as well as Article 23(2) and (3) of the 1948 Universal Declaration of Human Rights, both texts having been signed and acceded to by the Republic of Gambia.

(d) The issuing of an Order of payment to the Republic of Gambia and the University of Gambia compelling them, by obligation, to pay to the Applicant such sums as claimed in Pounds Sterling or Dollars, plus the sum of US$ 100,000.00 in damages and US$ 10,000 in judicial processing fee.

12. The Defendants raised a Preliminary Objection, contending as follows:

(a) That the Application is inadmissible, for having omitted to summon the Commonwealth Secretariat as a party to the Case.

(b) That the Application is inadmissible before the Court, on the grounds that the Applicant omitted to exhaust the local remedies as stipulated in Article 56(5) of the African Charter on Human and Peoples' Rights.

(c) That the Application is inadmissible, on the grounds that the Applicant's claim is based on non-renewable contract of employment, counter-offers and offers based on ***quantum meruit,*** which do not constitute fundamental rights positively established by statute or by contract.

(e) That the Court lacks jurisdiction to adjudicate upon the Case, because the facts thereof do not constitute a human right violation.

13. In its Interim Ruling No. 1 of 14th March, 2007. The Court decided on the Preliminary Objection, by declaring it inadmissible upon its first two points, and joined the preliminary plea to the merits as regards the 3rd and 4th points. This was done in accordance with Article 87 of the Rules of Procedure.

Indeed, the Court ruled as follows:

1. ***"The Preliminary Objection raised by the Defendants regarding non-exhaustion of local remedies has no relationship with the procedure for accessing the Court; hence, it is inadmissible".***

2. ***"Whereas the Defendants argued that the Court is devoid of its competence to determine this case without the joinder of the Commonwealth Secretariat; the Court decides that it is competent to hear the substantive case on its merit despite the non joinder of the Commonwealth Secretariat and that the Commonwealth Secretariat is not a necessary party which must be joined by the Plaintiff".***

3. ***"Whereas the Defendants argue that the main application was not properly instituted under the human rights violations and that the complaints of the Plaintiff are not justiciable as human rights violations, the Court decides that the issues stated herein touch on the substantive case which by Article 87(5) of the Rules of Procedure of this Court shall be taken in the substantive action".***

14. When the Case was called for hearing on the merits, the Defendants and their lawyers did not appear in Court. They however wrote a letter, dated 26th April, 2007, to the President of the ECOWAS Commission to express their displeasure with the Decision made by the Community Court of Justice, and to request the President of the Commission to intervene, in order for them to file an appeal.

15. Following this letter, the Court, in an Interim Ruling No. 2, indicated for the purposes of the Defendants, that at the current stage of its procedural texts, provision has not been made for appealing against its decided cases, except the possibility of requesting for a revision.

The Court recalled in *extenso* the provisions of Article 15 paragraph 4 and Article 76 paragraph 2 of the Revised Treaty, and Article 19 paragraph 2 of the 1991 Protocol on the Court, where it is set out as follows:

Article 15(4) of the Revised Treaty:

Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.

Article 76(2) of the Revised Treaty:

Failing this, either party or any other Member State or the Authority may refer the matter to Court of the Community whose decision shall be final and shall not be subject to appeal.

Article 19(2) of the 1991 Protocol on the Court:

Decisions of the Court shall be read in open Court and shall state the reasons on which they are based. Subject to the provisions on review contained in this Protocol, such decisions shall be final and immediately enforceable.

16. Then the Court adjourned the Case to a later date, June 18th 2007, to reserve further proceedings and ask the Court Registry to effect service of notice on the Defendants in due and lawful manner. Even though properly served, the Defendants did not appear in Court, but wrote a second letter, dated 25th May 2007, to the President of ECOWAS Commission with a copy to the Court, in which they stated that:

> ***"... the Defendants will not participate in any Court session of the Community Court of Justice, until the issue of competence is effectively resolved by the institution of an independent Appeal Court; the Respondents (i.e. the Defendants) will neither participate in the session scheduled for 18th June, 2007 nor any other, until the Commission finds a solution to this problem."***

17. At its Court hearing of 18th June, 2007, the Court actually took note of the non-appearance of the Defendants, and in taking the contents of the above-cited letter into consideration, the Court deliberated on the Case, after a last hearing of the Applicant.

18. The Case now comes before the Court for final decision on the merits, and upon the issues underlying the arguments submitted by the Parties.

RECAPITULATION OF THE ARGUMENTS OF THE PARTIES

19. The Applicant alleges the violation of his fundamental rights by the Defendants. He maintains that he has been economically exploited by the Defendants on the grounds that he carried out the same services as before, for the Commonwealth Secretariat, for a period of one year (1 year) without being paid with the same value of money. That this conduct on the part of the Defendants constitutes a violation of his right to equal salary for equal work. The Applicant cites in support, Article 15(5) of the African Charter on Human and Peoples' Rights, and Article 23 of the 1948 Universal Declaration of Human Rights by the United Nations.

20. Besides, the Applicant indicates that since the Defendants did not advance any argument of testimony in defence, the Court must decide in favour of his claims, which do not suffer from any counter arguments by the Defendants. The Applicant urges the Court to grant his requests as contained in his Application, in regard to paragraph 13 of the 1998 Declaration of the International Conference of Teheran (Iran) on Human Rights, as well as, the Preamble of the International Pact relating to Civil Rights, and the Pact relating to Economic, Social and Cultural Rights of 1966 both of which derive from the 1948 Universal Declaration of Human Rights.

21. The Defendants, on their part, challenge the competence of the Court in the instant Case. They contend that the rights claimed by the Applicant are not positively conferred by statute or by contract, and that what is at stake is an issue of salary claims, for which the Applicant

had already received part payment, and that as a result, his claims vitiate his action. The Defendants further state that the Applicant's claims are in respect of *quantum meruit* and not in terms of rights positively set out in a contract. And that on this ground, one is not dealing with a human right violation, so the Court is without jurisdiction to adjudicate on the Case.

22. From the foregoing, particularly, as regards the facts and arguments advanced by the Parties, the Court will have to answer the following questions:

    a. Has the Applicant been exploited economically by the Defendants?

    b. Have the Applicant's rights to equal work for equal salary been violated?

    c. Are the rights being claimed by the Applicant positively established by contract or statute?

    d. Does the Court of Justice of ECOWAS have jurisdiction to adjudicate on the Case?

THE COURT'S ANALYSIS

Issue 1: Has the Applicant been exploited economically by the Defendants?

23. Article 5 of the African Charter on Human and Peoples' Rights provides:

> ***"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".***

One derives from this provision, the following concepts: human dignity; legal status; slavery; slave trade; physical or psychological torture; cruel, inhuman or degrading treatment.

24. In basing his Application on the concept of economic exploitation, the Applicant does not demonstrate in what sense his human dignity has been damaged. The Court does not see how he has lost his legal status, and much less can the Court find any elements of torture whatever. Indeed, as a general rule, and in labour law, we talk of economic exploitation ***"when an individual, who is normally engaged on a remunerated work, is not remunerated at all, or if he is, the remuneration he receives is below the real value of the work done"*** (Definition taken from *Le Nouveau Petit Robert, 2008 edition; See page 984).*

25. Do the facts in the instant Case agree with this definition? The work in question, done by the Applicant and to the benefit of the Defendants, from February 2004 to January 2005, was indeed remunerated, but only in a currency different from that for the same work done as before, certainly to the benefit of the same Defendants, which was hitherto remunerated by the Commonwealth. The fundamental question here is why the remuneration changed whereas the beneficiaries of the work done remained the same. It is simply because the relationship for executing the same job changed while, indeed, the Defendants, in being the beneficiaries of the work done, were not the *direct* debtors of the contract with the Commonwealth. They are the debtors for the case in contention, and in this case, the fact that they offered the payment in a currency different from that of the Commonwealth, does not in itself, cause any damage to the dignity of the Applicant, nor does it deny him of his legal status. Neither does the payment proposed in Dalasis involve any elements of torture or cruel, degrading treatment. Both Parties honestly believed the Commonwealth would accept to pay, but that did not materialise.

26. Finally, the Court recalls that the Applicant accepted to work, even before securing a second contract with the Commonwealth, fully

aware that the first contract had expired. He thus worked for one year without being paid, and when he considered that the time lapse was sufficient, he requested for his salaries. The Defendants offered to pay him his salary according to the same terms of payment as the Lecturers of his rank. The Court, on this particular point therefore, rejects the claim of economic exploitation as not sufficiently proved.

Issue 2: Have the Applicant's rights to equal work for equal salary been violated?

27. In the terms of Article 15 of the African Charter on Human and Peoples' Rights,

> ***"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."***

In labour law, the concept of equal work for equal salary implies that two or several persons who carry out the same job or who occupy the same position in an organisation must earn the same remuneration and have the same prospects for promotion, except where the employer justifies a difference in treatment by objective factors not related to any form of discrimination. We hold that the objective of the principle of equal work for equal salary is to prohibit every form of discrimination between individuals who find themselves under the same condition.

28. Here, the Applicant is the worker and the Defendants are the employers. In advancing the principle of "equal work for equal salary", the Applicant is referring to the same work as was done for the Commonwealth. Now, the Court recalls the content of its Interim Ruling No.1 of 14 March, 2007, where it ruled as follows:

> ***"... the Court finds that it has jurisdiction to deliberate on the merits of the case without the joinder of the Commonwealth Secretariat, because the latter is not a necessary party to be summoned by the Applicant"***.

29. Consequently, the Court having already ruled that the Commonwealth is not 'a party directly involved in' the litigation, it cannot apply the conditions of remuneration, by comparing them with those offered in the latter case in point, more so when the beneficiaries in the two situations are the same Defendants. The Court also recalls the principle derived from the law on obligations according to which ***"obligations are binding only on those who freely contracted them"***, and states thereby that in the case in point, there has not been subrogation of the Commonwealth by the Defendants, and it shall not be binding on the latter to act as the Commonwealth did.

30. Indeed, the principle of equality of salary, which implies the elimination of salary discrimination based on whatever criteria that may relate to the person of the salaried worker, does not apply to the diversity of the sources of remuneration. Here, the salaries proposed by the Defendants are to be paid, not from the funds of the Commonwealth, but from the budget of the Defendants themselves. This was what was established as a principle, by Court of Justice of the European Union, in the 17th September 2002 Judgment on Lawrence and Regent Office Care Ltd. & Others (Report 1-07325-C.C.E.E.) when it stated that ***"the principle of equal work, equal salary, does not apply when the observed disparities in remuneration cannot be attributed to a single source"***.

31. As it were, the Court emphasises the risk of possible discrimination between the Applicant and his other Lecturer colleagues in the same university, if he should be paid based on a different salary scale, for, the principle of "equal work, equal salary" also signifies that the employer is bound to offer the same remuneration "to the salaried workers placed under the same conditions". This is the principle upheld in Judgment No. 5274 of 15 December 1998 delivered by the Social Chamber of the Court of Cassation of Paris in Case Concerning S. A. Aubin v. Chatel, where it is stated that "this obligation is binding on the employer even in cases where the salaried workers are of different nationalities".

The issue is rather, that of finding out whether in the instant case, the Applicant was a victim of under-payment vis-a-vis the other Lecturers of the same university, and whether such treatment could be described in terms of a violation of the principle of equal work for equal salary. But, as things are, the action of the Applicant does not target a comparison with his other colleague Lecturers, but with the salary system obtaining in the Commonwealth Secretariat. And so, on this point, the Court finds that the principle of equal work for equal salary does not apply, on the grounds that the sources of remuneration are not the same. Consequently, the Court decides that there was no violation of that principle.

Issue 3: Are the rights being claimed by the Applicant positively established by contract or statute?

32. The Defendants submitted that the Application was based on the renewal of a contract of employment, and on offers and counter-offers, and on the grounds that the Application is based on *"quantum meruit"*. The Defendants further argued that the case before the Court deals with relations between an employer and an employee, and that the employee having accepted one part of the salaries *(i.e. Six Thousand US Dollars = US$ 6,000)* and rejected the other part, the question now boils down to finding out whether the Applicant's claim to the remaining amount of money to be paid him should be granted upon the salary scale of the Commonwealth or that of the Defendants. And as far as the Defendants are concerned, their refusal to pay the Applicant based on the Commonwealth scale does not constitute a violation of the Applicant's fundamental rights.

The Court finds, indeed, by the letter dated 16th April, 2004 representing Exhibit No. A2 deposited in the Case-File, and by the letter dated 24th August, 2004 representing Exhibit No. A3 equally deposited in the Case-File, that in matters of commitment to the offer of service, the situation was no more than that of relations of fact having generated rights. The problem posed is how to put these rights into effect. The Court examined the nature of such rights.

Given that these rights were given birth to from the relations of fact between the Parties, i.e. constituted by the offers and counter-offers of payment arising from the working relations between employer and employee as acknowledged by the Defendants themselves, such rights are indeed constituted as salary entitlements. The Applicant's claim to salary is a right which the Defendants do not contest.

33. The international instruments on Human Rights classify salaries among Civil, Economic and Social Rights, which have been incorporated into the provisions of Article 7 of the 1966 International Pact on Civil, Economic and Social Rights, Article 10 of the Universal Declaration of Human Rights; and Article 15 of the African Charter on Human and Peoples' Rights.

34. Consequently, the Court adjudges that the claim for these rights, even if in part, is justified, because they constitute fundamental human rights enshrined in texts and instruments adopted by ECOWAS and ratified by the Member States.

Issue 4: Does the Court of Justice of ECOWAS have jurisdiction to adjudicate on the Case?

35. As to the rights invoked by the Applicant, namely, economic exploitation (Article 5 of the African Charter on Human and Peoples' Rights, as well as Article 23(2) of the Universal Declaration of Human Rights), having been treated already in the paragraphs above, the Court has already formed the view that the Applicant has not been economically exploited, nor has his right to equal salary for equal work been infringed upon. These two arguments by the Applicant have already been dismissed, even if the Court, in the instant Case, recognises that the fact that the Applicant was not remunerated according to the Commonwealth salary scale, might have caused him to suffer a reduction in revenue and some form of frustration; that per se would not amount to violation of his Human Rights.

36. The Applicant's claims based on economic exploitation and a claim for equal salary for equal work are recognised by Articles 5 and 15 of the African Charter on Human and Peoples' Rights. These provisions are applicable to this Court by virtue of Article 4 (g) of the Revised Treaty, and Article 10 (d) of the Court's Supplementary Protocol.

37. CONSEQUENTLY,

1) Whereas the Court does not find in the facts, elements amounting to the economic exploitation of the Applicant;

2) Whereas the Court has held that the principle of the right to equal salary for equal work does not apply in the instant Case, on the grounds that the sources of finance for the remuneration of the Applicant are not the same as those of the Commonwealth; therefore, there has not been a violation of this principle;

3) Whereas the claims made by the Applicant have been found to be rooted in the inherited rights of the salaried worker, and thus recognisable as fundamental rights derived from relations of fact established between the Parties; but, whereas these human, civil, economic and social rights have not been violated, either;

4) Whereas, ultimately, in terms of the Supplementary Protocol, the Court is competent to adjudicate in matters of Human Rights violation; whereas in the instant Case, the Court does not find any element of human rights violation whatsoever of the Applicant's right, within the meaning of the Articles cited above.

38. **FOR THESE REASONS**

1) The Community Court of Justice, ECOWAS, adjudicating in open Court, after hearing both Parties, in respect of Human rights violation, in first and last resort;

2) Having regard to the Revised Treaty of ECOWAS;

3) Having regard to the 1948 Universal Declaration of Human Rights;

4) Having regard to the 1966 International Pact on Civil, Economic, Social and Cultural Rights;

5) Having regard to the 1981 African Charter on Human and Peoples' Rights;

6) Having regard to the 1991 Protocol and 2005 Supplementary Protocol relating to the Court;

7) Having regard to the Rules of Procedure of the Court of 28th August, 2002;

8) The Court's earlier Preliminary Decisions of 14th March, 2007, and of 7th May, 2007;

- Adjudges that there is no Human Rights violation of the Applicant, and consequently, dismisses the Application made by the Applicant and his other claims;

39. **AS TO COSTS**

- Adjudges that each Party, shall bear their own costs in accordance with Article 66(4) of its Rules of Procedure;

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, on the day, month and year above;

40. And the Members have appended their signatures as below:

Hon. Justice Hansine N. DONLI - PRESIDING

Hon. Justice Aminata Malle SANOGO - MEMBER

Hon. Justice Anthony A. BENIN - MEMBER

Hon. Justice Awa Daboya NANA - MEMBER

Hon. Justice El-Mansour TALL - MEMBER

Assisted by **Tony Aneneh-MAIDOH** Esq. - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 2ND DAY OF NOVEMBER, 2007

SUIT N°. ECW/CCJ/APP/04/05
JUDGMENT N°. ECW/CCJ/JUD/06/07

BETWEEN

CHIEF FRANK C. UKOR - *Plaintiff*

V.

(1) MR. RACHAD LALEYE
(2) THE GOVERNMENT OF THE REPUBLIC OF BENIN } ***Defendants***

CONSTITUTION OF THE COURT

1. **HON. JUSTICE HANSINE .N. DONLI** - PRESIDING
2. **HON, JUSTICE AMINATA MALLE SANOGO** - MEMBER
3. **HON. JUSTICE SOUMANA D. SIDIBE** - MEMBER

ASSISTED BY

TONY ANENE-MAIDOH ESQ. - CHIEF REGISTRAR

COUNSEL TO THE PARTIES

1. ***Mr. Wilson Esangbedo*** - *for the Plaintiff*
2. ***Yede Hippolyte*** - *for the Applicant/Intervener*

JUDGMENT OF 2ND NOVEMBER, 2007

Human rights violation – freedom of movement – equal protection under the law – interpretation of the law – jurisdiction of the Court – damages

SUMMARY OF FACTS

The Applicant, Chief Frank Ukor, a Nigerian national, brought a case before the Court of Justice of ECOWAS for violation of his human rights by Mr. Rachad Laleye, a Benin national, and the Republic of Benin, a Member State of ECOWAS.

He averred that he requested Mr. Rachad Laleye, a Benin national and a freight forwarder, to clear on his behalf 1,785 packets of various items belonging to the J. I. Alinnor & Brothers Company. That as a result of Mr. Laleye's alleged fraudulent manoeuvres, the customs clearance was not done, his goods and the trailer transporting those goods were seized by the gendarmes and customs officers upon an order of seizure for the purposes of protection. Chief Frank Ukor equally alleged that the said order of seizure was made by the Cotonou Court of First Instance upon the request of Mr. Laleye.

He maintained that the Security Agents of Benin did not come to his aid in the search for Mr. Laleye and that he (Chief Frank Ukor) was not heard by the Courts of Benin in relation to the order of seizure, which was made for the purposes of protection. He therefore sought to bring charges against the Republic of Benin for human rights violation.

LEGAL ISSUES

1. *Whether the Court is competent to adjudicate on a case, which is centred on business relations between two individuals.*

2. *Whether the seizure of Chief Frank Ukor's goods following an Order by the Court of First Instance of Cotonou constitute a violation committed by the Republic of Benin in respect of Chief Frank Ukor's rights to equal protection under the law.*

3. *Whether as presented in this dispute, the facts of the case constitute a human rights violation, and if so, whether the Court is competent to adjudicate on those facts.*

DECISION OF THE COURT

The Court held that the seizure and detention of Chief Frank Ukor's goods were carried out upon the basis of an Order made by the Cotonou Court of First Instance, and that it was not within its competence to consider the grounds of the order thus made, since it is not an appellate Court of the national Courts.

The Court held that the facts do not constitute a case of human rights violation.

Consequently, the Court upheld the Preliminary Objection

JUDGMENT OF THE COURT

1. PARTIES

1) The Applicant, who is herein called the Plaintiff for the purpose of this Preliminary Objection, is called Chief Frank Ukor and he instituted the substantive case for violations of human rights. He resides in Nigeria, and a Community citizen, and of Nigerian nationality.

2) The 1st Defendant, Rachad Laleye, in this proceeding never appeared but was served with the application of the Applicant/ Plaintiff. He resides in Republic of Benin where the transaction took place. He is a community citizen, and of Beninois nationality.

3) The 2nd Defendant is the Government of the Republic of Benin which was later joined by the Applicant/Plaintiff in the case and brought this Preliminary Objection under consideration. The 2nd Defendant is a Member State in the Community.

4) Learned counsel, Mr. Wilson Esangbedo is for the Applicant/Plaintiff.

5) Learned Counsel, Mr. Hippolyte Yede Esq. with Friggens J. Adjavon Esq. are for the 2nd Defendant.

FACTS AND PROCEDURE STATED BY THE 2ND DEFENDANT

1. The Application in the substantive, referred to, in this case as dated 14th July 2005, the Government of the Republic of Benin submitted after reading the same that Mr. Chief Frank Ukor and Rachad Laleye were in a business relationship. Mr. Rachad Laleye. He, the Applicant/Plaintiff who was purported to be a freight forwarder/ clearing Agent and allegedly exercising his trade in Benin was requested by Chief Frank C. Ukor to carry out certain customs-clearance operations on his behalf in respect of 1,785 packets of items belonging to the Company called J. I. Alinnor & Brothers Limited.

2. In remuneration for his services, Mr. Rachad Laleye was supposed to receive the sum of Eight Million, Seven Hundred Thousand CFA Francs (CFA 8,700,000) as the amount agreed upon between the two (2) Parties. As a result of the fraudulent representation in the process of clearing the goods as allegedly adopted by Mr. Rachad Laleye, the Applicant may have been compelled to pay other additional sums, namely:

    1) The sum of Four Million CFA Francs (CFA 4,000,000), following a false declaration made by Mr. Rachad Laleye to the Benin Customs, since, instead of honestly declaring eight (8) items contained on board the truck, he fraudulently declared only one (1) item, in the words of the Applicant (See page 3 point (h) of the Application dated 14th July, 2005).

    2) The sum of Three Hundred Thousand CFA Francs (CFA 300,000) to another freight forwarding agent after Mr. Rachad Laleye had abandoned the customs clearing job at the port of Cotonou. (See page 4 point (i) of the Application dated 14th July, 2005).

    3) The sum of Three Million and Forty Thousand CFA Francs (CFA 3,040,000) as parking fees to Mr. George Zinzinsouhou, owner of the trailer carrying the goods. (See page 4 point (j) of the Application dated 14th July, 2005).

    4) The sum of Six Hundred Thousand CFA Francs (CFA 600,000), representing the hiring fee of the vehicle which the Applicant initially accepted to hire. (See page 4 point (j) of the Application dated 14 July 2005).

    5) The sum of Twelve Million and Forty Thousand CFA Francs (CFA 12,040,000) for the clearance of the goods (See page 4 point (k) of the Application dated 14th July, 2005).

    6.) The sum of Two Million CFA Francs (CFA 2,000,000) per week, for losses caused in connection with the trailer. (See page 4 point (I) of the Application dated 14th July, 2005).

3. The Applicant/Plaintiff maintains that at the time he was clearing the 1,785 packets at the Seme-Krake border with Nigeria, the goods and its trailer were seized by the gendarmes and customs officers of Benin, with bailiffs from the Court of First Instance of Cotonou.

4. He asserts that the authorities of the Benin security system did not offer him any helping hand in the operation of mounting a search for Mr. Rachad Laleye, when he lodged a complaint against the latter, for a criminal act. This compelled him (the Applicant/Plaintiff) to send his case before the Embassy of Nigeria in Cotonou, but received no assistance from the said Embassy.

5. That it was in such condition, that, the following Order of seizure for protection-of-security was issued by the Cotonou Court of First instance, on the basis of a false declaration made during the process of the said clearing which led Mr. Rachad Laleye to seize his goods.

6. He maintains that since he was not given a hearing by the judicial institutions of Benin, before the signing of the Order and he alleged that he was denied the right to equal protection by the law, as guaranteed by Articles 2 and 3 of the African Charter on Human and Peoples' Rights.

7. He equally asserts that the 1st and 2nd Defendants have violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights relating to the right to property, because his trailer, which had not been implicated in the Order of seizure for protection-of-security, was not handed over to him and that it is, allegedly, still being detained by them. It was on the basis of these facts that Chief Frank lodged his case in this Court, seeking the following declaration:

    (1) That the Defendant, by his false declaration before the Benin Court of First Instance which ordered the seizure of the 1,785 packets of various items belonging to J. I. Alinnor & Brothers Ltd., has violated Article 3(2)(d)(iii) and Article 4 of the Treaty of the Economic Community of West African States (ECOWAS).

(2) That the Defendant, following his false declaration before the Benin Court of First Instance which ordered the seizure of the 1,785 packets of various items being transported by the Applicant, has violated the Applicant's right to equal protection by the law, given that the goods in question were seized contrary to Articles 3 and 7 of the African Charter on Human and Peoples' Rights (1983 law on ratification and application).

(3) That the continuing holding of the Applicant's truck, which had not been affected by the Order of seizure for protection-of-security issued by the Cotonou Court of First Instance, on 8 January 2004, is a flagrant violation of the Applicant's right to property, provided for under Article 14 of the African Charter of Human and Peoples' Rights (1983 law on ratification and application).

(4) That the continuing holding of the goods belonging to J. I. Alinnor & Brothers Ltd., on board the Applicant's truck, upon the basis of the Order of seizure for protection-of-security issued by the Cotonou Court of First Instance, which expired on 8th February, 2004, is illegal, failing any principal case pending before a Cotonou Court relating to this particular Case; that the goods in question and the Applicant's truck are illegally being held, contrary to Article 14 of the African Charter on Human and Peoples' Rights (1983 law on ratification and Application).

8. He advances a legal argument, that the 1st Defendant, Mr. Rachad Laleye employed "the judicial system of his country, by using a false deposition" to seize his trailer and the goods contained in it, thus denying him of his legal right to free movement and to do business in Benin. And that, this is contrary to the spirit of Article 3 of the Revised Treaty of the Economic Community of West African States, which guarantees the free movement of persons, goods, services, and capital, as well as the right to residence and establishment - insinuating thereby, that the Government of Benin abets the violation of the said Article and the provisions of Articles 2, 3, 7, and 14 of the African Charter on Human and Peoples' Rights. This being so, the Courts in Benin did not give him any hearing before authorising the seizure of his trailer and goods.

9. He submitted that these arguments cannot stand the test of any reasonable legal analysis, and the Government of the Republic of Benin, through its judicial powers, has not violated in any way whatsoever the provisions indicated above, as shall be demonstrated.

ORDERS SOUGHT

10. Upon these facts, the 2nd Defendant sought the following reliefs:

    a) To adjudge and declare that Mr. Chief Frank Ukor did not submit evidence of the proof of violation of his fundamental rights, as drawn from Articles 2, 3, 7 and 14 of the African Charter on Human and Peoples' Rights;

    b) To adjudge and declare that Mr. Chief Frank Ukor did not, as well, tender any evidence to prove the violation his rights under Article 3 of the ECOWAS Revised Treaty;

    c) To acknowledge that Mr. Frank Ukor did not provide evidence as to whether he ever seized the Courts of the Republic of Benin to obtain the quashing of the seizure Order made on his 1,785 packets of various items and trailer No. XG 796 JJJ, and as to whether the Benin Courts obstructed him from defending himself through a lawyer, and whether the Benin Courts refused to uphold his rights;

    d) To adjudge and declare that no wrong may be attributable to the Government of the Republic of Benin or its judiciary, and that consequently, the Government of Benin has not violated in any way whatsoever, Articles 2, 3, 7 and 14 of the African Charter on Human and Peoples' Rights, nor Articles 3 and 4 of the Treaty of the ECOWAS Community;

    e) To dismiss, purely and simply, the Application of Chief Frank Ukor, together with all his claims, purposes and Orders sought, as directed against the Government of the Republic of Benin, the 2nd Defendant;

f) To Order the Applicant to bear the total cost of the proceedings, to be paid to Hippolyte Yede Esq. and Friggens J. Adjavon Esq., lawyers for the Government of Republic of Benin.

THE LEGAL ARGUMENTS OF THE 2ND DEFENDANT

11. The Government of the Republic of Benin observes that no evidence was furnished by the Applicant concerning the gendarmes and customs officials of Benin who seized his goods and trailer.

12. The Government of the Republic of Benin equally observes that Mr. Chief Frank C. Ukor did not submit, in the course of the proceedings, any evidence to prove whether he has actually made any legitimate claim of a criminal act against Mr. Rachad Laleye, and whether the Benin authorities in charge of investigating crimes were thereby unable to come to his assistance, in terms of mounting a search for him and apprehending him for the purposes of placing him under a legal arrest. Nor did he tender any evidence to prove that the Government of Benin restrained him from defending himself through any Counsel of his choice, to obtain the lifting of the Order of seizure for protection-of-security imposed by Mr. Rachad Laleye.

13. Hence, he reiterated that the Applicant/Plaintiff cannot claim that the 2nd Defendant violated the provisions of Article 7 of the African Charter of Human and Peoples' Rights. He further submits that the Applicant did not produce any evidence to prove that he brought his case before any of Benin's judicial bodies in order to have the Order of seizure quashed, and whether in so doing, he did not benefit from absolute equality of protection before the law vis-a-vis Rachad Laleye, and that he became a victim of discriminatory treatment within the meaning of Article 3 of the African Charter on Human and Peoples' Rights. Or yet still whether the Benin Courts failed to deliver judgment and that by such act he was denied equality of protection by the law.

14. It therefore follows that the Applicant cannot maintain the position that the Government of Benin violated the provisions of Article 3 of the African

Charter on Human and Peoples' Rights. As regards the arguments relating to the alleged violation of Article 2 of the African Charter on Human and Peoples' Rights, and Article 3 of the ECOWAS Revised Treaty, to the effect that by authorising Mr. Rachad Laleye, through Order No. 10/2004 of 8th January, 2004, to seize his items for the protection-of-security, in order to recover a debt owed him, the Government of Benin had allegedly aided and abetted the violation of the freedom of goods guaranteed under Article 3 of the ECOWAS Revised Treaty and the enjoyment of rights and freedoms guaranteed under Article 2 of the African Charter on Human and Peoples' Rights. He submits that these arguments cannot stand the test of any reasonable legal analysis and relies on the provisions of Acte Uniforme de I'OHADA, on methods of enforcement applicable in the Republic of Benin and that the President of the Cotonou Court of First Instance who made Order No. 10/2004 of 8th January, 2004 did not violate any rule, nor did he commit any abuse of authority. He submits that the rules of OHADA, relating to seizure for protection-of-security, did not put the Benin Courts under any obligation to grant a preliminary hearing to a debtor who is the victim of such seizure, before issuing the seizure Order. He relies on the provision of the governing law. Article 54 of Acte Uniforme de I'OHADA, on methods of enforcement, thus:

> ***“Any individual whose debt appears legitimate and founded on principle, may, by application, request the competent Court of the local area or of the home address of the debtor, the authorisation to impose a measure of protection-for-security on all the movable properties (physical and non-physical) of the debtor, without prior orders, if such measure of protection justifies any circumstances likely to jeopardise the recovery of the debt.”***

Also, Article 56 further provides inter alia that:

> ***“Seizure for protection-of-security may affect all movable properties, corporeal and non-corporeal. It renders them unavailable.”***

Article 59 stated the condition applicable that:

"The decision authorising a seizure for protection-of-security, must, subject to the risk of being invalidated, state the amount of money for which the guarantee the measure of seizure was being authorised, and indicate the nature of the properties being targeted for seizure."

15. In the instant case, he contends that it is Mr. Rachad Laleye, who, by application, as is well acknowledged by the Applicant, that applied for an Order in the Cotonou Court of First Instance, because he considered that he had, in principle, a credit-value amounting to Eighteen Million CFA Francs (CFA 18,000,000) owed to him by Mr. Chief Frank Ukor, and in application of Article 54.

16. He submits that the matter was lodged in the Court of First Instance Cotonou, Benin, and not the said Court which acted *suo motu* to have the case filed in Court, so as to grant Mr. Rachad Laleye the initiator of the proceedings the authority to seize the goods. The said Court he contends authorised the seizure in accordance with the provisions of Articles 54 and 59 of *Acte Uniforme de I'OHADA* relating to methods of enforcement. He submitted that by that Order, Mr. Rachad Laleye was authorised to enforce the measure of seizure for protection-of-security, in order to recover his debt.

17. He submitted that the Court acted in compliance with the law and committed no abuse of authority, or wrong doing, in view of the said Articles 54 and 59. He submits that Article 62 of *Acte Uniforme de I'OHADA* regarding methods of enforcement provides that:

"Even where preliminary authorisation is not required

- upon the request of the debtor, and whether the latter is heard or summoned.

- the competent Court, at any point in time, may curtail the order of seizure, if the complainant does not furnish the evidence that the conditions prescribed under Articles 54, 59, 60, and 61 have been duly fulfilled".

He submits that the Applicant, Chief Frank Ukor failed to resort to the proper procedure of seeking for a bailiff in Benin to file his case before that Court and that such a process would have availed him the defence in respect of the goods and truck in question and that it might have had an impression upon the Court to reverse the order made. He submits that having failed to tender evidence or take the necessary judicial step; the Government of Benin was devoid of any act of culpability whatsoever or that they were a party to the obstruction of free movement of his goods or the enjoyment of his right to property through the Courts in Benin. He contends that consequently, the 2nd Defendant cannot be said to be liable in the face of the alleged debt by Rachad Laleye the 1st Defendant.

19. He submits that the Applicant is in error to have invoked Articles 2 and 14 of the African Charter on Human and Peoples' Rights and Article 3 of the ECOWAS Revised Treaty in respect of the alleged hindrance of freedom of movement of the goods, and that this Court is incompetent to adjudicate in respect of issues 5, 6, 7, 8, 9, and 10 contained in the Application dated 14th July, 2005, and filed by the Applicant/Plaintiff. He submits further that since issues no. 1, 2, 3, and 4 are consequential issues to those in issues 5, 6,7,8,9, and 10 of the Application as filed on 14th July, 2005, the facts in the Application cannot stand on the same ground of incompetence. He finally urges the Court to strike out the case against the 2nd Defendant to wit the Republic of Benin, on the grounds of frivolity non involvement and lack of nexus between the 2nd Defendant and the Applicant/Plaintiff on one hand and the 2nd Defendant and 1st Defendant-Rachad Laleye on the other.

LEGAL ARGUMENTS BY THE COUNSEL TO THE APPLICANT/ PLAINTIFF

20. In reply, Learned Counsel for the Applicant/Plaintiff opposes the Application in all material particular and submitted that the issues that have been raised by the 2nd Defendant are issues that are very grave and bother on the ability of the Court to proceed on issues 5, 6, 7, 8, 9, and 10 which have to do with the jurisdiction of the Court.

21. He submits that the question of jurisdiction cannot be severed or objected to in part. He submitted that it is either the Court has total jurisdiction or not. He submits that it is detrimental to the Applicant's case to have the issues in respect of jurisdiction broken down into two parts. He relies on the case of **OLAJIDE AFOLABI V. FRN (Decision of this Court) at page 65 paragraph 32 (1), (2) and (3)**. He refers also to the provisions of the Supplementary Protocol with particular reference to Article 9 (1)-(4) of the Protocol to submit that at this stage of the proceedings the Court cannot deliberate on the substantive issues or consider the suit on the merit. He relies on Article 10 of the Protocol in respect of access to the Court by individuals and in particular Article 10 (c) which grants individuals access to the Court. He submits that the words 'Community Official' refer to an official of a Member State who carries out his official functions within the ECOWAS Sub-Region.

22. He refers to Article 9 (3) of the said Protocol to submit that same expands the meaning of Community to include Member States. He submits that issues 5, 6, 7, 8, 9, and 10 are all connected with violation of the Applicant's human rights and cannot be separated or severed in two. He submits that the Applicant/Plaintiff lodged the main Application on the basis that his Human Rights were violated contrary to Article 9 (4) of the Protocol and Article 10 (d) of the said Protocol which grant access to the Applicant/Plaintiff in respect of Human Rights' violation. On that basis, he urges the Court to hold that it has competence to adjudicate on the issues stated therein.

23. On points of law, the 2nd Defendant, even though had no right of a reply again, the Court however obliged him to reply for clarification of ambiguity that might have occurred in the earlier submissions.

CONSIDERATION OF THE FACTS, LEGAL ARGUMENTS AND THE PRELIMINARY OBJECTION AS TO JURISDICTION

24. By the Application on the issue of jurisdiction of this Court the 2nd Defendant relied on the Rules of Procedure to support the filing of the Application separate from the substantive action pursuant to Article 87 of the Rules as follows:

> ***"1. That a party applying for a decision on Preliminary Objection other preliminary plea not going to the substance of the case shall make the application by a separate document.***
>
> ***2. The application must state the pleas of fact and law relied on and the form of order sought by the Applicant and any supporting documents must be annexed to it."***

25. However, the Court considers relevant Article 88 of the said Rules which provides as follows:

> ***"1. Where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may by reasoned order, after hearing the parties and without taking further step in the proceedings gives a decision.***
>
> ***2. The Court may at any time of its own motion consider whether there exist any absolute bar to proceeding with a case or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it; it shall give its decision in accordance with Article 87(4) and (5) of these Rules"***

26. Even though the application is filed in a separate document, this Court states that the matters that arose in the argument touch on the substantive case because the Application herein seeks to dismiss the action on the basis of lack of jurisdiction. In this regard, Article 88 of the said Rules is materially relevant and applicable to this case. For where an Application as to lack of jurisdiction if granted disposes of the entire suit against the party that brought the action, the said preliminary objection requires no separate document, as it was done in the case. Nevertheless, the failure to so file the application in strict compliance does not erode the power of the Court from examining the document on its merit particularly so, when the parties have made substantial submissions for and in opposition. As always the Court will disregard enthronement of technicality over the hearing of the Application on its merit. On that note, we state that the Preliminary Objection is sufficiently relevant for our consideration.

27. Turning to the issues concerning the question of lack of jurisdiction, brings the Court to consider the jurisprudence on jurisdiction which are deplete in the decisions of the Court, nationally and internationally as to when they may be said to lack it. On that basis, the cardinal principle of law on jurisdiction which never changes is that jurisdiction or lack of it is fundamental to the proceedings. It is trite law that jurisdiction means simply the power of a Court to entertain an action. As to what constitutes jurisdiction, Counsel to the Plaintiff relied on the authority of **AFOLABI OLAJIDE *VS* FEDERAL REPUBLIC OF NIGERIA (2004) ECW/CCJ/04 dated April 27th, 2004 at page 65 paragraph 32 (1) (2) and (3)** wherein the Court stated thus:

> ***"It is a well established principle of law that a Court is competent when:***
>
> ***1) it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and***

2) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and

3) the case comes before the Court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction . ...The position of law which cannot be overstated is that any defect in competence is disastrous, for the proceedings are nullities, no matter how well conducted and decided, the defect is extrinsic to the adjudication...."

28. The submission elaborated by the 2nd Defendant's Counsel, relating to the action in the Court in Benin Republic, dealt with the seizure of property in respect of the contractual relationship between the 1st Defendant and the Plaintiff whereby an order was made by that Court in compliance with Article 54 of the OHADA Rules. Learned Counsel to the 2nd Defendant further relied on Articles 54, 56, 59, 60 and 61 of the said OHADA Rules to justify all the steps taken by the Court in Benin Republic. There was no mention whatsoever regarding an action for the violation of human rights but a contractual relationship simpliciter. However in this case, the action relates to violation of the Plaintiffs human rights as provided in Article 9 sub-paragraph 4 of the Supplementary Protocol of this Court which provides that: ***"the Court has jurisdiction to determine cases of violation of human right that occur in any Member State."*** Whereas Learned Counsel to the 2nd Defendant relied on the subject matter to submit that there was no violation as to confer jurisdiction upon the Court to adjudicate on the case. Learned Counsel to the Plaintiff relied on Article 10 paragraph (c) of the Protocol of the Court to contend that the individuals of ECOWAS have access to this Court in respect of violations of the Rights of individual or corporate bodies for an act or inaction of a Community Official and further submits that a Community means a Member State. He however failed to show

the violations committed by the 2nd Defendant to wit, the Republic of Benin, in the instant case. This Court finds itself disagreeing with the submission of Counsel to the Applicant/ Plaintiff that the action filed by him (Applicant) in substance amounts to human rights violation because the seizure of the goods and the said truck was based on a Court order from the Court of First Instance Benin. We therefore agree with Counsel to the 2nd Defendant that the acts complained of by the Applicant/ Plaintiff are devoid of violation of Human Rights. We therefore state that there is a serious misconception as to whether the complaint of the seizure and confiscation of the truck and goods therein, upon the Court Order, violates the rights of free movement of goods which Counsel hinges upon as human rights violation. It is trite that a valid order of the Court stands until any person dissatisfied with same makes the move by following the relevant judicial process to set it aside. Consequently, this Court which has no appellate jurisdiction over the decisions of the Courts of Member State cannot act as one through this process that Counsel of the Applicant/Plaintiff impressed upon it to enforce.

29. On this note, this Court declines to act outside its mandate as specified in Protocol A/P1/7/91 and the Supplementary Protocol (A/SP. 1/01/ 05) which clearly spelt out such mandate. The next point of concern in the legal arguments also relate to interpretation of the provision of the said Protocol. We consider the argument by Counsel to the Applicant/ Plaintiff relating to such interpretation of Article 10 (c) of the said Protocol as amended that the use of the word Community' is akin to the words, 'Member State' of ECOWAS. By the definition of Community and Member State in the definition section of the Revised Treaty of ECOWAS, it is apparent and clear that the two sets of words cannot mean the same or be interchangeable in meaning. This brings the Court to consider the rule of construction of Statutes as same affects the Protocol in question. The rule of construction of statutes is that they should be construed according to the intent and purpose of the makers and if the words of the statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary meaning. In the case of **CHIEF OBAFEMI**

AWOLOWO *V.* ALHAJI SHEHU SHAGARI & 2ORS (1979) A.N.L.R. 1120 the statement above was emphasised and applied. Also at page 34 paragraph 6 on canons of interpretation, in the case of **AFOLABI OLAJIDE V. FRN** (supra), this Court observed and applied the rule as to interpretation of Statute/Protocol thus:

> ***"in the rules of construction of statutes, words in the enactment should be given their ordinary and natural meaning as generally used and they have ordinarily understood the day after the statute was passed. When the words of a statute are given their ordinary, precise and natural meaning there is hardly any necessity to resort to any other principle of interpretation."***

Also see the book, Law of Treaties. The said Article 10(c) if interpreted, even by applying the purposive rule of interpretation, because of its clarity the words in their ordinary sense will support our stance in this case, that Community is different from Member State as ascribed in the Treaty of ECOWAS.

30. Now to the important question relating to the subject matter in which arguments have been advanced on the question of jurisdiction vis-a-vis violation of Human Rights, this Court after dissecting the facts of the Application which falls within the description cause of action, it agrees with Learned Counsel to the 2nd Defendant that even though the Applicant/Plaintiff mentioned human rights violation under the provisions of the African Charter on Human and Peoples' Rights as recognised by Article 4(g) of the said Revised Treaty of ECOWAS, the acts complained of are not in themselves violations of human rights because the seizure and dispossession of the goods and truck was based on the Order of a Competent Court to wit, Court of First Instance Cotonou Benin and that the Court followed the procedure and the provisions of Articles 54,56,59,60 and 61 and this Court cannot delve into the propriety of the said Order which still subsists. The position of this Court is that being devoid of appellate jurisdiction; only that Court can set aside the said Orders made and thus make the complaints justiciable.

In that vein the Court holds that issues 5,6,7,8,9, and 10 of the main Application which complained of the inappropriateness of the proceedings in Cotonou-Benin Republic, the issues fail to measure as human rights violations as to confer upon the Court jurisdiction under Article 9(4) of the Protocol. Consequently, the issues being not justiciable and are accordingly jettisoned. Turning, to the submissions by Counsel to the 2nd Defendant and the reply thereto by Counsel to the Applicant/ Plaintiff, as to the particulars of issues 1,2,3, and 4, in the main application, it was submitted that those issues were violations of human rights. The basis of issues 1, 2, 3, and 4, are the actions taken in the other Court in Cotonou which acts are stated in issues 5, 6, 7, 8, 9, and 10. This Court agrees with the submission that the acts in issues 5, 6, 7, 8, 9, and 10 being the acts that brought about the complaints in issues 1, 2, 3, and 4 of the Application and stated herein, make the latter subsidiary issues to issues 5, 6, 7, 8, 9, and 10 the main. As always the principle of law that is readily applied is that where the substantive complaints fail, the subsidiary relief must also fail as the latter would have nothing to hang upon. Also on this note, the said issues 1, 2, 3, and 4 fail in their entirety.

31. Another point canvassed by Counsel to the 2nd Defendant relates to his submission that this Court cannot adjudge a Member State to pay damages even if the violations of human rights have been proved against such Member State. This Court finds the argument strictly beyond what obtains if Article 38 of the Statute of International Court and Article 19 of the Protocol of the Court are applied. The combined effect of the said Articles 38 and 19 respectively brings into focus the need to do justice at all times pursuant to the principles of ensuring the observance of law and of the principles of equity in the interpretation and application of the Treaty. Even though no provision is given in the Protocol, as conferring competence in respect of damages, this Court is always ready to adjudge matters in compliance with the notion of justice and equity in line with the universal principles of justice in respect of Human Rights violations. In the case of **SHIR D K BASU AND ANOR V. STATE OF WEST BENGAL OF INDIA AND 8 ORS (2005) CHR page 131** it was stated that where the constitution is silent on remedies available for violations of constitutional rights, Courts have evolve compensatory reliefs in cases of established unconstitutional deprivation of a person's

liberties or life. Award of monetary compensation for breaches of basic Human Rights is an established judicial practice based on the Courts sense of duty towards the defence of civil liberty and social justice which rests on the principle of ***UBI JUS IBI REMEDIUM***. It was further held that the Courts, in the absence of statutory or constitutional remedies for breaches of fundamental rights can create remedies to meet the justice of particular cases.

Also in the case of **SUNDAY JIMOH V. ATTORNEY GENERAL AND 2ORS (1998) 1HRLRA AT PAGE 516** it was held that an Applicant whose rights have been violated is entitled to general damages and exemplary and aggravated damages also, if pleaded.

32. DECISION

For the foregoing facts, submissions and reasons stated, the preliminary objection succeeds and the action is hereby struck out on the basis that this Court lacks jurisdiction to adjudicate on the matter stated therein in the Application of the Applicant/Plaintiff.

33. LEGAL COSTS

In view of the circumstances of this case and in the interest of justice, coupled with the provision of Article 66 paragraph 2 of the Rules of Procedure, the Applicant/Plaintiff shall bear all the costs of the proceedings.

THIS DECISION IS READ IN PUBLIC IN THE OPEN COURT.
DATED THIS 2ND DAY OF NOVEMBER, 2007

HON. JUSTICE HANSINE .N. DONLI - PRESIDING

HON. JUSTICE AMINATA MALLE SANOGO - MEMBER

HON. JUSTICE SOUMANA D. SIDIBE - MEMBER

TONY ANENE-MAIDOH - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 22ND DAY OF NOVEMBER, 2007

SUIT NO: ECW/CCJ/APP/06/06
JUDGMENT NO. ECW/CCJ/JUD/07/07

BETWEEN

1. **MRS. ALICE R. CHUKWUDOLUE**
2. **MRS. ROSEMARY ADAEZE AMANZE**
3. **PRINCE R. N. J. CHUKWUDOLUE (I. K.) JNR.**
4. **PRINCESS JULIET ADAORA CHUKWUDOLUE**
5. **MRS. JENNIFER ADAOBA OBASI**
6. **MRS. CARMEN NGOZI ODERINDE**
7. **MRS. ALICE JANE OBIAGERI UWAOMA**
8. **MRS. ANGELA CHIOMA EFOSA**

} ***Plaintiffs***

V.

THE REPUBLIC OF SENEGAL **-** ***Defendant***

COMPOSITION OF THE COURT

1. **HON. JUSTICE AMINATA MALLÉ-SANOGO** - PRESIDING
2. **HON. JUSTICE ANTHONY A. BENIN** - MEMBER
3. **HON. JUSTICE HANSINE N. DONLI** - MEMBER

ASSISTED BY

ABOUBACAR DJIBO DIAKITÉ *Esq.* - REGISTRAR

COUNSEL TO THE PARTIES

1. **Adekunle Ojo** **-** *for the Plaintiffs*
2. **Mr. Mayacine Tounkara** **-** *for the Defendant*

JUDGMENT OF 22ND NOVEMBER, 2007

Violation of fundamental human right to property and ousting of the Jurisdiction of the Court by a Jurisdictional Clause.

SUMMARY OF FACTS

The Applicants are Administrators and beneficiaries of the estate of late Prince Dr. R.J.N Chukwudolue, an Economist in Industrial Development who died on 14th November, 1974. The Applicants are alleging that the Deceased deposited on 2nd May, 1973 a sum of Two Billion Four Hundred Thousand American Dollars (US $2,000,400,000) and sixty (60) Kilogrammes of precious metals, stones, diamonds and rubies contained in a bag with the Defendant as evidenced by a Certificate of Deposit bearing the imprimatur of the Government of the Republic of Senegal. Following the refusal of the Defendant to account for the said deposits, the Applicants sued the Republic of Senegal alleging the violation of their right to inheritance of the estate of Prince Dr. R.N.J. Chukwudolue.

The Defendant raised a Preliminary Objection regarding the competence of the Court to entertain the matter

LEGAL ISSUES

1. *Whether the Community Court of Justice has Jurisdiction to entertain a matter that has a jurisdictional clause appearing on the document tendered in evidence.*

2. *Whether the Applicants' Application falls within the subject matter of Human Rights violation.*

DECISION OF THE COURT

The Court held that as evidenced from the photocopy of the certificate of deposit dated 2nd May, 1973 tendered by the Applicants, the parties

have explicitly chosen to submit their disputes to the International Court of Justice at The Hague or in the International Court of Arbitration.

Therefore, the objection in respect of the incompetence of the Court as drawn from the jurisdictional clause is well founded. The Community Court of Justice declared that it lacked jurisdiction to entertain the case and consequently upheld the Preliminary Objection.

JUDGMENT OF THE COURT

1. The Applicants, Mrs. Alice Raphael Chukwudolue, Mrs. Rosemary Adaeze Amanze, Prince R. N. J. Chukwudolue (I. K.) Jnr., Mrs. Jennifer Adaora Chukwudolue, Mrs. Carmen Ngosi Oderinde, Mrs. Alice Jane Obiageri Uwaoma, Mrs. Angela Chioma Efosa, are all Community citizens and nationals of Nigeria, a Member State of the Community; the Defendant, Senegal, is a Member State of the Community.

2. The Applicants, appearing on their own behalf and in their capacity as the Administrators and Beneficiaries of the estate of Prince Dr. R. N. J. Chukwudolue, were represented by their Counsel, Adekunle Ojo Esq., Legal Practitioners & Notaries Public, No.2 Adeboye Solanke Street, by First Bank Bus Stop, Allen Avenue, Ikeja.

3. The Defendant was represented by Professor Cheikh Tidiane Thiam, Ambassador, Director of Legal and Consular Affairs, Place de I'lndependance, Dakar-Farm, Republic of Senegal; Mafall Fall, Judge, Deputy State-Attorney, Ministry of Finance, Republic of Senegal; assisted by their Counsel, Mes. Tounkara et Associes, Lawyers at the Court of Appeal of Dakar, 15 Bd, Djily Mbaye X, Rue de Thann, Immeuble Xeewel-ler etage, Dakar, Republic of Senegal.

4. The Applicants brought a case against the Republic of Senegal in terms of violation of their human rights and the right to inheritance of the estate of Prince Dr. R. N. J. Chukwudolue; that they have been denied access to the enjoyment of assets left for them by the deceased as an inheritance.

PRESENTATION OF THE FACTS AND PROCEDURE

5. The Applicants, who are heirs to the late Prince Dr. R. J. N. Chukwudolue (respectively his wife and children), lodged an Application on 29th November, 2006 at the Registry of the Community Court of Justice, ECOWAS.

They lodged their Application through their Lawyer, Adekunle and Associates, with the following submissions:

6. That Prince Dr. Ralph Nwachukwu James Chukwudolue, Economist in Industrial Development, a Nigerian and husband of the 1st Applicant, was born on 14th May, 1930 and died on 14th November, 1974.

7. That the said Prince Dr. Ralph Nwachukwu James Chukwudolue, a Nigerian, deposited on 2nd May, 1973, a sum of Two Billion Four Hundred Thousand American Dollars (US$2,000,400,000), and a sixty (60) kilogramme bag containing precious metals, stones, diamonds and rubies, evidenced a certificate of deposit bearing the imprimatur of the Government of the Republic of Senegal (Defendant).

8. The Applicants claim that the said certificate of deposit was duly signed by Mr. Ousmane Fall, Commercial Attache of the Embassy of the Republic of Senegal at Lagos, Nigeria, upon the instructions of the Senegalese Ambassador to the Federal Republic of Nigeria.

9. That the certificate of deposit dated 2nd May, 1973 puts the Republic of Senegal under an obligation to account for the assets deposited by Prince Dr. R. N. J. Chukwudolue.

10. That on the said certificate, Prince Dr. Chukwudolue gave instructions to the Government of the Republic of Senegal, Defendant, to go ahead with the purchase of sixty-thousand square miles (60,000 $miles^2$) of land in Africa and Brazil, where his organisation intended to establish, with the aid of the UNO, OAU, OAS, and with all men of goodwill throughout the world, an independent State for all stateless citizens of the world for his peace, love and social gospel mission. This project did not see the light of day.

11. The Applicants maintain that the Senegalese Ambassador accredited to Nigeria took charge of the transportation of the precious stones, which he deposited at Paris.

12. The Applicants maintain that before the death of Prince Dr. R. N. J. Chukwudolue, he handed over to the 1st Applicant, the original of the certificate of deposit; but that, the Senegalese Government neither executed nor implemented the instructions of the deceased.

13. That there is no evidence to prove that the said instructions have been executed, nor, is there any proof that an amount may have been handed over to the United Nations or one of its Agencies (UNHCR), to help solve the problems envisaged by Prince Dr. Chukwudolue.

14. The Applicants maintain that till today, the Senegalese Government continues to make conversions from the said deposit.

15. The Applicants assert that due to their tender age and the traumatism associated with the death of their father, they have not been able to question the Republic of Senegal as regards the deceased's legacy.

16. That all the steps they have taken so far to recover the deposits from the Senegalese Government have remained fruitless.

17. That the Republic of Senegal, a sovereign nation, and its ally, the BCEAO, have both departed from the fundamental obligations binding them, with respect to their mandate.

18. That the Defendant, in refusing to hand over the deposit to the Applicants, had completely ignored their interests, and in so doing, the well-being, means of subsistence, human and economic rights, as well as their accommodation and education of the children have been seriously affected.

19. That the rights of the Applicants are guaranteed and protected by Articles 14, 21(1), (2) and (3) of the African Charter on Human and Peoples' Rights; Articles 9(1) (a) and 9(4) of the Supplementary Protocol A/SP.1/01/05 amending Protocol A/P1/7/91 relating to the Community Court of Justice; Article 32 of the Rules of Procedure of the Community Court of Justice; and Article 17(1) and (2) of the Universal Declaration of Human Rights.

SUMMARY OF PLEAS-IN-LAW INVOKED BY THE APPLICANTS

(1) The African Charter on Human and Peoples' Rights

20. In support of their Application, the Applicants invoke Article 4 of the Revised Treaty of the Economic Community of West African States (ECOWAS) 1993, which entrenches the observance, promotion and protection of human and peoples' rights, in accordance with the provisions of the African Charter on Human and Peoples' Rights.

21. They further invoke Articles 1, 2, 14, 21(1), (2) and (3) of the African Charter on Human and Peoples' Rights.

22. Article 2 provides:

> ***"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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 other status"***

23. In the terms of Article 14 of the said Charter:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

24. Article 21(1), (2), and (3) of the said Charter provides:

"All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."

(2) The Universal Declaration of Human Rights

25. The Applicants also cite Article 17 (1) and (2) of the Universal Declaration of Human Rights which provides that:

    "Everyone has the right to own property alone as well as in association with others.

    No one shall be arbitrarily deprived of his property"

26. They stated that the action or inaction of the Senegalese Government and its Agents led to the denial of the Applicants' right to property, thus constituting a violation of their fundamental right as guaranteed under the African Charter on Human and Peoples' Rights, and also a violation of the provisions of the Universal Declaration of Human Rights, of which the Defendant is a signatory.

27. The Applicants urged the Court for the following orders:

    (a) A declaration that the Defendant and his associates have violated the Human Rights of the Applicants, by way of their arbitrary denial and dispossession of the Applicants' right of access to the enjoyment of their father's assets as guaranteed and protected by Articles 14 and 21(1), (2) and (3) of the African Charter on Human and Peoples' Rights, and Article 17(1) and (2) of the Universal Declaration of Human Rights.

    (b) A declaration that the Defendant is duty-bound to render account to the Applicants regarding the deposit of the deceased, by virtue of the certificate of deposit made for the purposes of being executed, and the obligation to receive from the Defendant the services due to be rendered, that the Defendant's refusal to render account of the items mentioned on the certificate of deposit dated 2/5/73, is illegal and contrary to the spirit of the ECOWAS Treaty and of the African Charter on Human and Peoples' Rights, which objective is to safeguard the rule of law in the West African sub-region.

(c) A declaration that the Defendant, having refused to implement the instructions of Prince Dr. Chukwudolue, the property constituted by the deposited items must return to the heirs of the late Prince Dr. Chukwudolue.

(d) A declaration that the Applicants, as title holders to the property of Prince Dr. Ralph Nwachukwu James Chukwudolue, do have the right to ask, in accordance with the Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights, that the Defendant render account and return to them the assets cited on the certificate of deposit dated 2nd May, 1973.

(e) An order enjoining the Defendant to account for the items appearing on the certificate of deposit dated 2nd May, 1973, together with the interest accruing.

(f) An order enjoining the Defendant to hand over to the Applicants the entire deposit, with all the accruing interests (or its value in cash) cited and specifically mentioned on the certificate of deposit bearing the reference number No. SN73 ARS/N, dated 2nd May, 1973, and duly signed and stamped on behalf of the Defendant on at Lagos, Nigeria, by the Commercial Attaché, Mr. Ousmane Fall (3rd Defendant) on behalf of the Senegalese Government.

(g) An order against the Defendant, to pay costs in the sum of Five Million Naira (N 5,000,000).

SUMMARY OF PLEAS-IN-LAW INVOKED BY THE DEFENDANT

28. By a Memorial in Defence lodged at the Court Registry on 17th August, 2007, *Mes. Tounkara et Associés*, Lawyers at the Court of Appeal of Dakar and Counsel for the Republic of Senegal, raised an Objection regarding the incompetence of the Court, as drawn, on the one hand, from the jurisdictional clause appearing on the document tendered in evidence by the Applicants, and on the other hand, as it regards the subject matter.

(1) In regard to the incompetence of the Court, as drawn from the jurisdictional clause appearing on the document tendered in evidence

29. The Defendant maintains that, from the document exhibited by the Applicants themselves, there is a clause worded as follows:

> ***"NB: Any dispute or claim is to be referred to the World Court at the Hague, or the International Court of Arbitration and no diplomatic Community"***

30. That in compliance with this clause, the Court lacks jurisdiction.

31. That indeed, it is an accepted principle of international law that the parties to a dispute, even public entities, may choose to submit their dispute to a specific court or to an arbitration process.

32. That while relying on the evidence as tendered, the Applicants cannot escape the application of the jurisdictional clause contained therein.

33. The Defendant requests the Court to declare that it lacks the jurisdiction to adjudicate upon the case.

(2) In regard to the incompetence *rationae materiae* of the Court

34. The Defendant considers that even if the Supplementary Protocol extended the jurisdiction of the Court to include matters on human rights violation, the Applicants have but inappropriately brought their case before the Court, because their claim does not fall within the subject matter of human rights violation.

35. The Defendant also indicates that the Applicants have no grounds for invoking, in support of their claims, Articles 14, 16, 17, and 21 of the African Charter on Human and Peoples' Rights, nor Article 17 of the Universal Declaration of Human Rights.

36. That indeed, Article 14 of the African Charter on Human and Peoples' Rights relates to the right to property - which is guaranteed for every citizen.

37. That such right to property may only be encroached upon by way of expropriation justified by appropriate compensation.

38. That Article 21 of the same Charter concerns all peoples' rights and not those of an individual.

39. That Article 16 sets out the principle of the right to physical and mental health, and entrusts the responsibility of taking the necessary measures for guaranteeing those rights, upon the State whose national insists upon such rights.

40. That the same principles stand out, in respect of the interpretation of Article 17.

41. That in the instant case, no problem arises as to Human and Peoples' rights; and that what is at stake is simply a claim to the general and common right of a group of individuals alleging that the author of their document may have entrusted to a particular State, or one of the institutions of that State, assets or valuable properties whose restitution they demand.

42. That it is a question of certain individuals relying on the deposit of a contract, and on a contract regarding power of attorney, which require execution.

43. That the present dispute is therefore one that concerns fundamentally general law, which is not within the jurisdiction of the Community Court of Justice, ECOWAS, as provided for under Article 9 of the Supplementary Protocol A/SP.1/01/05, amending Protocol A/P.1/7/91 relating to the Community Court of Justice, ECOWAS.

44. The Defendant points out, at any rate, that the Applicants only communicated to them the photocopy of the deposit-receipt of 2nd May, 1973.

45. That as a general rule, mere photocopies cannot serve as articles of proof, except where they have been certified as true copies of the original.

46. That at any rate, the Applicants' request is frivolous, for the simple reason that Prince Dr. Chukwudolue, who, as the Director of a Company while he was alive, could not have confused the Embassy of a foreign country with a bank; and also that the sums of money and precious stones could not have been transferred out of Nigeria without leaving a trace.

47. That the very content and wording of the deposit-receipt sufficiently prove the frivolity of the document.

48. That a close examination of the document reveals the following strange features and anomalies:

- The text of the receipt is written entirely in English, whereas it is supposed to be an official document of the State of Senegal, whose official language is French;
- The absence of a serial number on the receipt;
- The Ambassador is mentioned at the top of the receipt and yet he did not sign it;
- The purported signatory of the receipt never bore the title *"Commercial Attache"* of the Embassy of Senegal in Nigeria; as it were, that title did not even exist at the Embassy.

49. The Defendant concludes, in the alternative:

- That the Application made by the Applicants must be dismissed, as being unfounded and vexatious;

- That the Applicants must pay to the Republic of Senegal, a token remedy, as damages;

- That the Applicants must bear the costs, to be paid in accordance with an established schedule of payment.

50. At its session of 19th November, 2007, the Court decided to hear the Parties on the Preliminary Objection raised by the Republic of Senegal.

THE COURT'S ANALYSIS

As to the competence of the Court

51. **Whereas** the Applicants brought an Application before the Community Court of Justice on a complaint against the Republic of Senegal, for violation of their human rights and their rights as administrators and beneficiaries of the estate of Prince Dr. R. N. Chukwudolue, and that they were denied access to the enjoyment of the said estate.

52. **Whereas** they assert that the wishes and directives formulated by the deceased, as mentioned on the certificate of deposit, were never executed nor put into effect by the Government of the Republic of Senegal.

53. **Whereas** they maintain that all their attempts and moves to recover the assets deposited with the Embassy of the Republic of Senegal proved futile.

54. **Whereas** the Defendant, principally, raised the issue of incompetence of the Court, as drawn from the jurisdictional clause provided for in the certificate of deposit, as well as the incompetence *rationae materiae* of the Court, on the grounds that the present dispute does not concern Human Rights.

55. **Whereas** in the alternative, the Defendant refutes the arguments invoked by the Applicants, and maintains that the present dispute deals with general law, and that such law does not fall within the jurisdiction of the Community Court of Justice, in the terms of the 2005 Supplementary Protocol amending the 1991 Protocol.

DECISION OF THE COURT

1. As regards the incompetence of the Court, drawn from the jurisdictional clause

56. **Whereas** there exists among the documents tendered in the instant Case, particularly as is evident from the photocopy of the certificate of deposit receipt dated 2nd May, 1973 tendered by the Applicants, an inscription regarding a jurisdictional clause worded as follows:

> ***"NB: Any dispute or claim is to be referred to the World Court at the Hague, or the International Court of Arbitration and no diplomatic immunity."***

57. **Whereas** according to the foregoing, the Parties have explicitly chosen to submit their disputes to the International Court of Justice at The Hague or the International Court of Arbitration.

58. **Whereas** such a choice is perfectly in conformity with the principles of international law and consequently binds the Parties.

59. **Whereas** it is a general principle of law that legally made conventions are binding and hold good as law upon those who made them.

60. **Whereas** in the instant Case, the Applicants, having relied on the certificate of deposit-receipt, cannot therefore escape compliance with the jurisdictional clause contained therein.

61. **Whereas** in the light of the foregoing, the Objection in respect of the incompetence of the Court, as drawn from the jurisdictional clause, is founded.

2. As regards the incompetence *rationae materiae* of the Court

62. **Whereas** any examination by the Court of the second Objection, as drawn from its incompetence *rationae materiae*, would amount to examining the merits of the Case, i.e. the making of pronouncements as to whether the Applicants' human rights have been infringed upon or not.

63. **Whereas** the jurisdictional clause contained in the certificate of deposit tendered by the Applicants sets aside, *ipso facto*, the competence of the Community Court of Justice in the instant Case.

64. **Whereas** consequently, there is no ground to examine the second leg of the Preliminary Objection, as it relates to the incompetence *rationae materiae* of the Court.

65. FOR THESE REASONS

The Court, in public sitting, after hearing both Parties in first and last resort, in respect of the Preliminary Objection on the incompetence of the Court, as raised by the Defendant, and founded on the jurisdictional clause, hereby upholds the said Objection.

66. Consequently, the Court declares that it lacks jurisdiction to entertain the Case.

67. **AS TO COSTS**

In compliance with the provisions of Article 66(2) of the Rules of Procedure of the Court, which states that ***"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings"***, the Court asks the Applicants to bear the costs; payment shall be made in accordance with an established schedule of payment.

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, on the day, month and year stated above.

68. And the Members have appended their signatures as below:

HON. JUSTICE AMINATA MALLÉ-SANOGO - PRESIDING

HON. JUSTICE ANTHONY A. BENIN - MEMBER

HON. JUSTICE HANSINE N. DONLI - MEMBER

Assisted by **Aboubacar Djibo Diakité Esq.** - REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 16TH OF MAY, 2008

SUIT NO: ECW/CCJ/APP/05/07
JUDGMENT NO: ECW/CCJ/JUD/01/08

BETWEEN

ODAFE OSERADA - *Applicant*

V.

1. **ECOWAS COUNCIL OF MINISTERS**
2. **ECOWAS PARLIAMENT**
3. **ECOWAS COMMISSION**

} *Defendants*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AMINAU MALLE-SANOGO** - PRESIDING
2. **HON. JUSTICE AWA NANA DABOYA** - MEMBER
3. **HON. JUSTICE EL MANSOUR TALL** - MEMBER

ASSISTED BY

TONY ANENE-MAIDOH *Esq.* - CHIEF REGISTRAR

COUNSEL TO THE PARTIES

1. ***Kolawole O.O. James*** - *for the Applicant*

JUDGMENT OF 16TH MAY, 2008

Illegality of the Appointment of the Secretary General of the ECOWAS Parliament – Locus Standi - Legality of the Regulation by Council of Ministers, inadmissibility.

SUMMARY OF FACTS

By Application dated 1st of June 2007, Mr. Odafe Oserada, promoter of the Regional Development Group called Asher's Initiative, came before the ECOWAS Court of Justice to challenge and request for the annulment of Regulation C/REG.5/06/06 by the Council of Ministers as an exceptional measure, allocating the post of Secretary General of the Community Parliament to the Republic of Guinea and that the advertisement of this position in 'This Day Newspaper' of 30th of April 2007 is unlawful.

According to the Applicant limiting the application to only citizens of the Republic of Guinea goes against the principle of equal rights and opportunity of citizens of the Community. He contended that the Regulation violates Articles 12 (a), (b); 5 (1), (3); 3 (2a), (c), (f); 4 (k), (h) and 18 (3) of the Revised Treaty, 13 (1), (2); 19, 22 (1), (2) of the African Charter on Human and People' Rights and Chapter A9 Laws of the Federation of Nigeria (2004) (Ratification and Enforcement Act)

LEGAL ISSUES

1. *Whether the Applicant has suffered any injury as a result of Regulation C/REG.5/06/06?*

2. *Whether his Application is admissible?*

DECISION OF THE COURT

The Court found that the measure was adopted by the Council of Ministers as part of the administrative restructuring of the ECOWAS Parliament, and thus in the interest of the entire Community. For that reason, the Court held that the Applicant must personally or by his organization be affected by the Decision in order to have a cause of action. The Court found neither the Plaintiff nor his organization had suffered any form of harm and so held the Application inadmissible.

JUDGMENT OF THE COURT

1. The Applicant, Odafe Oserada Esq., a lawyer by profession, is a Community citizen of Nigerian nationality. The 1st Defendant, the Council of Ministers, the 2nd Defendant, the Community Parliament, and the 3rd Defendant, the ECOWAS Commission, are all Institutions of the Economic Community of West African States (ECOWAS).

2. The Applicant, whose address is at Chicken House Estate, Plot 472, Djibouti Close, Off Adetokumbo Ademola Crescent, Wuse II, Abuja, Nigeria, is represented by Kolawole O. O. James, who appeared in Court.

3. The Defendants, namely, the Council of Ministers, the Community Parliament, and the ECOWAS Commission, all of which are Institutions of the Economic Community of West African States (ECOWAS), neither appeared in Court nor were they represented.

4. The Applicant complains of violation of the Revised Treaty, by the advertisement of the post of Secretary General of ECOWAS Parliament and by the decision allocating such post to the Republic of Guinea.

5. He requests for the annulment of Regulation C/REG.5/06/06 of the Council of Ministers allocating the post of Secretary General of ECOWAS Parliament to Guinea, and equally asks for the annulment of all acts resulting from the said Regulation.

I. PRESENTATION OF THE FACTS AND PROCEDURE

6. The Applicant, who is a promoter of Asher's Initiatives Limited/ GTE, filed his Application on 1st June, 2007 at the Court Registry, for the purposes of asking the Court to declare as unlawful Regulation C/REG.5/06/06 made by the ECOWAS Council of Ministers, allocating the post of Secretary General of the Community Parliament to Guinea, previously held by Nigeria.

7. The following essential details do stand out from the said Regulation:

- The post of Secretary General of ECOWAS Parliament is allocated to the candidate presented by the Republic of Guinea;
- The Guinean candidate is appointed as an exceptional case to the category of statutory appointees for a term of office of four (4) years non renewable.
- Upon expiration of the tenure of the Guinean candidate appointed to the post of Secretary General of the Community Parliament, the said post shall be classified in the category of professional cadre on Director Grade (D2), and the filling of vacancy concerning this post shall be made by advertisement throughout all the Member States.

8. According to the Applicant, the post of Secretary General, within the structure of ECOWAS, falls into the category of professional cadre. He avers that the post of Secretary General is a permanent appointment on D2 professional status; and that it is not a statutory appointment offered on a rotational basis, and can therefore not be allocated to any particular Member State.

9. He relies on C/REG.20/12/99 abolishing the quota system of allocating posts within ECOWAS Institutions and asserts that by virtue of Article 12 (b) of the ECOWAS Staff Regulations, and Article 18(4) of the Revised Treaty, vacancies for permanent posts shall be filled by competitive recruitment procedure. For the Applicant, Guinea, with financial contribution of only 0.77% from the 2006 ECOWAS financial year, occupied two managerial positions within the institutions of ECOWAS, and that there is no justification for taking the post of Secretary General of the Parliament away from Nigeria and giving it to another country.

10. He adds that restricting the application to the nation of Guinea, as evidenced by the vacancy announcement of the post of Secretary General of ECOWAS Parliament in the 30th April 2007 edition of This Day newspaper, amounts to an act of injustice against him as

a Community citizen, which deprives him and his immediate constituency of the right to apply for the post, and that the same applies to the other citizens and constituencies within the Community.

11. Considering that he is the Principal Partner of the law firm Oserada and Oserada (Asher's Chambers) and the promoter of Asher's Initiatives LTD/GTE, the Applicant avers that the Council's Decision referred to above constitutes an impediment to the regional perspective of his company, and runs counter to the provisions of Article 3 of the Revised Treaty of ECOWAS, specifically in its paragraphs 2 (b), (c), (f), (g), (o), as well as Articles 18(5) and 5(1), (3) of the same Treaty. He equally cites the African Charter on Human and People's Rights in its Articles 13 (1), (2); 19; 22(1), (2) and Chapter A9 Laws of the Federation of Nigeria 2004 (Ratification and Enforcement Act).

12. He requests the Court to make the following declarations:

    - That Regulation C/REG.5/06/06 made by the Council of Ministers, allocating the post of Secretary General of ECOWAS Parliament to Guinea, on the grounds of "exceptional case", is illegal;

    - That the said Regulation violates Articles 5(1), (3) and 18(5) of the Revised Treaty, to which all the Member States are signatory;

    - That the said advertisement published in the 30th April 2007 issue of This Day newspaper is unlawful and a violation of C/REG.20/12/99 Abolishing Quota within the Institutions of the Community, and a violation of Article 18(4) of the Revised Treaty.

13. He therefore seeks from the Court a mandatory order of injunction restraining the ECOWAS Parliament from filling its office of Secretary General of professional cadre D2, pending the final determination of the instant case by the Court, and to order further that the appointment to the post of Secretary General of ECOWAS Parliament be conducted in accordance with the provisions of the

ECOWAS Staff Regulations. Ultimately, he asks for the award of N20,000,000 (Twenty Million Naira) in damages.

PROCEDURE

14. The Applicant filed his Application at the Registry, in accordance with the provisions of Article 32 of the Rules of Procedure of the Court and its related Articles. Notice of the Application was duly served on the Defendants on 5th December, 2007 as evidenced by the acknowledgements of receipt pleaded in the case.

15. The case was called for hearing for the first time on 30th October, 2007, and was adjourned to 28th November, 2007, and then to 24th January, 2008, to give a fairly reasonable opportunity for both parties to appear in Court; the Defendants never appeared in Court. Finally, the case was deliberated upon and judgment was fixed for today.

16. Article 35 of the Rules of the Court provides:

> ***"Within one month after service on him of the application, the Defendant shall lodge a defence; the time limit laid down in paragraph 1 of this Article may be extended by the President on a reasoned application by the Defendant."***

    Now, the Application was served on the Defendants on 5th December, 2007. However, they never appeared in Court nor considered it incumbent upon them to ask for an extension of time-limit from the President of the Court; the time-limit expired on 5th January, 2008.

17. Consequently, it was considered valid and proper to adjourn the case to 24th January, 2008 to be deliberated upon, for the decision to be made today.

18. The Application was filed and examined in accordance with the relevant provisions of the Rules of Procedure of the Court, the Defendants received the communication and notification of the proceedings instituted,

together with the annexed exhibits, but did not ultimately explain their absence from Court. It is therefore ripe to declare that the Defendants defaulted and the Court adjudicates in default with respect to the Defendants.

H. PRESENTATION OF THE PLEAS-IN-LAW INVOKED BY THE APPLICANT

19. The Applicant contends that Regulation C/REG.5/06/06 of the Council of Ministers allocating the post of Secretary General of ECOWAS Parliament as an "exceptional case" to Guinea is illegal and violates the provisions of the Revised Treaty in its Articles 3(2)-(a), (c); 4-(h), (k); 5(1), (3); 12(b); 18(a).

He equally maintains that the said Regulation violates the African Charter on Human and People's Rights in its Articles 2; 13(1), (2); 22(1), (2).

20. He adds that his rights, as protected by the various provisions referred to, have been violated by the fact that Regulation C/REG.5/06/06 of the Council of Ministers did not respect the equality of rights and opportunities available to all Community citizens.

21. He requests the Court to declare that this Regulation is illegal; to make an order restraining the ECOWAS Parliament from proceeding to recruit a Secretary General, pending the determination of the proceedings brought before the Court; to order that the appointment to the office of Secretary General of ECOWAS Parliament be done in accordance with the provisions of the ECOWAS Staff Regulations; and finally, to order the Defendants to pay the sum of N20,000,000 (Twenty Million Naira) in damages.

22. From the foregoing, particularly as regards the facts and pleas-in-law invoked by the Applicant, the Court has to provide an answer to the principal question of whether the Applicant has any interest at stake.

THE COURT'S ANALYSIS OF INTEREST AT STAKE

23. It can be deduced from the facts of the case and the pleas-in-law invoked that the instant case deals with appreciation of the legality of the Regulation complained of. In challenging the said Regulation, the Applicant relies on the provisions of Article 10(c) of the 19th January, 2005 Supplementary Protocol on the Court, which provides:

    "... individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies."

24. The Applicant relies on this Article to affirm that he has an interest at stake. He declares that his interest is derived from the fact that he is a Community citizen; that he is the promoter of a regional development project, through Asher's Initiatives LTD/GTE. He asserts that he had requested the participation of all the Member States of the Community in his company, which could have had a sure impact on the economic and industrial development of the sub-region, but then the allocation of the post of Secretary General to Guinea constituted a hindrance to the regional development perspective of his company, and that if he had been allowed to apply for the post, he would have secured that office and would have been capable of implementing the Asher's Initiative LTD/GTE Project, which, he claims, is a force to reckon with in the overall economic and energy development of the sub-region.

25. He concludes that an interest clearly exists for him and his company to seek the annulment of the Regulation in contention. He indicates that his interest in the instant case resides in the fact that he is the promoter of a regional development body, and that he had been deprived of the opportunity of seeing this regional body participate in Community development, as a result of the restriction of candidates to Guinean citizens only.

26. The question which arises is whether Regulation C/REG. 5/06/06 harms the Applicant; if it does, then he would have an interest at stake.

27. Generally, and from a legal standpoint, the necessity for an Applicant to provide justification of interest in a case is attested to by the adage that *"Where there is no interest, there is no action"*, and also *"An interest is the measuring rod for an action"*. In other words, an application is admissible only when the applicant justifies that he brings a case before a judge for the purposes of protecting an interest or defending an infringement of such. Such an interest must be direct, personal and certain.

28. Also, before examining the direct relationship between the contested Regulation and the situation of the Applicant, one needs to know, first of all, whether the said Regulation really affected him.

29. Indeed, the provision made under Article 10(c) of the 2005 Supplementary Protocol on the Court, in respect of bringing cases before the Court to contest the legality of an act of the Community, does concern the existence of an act or inaction of a Community official which violates the rights of the person requesting the annulment of such act. The complaint brought forward in the instant case, by the Applicant, boils down to staring that his company has been deprived of the opportunity of competing for a professional position - which does not constitute in any way whatsoever a direct harm done against him. Now, if there is any injury caused in not allowing his company to compete for the post, such injury can only be detrimental to the Community and not to the Applicant.

30. It is the accepted truth that allocating the post of Secretary General of ECOWAS Parliament to Guinea neither affected him in his legal status nor in his constituency. The alleged grievance is only hypothetical, no more no less, in the sense that the Applicant does not demonstrate the personal and direct benefit he would have derived from it. In other words, the Applicant does not demonstrate the existence of an injury he may have suffered, which could have arisen from the Regulation complained of; the mere fact of being the promoter of a regional project cannot on its own amount to the existence of an interest at stake in the instant case. Indeed, here, the interest at stake is to be derived from the professional qualification of the Applicant and from the link between such qualification and the post that the

Applicant considers to have been deprived of competing for. Even then, the Applicant has not demonstrated any direct link between his Development Project cited above and the office sought. In other words, the development project whose promoter he is, is not an essential element for the post of Secretary General of ECOWAS Parliament

31. In the current circumstances, an announcement concerning vacancy of a post is accompanied by requirements of a job profile, which naturally excludes certain prospective candidates, in terms of nationality, University degree, academic qualification, work experience, age, etc. Yet, once again, it cannot reasonably be held that the promoter of a project will be the most qualified to occupy the post of Secretary General of ECOWAS Parliament, much less when he had not demonstrated, on his own, any interest in the said post; whereas legally speaking, an interest in a case must be personal, direct and certain.

32. It is imperative to note that in his Application, the Applicant does not demonstrate any of the features of having an interest at stake. His mere status as a Community citizen or promoter of a regional development company is not sufficient to concretely determine his interest in the case. Consequently, the question arises as to whether his action is admissible.

AS TO THE ADMISSIBILITY OF THE ACTION

33. In order for an application seeking to contest the legality of an act to be deemed admissible, it is not sufficient for the act in question to affect the applicant in whatsoever manner that it may be; there should exist, as an additional condition, a sufficiently direct relationship of cause and effect. The act made by the Council of Ministers, i.e. the Regulation complained of, must affect the legal status of the Applicant. The principle according to which "any act adversely affecting the legal status of a person may be brought before the law courts" is trite law (*see* **CJEC Reports 17 July 1959, p.275; CJEC Reports 17th March 1967, CBR Cement Works, Cases 8 -11/66, p.93; ICCEC, 27 February 1992, Vichy v. Commission, Case T. 19/91; 1992, II, p. 415**).

34. Such direct relationship is however absent from the case brought. Furthermore, the Applicant must be directly and personally

concerned by the act complained of. In other words, the Applicant must establish or demonstrate that the contested Regulation concerns him directly and personally. Here, there are two cumulative conditions and once any one of the two is not fulfilled, the Application is inadmissible.

35. In its Judgment of 15th July, 1963, in Case Concerning **Plauman v. Commission (see CJEC Reports, 1963, p. 199)**, the Court of Justice of the European Communities (CJEC) held that those personally concerned are the persons who ***"are affected by the act, by reason of a situation of fact which typifies them vis-a-vis any other person, and marks them out individually in exactly the same manner as recipient is marked out".***

AS TO THE OTHER PLEAS-IN-LAW INVOKED BY THE APPLICANT

36. Nowhere in the Application does the Applicant demonstrate his interest in the post. Nor does he show the extent to which the contested Regulation constitutes an act of injustice against his person or an obstruction to the interests of his constituency.

37. At any rate, the Regulation complained of, which was a measure adopted within the context of the administrative restructuring of the ECOWAS Parliament, was enacted, not in the interest of individuals but that of the Community. From this standpoint, there are grounds to conclude that individuals have no interest at stake and therefore the action of the Applicant is inadmissible for lack of interest. Since the Applicant has no interest at stake, he cannot ask for an annulment of the contested Regulation, and the inadmissibility of his action, with respect to form, leads to the dismissal of all his other prayers, intentions and orders sought.

CONSEQUENTLY

1. **Whereas** the Court does not find in the facts and pleas-in-law invoked by the Applicant, elements amounting to a sure and certain injury done against him as an individual;

2. **Whereas** the Applicant does not portray his own professional competence in any way whatsoever; whereas such portrayal may have enabled him to possibly take up the post of Secretary General of ECOWAS Parliament;

3. **Whereas** finally, he was also unable to establish that the challenged Regulation affected him directly and personally, and much less his company;

4. **Whereas** it is ripe, therefore, to declare that his action is inadmissible.

AS TO COSTS

Whereas in the terms of Article 66(2) of the Rules of the Court *"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings"*, it is ripe to adopt same.

This statement which was adopted for the first time then, has since been applied several times to various subject-matters (*See* CJEC Reports - 29 March 1979, ISOC/Counsel Case 118/77; CJEC Reports 1979, p. 1277; CJEC Reports 231, February 1984, **Allied Corporation v. Commission,** Case 239/82, 1984, p. 10005; ICCEC 25 September 1997, **Shangai Bicycle Corporation v. Council,** Case T 170/94; CJEC Reports 1997, II, p. 1383).

FOR THESE REASONS

THE COMMUNITY COURT OF JUSTICE, ECOWAS,

Adjudicating publicly, in first and last resort, after hearing the Applicant, who was present in Court, and in default of the Defendants, who were absent from Court;

1. Having regard to the Revised Treaty of ECOWAS;

2. Having regard to the 1991 Protocol on the Court and the 19th January, 2005 Supplementary Protocol on the Court;

3. Having regard to the 28th August, 2002 Rules of Procedure of the Court;

4. Having regard to Regulations C/REG. 5/06/06 and C/REG.8/06/07 of the Council of Ministers;

Solely in terms of form,

Declares the action brought by Odafe Oserada Esq. inadmissible, for lack of interest

On merits,

Holds that there are no grounds for examining merits

Resultantly,

Dismisses the Application brought by Odafe Oserada Esq., together with all his other prayers, intentions and claims

As to costs.

Asks the Applicant to bear costs

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, on the day, month and year above.

And the Members have appended their signatures as below:

Hon Justice Aminata MALLE-SANOGO - PRESIDING

Hon Justice Awa Nana DABOYA - MEMBER

Hon. Justice El Mansour TALL - MEMBER

Assisted by **Tony ANENE-MAIDOH** Esq. - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 5TH OF JUNE, 2008

SUIT N°: ECW/CCJ/APP/04/07
JUDGMENT N°: ECW/CCJ/JUD/03/08

BETWEEN
CHIEF EBRIMAH MANNEH - *Plaintiff*

V.
THE REPUBLIC OF THE GAMBIA - *Defendant*

COMPOSITION OF THE COURT
1. **HON. JUSTICE ANTHONY ALFRED BENIN** - PRESIDING
2. **HON. JUSTICE AWA NANA DOBOYA** - MEMBER
3. **HON. JUSTICE TALL EL-MANSOUR** - MEMBER

ASSISTED BY
TONY ANENE-MAIDOH - CHIEF REGISTRAR

COUNSEL TO THE PARTIES
1. ***Femi Falana, Chinedum Agwaramgbo & Sola Egbeyinka*** *- for the Plaintiff*

JUDGMENT OF 5TH JUNE, 2008

Violation of fundamental human rights- right to fair hearing - arbitrary detention - award of damages

SUMMARY OF FACTS

The Plaintiff, a Gambian journalist with the Daily Observer Newspaper based in the Gambia was arrested in the premises of the Daily Observer Newspaper and taken into custody by two men alleged to be security agents of the Defendant. The reason for the arrest was not disclosed by the Defendant and he was never charged to Court for any wrong doing. He was detained at the National Intelligence Agency where he was tortured and kept under inhumane living conditions.

Whereupon the Plaintiff brought an action against the Defendant for the violation of his human rights. The Defendant however failed to lodge a defence despite repeated demands.

LEGAL ISSUES

1. *Whether the arrest and detention of the Plaintiff is justified under the African Charter on Human and Peoples' Rights.*

2. *Whether the Plaintiff is entitled to have his rights to dignity, personal liberty and freedom of movement restored.*

3. *Whether the Plaintiff is entitled to monetary compensation.*

DECISION OF THE COURT

The Court held that the arrest and detention of the Plaintiff was contrary to Article 6 of the African Charter on Human and Peoples' Rights (ACHPR).

The Court also held that the Plaintiff was entitled to have his dignity, personal liberty and freedom of movement restored by virtue of Article 7 of the ACHPR.

On compensation, the Court held that the object of human rights litigation was to vindicate the victim and to restore his personal liberty. Punitive damages should not be the objective. However, the Court held that the Plaintiff was entitled to compensation for his detention, and harm to his person. Consequently the Court awarded him $100,000.00 as damages for compensation.

JUDGMENT OF THE COURT

1. The Plaintiff is a Community citizen, a national of the Republic of The Gambia. The Defendant is a Member State of the Economic Community of West African States (ECOWAS).

2. Femi Falana with Chinedum Agwarambo (Mrs.) and Sola Egbeyinka appeared for the Plaintiff. Defendant failed to enter an appearance.

3. The Plaintiff has come to this Court seeking the following reliefs:

   A. A declaration that his arrest by the National Intelligence Agency of The Gambia at the premises of The Daily Observer in Banjul on the 11th July, 2006 is illegal and unlawful as it violates Article 6 of the African Charter on Human and Peoples' Rights, which guarantees his human right to personal liberty.

   B. A declaration that his detention on the 11th July, 2006 and his continual detention since then without trial is unlawful and a violation of his right as guaranteed by Articles 4, 5 and 7 of the African Charter on Human and Peoples' Rights.

   C. An order mandating the Defendant and/or its agents to immediately release the Plaintiff from custody.

   D. US $5,000,000.00 (Five Million United States Dollars) being compensation for the violation of the Applicant's human rights to dignity, liberty and fair hearing.

4. The Defendant was first served on the 31st May, 2007 with the application initiating the proceedings through its High Commission in Abuja, the capital city of the Federal Republic of Nigeria, where the Court has its seat and also by registered mail.

   The Defendant failed to file a defence within the thirty day period stipulated for the filing of a defence without assigning any reasons for the failure. The Court served a hearing notice on the Defendant through its High Commission in Abuja and by a registered mail on the 14th June, 2007. The Defendant failed to appear in Court on the

16th July, 2007 when the case was due for hearing. The Court adjourned the case to the 26th September, 2007 to enable the Defendant enter an appearance and defend the action. A hearing notice was served on the Defendant on the 19th July, 2007 through its High Commission in Abuja, and by registered mail. Notwithstanding all the efforts of the Court in getting the Defendant to take part in the proceedings, the Defendant failed to enter an appearance or to defend the action. Hence the case was heard on the 26th of September, 2007 without the participation of the Defendant.

However, by a letter dated the 23rd August, 2007 addressed to the President of the ECOWAS Commission, a copy of which was received by the Court on the 28th September, 2007, the Defendant had decided not to ***"participate or attend proceedings fixed for 26th September 2007."***

Due to a change in the composition of the panel members on the case, the case had to be tried de novo. A hearing notice was accordingly sent to the Defendant but again they failed to enter appearance on the 26th November, 2007 when the case was heard. Consequently, the case proceeded to trial without the participation of the Defendant.

5. SUMMARY OF THE FACTS

According to the facts contained in the Plaintiff's Application,

i. The Plaintiff is a Community citizen by virtue of his nationality of the Republic of The Gambia.

ii. The Plaintiff is a journalist with the Daily Observer newspaper based in Banjul, The Gambia.

iii. The Plaintiff was arrested by two officials of the National Intelligence Agency of The Gambia at the Daily Observer's premises in Banjul on July 11, 2006 without any warrant of arrest.

iv. The reasons for his arrest have not been disclosed by the Government of The Gambia.

v. Efforts by his family, friends and lawyers to know his whereabouts or have access to him have proved futile,

vi. Since his arrest the Plaintiff has been detained at the National Intelligence Agency Headquarters, State Central Prison, Kartong Police Station, Sibanor Police Station, Kuntaur Police Station and Fatoto Police Station,

vii. The Plaintiff has not been accused or charged with the commission of any criminal offence,

viii. The conditions under which the Plaintiff is detained are dehumanizing as detainees are made to sleep on bare floor in overcrowded cells.

ix. The Plaintiff has been held in solitary confinement and denied access to adequate medical care.

x. The Plaintiff Counsel's letter dated 16th March 2007, demanding for the release of the Plaintiff was ignored by the Defendant.

6. In line with Article 43 of the Court's Rules of Procedure, the Court demanded that evidence should be introduced to prove the facts, notwithstanding the absence of the Defendant.

7. EVIDENCE OF WITNESSES

On the 26th of November, 2007, during the hearing the Plaintiff called in three witnesses who testified on his behalf. The first witness, (PW1) Mr. Usman S. Darboe, a native of the Republic of The Gambia and the news editor of the Daily Observer Newspaper said he was present at the time the Plaintiff was arrested. He stated that he has personally known the Plaintiff for well over seventeen (17) years and has worked with him for seven (7) years. According

to him, on the 11th of July, 2006, while they were in the office, the Gambian Police came and arrested the Plaintiff. He further stated that he has not seen the Plaintiff since his arrest, but as a journalist he made investigations about him in the course of his work and was informed that the Plaintiff was detained at Mile 2 Central Prison, Banjul. PW1 also said that to the best of his knowledge the Plaintiff has not been charged with any criminal offence. PW1 stated that sometime during the latter part of July 2006, it came to his knowledge that the Plaintiff had been moved from the National Intelligence Agency (NIA) to Fatoto Police Station.

8. The second witness (PW2), Mr. Yaya Dampha is a journalist with the Foroyaa Newspaper based in The Gambia. He stated that he knew the Plaintiff as both of them worked as journalists in The Gambia. He mentioned that he does not know the whereabouts of the Plaintiff presently but that he was informed of his arrest in July 2006. PW2 continued that he last saw the Plaintiff in December 2006 after his office had a tip off that the Plaintiff had been moved from the Central Prison in Banjul to an unknown location. He then embarked on a search mission and visited several prisons. He eventually saw the Plaintiff in Fatoto Police Station when the Plaintiff was being escorted back to his cell after a meal. Mr. Yaya Dampha further testified that the Foroyaa Newspaper published the arrest and detention of the Plaintiff. This was tendered as exhibit "A". The publication did not elicit any reaction from either the Police or National Intelligence Agency.

9. The third witness (PW3), Professor Kwame Karikari is a native of the Republic of Ghana and a professor with the University of Ghana, Legon. He is the executive director of an organization called the Media Foundation for West Africa which has correspondents in each of the fifteen countries of ECOWAS. They monitor issues that concern the media and press freedom. Professor Kwame Karikari does not know the Plaintiff in person, but as a journalist, who was working with the Daily Observer in The Gambia. The organization received information that the Plaintiff had been arrested and detained without any criminal charge(s) preferred against him in July 2006. This information was confirmed when they contacted other media men in The Gambia. The

Media Foundation contacted lawyers in The Gambia to facilitate the release of the Plaintiff but they were advised that they could not obtain justice in The Gambia so they should pursue the matter before the Community Court of Justice, ECOWAS.

10. The evidence of these witnesses stood uncontroverted. Even after the evidence of these witnesses, the Court by a ruling, gave another opportunity to the Defendant to attend the next session to cross-examine the witnesses, and to present their side of the story, if they so desired, but they still failed or refused to attend. It is manifestly clear the Defendant does not desire to be heard, so the trial proceeded in default.

11. The facts to the Court for determination are in respect of the violation of Articles 2, 6, and 7(1) of the ACHPR, related to individual freedom, fair hearing and the prohibition of all forms of arbitrary detention.

ISSUES FOR DETERMINATION

ISSUE 1: WHETHER THE ARREST AND DETENTION OF THE PLAINTIFF IS JUSTIFIED UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

12. The competence of the Community Court of Justice in applications filed by individuals arises from Articles 9 (4) of the 1991 Protocol and 10 (d) of the Supplementary Protocol on the Court of Justice. They provide:

    Article 9 (4): The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.

    Article 10 (d): Access to the Court is open to individuals on application for relief for violation of their human rights.

    These provisions enable an individual to access the Court directly in human rights issues, and to give the Court the competence to entertain such applications.

13. The application of the Plaintiff was primarily premised on Article 6 of the African Charter on Human and Peoples' Rights, which reads as follows

    Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained. *(Emphasis added).*

14. Article 4(g) of the Revised Treaty of the Economic Community of West African States (ECOWAS) provides for the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

15. The effect of Article 6 of the African Charter on Human and Peoples' Rights as stated above is that no one shall have his right to liberty limited or restricted unless it is in accord with a law previously laid down. In other words, the law under which a person is arrested and / or detained must have been valid and in force, before or at the time of such arrest and / or detention.

    Plaintiff alleges that his rights under Article 6 of the African Charter on Human and Peoples' Rights have been violated and therefore the intervention of this Court is justifiable under Article 9 (4) of the Protocol of this Court, as amended.

16. This Court in the case of **ALHAJI HAMMANI TIDJANI v. THE FEDERAL REPUBLIC OF NIGERIA & 4 OTHERS**, Suit No. ECW/CCJ/APP/01/06, judgment delivered on the 28th June 2007 held that the combined effect of Article 9(4) of the Protocol of the Court, as amended, Article 4(g) of the Revised Treaty and Article 6 of the African Charter on Human and Peoples' Rights is that the Plaintiff must invoke the Court's jurisdiction by (i) establishing that there is a right recognized by Article 6 of the African Charter on Human and Peoples' Rights; (ii) that this right has been violated by the Defendant;

(iii) that there is no action pending before another international Court in respect of the alleged breach of his right; and (iv) that there was no previously laid down law that led to the alleged breach or abuse of his rights.

17. In this case, Applicant alleges his right has been violated under Article 6 of the ACHPR and seeks an end to be put to it, and this is what was done by hearing the witnesses.

18. Plaintiff witness 1 (PW1) stated that he was present when the Plaintiff was arrested by two security operatives of the Republic of The Gambia in the office of the Daily Observer Newspaper where they both worked. PW1 further stated that though the Policemen were not in official uniforms, he knew they were police officers because he personally knew one of them, one Corporal Sey, from the National Intelligence Agency.

19. Furthermore, the arrest of the Plaintiff was confirmed by Professor Kwame Karikari, Plaintiff witness 3 (PW3). He stated that his organization, the Media Foundation for West Africa raised an 'alert' in order to get confirmation about the arrest of the Plaintiff when it came to their notice. PW3 stated that the arrest of the Plaintiff was confirmed. PW3 also stated that his organization made the necessary enquiries in order to secure the release of the Plaintiff but they were told that it was impossible because of the conditions prevailing at The Gambia at the time. They were therefore advised to pursue the matter at the Community Court of Justice, ECOWAS. The conduct of the Plaintiff which amounted to a criminal offence for which he was arrested was not disclosed to him, neither was he told of the law which made that conduct a crime. PW1 stated that Plaintiff was held incommunicado after his arrest and has since been detained without trial, neither has he been charged with the commission of any criminal offence known to the law of the Republic of The Gambia.

20. Plaintiff witness 2 (PW2) in his evidence stated that he saw the Plaintiff at the Fatoto Police Station during his visits to several police stations when his firm, Foroyaa Newspaper got a tip-off that the Plaintiff had been moved from the Central Prison to an unknown

destination. PW2 further stated that though they followed the case of the Plaintiff and other detainees, they were not arraigned before Court within the seventy-two hours stipulated by The Gambian Constitution for detainees to be brought before Court, and that the Plaintiff, till date has not been brought before Court to his knowledge. All these facts stand uncontroverted, and they appear credible so the Court accepts them.

21. Article 7 of the African Charter on Human and Peoples' Rights is very instructive with regards to the treatment of people once they have been arrested. Article 7(1) of the African Charter on Human and Peoples' Rights stipulates thus:

> ***"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 proved 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 by an impartial Court or tribunal."***

Article 7(1) clearly states that every individual shall have the right to have his cause heard and this comprises among other things the right to be presumed innocent until proven guilty by a competent Court or tribunal, the right to defence, including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial Court or tribunal. From the evidence of PW1, the Plaintiff has been denied the right to have his cause heard by an impartial Court or tribunal as the Defendant has failed to put him before such a competent impartial Court or tribunal for his guilt or innocence to be established.

22. The Plaintiff was arrested on the 11th July, 2006 and has since been detained without trial and no criminal offence known to the Law of the Republic of The Gambia has been levelled against him

for a period exceeding one year. Holding a person for over a year without trial will be an unreasonable period unless proper and distinct justification is provided.

23. From the foregoing, it is clear that the arrest and detention of the Plaintiff is contrary to the rules enshrined in Articles 6 and 7 (1) of the African Charter on Human and Peoples' Rights.

ISSUE 2: WHETHER THE PLAINTIFF IS ENTITLED TO HAVE HIS HUMAN RIGHTS TO THE DIGNITY OF THE PERSON, PERSONAL LIBERTY AND FREEDOM OF MOVEMENT RESTORED

24. The fundamental human rights of the individual have been guaranteed by various human rights instruments. Among the core rights guaranteed by these various human rights instruments including the African Charter on Human and Peoples' Rights are, the right to life and the integrity of the person, personal liberty, freedom from torture and other inhuman and degrading treatment and the right to political or any other opinion.

25. Article 2 of the African Charter on Human and Peoples' Rights affirms the recognition and protection of the basic rights of the individual. Article 2 states that:

    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 other status.

26. Article 6 of the African Charter on Human and Peoples' Rights clearly states that the individual shall have the right to his liberty and personal freedom, with the *proviso* that, that right may only be limited or restricted for reasons and conditions previously laid down by law.

It is clear from the provisions of Article 6 of the African Charter on Human and Peoples' Rights that there is a presumption of innocence in favour of the liberty of the individual. Therefore, any infringement on the liberty of the individual must clearly be in conformity with reasons and conditions previously laid down by law, otherwise any such deprivation or limitation of the liberty of the individual cannot be sustained.

27. From the facts of the present application, which facts have not been disputed, the Plaintiff was arrested without a warrant of arrest. The reason for the arrest of the Plaintiff has not been communicated to him. He has been detained since his arrest without any criminal charges being levelled against him.

    He has not been arraigned before any Court of competent jurisdiction in order to ascertain his guilt or innocence. This is clearly contrary to the provisions of Articles 2 and 6 of the African Charter on Human and Peoples' Rights which dictate that every individual, regardless of race, ethnic group, colour, sex, religion, political opinion or other like distinction shall have the right to liberty and to the security of his person in the absence of any reasons and conditions previously laid down by law.

28. The Defendant refused to appear to defend this claim. Since the Defendant has failed to establish that the arrest and detention of the Plaintiff was in accord with the provisions of any previously laid down law, the Plaintiff is entitled to the restoration of his personal liberty and the security of his person.

ISSUE 3: WHETHER THE PLAINTIFF IS ENTITLED TO MONETARY COMPENSATION IN THE SUM OF US$ 5,000,000.00 (FIVE MILLION US DOLLARS)

29. Compensation that is given to a party that has been wronged in a legal action is referred to as damages.

    Generally speaking, there are three kinds of damages: special damages, general damages, and punitive damages. Special damages are the enumerable or quantifiable monetary costs or losses suffered

by the Plaintiff For example, medical costs, repair or replacement of damaged property, lost wages, lost earning potential, loss of business, loss of irreplaceable items, loss of support, etc. Special damages have to be specifically pleaded and proved in order for them to be awarded. This is compensation for losses that can easily be quantified and proved. The loss of a Plaintiff's income as a result of an unlawful detention for instance can easily be proved and claimed accordingly as a special damage.

Where the amount claimed for damages is quantified in the claim, the Plaintiff is required to introduce facts to justify it. However, the Plaintiff failed to plead and prove any ground under which the amount ought to be awarded. In the absence of any proven losses which will justify the award of special damages, no special damages will be awarded the Plaintiff.

30. General damages are items of harm or loss suffered, for which only a subjective value may be attached. Examples of this might be pain, physical suffering, emotional trauma or suffering, loss of companionship, loss of consortium, disfigurement, loss of reputation, loss or impairment of mental or physical capacity, loss of enjoyment of life, etc.

31. Generally, punitive damages are not awarded in order to compensate the Plaintiff, but in order to reform or deter the Defendant and similar persons from pursuing a course of action such as that which damaged the Plaintiff. Punitive damages are awarded only in special cases.

32. Having concluded in Issues 1 and 2, above, that the Plaintiff's right to his personal liberty has been abused, the Plaintiff is entitled to some damages for the wrongs that he has suffered. The amount of damages, however, is dependent on the facts of this application and the relevant rules governing the award of damages.

    Learned Counsel for the Plaintiff prayed this honourable Court to award the sum of $5,000,000.00 (Five Million US Dollars) as compensation to the Plaintiff for his unlawful arrest and detention. Counsel stated that the essence of this Court awarding such a substantial

amount is to deter other Member States of the Community from engaging in violations of the human rights of Community citizens contrary to their obligations under domestic and international law.

Counsel urged this Court to award some punitive damages in favour of the Plaintiff in order to deter governments of Member States from infringing on the rights of Community citizens with impunity. However, as stated earlier, punitive damages are awarded only in limited circumstances as it is not awarded to compensate the Plaintiff but to deter the Defendant and others from very reprehensible behaviour.

33. Although this Court is not bound by the precedents of other international Courts, it can draw some useful lessons from their judgments, especially when the issues involved are similar: in other words, such decisions can be of persuasive value to this Court.

34. The European Court of Human Rights has awarded damages to successful Plaintiffs whose human rights were violated by various governments of the European Union. In **AHMED SELMOUNI V. STATE OF FRANCE [2005] CHR 237**, the European Court of Human Rights awarded damages to the Plaintiff who established to the satisfaction of the Court that the treatment meted out to him by the French authorities amounted to torture, inhuman and degrading treatment contrary to the provisions of Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

35. The European Court of Human Rights similarly awarded damages to the Plaintiff in the case of **MIROSLAV CENBAUER V. REPUBLIC OF CROATIA [2005] CHR 429** when the Court held that he had been treated in a way that violated Article 25 of the European Convention on Human Rights.

36. Notwithstanding the fact that the European and the Inter-American Courts have been in existence for long, there is no record available to us that showed that any of them had awarded punitive damages in a human rights cause.

37. In the European Court of Human Rights, Applicants first argued for the award of punitive damages in the case of **SILVER AND OTHERS V. UNITED KINGDOM, 5 E.H.R.R. 347, 61 Eur. Ct. H.R. (ser. A)**. This case was referred to the Court in March 1981 by the European Commission of Human Rights. The case originated in seven applications against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on various dates between 1972 and 1975.

    The Applicants complained that the stopping by the prison authorities of a number of letters written by or addressed to them constituted a violation of Articles 8 and 13 of the European Convention of Human Rights and asked for general damages for violation of their rights. In addition, three of the Applicants claimed punitive damages against the government of the United Kingdom. Among the issues for determination by the Court was whether the acts complained of by the Applicants amounted to a violation of their rights under Articles 8 and 13 and whether the Applicants were entitled to the damages sought, including that of the punitive damages.

    By judgment of 25th March, 1983, the Court held that the stopping by the prison authorities of a number of letters written by or addressed to the Applicants had given rise to violations of Articles 8 and 13 of the Convention. The Court, however, denied the request for punitive damages, without discussing the merits or otherwise in the claim. The attitude of the Court in the case cited above clearly indicated that the Court was not in favour of awarding punitive damages in a human rights cause such as the one that was before them.

38. In **ANUFRIJEVA AND ANOTHER *V.* SOUTHWARK LONDON BOROUSH COUNCIL: R (MAMBAKASA) *V.* SECRETARY OF STATE FOR THE HOME OFFICE; R(N) *V.* SECRETARY OF STATE FOR THE HOME OFFICE [2004] QB 1124** it was held that:

    "Where an infringement of an individual's human rights has occurred, the concern will usually be to

bring the infringement to an end and any question of compensation will be of secondary, if any, importance. "

This point was emphasized in **R (GREENFIELD) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2005] UKHL, 14,** where Lord Bingham noted that the focus of the Convention is on the protection of human rights and not the award of compensation.

39. Thus it is clear that the object of human rights instruments is the termination of human rights abuses and in cases where the abuse has already taken place, restoration of the rights in question. Compensation is awarded in order to ensure **"just satisfaction"** and no more. It is not the object of human rights instruments, including the African Charter on Human and Peoples' Rights on which this application is premised to award punitive damages against offenders of the instruments. This by no means deprives a successful human rights victim from claiming monetary compensation in appropriate cases, particularly where special damages are pleaded and proven at the trial.

40. With regard to general damages, the peculiar circumstances of this case would be taken into account. Plaintiff was arrested on the 11th day of July, 2006 and has since been detained. He has not been charged with any criminal offence and has not been put to trial before any Court of competent jurisdiction. He has not even been told of the reason for his arrest. He has been held incommunicado. Plaintiff is a journalist who was working and living a normal life before he was arrested and detained. The Court considers an award of compensation to be justified in these circumstances.

41. DECISION OF THE COURT

The Court has found that the Applicant was arrested on 11th July, 2006 by the Police Force of The Gambia and has since been detained incommunicado, and without being charged. He has not been told the reason for his arrest, let alone the fact that it was in accord with a previously laid down law. The Court holds that these acts clearly violates the provisions of Articles 2, 6 and 7(1) of the African Charter on Human and Peoples' Rights. Furthermore, in

view of the fact that these violations of Applicant's human rights were caused by the Defendant, which refused to appear in Court, it entitles the Applicant to damages. And the Court considers that this violation should be terminated and the dignity of the Applicant's person is to be restored.

42. COSTS

The Plaintiff is adjudged to be entitled to the costs of this application to be borne by the Defendant, as will be assessed, under and by virtue of Article 66 of the Court's Rules of Procedure.

43. REASONS

For these reasons, the Community Court of Justice, sitting in public after hearing the Applicant, in the absence of the Defendant who refused to appear, in first and last resort, considering Article 4(g) of the Revised Treaty, as well as Articles 2, 6 and 7(1) of the African Charter on Human and Peoples' Rights, and also the Supplementary Protocol of the Court and the Court's Rules of Procedure, declares this application to be admissible in human rights and the Court enters judgment for the Plaintiff against the Defendant, who is liable for this violation.

44. ORDERS

Consequently, the Court orders:

(i) that the Republic of The Gambia releases Chief Ebrimah Manneh, Plaintiff herein from unlawful detention without any further delay upon being served with a copy of this judgment;

(ii) that the human rights of the Plaintiff be restored, especially his freedom of movement;

(iii) the Republic of The Gambia pay the Plaintiff the sum of one hundred thousand United States Dollars (US $100,000.00) as damages;

(iv) the Defendant to pay the costs of this action to be assessed.

DONE IN ABUJA THIS 5TH DAY OF JUNE, 2008

HON. JUSTICE ANTHONY A. BENIN - PRESIDING

HON. JUSTICE AWA NANA DABOYA - MEMBER

HON. JUSTICE TALL EL-MANSOUR - MEMBER

MR. TONY ANENE-MAIDOH - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 16TH DAY OF JUNE, 2008

ADVISORY OPINION No. 001/08
CASE ECW/CCJ/ADV.OPN/ 01/ 08

REQUEST FOR ADVISORY OPINION SOUGHT BY THE PRESIDENT OF ECOWAS COMMISSION ON RENEWAL OF THE TENURE OF DIRECTOR GENERAL AND DEPUTY DIRECTOR GENERAL OF GIABA

COMPOSITION OF THE COURT

1. **HON. JUSTICE AMINATA MALLE-SANOGO -** PRESIDING
2. **HON. JUSTICE ANTHONY BENIN -** MEMBER
3. **HON. JUSTICE BARTHELEMY TOE -** MEMBER
4. **HON. JUSTICE AWA NANA DABOYA -** MEMBER
5. **HON. JUSTICE SOUMANA DIRAROU SIDIBE -** MEMBER

ASSISTED BY:
TONY ANENE-MAIDOH - CHIEF REGISTRAR

ADVISORY OPINION OF 16TH JUNE, 2008

Renewal of contract – non-retroactivity

SUMMARY OF FACTS

In compliance with the provisions of Article 9 paragraphs 1(a) and (b) and Article 11 of Supplementary Protocol A/SP.1/01/05 of 19 January 2005, the President of the ECOWAS Commission sought for an advisory opinion from Community Court of Justice, ECOWAS.

This request arose from divergent views expressed by delegates during the 60th Ordinary Session of the Council of Ministers concerning the renewal of the tenure of the Director General and Deputy Director General of GIABA.

ISSUES FOR DETERMINATION

1. *Is the new Article 18 paragraph 3 (f) of Supplementary Protocol A/SP1/06/06 of 14th June 2006, which limits the tenure of statutory appointees of the other Community institutions to a single non-renewable term of four years applicable to the Director General and Deputy Director General of GIABA?*

2. *In the absence of a reference relating to the renewal of their tenure, can Director General and Deputy Director General of GIABA rely on Article 18 paragraph 4(a) of the Revised Treaty which provides for the appointment of Deputy Executive Secretaries and other Statutory Appointees?*

OPINION OF THE COURT

The old Article 18 paragraph 4 (a) of the Revised Treaty has been abolished and has been replaced by a new Article 18 paragraph 3 (f) of Supplementary Protocol A/SP.1/06/06 of 14th June, 2006, which rules

out every possibility of renewal of the tenure of statutory appointees of ECOWAS.

The new law which had entered into force had immediate effect; it did not contain transitional provisions preserving the option of a renewal of the tenure of ECOWAS statutory appointees already at post. Therefore, the tenure of the Director General and Deputy Director General of GIABA are not renewable.

At its public sitting of 16th June, 2008,

Gave the following Advisory Opinion on the question set out above:

Having regard to the 24th July, 1993 Revised Treaty of the Economic Community of West African States;

Having regard to the 6th July, 1991 Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS;

Having regard to the 19th January, 2005 Supplementary Protocol A/SP. 1/01/05 on the Community Court of Justice, ECOWAS;

Having regard to the 28th August, 2002 Rules of Procedure of the Community Court of Justice, ECOWAS;

Having regard to the 14th June, 2006 Supplementary Protocol A/SP 1/06/06 amending the Revised Treaty;

Having regard to the Letter ECW/INST/LEG/051/RL/my dated 20th May, 2008 from the President of ECOWAS COMMISSION seeking legal advisory opinion;

THE COURT

1. By Letter ECW/INST/LEG/051/RL/my dated 20th May, 2008, received at the Registry of the Court on 30th May, 2008 under **N°ECW/CCJ/ADV.OPN/01/08,** the President of ECOWAS Commission, pursuant to the provisions of Article 9 paragraph 1 (a) and (b) and new Article 11 of Supplementary Protocol A/SP.1/01/05 of 19th January, 2005, filed a request for a legal opinion of the Community Court of Justice, ECOWAS, in the following terms:

2. "Dear Madam,

   At the 60th Ordinary Session, the Council of Ministers could not reach a consensus on the recommendation to the Authority of Heads

of State and Government on the decision to be taken relating to the allocation of the positions of Director General and Deputy Director General of the Inter-Governmental Action Group Against Money Laundering (GIABA) at the end of the terms of office of the statutory appointees occupying the positions.

The differing opinions expressed at the Council's Plenary were either in favour of renewing the current terms, or allocating the positions to other Member States whose nationals are not occupying the positions.

In view of providing appropriate advice to the Heads of State and Government, should they decide to base their decision on a legal foundation, I feel it necessary to solicit a legal opinion from your high jurisdiction.

My request is in line with the provisions of Article 11 of the new Supplementary Protocols A/SP.1/01/05 of 19th January 2005 on advisory opinions (Article 10 paragraphs (1) and (2) of Protocol A/P.1/7/91 of 6th July 1991) which states:

> ***"1. The Court may, at the request of the Authority, Council, one or more Member States, or the Executive Secretary, and any other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty.***
>
> ***2. Requests for advisory opinion as contained in paragraph 1 of this Article shall be made in writing and shall contain a statement of the questions upon which advisory opinion is required. They must be accompanied by all relevant documents likely to throw light upon the question."***

Furthermore, I am soliciting for legal opinion in conformity with Article 9 paragraph 1 (a) and (b) of the new Supplementary Protocol A/SP1/01/05 of 19th January, 2005 on the competence of the Court which says:

"The Court has competence to adjudicate on any dispute relating to the following:

a. the interpretation and application of the Treaty, Conventions and Protocols of the Community;

b. the interpretation and application of the regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS."

The 34th Session of the Authority of Heads of State and Government will take place in Abuja on 23rd June 2008.

The requirement is to transmit to the Heads of State and Government the documents of their session fifteen (15) days before the session. Moreover, in accordance with the directive of the 33rd Session of the Authority, I am forced to request you, Madam President, to fast track the process in conformity with Chapter iv of the Rules of Procedure of the Community Court of Justice approved by Regulation C/REG.4/8/02 of 28th August 2002. I will be most grateful to receive the Court's opinion by 5th June 2008.

Please accept Madam President, the assurances of my highest consideration."

3. In a document annexed to the request of the President of the Commission, it is indicated that at the Sixtieth Ordinary Session of the Council of Ministers, held at Abuja on 17th and 18th May, 2008, favourable opinions were expressed towards renewing the term of office of **Dr. Shehu Abdulahi Yibaikwal,** Director General and that of **Dr. (Mrs.) Elizabeth Ndeye Diaw,** Deputy Director. It was vigorously stressed that their proven competence and significant achievements had accorded GIABA its worldwide recognition, on one hand, and that on the other hand, their appointment was made before the Supplementary Protocol A/SP1/06/06 of 14th June, 2006.

4. The same document indicates that other points of view opposing the renewal of the tenure of the Director General and Deputy Director General were argued in support of a strict adherence to the texts in force.

AS TO FORMALITY

5. In its new Article 11, the 6th July, 1991 Protocol A/P1/7/91 on the Court provides that:

 > ***"The Court may, at the request of the Authority, Council, one or more Member States, or the Executive Secretary, and any other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty."***

6. Even though the request was addressed to the President of the Court, whereas it should have been addressed to the Chief Registrar, there is no doubt as to the import of the content, which tends to seek an Advisory Opinion from the Court.

7. Besides, a careful study of the documents attached to the request enables one to understand that the appellations **Director General** and **Administrative Secretary,** on one hand, and **Deputy Director General** and **Deputy Administrative Secretary,** on the other hand, do apply respectively to one and the same person in GIABA.

 Considering the entire documents filed, the instant request appears to be in conformity with the prescriptions of the new Article 11 of the Supplementary Protocol A/SP.1/01/05 of 19th January, 2005 on the Court of Justice of ECOWAS. Indeed, the request was filed by an Authority (or Institution) having the required qualification to do so, namely the President of ECOWAS Commission (ex-Executive Secretary of ECOWAS) ; the request was made in writing; it contains the precise statement (indication) of the questions upon which the advisory opinion was required; it is accompanied by relevant documents likely to throw light upon the question, notably the Supplementary Protocol A/SP.1/06/06 of 14th June, 2006 amending the Revised Treaty of ECOWAS, Regulation C/REG.1/

05/06 of 15th May, 2006 appointing the Administrative Secretary of GIABA, and Letter No. ECW/01-00025-E/10-03/cka dated 10th March, 2006 appointing Dr. Shehu Abdullahi Yibaikwal to the position of Administrative Secretary of GIABA.

8. Having fulfilled all the conditions prescribed by Protocol A/P.1/7/91 of 6th July, 1991, Supplementary Protocol A/SP.1/01/05 of 19th January, 2005, and the Rules of Procedure of the Court, the request for advisory opinion is thus admissible.

AS TO MERITS

9. The Court is requested to adjudge and declare:

- Whether the provisions of new Article 18 paragraph 3 (f) of Supplementary Protocol A/SP 1/06/06 of 14th June, 2006, according to which ***"the statutory appointees of the other Community institutions shall be appointed for a single four-year term of office"***, are applicable to the Director General and Deputy Director General of GIABA;

- Whether, notwithstanding the absence in Regulation C/REG.21/01/05 of 18th January, 2005 appointing the Administrative Secretary and Deputy Administrative Secretary of GIABA, in Regulation C/REG. 1/05/06 of 15th May, 2006 appointing the Administrative Secretary of GIABA, and in Letter ECW/PER/01-00025-E/10-03cka of 10th March, 2006, of any indication concerning renewal of their terms of office, the Director General and Deputy Director of GIABA may rely on the provisions of Article 18 paragraph 4 (a) of the Revised Treaty, which provides that ***"the Deputy Executive Secretaries and other Statutory Appointees shall be appointed ... for a period of 4 years renewable only once for a further 4-year term."***

I. As regards the question of whether the provisions of new Article 18(3) (f) of Supplementary Protocol A/SP1/06/06 of 14 June 2006 are applicable or not to the current Director General and Deputy Director General.

10. The provisions in question are conceived and set out in the following terms: "the statutory appointees of the other Community institutions shall be appointed for a single four-year term of office." It must be noted that this text was made as an amendment to the old Article 18 of the Revised Treaty of the Community, which provided that

    "the Deputy Executive Secretaries and other Statutory Appointees shall be appointed... for a period of 4 years renewable only once for a further 4-year term"

11. The matter brought before the Court for legal opinion has to do with application of the law in relation to time. In this instance, we are dealing with the principle of non-retroaction of the new law, which, as clearly and concisely enunciated in Article 2 of the French Civil Code states, among other references, that ***"The law makes provision for the future only; it has no retrospective effect."*** In reality, this principle is somewhat complex, which has led to contemporary doctrine proposing three solutions thereof, one of which is on principle, the others being on exceptional grounds.

A. The principal solution: immediate effect of the new law

12. The Revised Treaty of ECOWAS fixed the duration of the term of office of the Statutory Appointees other than the Executive Secretary at 4 years renewable only once for the same duration (four years). The Supplementary Protocol A/SP1/06/06 of 14th June, 2006 retained the same four-year period for the tenure of all the Statutory Appointees of ECOWAS, eliminating the possibility of a renewal. What fate therefore awaits the unfolding legal scenario?

13. According to Professors Pierre Voirin and Gilles Goubeaux, "The law does not go into the past, but it governs the future as from the time it enters into force ...A new law immediately affects the prevailing circumstances but does not modify the consequences such circumstances may already have produced.'" (*cf.* **Pierre Voirin and Gilles Goubeaux: Civil Law, Vol. 1, 31st Edition - L. G. D. J.)**

14. In applying to the present case the combined rules of immediate effect and non-retrospective effect of the above-mentioned new law, the following solutions must be upheld:

    a. Supplementary Protocol A/SP 1/06/06 of 14 June 2006 has actually entered into force and continues to have effect as from the date it entered into force. However, the effect of this new law is not to suspend, modify or abolish the terms of office of the Director General and Deputy Director General of GIABA under Article 18 of the Revised Treaty, in its original draft; the said terms of office have to continue to run till the normal end of the tenure, as fixed by the Revised Treaty. Even if the old Article 18 of the Revised Treaty had prescribed a longer (e.g. six years) or shorter (e.g. three years) tenure with respect to that which was retained by the new Article 18 of the 14 June 2006 Supplementary Protocol (four years), one cannot rely on the provisions of this new law to bring to four years (either by extension or reduction as the case may be) the tenure which process had already begun to run.

    b. Statutory Appointees of all ECOWAS Institutions appointed before the entry into force of the Supplementary Protocol A/SP 1/06/06 of 14 June 2006, who had served their first four-year term and obtained a renewal of their tenure for the same period of time, i.e. for four years, in accordance with the old Article 18 of the Revised Treaty, have to continue exercising their tenure till the end of the second term without any interference of any sort from the terms of renewal enacted by the new Article 18 of the Supplementary Protocol. The reason being that the tenure renewal effected for them, which is **"an already generated consequence"** of the legal condition brought forth and implemented before the advent of the new law abolishing the option (or possibility) of renewal, constitutes an **"acquired right"** which the new law has no power to wipe out with retrospective effect, but such is not the case in point.

    c. All statutory appointees of ECOWAS institutions appointed under the old Article 18 of the Revised Treaty for a period of four years renewable once for the same period of four years whose initial term had not yet ended on the date of entry into force of

Supplementary Protocol A/SP 1/06/06 of 14th June, 2006, cannot have **a reserved right** for the renewal of their tenure, which implementation would be projected or merely capable of being projected into the future, more precisely, on the date of expiration of their currently running term of office.

Indeed, not only had the essential condition for renewing their term of office (i.e. the expiration of the first term of four years to which they had been appointed) been attained upon the entry into force of the new law eliminating the possibility of renewal, but even if the said condition had been attained as at the considered date, the renewal would neither be **automatic** (or as of right), **nor an obligation** upon the appointing Authority. Being **optional** and **at the discretion of** the appointing Authority, the renewal of a tenure is equally **hypothetical,** that is to say, uncertain and indeterminate for the aspirant. Thus described, the renewal of a term of office cannot constitute, for the claimant, an acquired right which he may claim at the end of his term of office, but rather, such renewal of tenure falls into the category of **"mere contingencies."**

15. The new Article 18 paragraph 3 (f) which, contrary to the old Article 18 paragraph 4 (a), no more permits renewal of the tenure of statutory appointees, is, in accordance with the will of the signatories to the Supplementary Protocol A/SP1/06/06 of 14th June, 2006, **of immediate application** as much for the Member States as for ECOWAS, since the said Protocol in its Article 4 provides,

"1) The present Supplementary Protocol shall enter into force provisionally upon signature by the Heads of State and Government. Consequently, signatory ECOWAS Member States, undertake to begin to implement its provisions. ...

3) The present Supplementary Protocol shall be annexed to the Revised Treaty of which it shall form an integral part."

As regards Article 6 of the said Supplementary Protocol, it provides,

"Notwithstanding the provisions of new Article 9

above, all Community Conventions, Protocols, Decisions, Regulations and Resolutions of the Community made since 1975 and which are still in force shall remain valid and in force, except where they are incompatible with the present Supplementary Protocol.”

16. Consequently, in accordance with the said Article 6 above, the indication

    “... renewable only once for a further 4-year term”,

    as contained in the old provision, is abolished because it is incompatible with the new provision.

B. The exceptional solutions

One can notably cite two: <u>retroaction of the new law</u> and <u>survival of the old law</u>.

a) Retroaction of the new law

17. Retroaction is a source of legal insecurity, which explains why a judge is debarred from applying to a dispute brought before him, a rule of law which existed or entered into force after the dispute arose; unless the new law embodies transitional provisions or where the lawmaker expressly declares this new law as having retrospective effect. Even if as a general rule, the retrospective effect of a new law emanates from an express statement it contained in itself, it may happen that notwithstanding the silence of certain laws on the issue, such laws may automatically be considered having retrospective effect. One can cite, in this context, lenient laws (applied with retrospective effect, for humanitarian reasons) and interpretative laws (which do not in effect constitute new laws, and do not have the effect of getting rid of the old laws which they interpret).

b) Survival of the old law

18. To avoid the complexity of one or more legal conditions having to occur within the same period, and to attain a measure of progress which a new law is supposed to achieve with respect to the old law, there is a commonly accepted principle that the new law abolishes the old rule of law. Such an annulment is either tacit (when the new provisions are simply incompatible with the old ones) or express.

19. There is however an area where we freely accept that the old law subsists despite the adoption of the new law. This is in the area of contracts. The survival of the old law is explained by the fact that **"in signing a contract, the parties have already had in view the effects that the contract will generate in the future; it would amount to defeating their forecasts if a new law came to disrupt such effects."** The object is therefore to observe the expression of the will of the parties, in accordance with the principle of law which asserts that **"a contract is the law of the parties"**. But the latter principle is not binding on the legislator, who can always decide upon the application of a new law which may be directed against existing contracts, particularly when the maintenance of the old law stands opposed to public policy or general interest.

20. In the present case, exceptions to the principle of non-retroaction as described may not be applicable. Indeed, here, we are neither concerned with more lenient legislative provisions nor with a contractual issue. And even if we were to be dealing with a contract, there are grounds for one to consider here, that general interest is at stake since in the terms of Article 18 paragraph 3 (f) of the new Supplementary Protocol A/SP1/06/06 of 14 June 2006, **"the statutory appointees of the other Community institutions shall be appointed for a single four-year term of office."**

II. As regards the question of whether, notwithstanding the absence of any indication on the renewal of their terms of office in the instruments appointing them, the Director General and the Deputy Director General of GIABA may rely on the provisions of paragraph 4(a) of Article 18 of the Revised Treaty

21. The Article mentioned above provides that, **"The Deputy Executive Secretaries and other Statutory Appointees shall be appointed ... for a period of 4 years renewable only once for a further 4-year term".** Thus, it is by the instrumentality of a law that the duration of the initial term of office of all the statutory appointees of ECOWAS other than the Executive Secretary was fixed, and it was also by virtue of a law that the possibility of renewing the tenure once for the same period of time, was envisaged. Because it is a general and impersonal measure and as well as public order, this law automatically applies to all staff members classified in the targeted categories. Whereas the expression **"other Statutory Appointees"** refers notably to the Director General and Deputy Director General of GIABA, the latter may rely on the provisions of Article 18 paragraph 4 (a) of the Revised Treaty, notwithstanding the absence of any indication on the renewal of their tenure in the instruments appointing them, as well as in those appointing their predecessors. But on condition that the said provisions are still in force at the time they intend to invoke **"the option of renewal of tenure"**, or at any rate, **"the possibility of such a renewal."** But it happens that Article 18 paragraph 4 (a) of the Revised Treaty has been abolished and replaced by a new Article 18 paragraph 3 (f) of the Supplementary Protocol A/SP1/06/06 of 14th June, 2006, which therefore excludes any possibility of renewing the tenure of the Statutory Appointees of ECOWAS, that is to say, that this new law has entered into force and has immediate effect.

22. Whatever the case may be, the incomplete, verbose and incompatible provisions of a contract or an inferior rule of law such as Regulation C/REG.21/01/05 of 18th January, 2005 appointing the Administrative Secretary and Deputy Administrative Secretary of GIABA, Regulation C/REG. 1/05/06 of 15th May, 2006 appointing the Administrative Secretary of GIABA, and Letter ECW/PER/01-00025-E/10-03cka of 10th March, 2006, cannot stand in the way of the application of a superior law such as the Revised Treaty.

IN CONCLUSION

THE COURT HOLDS THE VIEW THAT:

1. The absence in: Regulation C/REG.21/01/05 of 18 January 2005 appointing Administrative Secretary and Deputy Administrative Secretary of GIABA, Regulation C/REG. 1/05/06 of 15 May 2006 appointing the Administrative Secretary of GIABA, and Letter ECW/PER/01-00025-E/10-03cka of 10 March 2006, of any indication on the renewal of the terms of office of the Director General and Deputy Director General of GIABA, cannot prevent the Director General and Deputy Director General of GIABA from relying on the provisions of Article 18 paragraph 4 (a) of the Revised Treaty, which provides that, "the Deputy Executive Secretaries and other Statutory Appointees shall be appointed... for a period of 4 years renewable only once for a further 4-year term", because the incomplete, verbose and incompatible provisions of a contract or inferior rule of law cannot stand in the way of the application of a superior rule of law, i.e. the Revised Treaty.

2. The Director General and Deputy Director General of GIABA cannot, as at now, rely on the clause prescribing renewal of their terms of office, not because of the absence of any indication of such renewal in the instruments appointing them to the said posts, but because:

   - The old Article 18 paragraph 4 (a) of the Revised Treaty which contained the said clause has been abolished and has been replaced by a new Article 18 paragraph 3 (f) of Supplementary Protocol A/SP. 1/06/06 of 14 June 2006, which rules out every possibility of renewal for the tenure of statutory appointees of ECOWAS;

   - This new law has entered into force;

   - The said new law has immediate effect and does not contain transitional provisions preserving the option of a renewal for tenure of ECOWAS statutory appointees who are already at post.

3. The provisions of new Article 18 paragraph 3 (f) of Supplementary Protocol A/SP 1/06/06 of 14 June 2006, according to which, "The statutory appointees of the other Community institutions shall be appointed for a single four-year term of office" **are applicable** to the Director and Deputy Director General of GIABA, by virtue of the principle of immediate effect of the new law.

Done at Abuja on the 16th day of June 2008

And the Members have appended their signatures as follows:

HON. JUSTICE AMINATA MALLE-SANOGO - PRESIDING

HON. JUSTICE ANTHONY BENIN - MEMBER

HON. JUSTICE BARTHELEMY TOE - MEMBER

HON. JUSTICE AWA NANA DABOYA - MEMBER

HON. JUSTICE SOUMANA DIRAROU SIDIBE - MEMBER

And assisted by: **Tony Anene-Maidoh - Chief Registrar**

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT NIAMEY, NIGER

ON THE 27TH DAY OF OCTOBER, 2008

SUIT N° : ECW/CCJ/APP/08/08
JUDGMENT N° : ECW/CCJ/JUD/06/08

BETWEEN
HADIJATOU MANI KORAOU - *Plaintiff*

V.
THE REPUBLIC OF NIGER - *Defendant*

COMPOSITION OF THE COURT:
HON. JUSTICE AMINATA MALLE-SANOGO - PRESIDING
HON. JUSTICE AWA NANA DABOYA - MEMBER
HON. JUSTICE EL-MANSOUR TALL - MEMBER

ASSISTED BY
ATHANASE ATANNON ESQ. - REGISTRAR

COUNSEL TO THE PARTIES
1. ***SPCA Chaibu-Nanzir, Assisted by Mrs. Helena Duffy and Mr. Ibrahima Kane*** *- for the Plaintiff*
2. ***Mossi Boubacar Esq.*** *- for the Defendant*

JUDGMENT OF 27TH OCTOBER, 2008

Human Rights violation - Slavery – Discrimination - Unlawful detention - Crime against humanity - Non-exhaustion of local remedy – Locus standi - State liability – Competence to examine national law – Award of damages.

SUMMARY OF FACTS

In 1996, Hadidjatou Mani Koraou, was sold as a slave carrying out all sorts of domestic tasks, and as forced concubine to El Hadj Souleymane Naroua. Freed nine (9) years later by the latter, she decided to leave his home, but the master refused. Hadijatou seised the National Court, but the Court decided that she remained the wife of her master.

On the 14th of September, 2007, Hadidjatou came before the Court with an Application against the Republic of Niger for discrimination, slavery and unlawful detention.

The Defendant maintained that the Application was inadmissible for non-exhaustion of local remedies as well as for the termination of the Applicant's slave condition.

LEGAL ISSUES

1. *Is the Application inadmissible due to the non-exhaustion of local remedies?*

2. *Whether the Applicant was held in slavery and whether she was afforded adequate protection by the National Courts.*

DECISION OF THE COURT

The Court rejected the plea of inadmissibility raised on non-exhaustion of local remedies because according to it, such condition does not apply before it and there is no reason to consider this absence as a lacuna that the practice of the Court must address.

The Court acknowledged that the Applicant was a victim of slavery and could not benefit from the protection of the administrative and judicial authorities, which the Government of Niger is supposed to provide her with. The Court granted the Application for reparation by the Applicant and awarded her a lump sum of 10,000,000CFA for damages.

JUDGMENT OF THE COURT

THE COURT OF JUSTICE OF ECOWAS, sitting at Niamey, in the **Republic of Niger, and composed as below:**

1. **Hon. Justice Aminata Malle SANOGO** - PRESIDING
2. **Hon. Justice Awa Daboya NANA** - MEMBER
3. **Hon. Justice El-Mansour TALL** - MEMBER

Assisted by **Athanase ATANNON Esq**. - REGISTRAR

Delivers the following Judgment:

1. The Applicant, Hadijatou Mani Koraou, is a Niger national, and a citizen of the Economic Community of West African States (ECOWAS).

2. The Applicant, present in court, is unemployed and resides at the village of Louhoudou, in the *département* (administrative division) of Konni. Her Counsel is Abdourahaman Chaibou, of SCPA Chaibou-Nanzir (A Professional Partnership of Lawyers), a legal firm registered with the Court of Appeal of Niamey, in the Republic of Niger, and she is assisted by Mrs. Helena Duffy and Mr. Ibrahima Kane of Inter Rights, London.

3. The Defendant, the Republic of Niger, is a Member State of the Economic Community of West African States (ECOWAS).

4. The Defendant is represented by Mossi Boubacar Esq. and Partners, Lawyers registered with the Appeal Court of Niamey, in the Republic of Niger.

5. The Applicant brings a complaint against the Defendant for violating her fundamental human rights, asks the Court to find such violation, and to sanction the Defendant.

6. The Defendant raised a Preliminary Objection of inadmissibility of the Application.

7. The Court decided to join the Preliminary Objection to the merits, in accordance with Article 87 (5) of its Rules of Procedure.

PRESENTATION OF THE FACTS AND PROCEDURE

8. In 1996, aged twelve (12) years by then, the Applicant, Hadijatou Mani Koraou of Bouzou customary background was sold by the head of the Kenouar tribe, to El Hadj Souleymane Naroua of Hausa customary background, aged 46 years, for the sum of Two Hundred and Forty Thousand CFA Francs (CFA F 240,000).

9. This transaction was carried out within the context of 'wahiya', a practice obtaining in the Republic of Niger, which consists of acquiring a young girl, generally under the conditions of servitude, for her to serve both as domestic servant and concubine. A woman slave who is bought under such conditions is called a 'sadaka', or 'the fifth wife', that is to say, a woman outside those legally married (the number of which cannot exceed four (4), in accordance with the recommendations of Islam).

10. The 'sadaka' generally carries out the domestic chores and caters for the 'master'. The latter can, at any time, during the day or night, engage her in sexual relations.

11. One day, while she was working on her master's fields, he came and pounced on her and sexually abused her. This initial, forced sexual act, was imposed on her under the aforesaid condition, at a time that when she was still less 13 years old. The Applicant thus often became a victim of violent acts perpetrated by her master, in cases of presumed or real insubordination.

12. For about nine (9) years, Hadijatou Mani Koraou served in the house of El Hadj Souleymane Naroua, carrying out all sorts of domestic duties and serving as a concubine for him.

    From such relations with her master, four (4) children were born, out of which two (2) survived.

13. On 18th August, 2005, El Hadj Souleymane Naroua issued Hadijatou Mani Koraou with a certificate of emancipation (as a slave). This deed was signed by the beneficiary, the master, and countersigned by the chief of the village, who affixed his seal thereto.

14. Following the said deed of emancipation, the Applicant decided to leave the house of the man, who not too long before then, was her master. The latter refused to let her go, upon the grounds that she was and remained his wife. Nevertheless, upon the pretext of going to visit her sick mother, Hadijatou Mani Koraou finally left the house of El Hadj Souleymane Naroua.

15. On 14th February, 2006, Hadijatou Mani Koraou brought her case before the Konni Civil and Traditional Court, to assert her desire to regain her total freedom and go and live her life elsewhere.

16. As regards the said request, the Konni Civil and Traditional Court, in its Judgment No. 06 of 20th March, 2006, found that **"there had never been a marriage in the proper sense of the word, between the Applicant and El Hadj Souleymane Naroua, because there had never been the payment of any dowry, or any religious celebration of marriage, and that Hadijatou Mani Koraou was free to start her life all over with any person of her own choice."**

17. El Hadj Souleymane Naroua filed an appeal at the Konni High Court, against the Judgment of the Konni Civil and Traditional Court. By Ruling No. 30, delivered on 16th June, 2006, the Konni High Court reversed the contested Judgment.

18. The Applicant filed before the Judicial Chamber of the Supreme Court of Niamey, an appeal for the annulment of the latest decision, by asking for "the application of the law against slavery and slavery-related practices."

19. On 28th December, 2006, the Supreme Court, by Judgment No. 06/06/Court, quashed the Konni High Court Ruling, on grounds of violation of Article 5 (4) of Law 2004 - 50 of 22nd July, 2004 in

regard to the Judicial Set-Up of Niger, without making any declaration on the question concerning Hadijatou Mani Koraou's status as a slave. The matter was adjourned before the same court, differently composed, for re-examination.

20. Before proceedings were brought to a conclusion, Hadijatou Mani Koraou, who had returned to her paternal home, contracted a marriage with one Ladan Rabo.

21. Having learnt of the marriage of the Applicant to Ladan Rabo, El Hadj Souleymane Naroua filed on 11th January, 2007, a case of bigamy against her before the Konni Gendarmerie Squad, who took down a statement of the case and transmitted it to the State Prosecutor at Konni High Court.

22. By Judgment No. 107 of 2nd May, 2007, the criminal division of the Konni High Court sentenced Hadijatou Mani Koraou, her brother Koraou Mani and Ladan Rabo to six (6) months imprisonment without remission and imposed a fine of CFA F 50,000 on each of them, in compliance with Article 290 of the Penal Code of Niger, which punishes the offence of bigamy. In addition, an arrest warrant was issued against them.

23. The same day, Hadijatou Mani Koraou filed appeal against the said judgment. Despite that, on 9th May, 2007, Hadijatou Mani Koraou and her brother Koraou Mani were incarcerated at the Konni Prison House, in compliance with the arrest warrant issued against them.

24. On 17th May, 2007, while Hadijatou Mani Koraou was still in detention, SPCA Chaibu-Nanzir (a Professional Partnership of Lawyers), Hadijatou Mani Koraou's Counsel, filed a case before the State Prosecutor at the Konni High Court, bringing a charge against Souleymane Naroua, for criminal offence of slavery, relying on Article 270 (2) and (3) of the Penal Code of Niger as amended by Law No. 2003 - 025 of 13th June, 2003. The case, which was still pending, was being examined under Number R. P. 22, R.I. 53.

25. Concurrent with these criminal proceedings, the Konni High Court, while adjudicating upon the case which was adjourned after being quashed by the Supreme Court, in Judgment No. 15 of 6 April 2007,

> ***"found in favour of Hadijatou Mani Koraou's divorce action; ...declared that she shall observe a minimum legal period of three (3) months of widowhood before any remarriage."***

26. El Hadj Souleymane Naroua filed an appeal seeking the annulment of the last decision.

27. On 9th July, 2007, while adjudicating on the appeal brought by Hadijatou Mani Koraou against the decision of the criminal division of the Konni High Court, the Criminal Chamber of the Court of Appeal of Niamey **"ordered in a preliminary ruling, the provisional release of the Applicant from prison, together with her brother, ordered the automatic revocation of the arrest warrant issued against Ladan Rabo, and stayed examination of the merits pending the final decision of the divorce judge."**

28. On 14th September, 2007, Hadijatou Mani Koraou seised the Community Court of Justice, ECOWAS, upon the basis of Articles 9 (4) and 10 (d) of the Supplementary Protocol A/SP. 1/01/05 of 19th January, 2005 amending Protocol A/P. 1/7/91 of 6th July, 1991 on the Court, for the purposes of requesting the Court to:

    (a) Charge the Republic of Niger for violation of Articles 1, 2, 3, 5, 6, and 18 (3) of the African Charter on Human and Peoples' Rights;

    (b) Demand that the Authorities of Niger introduce a new legislation which actually protects women against discriminatory customs in issues of marriage and divorce;

    (c) Ask the Authorities of Niger to revise the laws relating to courts and tribunals in such a manner that justice may fully play its role as a guardian of the rights of persons who are victims of the practice of slavery;

(d) Require from the Republic of Niger that it abolishes harmful customs and practices founded upon the idea of inferiority of women;

(e) Grant fair reparation to Hadijatou Mani Koraou, for the harm she had suffered during her 9 years of captivity.

29. The Defendant raised a Preliminary Objection to the effect that;

(a) The Application was inadmissible, for lack of exhaustion of local remedies;

(b) The Application was inadmissible, due to the fact that the case brought before instant Honourable Court was still pending before the domestic courts of Niger.

30. In compliance with Article 87 (5) of its Rules of Procedure, the Court of Justice of ECOWAS joined the Preliminary Objection to the merits, to adjudicate by virtue of one and the same Judgment.

31. At the 24th January, 2008 proceedings, scheduled for the hearing of the Parties, Counsel for the Applicant, citing her state of extreme financial poverty, and the necessity of hearing witnesses residing in Niger (whose transport costs to Abuja seemed to be beyond the financial capacity of the Applicant), requested that the Court's session be transferred to Niamey or any other venue in the Republic of Niger.

32. Counsel for the Defendant averred that "he did not mind if the Court session was held outside the seat of the Court" but did, all the same, draw the Court's attention "to negative media coverage and a possible politicisation of the proceedings," before concluding upon the pointlessness of holding such a session in Niger.

33. By its Preliminary Ruling No. ECW/CCJ/RUL/08/08 of 24th January, 2008, the Court ordered that the court session be held at Niamey in compliance with Article 26 of the 1991 Protocol on the Court.

34. At the hearing of 7th April, 2008, at Niamey, the Parties as well as their Witnesses appeared in court.

CONSIDERATION OF THE PARTIES' PLEAS-IN-LAW

AS TO THE PRELIMINARY OBJECTION

35. The Republic of Niger raised, *in limine litis*, the inadmissibility of the Application on grounds of non-exhaustion of local remedies, on one hand, and on the other hand, upon the grounds that the case brought before the Court of Justice of ECOWAS was still pending before the national courts of Niger.

Regarding Non-Exhaustion of Local Remedies.

36. While acknowledging that the condition of non-exhaustion of local remedies does not form part of the conditions of admissibility of cases of human rights violation brought before the Court of Justice of ECOWAS, the Republic of Niger considered such absence as a lacuna which should be filled by the Court.

37. Besides, Counsel for the Defendant further averred that it is the rule of exhaustion of local remedies, which enables one to assert whether a State sufficiently or insufficiently safeguards human rights on its territory. He furthermore averred that the protection of human rights by international mechanisms is only a subsidiary protection which is available only when a State, on the national plane, has failed to fulfil its duty of ensuring the observance of such rights.

38. Furthermore, by relying on Article 4 (g) of the Revised Treaty of ECOWAS, the Defendant maintained that the Court of Justice of ECOWAS must apply Article 56 of the African Charter on Human and Peoples' Rights, to make up for the silence of the texts governing the operation of the Court, particularly as regards the preliminary exhaustion of local remedies.

39. Even if it is irrefutable that the protection of human rights by international mechanisms is subsidiary in nature, it is no less true

that such subsidiary nature of the protection has undergone, for some time now, a remarkable evolution which translates into a very flexible interpretation of the rule of exhaustion of local remedies. At any rate, this was what the European Court on Human Rights was saying, in its Judgment on the case concerning **De Wilde, Versyp *v.* Belgium**, 18th June, 1971, when it found that: "**in accordance with the evolution of international practice States may well renounce the benefits of the rule of exhaustion of local remedies**"

40. In refraining from making the rule of preliminary exhaustion of local remedies a condition for admissibility of applications filed before the Court, the Community lawmaker of ECOWAS has undoubtedly responded to this call. The renunciation of such a rule is binding on all the Member States of ECOWAS, and the Republic of Niger cannot claim to be an exception in that regard.

41. Moreover, in affirming in Article 4 (g) of the Revised Treaty that ***"recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights"***, the Community lawmaker simply intended to subsume that instrument in the law applicable before the Court of Justice of ECOWAS.

42. The adherence of the Community to the principles of the Charter signifies that in the absence of ECOWAS legal instruments relating to human rights, the Court ensures the protection of the rights spelt out in the Charter, without necessarily proceeding to do so in the same manner as would the African Commission on Human and Peoples' Rights.

43. Indeed, from the interpretation of Article 4 (g) of the Revised Treaty, one cannot deduce that the modalities for the protection and promotion of human rights by the Court must be those provided for by the Charter.

44. A distinction must be made between the setting out of the fundamental principles of the Charter (Part I), and the modalities for implementing such rights (Part II). These modalities comprise the

creation of the Commission (Article 30), its composition (Articles 31 to 41), its functioning (Articles 42 to 45) and the procedure to be followed before it (Articles 46 to 59), whereas the Revised Treaty of ECOWAS on its part, has prescribed other mechanisms to the Court of Justice of ECOWAS, for implementing these same fundamental principles.

45. In the final analysis, there are no grounds for considering the absence of preliminary exhaustion of local remedies as a lacuna which must be filled within the practice of the Community Court of Justice, for the Court cannot impose on individuals more onerous conditions and formalities than those provided for by the Community texts without violating the rights of such individuals.

46. In tracing the origins of the entire pleadings filed before the national courts of Niger, the Defendant averred that on 14th February, 2006, the Applicant brought a divorce case before the Konni Civil and Traditional Court; that the said court decided in favour of his request; that following the appeal filed, the Judgment was reversed; that the reversed decision made upon appeal was quashed by the Supreme Court; that the decision made after the quashing, with an adjournment, was in favour of the Applicant; that a second appeal was made by the Defendant against the last decision, and that the Supreme Court has not yet brought its proceedings on the matter to a close.

47. The Defendant further averred that on 11th January, 2007, a Criminal proceeding was initiated against the Applicant; that an appeal was filed against the criminal sentence made against the Applicant and her co-accused, delivered on 2nd May, 2007; that the Court of Appeal Niamey, after ordering the release from prison of the Applicant and her brother, adjourned proceedings, pending the determination of the civil proceedings.

48. In this wise, is there any basis for Hadijatou Mani Koraou, who has already seised the domestic courts, to bring her case before the Court of Justice of ECOWAS, whereas the said national courts have not exhausted their proceedings on the case?

49. In the terms of the provisions of Article 10 (d) of the Supplementary Protocol A/SP. 1/01/05 relating to the Community Court of Justice, ECOWAS:

> **"Access to the Court is open to ... individuals on application for relief for violation of their human rights... the submission of application for which shall i) not be anonymous; nor ii) be made whilst the same matter has been instituted before another International Court for adjudication"**

It therefore follows that the rule of exhaustion of local remedies is not applicable before the Court.

50. These provisions are essentially intended to prevent individuals from abusing the possibilities offered them for seeking redress in the courts, and to avoid the same case being handled by several bodies at the same time. ***(See)*** Cohen Jonathan, European Convention of the Safeguard of Human Rights and Fundamental Freedoms, Economica, Paris, 1989, page 143, where it is rightly stated that this condition was expressly posed "to exclude the accumulation of international proceedings"

51. At the source of this condition, provided for in all the international mechanisms of examining and settling cases, can be found the idea of avoiding a situation whereby one and the same case is brought before several international bodies (Cf. Article 35 (2) (b) of the European Convention of the Safeguard of Human Rights and Fundamental Freedoms, Article 56 (7) of the African Charter on Human and Peoples' Rights, Article 46 (c) of the American Convention of Human Rights, Article 5 (2) (a) of the First Optional Protocol relating to the International Pact on Civil and Political Rights).

52. But the interpretation of this rule has revealed, as Stefan Trechsel points out, in Die europäische Menschenrechts-konvention ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte, Stämpfli, Bern, (1974) p. 125, that it

> ***"is not limited to the*** *'non bis in idem'*, ***but equally***

> ***covers the situation of pendency of cases, since it is sufficient for a case to have been brought, in substance, before another international court. It is therefore a question of avoiding the parallelism of various international proceedings, on one hand, and on the other hand, to avoid conflict between various international courts; indeed, there is no order of hierarchy between such international courts and it follows that none among them should be competent to revise, indeed, the decision of Another international Court."***

53. Consequently, by providing for Article 10 (d) (ii) of the Supplementary Protocol in the manner it did, the Community lawmaker of ECOWAS intended to remain within the strict confines of what international practice has deemed appropriate to abide by. It is therefore not the duty of the instant Court to add to the Supplementary Protocol conditions which have not been provided for by the texts. Ultimately, and for all these reasons, the Objection raised by the Defendant cannot thrive.

AS TO THE APPLICANT'S STATUS IN THE ACTION BROUGHT

54. In his last brief, and in his Reply of 9th April, 2008, the Defendant raised the issue of the Applicant's status in the action brought. He put forward that, being an emancipated *'wahiya'* at the time of her Application, Hadijatou Mani Koraou was therefore not a slave anymore; that, on that score, she had come out of her condition of servitude; that she could have instituted proceedings before her emancipation; and that since she did not do so, her action had become ineffective and must be declared inadmissible on grounds of being unqualified to file the suit.

55. Such Preliminary Objection lately raised, must be declared inadmissible. Moreover, in regard to the provisions of Articles 9(4) and 10 (d) respectively, of its Supplementary Protocol,

> ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State", and "Access to the Court is open to ... individuals on application for relief for violation of their human rights"***

56. It must be emphasised that human rights, in being inherent to the human person, are "inalienable, irrevocable and sacred", and cannot therefore suffer any limitation whatsoever.

AS TO THE PLEAS IN THE MERITS

57. The Applicant filed several pleas alleging violation of her rights. In the first place, she pleaded that the Defendant did not take the necessary measures to guarantee its citizens the rights and freedoms proclaimed in the African Charter on Human and Peoples' Rights, thus violating Article 1 of the said charter. She contended that this violation derives from the other violations contained in the other pleas filed before the instant Honourable Court, in as much as Article 1 of the said African Charter makes it binding upon the States to respect such rights; and that in the terms of the cited article,

> ***" The Member States ... shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".***

58. The Applicant stated further that in accordance with the legislation of Niger, ***"The Republic of Niger shall be a constitutional State; it shall ensure equality of the law before all, without distinction of sex, social, racial, ethnic or religious origin ..."*** (Article 11 of 1996 Constitution); "None shall be subjected to torture, abuses, or cruel, inhuman or degrading treatment" (Article 12 of 1996 Constitution); ***"Any individual ... who shall be guilty of acts of torture, ... or of cruel, inhuman or degrading treatment ... shall be punished in accordance with the law"*** (Article 14 of 1989 and 1992 Constitutions).

59. The Applicant pointed out that despite the existence of the aforementioned legislation, she faced sexually and socially based discrimination because she was held in slavery for almost 9 years; that after being emancipated, she was unable to fully enjoy her freedom despite her calls for justice, that she was put into detention, and that all these incidents contributed to the loss of her fundamental rights. She therefore asked that the Defendant be charged for violation of the various Articles cited in the African Charter on Human and Peoples' Rights, and demanded the adoption of new laws which are more protective of the rights of women against discriminatory customs.

60. As regards the Applicant's first plea-in-law, the Court finds that it does not have the mandate to examine the laws of Member States of the Community in abstrato, but rather, to ensure the protection of the rights of individuals whenever such individuals are victims of the violation of those rights which are recognised as theirs, and the Court does so by examining concrete cases brought before it.

The Court indicates that other mechanisms are employed in the consideration of cases, such as the checking of the situation in each country, the submission of periodic reports as provided for by certain international instruments, including Article 62 of the African Charter on Human and Peoples' Rights, which provides:

> ***"Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter".***

61. In this regard, the Court finds that such considerations have already taken place, notably before the Human Rights Committee and the Children's Rights Committee of the United Nations, particularly in regard to the Republic of Niger, followed by Recommendations.

Consequently, the Court declares that it cannot overstep the bounds of its core jurisdiction, which is that of entertaining concrete cases of human rights violation and sanctioning such where necessary.

AS TO DISCRIMINATION

62. The Applicant maintained that she was a victim of sexually and socially based discrimination, in violation of Articles 2 and 18 (3) of the African Charter on Human and Peoples' Rights; she further stated that she did not benefit from ***equal protection of the law and equality before the law*** as provided for by Article 3 of the said charter. She made it clear that the system of 'sadaka' or the act of selling a woman to a man to serve as a concubine for him, is a practice exclusively affecting women and thus constitutes a form of discrimination based on sex; that, moreover, the fact that she was not in a position to freely give her consent to marry or to divorce do bear ample testimony of discrimination in relation to her social origin.

63. The following statement comes from the testimony of Djoulde Laya, a sociologist, and it was cited by the Defendant during the court session of 8 April 2008 at Niamey:

> ***"In the case of the 'wahiya' woman, one does not say that she is emancipated, since she is a slave. Therefore, she is someone else's property; ... the 'wahiya' system or 'fifth wife' is a system which was put in place by the advocates and practitioners of slavery; ... I consider that women are not emancipated from their 'wahiya' condition; ... it is a system which permits the movement of a woman from one status to another, meaning that the slavery condition continues, in any case, because women still have to be captured, war must be fought, one has to buy".***

64. After a careful consideration of all the pleas-in-law of the Applicant, drawn from discrimination, equality before the law, and equal protection by the law, the Court finds that, as pointed out by Frederic Sudre, on page 259 of his work Le Droit International et Europeen des Droits de l'Homme (2005 edition), **"The principle of non-discrimination is a principle drawn from the general postulate**

according to which all human beings are born free and equal in dignity and rights" (cf. Article 1 of the Universal Declaration of Human Rights). It is this principle which helps to define the domain of ***equality***.

65. According to the texts cited by the Applicant, every form of discrimination based on race, ethnic group, sex, religion, and social origin, is forbidden, and constitutes a human rights violation recognized by the various Constitutions of the Republic of Niger (1989, 1992 and 1996) and by the provisions of the Penal Code of Niger, which enshrines the same protective principles.

66. In the instant case, to determine if the Applicant has been discriminated against or not, it is worthwhile to take a close look at the practice of 'wahiya' or 'sadaka' as described by the Witnesses, in order to know whether, on one hand, all women have the same rights in respect of marriage, and whether, on the other hand, men and women have the same capacities of enjoying the rights and freedoms proclaimed in the international instruments ratified by the Defendant.

    Indeed, Halilou Danda, a farmer and livestock breeder, Witness called by the Applicant, declared during the hearing of Monday, 7 April 2008 that:

    > ***"The prefet (district administrative officer) summoned us to his office to tell us that he had received a paper from Niamey which says that we should hand over El Hadj Souleymane Naroua's wife back to him. The prefet asked him: Would you like to remarry her, since you have emancipated her? If so, bring 'Kola' and let us perform the marriage ceremony. El Hadj Souleymane Naroua said - No! I cannot marry her, since it is God who has already given her to me."***

67. Besides, Almou Wangara, farmer and Witness called by the Applicant, declared that:

> ***"When the former master of Hadijatou was asked to bring the dowry, he said that it was God who gave him the woman and so how could we be asking him for money as payment for dowry? The prefet told the former master: - Since you have already emancipated this woman, what is appropriate to be done is to provide the dowry; we are going to implore her to accept the marriage. The former master got up and said - No! How! Am I to buy a woman and be asked to pay dowry on her? ... After this reaction, the prefet said - Listen, as for me, I can do nothing - you must go away".***

68. The Court therefore holds that when summoned to the office of the administrative authority, namely, to the prefet's office, the Applicant's former master not only refused to accomplish the marriage formalities with her but equally did not grant her the freedom due her, regardless of the certificate of emancipation.

69. In the Republic of Niger, the celebration of marriage is recognised by the payment of dowry and the holding of a religious ceremony.

    Now, in the instant case, El Hadj Souleymane Naroua fulfilled neither the customary nor civil requirements in regard to the Applicant.

70. Moreover, the Court holds that the Applicant was discriminated against vis-a-vis the wives in the family of her former master.

71. The Court finds that even if the complaint drawn from discrimination - to which the Applicant lays claim for the first time before the Court - is founded, that violation is not attributable to the Republic of Niger but rather to El Hadj Souleymane Naroua, who is not a party to the instant proceedings.

Consequently, the Court finds this plea-in-law inoperative.

WAS THE APPLICANT HELD IN SLAVERY?

72. The Applicant complains having been held in slavery, in violation of Article 5 of the African Charter on Human and Peoples' Rights and other international instruments relating to human rights enacting absolute prohibition of slavery.

    She declared being born of parents who were themselves of the status of slaves and that she had always been treated as a slave under the roof of her former master, El Hadj Souleymane Naroua.

73. On its part, the Defendant refuted the grounds of slavery and maintained that the Applicant was certainly under conditions of servitude but was the wife of El Hadj Souleymane Naroua, with whom she had more or less lived happily as in the lives of all couples.

74. In the terms of Article 1 of the Geneva Convention 1926, slavery is

    > ***" The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" and slave trade was defined to include "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."***

75. Thus defined, slavery is considered a grave violation of human dignity, and it is strictly prohibited by all the international instruments relating to human rights. Other instruments such as the European Convention on Human Rights and Fundamental Freedoms (Article 4 (1)), the American Convention on Human

Rights (Article 6), and the International Pact Relating to Civil and Political Rights (Article 8 (l)-(2)) as ratified by the Republic of Niger) consider the prohibition of slavery as an inviolable right, that is to say, an unbreakable or a right which cannot be transgressed.

Similarly, the Penal Code of Niger as amended by Law No. 2003-025 of 13th June, 2003, in its Article 270 (1) to (5), defines and stamps out the crime and offence of slavery.

76. From the foregoing, it is incontrovertible that Hadijatou Mani Koraou was sold off from El Hadji Ghousmane to El Hadj Souleyman Naroua, at the age of twelve (12), at a monetary price of Two Hundred and Forty Thousand CFA Francs (CFA F 240,000). She was led to the home of her buyer, went through almost a decade of numerous psychological pressures characterized by subjugation, sexual exploitation, forced labour in the home and on the farm, physical violence, insults, and a permanent constraint on her movements exercised by her buyer, who, on 18th August, 2005, issued her with a document entitled "certificate of emancipation (from slavery)", stating that from the date of signature of the said deed, "she (the Applicant) was free and was nobody's slave."

77. The foregoing do portray the Applicant's condition of servitude and they bring out all the indicators of the definition of slavery as contained in Article 1 of the Geneva Convention 1926, and as interpreted by the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY), in the case concerning **Public Ministry *v.* Dragoljub Kunarac, Radomir Kovac and Vukovic Zoran**, **Judgment of 12th June, 2002, IT-96-23 & 23/1, paragraph 119**.

According to that case-law, in addition to the attributes of the right of ownership which characterises slavery,

> ***"whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the 'control***

of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour"

78. The Defendant, while acknowledging the continued existence of slavery, contended that this practice had become more discreet and had been confined to very restricted social circles. The Defendant maintained that the Applicant was rather the wife of El Hadj Souleyman Naroua, with whom she had lived a more or less happy marital relationship as in all homes, up to 2005, and that from their union, children were born.

79. The Court cannot countenance such a manner of arguing, for it is trite that slavery may exist without the presence of torture. Even with the provision of square meals, adequate clothing and comfortable shelter, a slave still remains a slave if he is illegally deprived of his freedom through force or constraint. All evidence of ill treatment may be erased, hunger may be forgotten, as well as beatings and other acts of cruelty, but the acknowledged fact about slavery remains, that is to say, forced labour without compensation. There is nothing like goodwill slavery. Even when tempered with humane treatment, involuntary servitude is still slavery. And the issue of knowing the nature of relationship between the accused and the victim is essential. See Judgment of 3 November 1947, in Trials of Major War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 5, 1997, page 958, as cited by the International Criminal Tribunal for former Yugoslavia (ICTY), in the case concerning **United States of America *v.* Oswald Pohl et al**.

80. The Court finds in the instant case that beyond well constituted deeds, the moral element in reducing a person to slavery resides, moreover, in the intention of El Hadj Souleyman Naroua to exercise the attributes of the right of ownership over the Applicant, even so, after the document of emancipation had been made.

Consequently, there is no doubt that the Applicant, Hadijatou Mani Koraou, was held in slavery for almost nine (9) years, in violation of the legal prohibition of such practice.

81. In Niger's criminal law, just as is evident in international instruments, the prohibition and stamping out of slavery are inviolable and fall within public policy. As was asserted by the International Court of Justice (ICJ), in the Barcelona Traction Judgment (5th February, 1970), **"Outlawing slavery is an erga omnes obligation binding on all organs of the State."**

82. Consequently, the national judge who sat at the Konni High Court upon the case relating to persons whose condition was akin to that of Hadijatou Mani Koraou, was under an obligation to raise at the first instance, the issue of slavery and set in motion the procedure for stamping out such a practice, once the case brought to light an obvious issue of slavery.

83. In conclusion, as regards this particular point above, the Court finds that, the national judge of Niger before whom the case of Hadijatou Mani Koraou v. El Hadj Souleymane Naroua was brought, instead of denouncing the slavery status of the Applicant, as constituting a violation of Article 270 (1) to (5) of the Penal Code of Niger as amended by Law No. 2003-025 of 13th June, 2003, rather affirmed that, **"The marriage of a free man with a slave woman is licit, in as far as he does not have the means of marrying a free woman, and if he fears falling into fornication".**

84. The Court considers that, acknowledging thus the status of Hadijatou Mani Korao as a slave, without denouncing that condition constitutes a form of acceptance, or at least a tolerance of this crime, against which the domestic judge of Niger was under obligation to ensure that proceedings were instituted or that sanctions were preferred where necessary.

85. The Court further considers that even if the Applicant's condition of being a slave arises from a supposedly customary or personal context, there was an avenue of protection open to her from the authorities of the Republic of Niger, be they administrative or judicial.

And that, consequently, the Defendant becomes responsible, in terms of both National and International law, for every form of human rights violation against the Applicant, on the basis of slavery, as a result of the tolerance, passiveness, inaction, and abstention of these same authorities of Niger vis-a-vis the practice of slavery.

86. Ultimately, by failing to raise an instant charge regarding an act prohibited as a public policy, and in omitting to adopt or have adopted the appropriate measures for stamping out such prohibited act, the national judge of Niger has not carried out his mandate of protecting the rights of Hadijatou Mani Koraou, and has thereby committed the Defendant into becoming liable on the same scale as the State administrative authority, when the latter declared that: "Listen, as for me, I can do nothing - you must go away."

87. Besides, by relying on international texts, notably, Article 7 (1) (c) and (g) of the Statute of the International Criminal Court, the Applicant maintained that her status of being a slave is a crime against humanity.

88. If it is true that slavery features on the list of acts constituting crimes against humanity, it is nevertheless worthy to indicate that, for it to constitute a crime against humanity, the slavery in question must form part of a "widespread or systematic attack" as enshrined in Article 7 of the Statute of the International Criminal Court.

89. Now, the appreciation of such cases fall within the jurisdiction of other international judicial set-ups, more precisely, the International Criminal Courts.

The instant Honourable Court is therefore incompetent to consider whether the complaint drawn from this particular plea-in-law is well founded or not.

ARE THE ARREST AND DETENTION OF THE APPLICANT ARBITRARY?

90. The Applicant averred that her arrest and detention on 9th May,

2007, as well as her detention at the Konni Prison, were arbitrary and do constitute a violation of Article 6 of the African Charter on Human and Peoples' Rights. According to her, the said bigamy is unfounded, for lack of a marriage between her and El Hadj Souleymane Naroua - whereas it has been proved that the said detention was consequent upon the complaint deposited by El Hadj Souleymane Naroua, and whereas the arrest and detention of the Applicant were decided upon following the same complaint which had been deposited by her ex-master before the Konni Criminal Court.

91. A detention is said to be arbitrary when it does not repose on a legal basis. Now, in the instant case, the arrest and detention of the Applicant were carried out in implementation of the judicial decision made by the said Konni Criminal Court. This decision constitutes a legal basis, and it does not fall within the jurisdiction of the Court to consider whether such a decision is well founded or ill founded.

DOES THE APPLICANT HAVE A RIGHT TO RELIEF FOR REPARATION?

92. In her Reply dated 7th April, 2008, the Applicant requested that the Republic of Niger be made to pay the amount of Fifty Million CFA Francs (CFA F 50,000,000) as relief for the reparation of the harm suffered.

93. In reaction to the foregoing, the Defendant asserted that this request amounts to the filing of a new plea-in-law, and he cited Article 37 (2) of the Rules of Procedure of the Court, thus concluding upon the inadmissibility of the application for reparation.

94. The Court recalls that the inadmissibility provided for in Article 37 (2) of the Rules of Procedure concerns new pleas-in-law raised by a party during the course of proceedings. In the instant case, the quantification of the reparation asked for cannot be considered as a new plea-in-law, but rather, as a specification of the request for relief as contained in the application instituting proceedings.

Consequently, there are grounds for dismissing the argument of the Defendant.

95. The Applicant did not furnish the Court with any guideline for an accurate calculation of the amount involved as reparation for the harm pleaded. The Court deduces thereof that an all-inclusive amount may be paid to the Applicant.

96. A close examination of the facts in cause clearly demonstrate that the Applicant has gone through undeniable physical, psychological and moral harm, as a result of her nine (9) years of servitude, justifying the award of a relief in reparation for the harm thus suffered.

CONSEQUENTLY

1. Whereas in any instance where the texts do not make provision for particular conditions in respect of admissibility of applications, the Court cannot impose heavier ones thereof;

2. Whereas the practice of ‘wahiya’ or ‘sadaka’ - founded upon considerations of belonging to a social class - put the Applicant in an unfavourable condition and excluded her from the sure and certain benefits of equal dignity recognised for all citizens; whereas she was thus discriminated against by virtue of her belonging to a social class; but, whereas such discrimination is not attributable to the Republic of Niger;

3. Whereas the Court finds that the Republic of Niger did not sufficiently protect the rights of the Applicant in regard to the practice of slavery;

4. Whereas this condition of slavery has caused the Applicant undeniable physical, psychological, and moral harm.

5. Whereas the Applicant is therefore entitled to an all-inclusive relief in reparation for the harm resulting from such practice of slavery.

FOR THESE REASONS

THE COMMUNITY COURT OF JUSTICE, ECOWAS,

Adjudicating publicly, in first and last resort, after hearing both Parties on the issue of human rights violation;

- Having regard to the 24th July, 1993 Revised Treaty of ECOWAS;
- Having regard to the 10th December, 1948 Universal Declaration of Human Rights,
- Having regard to the 18th December, 1979 Convention on the Elimination of All Forms of Discrimination against Women,
- Having regard to the 25th September, 1926 Convention relating to Slavery, and the 7th September, 1956 Supplementary Convention relating to the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery,
- Having regard to the 27th June, 1981 African Charter on Human and Peoples' Rights,
- Having regard to the 6th July, 1991 and the 19th January, 2005 Supplementary Protocols on the Community Court of Justice, ECOWAS,
- Having regard to the 28th August, 2002 Rules of Procedure of the Community Court of Justice, ECOWAS;
- Having regard to the 24th January, 2008 Preliminary Ruling No. ECW/CCJ/APP/08/08;

IN TERMS OF FORM

- Dismisses the Preliminary Objection raised by the Republic of Niger as inadmissible in all its aspects;
- Admits the Application of Hadijatou Mani Koraou and declares that she is qualified to bring such an Application before the Court;

ON MERITS

1. Declares that the discrimination from which Hadijatou Mani Koraou suffered is not attributable to the Republic of Niger;

2. Declares that Hadijatou Mani Koraou was a victim of slavery and that the Republic of Niger is to be blamed for the inaction of its administrative and judicial authorities;

3. Receives the request of Hadijatou Mani Koraou for reparation of the harms she had suffered and grants her an all-inclusive award of Ten Million CFA Francs (CFA F 10,000,000);

4. Orders the said sum to be paid to Hadijatou Mani Koraou by the Republic of Niger;

5. Dismisses all other points of request made by Hadijatou Mani Koraou;

6. Asks the Republic of Niger to bear the costs, in accordance with Article 66 (2) of the Rules of Procedure of the Court;

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, at Niamey (Republic of Niger), on the day, month and year above.

And the Members have appended their signatures as below:

HON. JUSTICE AMINATA MALLE SANOGO - PRESIDING

HON. JUSTICE AWA DABOYA NANA - MEMBER

HON. JUSTICE EL MANSOUR TALL - MEMBER

Assisted by **Athanase ATTANON Esq**. - REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 28TH OF JANUARY, 2009

SUIT N°. ECW/CCJ/APP/10/06
JUDGMENT N°. ECW/CCJ/JUD/01/09

(1) DJOT BAYI TALBIA
(2) MAKOMILLAN TANOE, (3) BOUBOU DIALLO
(4) INZA CISSE (5) DEBO JEREMMIE
(6) MOBIO ETIENNE (7) AKAKPO ANTOINE
(8) FALL ABDOU (9) LATTE SERGE ALFRED
(10) SAWADOGO PIERRE (11) VANIE PASCAL
(12) COULLIBALLY HAMED (13) KPILLIMAKA NIKABOU
(14) VLAVONOU ZANNOU (15) KOI JOACHIM

Plaintiffs

V.

1. **FEDERAL REPUBLIC OF NIGERIA**
   ATTORNEY GENERAL OF THE FEDERATION
   (ON HIS OWN BEHALF AND AS REPRESENTATIVE OF THE FEDERAL GOVERNMENT OF NIGERIA)
2. **CHIEF OF NAVAL STAFF**
3. **INSPECTOR GENERAL OF POLICE**
4. **COMPTROLLER GENERAL OF PRISONS**

Defendants

COMPOSITION OF THE COURT
HON. JUSTICE HANSINE N. DONLI - PRESIDING
HON. JUSTICE AWA DABOYA NANA - MEMBER
HON. JUSTICE EL MANSOUR TALL - MEMBER

ASSISTED BY : TONY ANENE-MAIDOH - Chief Registrar

COUNSEL TO THE PARTIES

1. ***Chief Emefo ETUDO*** *- for the Plaintiffs*
2. ***Nnanna O. OBOM*** *- for the 1st, 2nd, 4th, and 5th, Defendants*
3. ***Muhammad Danjuma ALHASSAN*** *- for the 3rd Defendant*

JUDGMENT OF 28TH JANUARY, 2009

Human Rights Violation - unlawful detention - presumption of innocence.

SUMMARY OF FACTS

The Vessel MT Capbreton, a foreign vessel flying the flag of St Vincent and Grenadines was arrested on the 17th of July, 2003 by the Nigerian Naval ship on the allegation that she was taking Nigerian crude oil into her. The Plaintiffs, all crew members, were arrested and detained before being brought before the Federal High Court of Nigeria. The Court decided in its Judgment that the arrest of the Plaintiffs took place at sixteen (16) nautical miles off the territorial waters of Nigeria, it lacked jurisdiction and ordered the release of the Plaintiffs. The Plaintiffs then came before the ECOWAS Court of Justice to claim for reparation due to the harm they suffered, violation of their Human Rights due to their arrest and unlawful detention as well as loss of their employment.

The Defendants, by way of objection on grounds of inadmissibility, maintained that the action is statute barred pursuant to Article 9 (3) of the Supplementary Protocol. Regarding the damages for loss of employment, they are affected by the privity of the employment contract that binds the Plaintiffs to their employer

LEGAL ISSUES

1. *Whether the action of the Plaintiffs is statute-barred under Article 9(3) of the Supplementary Protocol of the Court.*

2. *Whether the detention of the Plaintiffs is arbitrary and does constitute a violation of their human rights.*

DECISION OF THE COURT

The Court held that the provision of Article 9 (3) of Supplementary Protocol of the Court on limitation period does not apply to this case. It declared the Application admissible.

The Court decided that as of 1 March 2004 when the Plaintiffs were presented to the penal Judge who ordered the release of five (5) of them, there was no arbitrariness. On the contrary, the Decision to take legal action against the ten other Plaintiffs and maintain their detention till 30th November 2005 constitutes a violation of their rights pursuant to Article 6 of the African Charter on Human and Peoples' Rights as well as Article 35 of the Nigerian Constitution.

JUDGMENT OF THE COURT

THE PARTIES

1. The Applicants are Members of crew of ship/vessel M.T CAPBRETON, represented by their Learned Counsel Bar. Chief Emefo ETUDO. The 1st, 2nd, 4th and 5th Defendants are namely, the 1st Defendant is the Federal Republic of Nigeria, a Member State of the Economic Community of West African States (ECOWAS). The 2nd Defendant is Minister of Justice, Attorney General of the Federal Republic of Nigeria. The 4th Defendant Inspector General of Police of Nigeria and the 5th Defendant is the Comptroller of prisons of Nigeria, all represented by Nnanna O. Obom. The 3rd Defendant is the Chief Naval Staff of the Nigerian Marine represented by Mr. Mohammad Danjuma Alhassan.

THE FACTS OF THE CASE

2. After fifteen Applications dated from the 30th November, 2006 and lodged in the Registry of the ECOWAS Court of Justice, the learned counsel to the Applicants brought a motion that the fifteen claims should be consolidated into one Application. The learned counsels to the Defendants did not oppose the application and the Court granted their demand by consolidating the said Applications due to the reason that they were the same in nature, subject matter and the reliefs sought the facts of case are the following:

3. The said Vessel MT Capbreton, a foreign Vessel flying the flag of St. Vincent and Grenadines Islands with its identified registration Number, was arrested on the 17th day of July 2003 at the coast of Forcados, a port on the high seas, sixteen (16) nautical miles of the coast of the Federal Republic of Nigeria, on the allegation that she was taking crude oil into her, a crime of dealing in crude oil within the Nigerian territorial waters.

4. The said vessel originally belonged to a petro-marine and its principal Barnex Holding SA, was sold to All Shore Marine Services Ltd, which by letter of re-employment, the said crew members were re-employed. The vessel was chartered by African Sea Shipping

BV, a Geneva Branch, to which she was loaded with cargo of LPFO (Low pour fuel oil) at Abidjan for discharge at Cotonou, Benin Republic. On arrival at Cotonou, the discharge was delayed as the jetty was busy and thus deviated from her goal of discharging her cargo to render help to a nearby vessel in distress, named M.T Zogu, as she could not sail due to a faulty engine, problem of shortage of clean water and diesel for both the crew and the power generator. The said vessel could not put on its lights at night due to the shortage of Diesel; which constituted a serious danger to navigation

5. The Vessel, MT Capbreton and her crew, which are the Applicants, set to sail towards the distress vessel off the coast of Nigeria at 16 nautical miles where she anchored. It was only blue waters insight and also, there were no installations within 200 meters of the vessel. While rendering assistance, the vessel MT Capbreton was spotted and arrested by a naval ship of the 3rd Defendant, NNS Kyenwa on the allegation that she was taking Nigerian crude oil into her; the alleged act being a crime under the laws of the Federal Republic of Nigeria. The vessel MT Capbreton, cargo, documents, vessel log book and the letter of re-employment of the Applicants were handed over to the Defendants, Nigerian Naval officers. The Applicants were arrested and detained in prison while the investigation was going on, in which the cargo documents alongside the substance removed from the said vessel were analyzed. The analysis showed that the cargo from MT Capbreton was actually fuel oil 180 cst (LPFO) Low pour fuel oil and not crude oil.

6. Notwithstanding, the above mentioned cargo documents and the result of the investigation of the substance, and despite the conclusions of the findings, the Defendants continued to detain the Applicants, during which the Applicants were paraded before the National and International press as thieves of Nigerian crude oil. Consequently, they were charged to the Federal High Court of Nigeria on two count charges on the 27th of July 2004. Following this arrest the Defendants sought and obtained consent of the Attorney General of the Federal Republic of Nigeria to prosecute the Applicants who were foreigners but ECOWAS Community citizens. During the trial, the Defendants called fourteen witnesses while the Applicants called four witnesses. The judgment of the criminal case delivered and annexed to the Applications, ruled that

the arrest of the Applicants was at 16 nautical miles off the waters and off the coast of the Federal Republic of Nigeria and the Federal High Court lacked jurisdiction except at 12 nautical miles.

7. Consequently, the Applicants lodged their case at the ECOWAS Court of Justice claiming that they have lost their gainful employment: (1) Suffered violations of their Human Rights of which they are claiming damages and interest for arrest and unlawful detention; (2) Attempt at the violation of their human dignity by parading the Applicants as thieves of the Nigerian crude oil; (3) for the prosecution they went through; (4) Dispossession of their vessel MT Capbreton and its destruction; (5) The Applicants pleaded material facts that the said acts complained of amounted to violations of their Human Rights pursuant to Articles 5, 6 and 2 (2) of the African Charter on Human and Peoples' Rights, which is domesticated by cap A9 Laws of the Federal Republic of Nigeria 2004. The Applicant reiterated that out of fifteen (15) Applicants ten (10) were detained till the 30th of November, 2005 while five (5) Applicants were released on the 2nd of March, 2004. They added that this detention was unlawful and requested the following reparation for damages:

a) Declare that the continued detention of the Applicants by the Defendant from 1st December, 2003 till the 1st of March, 2004 is unlawful and amounts to the infringement of Article 6 of African Charier on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9, LFN, 2004 and section 35 of the Constitution of Federal Republic of Nigeria 1999.

b) Declare that the suit instituted against the ten Applicants from amongst the fifteen on the 1st of March 2004, for proceedings against them and their continued detention till 30th of March 2005, are unlawful, void and amount to an infringement of Article 6 of the African Charter on Human and Peoples' Rights and section 35 of the Nigerian Constitution.

c) Declare that their dispossession of MT Capbreton by the Defendants, since the 1st of December 2003, then the destruction of this vessel and the Applicants' ejection from

the said vessel between January/February 2004 constitutes a violation of their Human Rights.

d) Declare that the Applicants are entitled to adequate compensation from the Defendants for dispossessing them of MT Capbreton.

e) Declare that the refusal of the Defendants to compensate the Applicants for the spoliation and dispossession constitutes a violation of their rights under Article 21(2) of the African Charter on Human and Peoples' Rights.

f) Declare that the parading of the Applicants before the International Press as common thieves and thieves of Nigerian crude oil amounts to a destruction of their reputation as seamen and their right to human dignity as entrenched by Article 5 of the African Charter on Human and Peoples' Rights.

g) Order the immediate release of all personal effects belonging to the Applicants on board MT Capbreton.

h) An Order of injunction restraining the Defendants by themselves, agents or privies from further arresting or detaining the Applicants in connection with the case; and condemn them to pay damages and interest to their Applications as set out in paragraph 40 to the facts in support.

8. After Service of the Application on the Defendants, the latter filed their responses in which they ask for the rejection of the application for reparation presented by the 1st Defendants learned counsel representing the 1st, 2nd. 4th, and 5th Defendants, and the 2nd learned counsel representing the 3rd Defendant. They claim justification for their acts in arresting, detaining and prosecuting the Applicants through two important defences; that of privy of contract of employment between the Applicants and their employers and the statute of limitation as entrenched in Article 9 (3) of the Supplementary Protocol of the Court. The claims of the Defendants are as follows:

a) Declare that the Applicants do not have claim to any relief sought in their Application for enforcement of their fundamental human rights;

b) Declare that the arrest of the Applicants and their prosecution was constitutional, lawful and in accordance with the laws of the Federal Republic of Nigeria, that no violation of human rights occurred under the African Charter on Human and Peoples' Rights;

c) Declare that no reputation of the Applicants was soiled, despite the fact that after the said trial they were discharged and acquitted by the Federal High Court of Nigeria;

d) Declare that the claim is statute barred;

e) Order the dismissal of the claim on the grounds that it is arbitrary, speculative, lacked merit and an abuse of the process of the Court;

LEGAL ARGUMENTS BY THE PARTIES AND CONSIDERATIONS BY THE COURT

9. Learned Counsel to the Applicants, Chief Emefo Esq., made the following legal submissions:

A. He submitted that by treaties, all Nations covenanted to enforce the provisions of the UN Charter on Human Rights in all Member States that ascribed or assented to the Charter. In line with this, the learned counsel contended that the detention of the Applicants from the 1st of December, 2003 to 30th November, 2005 was without justification, abusive and their dispossession of MT Capbreton on the above mentioned dates, as well as in parading them before the world press in Nigeria in 2004 as thieves of Nigerian crude oil was unjustified being that the spot of arrest was at 16 nautical miles outside the territorial waters off the coast of Nigeria; and that they were only rendering assistance to a distressed vessel pursuant to the provisions of Article 98 of the UN Convention of 1982 on maritime law.

B. He further relied on section 220 of Merchant Shipping Act Cap M 11 Laws of the Federation of Nigeria 2004 which permitted master or person in charge of a ship to, in so far can render such assistance, every person found at sea in danger of being lost. He relied on the case of **QUEEN V. KEYN (1986) 2 exch Div. 63** where the House of Lords, represented by Justice Cockhurn stated,

> ***"that the rules of International Laws on the seaward boundary of coastal states did not extend to the sea"***

C. He further relied on the jurisprudence of the Supreme Court of Nigeria: **ATTORNEY GENERAL OF THE FEDERATION *v.* ATTORNEY GENERAL OF ABIA STATE No. 2 (2002) 6 NWLR (pt 764) 542**, which fixed the boundary of the sea and the boundary mark of low water and maintained that the low water mark form the boundary of the land territory of not only the, eight coastal states of Nigeria but equally that of the entire country. He also relied on the case **QUEEN *v.* KEYN** (supra) to say that the Parliament can legislate on the limit of territorial waters which is beyond the low mark and that any exercise of judicial power beyond the area of competence of Nigeria will amount to a violation of the fundamental principles and would be declared unconstitutional.

10. He further relied on section 12 (1) of the 1999 Constitution of the Federal Republic of Nigeria which stipulates that:

> ***"no treaty shall have the force of law unless same is domesticated as the Laws of Nigeria..."***

and based on this, the law that domesticated the UN Convention on the Law of the Sea, he maintain that the Defendants accosted and apprehended the Applicants at 16 nautical miles beyond the territorial waters from the coast land; which is 12 nautical miles that is authorized. He recalled the jurisprudence of Queen v. Keyn (supra) to contend that the Nigeria and her Courts are bound by the laws made by the National Assembly (Parliament mentioned above); he referred to section 1 (17) of the Miscellaneous Act to support his argument and

which states that the said law deals with transactions in petroleum within 12 nautical miles of the coast and not beyond it; or 16 nautical miles. He added that even if the location of the arrest is at the exclusive economic zone, the Applicants will not be said to have committed an offence, more or less violate the conditions provided by the regulations on the exclusive economic zones.

These conditions are as follows:

- Case of the breach of fishing right pursuant to Article 73 of the United Nations Convention on the law of the sea;
- Prohibition of the Transport of slaves pursuant to Article 99 (a) of the same United Nations Convention;
- Seizure of a private ship or aircraft pursuant to Article 105 of the same Convention;
- Illicit traffic in narcotic drugs and psychotropic substances pursuant to Article 108 of the UN Convention;
- Unauthorized broadcasting from the high seas pursuant to Article 109 of the UN Convention;
- Right of hot pursuit of an escaping vessel such as provided in Article 111 of the same Convention.

11. The Learned Counsel to the Applicant equally relied on Article 56 and 58 of the UN Convention of 1982, on the Laws of the sea above cited which authorizes states to make rules and regulations regarding the Exclusive Economic Zones. Which made Nigeria to enact her law: Exclusive Economic Zone Act and crude oil (Transportation and Shipment), which the Applicants did not contravene. Consequently, the Learned Counsel to the Applicants submitted that the act against his clients by the Defendants cannot justify. Even more, the Learned Counsel emphasized that Exclusive Economic Zone, Coastal state, such as Nigeria must respect the rights of other states, and can only act in the zone in line with Article 110 of the said United Nations Convention. He relied on section 379 (2) of merchant shipping Act to support that the extra territorial jurisdiction does not extend to acts that occurred outside Nigeria.

12. He strongly submitted that the defendants were not competent to regulate shipping outside her territorial waters, as they admitted and as mentioned in the evidence presented by Sylvester Njoku and Emmanuel Ogunka in the Judgment of the Nigerian Court already pleaded, in which all vessels automatically acquire licence or an authorization, at 16 nautical miles, which is outside Nigeria territorial waters and do not need regulation or authorization.

    He relied on section 7 and 6 of the crude oil Regulation (Transportation and Shipment) Cap P. 10 LFN 2004 on the creation and regulation of activities relating to petroleum occurring in Nigeria. He stated that it is no doubt that MT Capbreton did not load in Nigeria but rather in Abidjan, in Cote d'lvoire where it loaded the LPFO.

13. The Applicants contended that their arrest, detention and the prosecution of ten of them from the 1st of December 2003 till 30th November, 2005 in the Nigerian High Court, and the imprisonment of five others from the 1st of December 2003 to the 2nd of March 2004 by the Defendants was unlawful as they knew that the acts amounted to gross violations of the liberty of the Applicants.

14. The Learned Counsel to the Applicants submitted that under both Domestic and International Law, the Defendants had no right nor power to proceed against the Applicants in Nigeria as they did in the criminal charge that consequently, the charge was incompetent as well as the proceeding that followed, and that in fact, the invalid prosecution amounts to gross infringement of the rights of personal liberty and security as entrenched in Article 6 of the African Charter on Human and Peoples' Rights as well as section 35 of the 1999 Constitution of the Federal Republic of Nigeria. The Learned Counsel contended that the trial which was malicious entitled the Applicants to recover loss of earnings as stated in their Applications.

15. He contended that the facts of the case and legal arguments already developed proved that there was no reasonable cause justifying the Defendants acts.

16. He relied on the jurisprudence of **VVII BRAHAM *v.* SNOW (1669) 2 WMS Sound 47a**, to state that in tort, the person in actual

possession can sue in conversion, because it is not necessary to prove title of absolute ownership. The Learned Counsel to the Applicants also relied on the case of **ROBERT *v.* WYATT (1810) 2 Taunt 268 and Clerk & Lindsell on Tort 17th Edition** to the effect that a person who is entitled to temporary possession of a furniture can sue in conversion, even against the owner. Thus, the Applicants who were in possession can sue in tort for trespass for violation of right to property and conversion of MT Capbreton against the Defendants. They further contended that no doubt they can also sue under Article 21(2) of the African Charter on Human and Peoples' Rights as dispossessed persons. The essential element is the possession and not the title, because their right to adequate compensation is further consummated by the fact that they have proprietary right in the vessel.

17. He also relied on Article 5 of the African Charter on Human and Peoples' Rights, to the effect that the Defendants damaged their reputation, and attempt at their dignity by presenting them before the world press as thieves of Nigerian crude oil. This is a case of inhuman treatment and the worst case of indignity of their person. Consequently, the world marine industry is fully aware and no one will want to employ a thief, thus minimizing their chances of getting re-employed all through the rest of their lives. The Learned Counsel to the Applicants contended that Nigerian Crude oil was never declared missing. This was therefore illogical and problematic as proof since the certificate of origin showed that the cargo was from Abidjan.

18. He concluded that his clients were entitled to compensation as the charges against them are illegal, null and void pursuant to Article 97 of the UN Convention on the Law of the sea (1982) and that indeed; all the proceedings that followed are equally void. Consequently there can be neither prosecution nor valid trial.

CONCERNING THE DEFENDANTS

19. In their Brief, the Defendants denied the allegations of the Applicants, stating that the arrest, detention and the prosecution against the Applicants were lawful pursuant to the laws of the Federal Republic of Nigeria and regular application of the law; this

was why after they were brought before the Federal High Court in Lagos Nigeria on two main charges against them and which were stealing and transferring crude oil on the coast of Forcados in the territorial waters of Nigeria, pursuant to section 3 (17) (a) and (b) of the Miscellaneous Offences Chapter 410 Laws of the Federal Republic of Nigeria 1990 as amended; The Defendants thus contended that the Applicants should vested the right to their claim. To support their defence arguments, the learned Counsel to the Defendants relied on the 1st Judgment of the Federal High Court of Nigeria of 1st March, 2004 which maintained the charges against 10 of the 15 detained Applicants, interrogated 12 witnesses cited by the Defendants and four (4) cited by the Applicants. At the end of the trial, the Judge made his decision discharging and acquitting the ten of them on the grounds that the incident occurred outside the Nigerian Territorial waters whose limit is 12 nautical miles off the coast, and thus beyond the jurisdiction of Nigeria; the Defendants claimed that in arriving at this decision, some important declarations were made in relation to fact that the Applicant were dealing in crude oil but that the act did not occur in the Nigerian Territorial waters and that with these fact the Nigerian Court could not confer jurisdiction, despite the authorization of the Ministry of Justice for the Applicants to be prosecuted. The Defendants raised two arguments to support their defence contending that the act was punishable and that the claim for damages and interest for the lost of employment is due to contract of employment which between the Applicants to their employer. They pleaded with the Court to reject the claims for damages and interest by the Applicants on the grounds that they were abusive, founded on speculation and unjust.

20. Indeed, the Defendants insisted on the fact that the Nigerian Court of first instance recognized it her decision that they were dealing in crude oil, though admitted that the Court could not confer jurisdiction in so far as the offences did not occur in Nigeria. They relied on page 38, 2nd paragraph lines, 7 and 8 of the judgment Delivered by the High Court of the Federal Republic of Nigeria. However, these arguments do not show any dealings in crude oil within the territorial waters as to bring about the application of the provisions of the laws of Nigeria referred thereto.

21. The Learned Counsel to the Defendants contended that it was the report established by the police which revealed a prima facie case which led to the filing of criminal charges against the Applicants. The Defendants maintained that the steps taken by Attorney General of Nigeria are pursuant to the provisions provided under Section 174 of the 1999 Constitution, as well as the action by the police which are legal as justified by the provisions of Section 4 of the Police Act. They relied on the Supreme Court of Nigeria case of **AJIBOYE *v.* STATE (1995) 8 NWLR pt 414 pp 386 - 512 at 410 ratio 5 & 6**. The Defendants further stated that the action of the Applicants before this Honourable Court is statute barred by virtue of Article 9(3) of the Supplementary Protocol of the Court which states that:

> ***"Any action by or against a Community institution or any Member of the Community shall be statute barred after 3 years from date when the right of action arose."***

22. Consequently, the Defendants maintained that damages which occurred in the instant case of 16th of July 2003 are statute barred. To this end, the Defendants relied on page 9 of the judgment delivered by the Federal High Court of Justice of Nigeria, for the purposes of asserting that since the Application was filed on 30th November 2006, the date advanced on the argument was accurate, because the Applicants and the 1st, 2nd, 4th and 5th Defendants all declared that the arrest occurred on 17th July, 2003 and not on 16th July, 2003.

    All the same, the Defendants relied on the following case-law and on the Rules of Procedure of the Court:

    a) **UBA LTD *v.* MICHEAL O. ABIMBOLU & Co (1995) NWLR pt. 419 pp256-284**.

    b) **IBRAHIM *v.* JUDICIAL SERVICE COMMISSION (1998) 14 NWLR pt 584 pp 1-222 at page 6, 182 (Supreme Court)**,

    c) **Article 32 (3) of the Rules of this Court** which provides that

    > ***"...In the reckoning of time limit for taking steps on proceedings, only the date of lodgment at the Registry shall be taken into account".***

23. The Learned Counsel to the Defendants relied on the above cited jurisprudence and statutory authorities to conclude that the action of the Applicants was statute-barred and that this Court does not have the jurisdiction to hear the case. The Defendants further stated that Applicants even tried to camouflage as to the actual date of infraction, but referred the Court to paragraph 41 of the Application which is a clear admission of the date the cause of action arose. The Defendants contended that it was also not an excuse that criminal prosecution was made against the Applicants because there was enough opportunity to file and enforce the rights of the Applicants, as given the facts of the case it was made known that the time of arrest was 17th of July, 2003. They were arrested on the 16th of July, 2003 and the charges were filed against them on the 27th of July, 2004, which is after one year. The Defendants maintained that the provisions of African Charter on Human and Peoples' Rights cited by the Applicants is not relevant to this instant case, due to the fact that they were lawfully tried according to due and acquittal process pursuant to Nigerian laws.

24. They contended that the Applicant did not suffer any loss of reputation, but while assuming without conceding that if any, same has now been cleared by the judgment of acquittal. The Defendants maintained that it was not true that the 3rd Defendant and in fact all the other Defendants were negligent in regard to the vessel MT Capbreton, because according to the law in which the Applicants were judged, which is that of Miscellaneous Offences Act, Section 3 sub-sec 17(b) of the said law, provided for the confiscation of the said vessel by the Federal Republic of Nigeria after, condemnation. Consequently, they concluded that while the said vessel was lying in anchorage while the trial was on going, it was in the custody of the trial court and thus the Applicants cannot attribute to the negligence on the part of the Defendants.

25. They contended that it is trite law when a Applicant is seeking the court to award special damages and interest, the Applicant must furnish proofs which must go through rigorous verification; but that in this case, no written or other kind of evidence was produced as proof and the claim for anticipated earnings is not only speculative but a vain venture. They

relied on several jurisprudence especially that of **SHELL PETROLEUM DEV. CO. NIG. LTD. *v.* TIEBO Vll (1996) 4 NLWR Pt 445 PP 622 - 743 at 622 Q 663 ratio 5, 10 and 11;** and **AG Fed *v.* AIC (2000) NLWR Pt. 675 PP 229 - 449 at P 296 Ratio 1**, to declare that the courts are not charitable establishments as to award damages and interest as claimed by the Applicants.

26. Finally, the Defendants submitted that the principle relating to privy of contract shall apply in this case and that consequently, since they are not privy to the contract of employment between the Applicants and their employer, they cannot be held liable pursuant to the said contract. The Defendants relied on the case of **AG FEDERATION v. AIC (2000) NWLR Pt 675 PP 229 -449, page 298 ratio 3**.

CONSIDERATION OF THE ARGUMENTS BY THE COURT

27. After having considered the facts of the case and the arguments raised for determination between parties, the Court summoned up the various contending legal issues in line with Article 10(d) and Article 9(4) of the Supplementary Protocol (A/SP.1/01/05); especially when these legal issues deals with the provisions granting the Applicants access to the Court on the one hand, and on the other hand those dealing with the competence of the Court on issues bothering on Human Rights. In this regard, the Court shall answer the questions drawn from the arguments by the parties as stated here under:

    i) The action of the Applicant is it statute barred by virtue of Article 9 (3) of the Supplementary Protocol of the Court so as to make the Court have its jurisdiction ousted?

    ii) Whether the detention of the Applicants by the Defendants from the 1st December 2003 to 1st March 2004 was lawful and amounts to infringement of the Applicants' Human Rights as entrenched in the Universal Declaration of Human Right and in the African Charter on Human and peoples' Rights to which reference is made in Cap A9, LFN 2004 and section 35 of the Constitution of the Federal Republic of Nigeria.

iii) Whether the suit of criminal procedure against the Applicants by the Defendants on the 2nd of March 2004 till 30th November 2005 were malicious, unlawful and void and amount to infringement of their Human Rights pursuant to Article 6 of the African Charter on Human and Peoples' Rights and also section 35 of the Constitution of the Federal Republic of Nigeria?

iv) Whether the refusal of the Defendants to compensate the Applicants for the said spoliation and dispossession amounts to the infringement of their rights as stated in Article 21 (2) of the African Charter on Human and Peoples' Rights.

v) Whether the parading of the Applicants before the international press as vandals and thieves of Nigerian crude oil is in the circumstances of this case, the destruction of their reputation as seamen and thus an infringement of their rights to the dignity of their human persons as entrenched by virtue of Article 5 of the African Charter on Human and peoples' Rights.

vi). Whether the arguments developed by the Defending party on the effect of privy of contract between the parties can defeat the claim for loss of employment and wages attached thereto and the damages and interest sought to flow from the violation of human rights if the claims by the Applicants mentioned above succeeded.

QUESTION No. 1
THE CASE BY THE DEFENDANTS IS WHETHER THE CASE IS STATUTE BARRED PURSUANT TO ARTICLE 9 (3) OF THE SUPPLEMENTARY PROTOCOL OF THE COURT; IS THE CASE STATUTE BARRED OR NOT?

28. While the Applicants indicated that the arrest of MT Capbreton took place at 16 nautical miles, the Defendants according to them maintained that this arrest took place at 14 nautical; on the other hand, the Applicants claimed they were carrying LPFO (Low Pour Fuel Oil) and not crude oil, that they were rendering assistance to another vessel in distress on the 17th of July 2003; that 10 of them were detained and tried in the Federal High Court of Nigeria in

Lagos on the 1st of March 2004, date in which they were discharged, the Defendants on their own contended that the arrest took place on the 16th of July 2003 and that based on the provisions of Article 9 (3) of the Supplementary Protocol, the case is statute barred and cannot be reopened before this court. It is Necessary to recall the provisions of Article 9 (3) of the Supplementary Protocol.

29. Pursuant to this Article 9 (3) of the Protocol, the actions founded on Human Rights violation shall not be brought after the expiration of three years from the date on which the cause of action occurred. The word used in the provision is "Shall" and the meaning is stated in Black's Law Dictionary, Six Edition, page 1375 as follows:

> ***"As Used in statutes, contracts or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning as denoting obligation. The word in ordinary usage means "must" and is inconsistent with a concept of direction".***

30. However, it is important to state that this provision only concerns cases against the Community or those of the Community against another; in this case, the action is between individuals (legal Entity) and a State Member of the Community and her agents. Consequently, the Court is of the opinion that the arguments of the Defendants aiming at declaring the action statute barred does not hold water and cannot prosper. It is therefore proper to reject the arguments of the Defendants.

QUESTION No. 2
WAS THERE UNLAWFUL DETENTION OF THE APPLICANTS?

31. The Applicants contended that their detention for the period of 17th July, 2003 to 30th November, 2005 is unlawful and that as a result of this detention they suffered important damages for which they are seeking reparation: on one hand for the loss of their employment and on the other hand, for the seizure of their personal effects as well as

the dispossession of their vessel and later the destruction of the vessel. They stated that these facts constitute their Human Rights violation pursuant to the provisions of the African Charter on Human and Peoples' Rights cited above.

32. Indeed, the provisions of Article 6 of the African Charter on Human and Peoples' Rights adopted by the legislature in Nigeria as CAP, A9 Laws of the Federation of Nigeria, 2004 provides that:

    "Every Individual shall have the Rights to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law, in particular no one may be arbitrarily arrested or detained."

33. Also Article 17 of the Universal Declaration of Human Rights provides;
    - ***Everyone has the right to own property alone as well as in association with others.***
    - ***No one shall be arbitrarily deprived of his property.***

34. Finally, Article 9 of the Universal Declaration of Human Rights provides that:

    "No one shall be subjected to arbitrary arrest detention or exile"

ARE THE ABOVE MENTIONED PROVISIONS APPLICABLE TO THIS CASE?

35. The Court is aware that the arrest of the Applicants took place outside the territorial waters and far from the coast of the Federal Republic of Nigeria, without legal authorization, after arrest of the Applicants on the 17th of July to the 1st of March, 2004 can be justified by the necessity preliminary investigation to establish if the theft or transfer of Nigerian crude oil that the Applicants are accused of is founded or not. In other words, the Court is of the opinion that on the 1st of March, 2004 when the Applicants were presented before the trial judge who ordered the release of five (5) among them, it was not unlawful; but if the Defendants do not contest the fact that the Applicants were arrested outside Nigerian territorial

waters, the Court is of the opinion that the prosecution of the ten (10) others and their continued detention till 30th November, 2005 is not justified. However, such was the case as seen by the Federal High Court of Nigeria in her decision of 30th November, 2005 declared that the Nigerian Court does not have the jurisdiction and thus pronounced the release of the ten (10) other Applicants. Consequently, this decision by the Federal High Court of Nigeria on the 30th of November, 2005 is analyzed as the confirmation of the Decision of the Judge on 1st of March, 2004 who asked for the simple and pure release of the fifteen (15) Applicants.

36. Outside deciding to maintain the ten (10) Applicants among the fifteen (15) in detentions and their prosecution before the Federal High Court of Nigeria, on the grounds that these Applicants were dealing in crude oil without concrete evidence and disregard for the analysis of the expert, the Defendants are guilty of malice and unlawful arrest. This is why this Court concludes that the detention of the Applicants in March 2004 to 30th November, 2005 is purely malicious and unlawful.

QUESTION 3:
ARE CRIMINAL PROCEEDINGS INSTITUTED AGAINST THE APPLICANTS BY THE DEFENDANTS FROM THE 1ST OF DECEMBER 2003 TO THE 2ND OF MARCH 2004 UNLAWFUL, AND DO THEY AMOUNT TO THE VIOLATION OF THEIR HUMAN RIGHTS?

37. This issue has already been resolved in the preceding consideration such that the Court is of the opinion that the detention of the Applicants during this period is justified by the necessity of the investigation. Consequently, the Court strikes out the claim of the Applicant on this point.

QUESTION 4:
DOES THE REFUSAL OF THE DEFENDANTS TO COMPENSATE THE APPLICANTS FOR THE DISPOSSESSION AND DESTRUCTION OF ARRESTED VESSEL CONSTITUTE A HUMAN RIGHTS VIOLATION IN THE SENSE OF ARTICLE 21 (2) OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHT?

38. During the debates the Court retained that the Applicants desisted from their claim on this point. There is room to grant the request to desist by the Applicants on this point.

QUESTION 5:
DOES THE PARADING OF THE APPLICANTS BEFORE THE WORLD PRESS AS VANDALS AND THIEVES OF NIGERIAN CRUDE OIL CONSTITUTE A VIOLATION OF THEIR RIGHTS WITH REGARD TO THEIR DIGNITY OF PERSONS AS ENTRENCHED IN ARTICLES 5 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS?

39. The Applicants declared that during their detention, they were paraded before the World press in 2004 without real grounds; they were regarded as thieves and vandals of Nigerian crude oil. That these defamatory acts brought disrepute to their dignity of human being and are contrary to Article 5 of the African Charter. Article 5 mentioned above provides that:

    "Every individual shall have right to the respect of the dignity inherent in a human being and to the recognition of his legal status; all forms of exploitation and degradation of man... shall be prohibited".

40. The Court is of the opinion that for the fact that the Defendants presented the Applicants before the press when no judge or court has found them guilty, certainly constitute a violation of the principle of presumption of innocence such as provided in Article 7(b) of the same African Charter and not a violation in the sense of Article 5 of the said Charter. Indeed, the Court is of the opinion that the Defendants employed language and an act of pure administrative

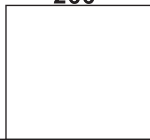
publicity which should be condemned and which equally going beyond the framework of the preliminary investigation. Consequently, the claim of the Applicants on this point shall be granted.

QUESTION 6
ARE THE APPLICANTS ENTITLED TO THE REPARATION OF DAMAGES AND INTERESTS FLOWING FROM THE RELATIVE EFFECT OF THEIR CONTRACT?

41. The Applicant claimed that they lost their employment as a result of their arrest and detention by the Defendants from July 2003 to November 2005; that as a result they can no longer claim their right to retirement and that the principle of mutuality of contract obliges the Defendants to compensate them by paying their salaries up to retirement in 2003 and even till 2005 date in which they are supposed to end their active service.

42. According to the argument of defence on the mutuality of contract, Learned Counsel to the Defendants contended that the Applicants claimed damages and interest based on the contract of employment which in no way has any relation to the Defendants. The Applicants discredited the position of the Defendants due to the fact that the claims are based on the damages suffered by the Applicants on the intervention of the Defendants and which brought about the end of their work contract. The doctrine of relative effect of contract has two elements such as: an individual who is not signatory to a contract cannot claim for compensation of this contract even when this contract must have been signed with the intention of profiting from this third party, and a third party cannot be linked to a contract that was not signed by him/her. In the case of **DUNLOP *v.* SELFRIDGE (1915)**, the House of Lords averred that Selfridge cannot be related by the mutual effect of the contract signed between Dunlop and Dew, because it was not part of the said contract.

43. According to the principle of mutuality (relative effect), only the parties susceptible of being sued in relation to a contract, can be sued in respect of the said contract, Such is the case presented before this Court, it is the actions of the Defendants that are at the bases of termination of the contract of employment of the Applicants with their employer and even if the Defendants are not part of the contract their actions having caused



the termination of the said contract justifies the award of damages and interest. The other questions raised on the relative effect of the contract of employment. Seem to be misunderstood because the claim is not based on the contract but on the damages suffered on the issue of tort (based on the civil responsibility of the Defendants).

44. On these grounds, the arguments of defence raised on this issue should be totally rejected in its entirety on this other point.

ON DAMAGES AND INTERESTS DUE TO THE APPLICANTS IN RESPECT OF THEIR HUMAN RIGHTS VIOLATION

45. The is trite that the payment of damages and interest in the violation of Human Rights is an acquired principle of which the evaluation varies from one court to another, whereby the Court may grant punitive, special or general damages and interest. Indeed, the principle whereby, ***"Any individual who is a victim of violation of his rights is entitled to just and equitable reparation"***

46. This can be retained by this Court, in this case that the total reparation is impossible on matters of Human Rights Violation; however, it is important to award reparation that is equitable in nature to all the Applicants that are entitled to it. Thus, as a result of the facts and elements of the case, it behoves on the Court to have a sufficient evaluation and award of reparation that is inclusive of the prejudice suffered by the ten Applicants due to the unique nature of their detention which is unlawful as ruled above.

47. It is proper to state that the Supplementary Protocol of the Court does not provide for reparation in its Articles 9 and 10; the Rules of this Court only retained the principle of measures of redress. However, Article 19 (1) of the 1991 Protocol of the Court authorized the application of Article 38 (1) of the Statute of the International Court of Justice, such as (International Law and the Court of Civilized Nations). This provision allows the Court to rule as it has done in this case in respect of the same inclusive amount to the concerned Applicants.

48. Indeed, and in the words of Aristotle:

> ***"what the judge wants is to ensure that the parties are equal in the sanction to be imposed, whereby she retrieves from the aggressor all what he must have acquired. The equality is thus a means between the winner and loser. But gain and loss are more or less opposite, so also more good and less evil constitutes gain, and more evil and less good constitute a loss. Equality which we are trying to apply is simply seen as the intermediary between the two"***.

It is thus proper to award the ten (10) Applicants who suffered unlawful detention an exclusive amount of US $42,720 each for all the prejudices and violations against them by the 1st Defendant which is the Federal Republic of Nigeria and represented by 2nd Defendant, the Attorney General and all the Defendants jointly and severally.

DECISION

49. Whereas the provisions on statute of limitations stipulated in Article 9(3) of the Supplementary Protocol of the Court do not apply to the instant case; the Court declares that the action of the Applicants is admissible.

50. Whereas the detention of the Applicants by the Defendants from 1 December 2003 to 1 March 2004 is justified by the necessities of preliminary inquiry; the Court considers that such detention is not of a wrongful nature, but nevertheless, the continuing detention of the 10 Applicants after the judicial decision of 1 March 2004, as well as the criminal proceedings brought against them from 2 March 2004 to 30 November 2005 are malicious and wrongful, and constitute a violation of the human rights of the Applicants, in accordance with Article 6 of the African Charter on Human and People's Rights as well as Article 35 of the Constitution of Nigeria; consequently the Court admits the application brought by the Applicants, for reparation of the harm suffered as a result of the said violation.

51. Whereas the Court upholds that the Parties have acknowledged having withdrawn their application of reparation, for the dispossession and destruction of their vessel, the Court declares that since no claim was made concerning the dispossession of the vessel, the Court makes no order hereto.

52. Whereas the Court has upheld that the portrayal of the Applicants in the international press as thieves and vandals of Nigerian crude oil, constitute excesses of the preliminary inquiry, and not a violation of the right to respect human dignity, as provided for in Article 5 of the African Charter on Human and Peoples' Rights, the Court dismisses the application of the Applicants in respect of the said relief.

53. Whereas the Court has upheld the principle of privity of contracts, it is necessary to hold that it is inapplicable in this case. However, the 10 Applicants to wit, Djotbayi Talbia, Inza Cisse, Latte Serge Alfred, Makomillan Tanoe, Viavonou Zannou, Boubou Diallo, Mobio Etienne, Koi Joachim, Kpilimake Nkadon, Debo Jeremie, having suffered harm arising from their continuing detention from 2nd March, 2004 to 30th November, 2005, each of the said 10 Applicants is entitled to fair and just reparation adjudged by this Court in the lump sum of US 42,750 dollars, against the Defendants jointly and severally.

54. Whereas it is trite that claims not proved must fail, accordingly this Court dismisses all other claims brought by the Applicants, for the reasons stated herein in this judgment.

55. Whereas the other 5 Applicants to wit, Sawadogo Pierre, Akakpo Antoine, Vanie Pascal, Fall Abdou, Coulibaly Hamed failed to prove the claim of human rights violation against the Defendants as stated in their Application, the Court dismisses the said claim.

COSTS

56. As always cost goes with the successful party, the Court awards the sum of Ten Thousand US Dollars (US$ 10,000) against the Defendants, in accordance with Article 66(2) of the Rules of Procedure of the Court.

THIS DECISION IS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THIS COURT OF JUSTICE, ECOWAS, ON THE DAY, MONTH AND YEAR STATED ABOVE.

1. **HON. JUSTICE HANSINE N. DONLI** - PRESIDING
2. **HON. JUSTICE AWA DABOYA NANA** - MEMBER
3. **HON. JUSTICE EL MANSOUR TALL** - MEMBER

Assisted by **Tony Anene-Maidoh** - Chief Registrar

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 19TH MARCH, 2009

SUIT N°. ECW/CCJ/APP/09/07
JUDGMENT N°. EWC/CCJ/JUD/02/09

BETWEEN
LINAS INTERNATIONAL NIG. LTD - *Plaintiff*

V.
AMBASSADOR OF MALI
EMBASSY OF MALI
THE REPUBLIC OF MALI
} *Defendants*

COMPOSITION OF THE COURT
1. **HONOURABLE AWA DABOYA NANA - PRESIDING**
2. **HONOURABLE H. N. DONLI - MEMBER**
3. **HONOURABLE ANTHONY A. BENIN - MEMBER**

ASSISTED BY:
TONY ANENE-MAIDOH - CHIEF REGISTRAR

COUNSEL TO THE PARTIES
1. **Mr. Obanioke Akhabue Friday Esq.,** - *for the Plaintiff*
2. **Boubakar Karamoko Coulibally,**
   Ambassador of Mali - *for the Defendants*

JUDGMENT OF 19TH MARCH, 2009

Determination of legality – Definition of Community – Definition of Community official – Nature of application – Contractual relation – Basis of jurisdiction of the Court – Manifest inadmissibility and incompetence – Absolute bar to proceeding with a case – Application of Article 88 of the Rules of Procedure

SUMMARY OF FACTS

The Plaintiff, Linas International Nigeria Limited, contended that the State of Mali, in violation of its promise to remunerate it, did not pay the price in the agreements made for the purposes of facilitating and ensuring land allocation to the State of Mali in Abuja (Federal Capital Territory), to put up the building housing the Embassy of Mali. The Plaintiff brought his case before the Court so that the State of Mali may be asked to pay the principal and the damages.

LEGAL ISSUE

Can a case be filed before the Court on the basis of Article 10 (c) of the 2005 Supplementary Protocol on the Court, to examine a dispute arising from the execution of a contract, between a legal person and a Member State of the Community or an official of that State?

DECISION OF THE COURT

The Application, filed by a legal person against the Ambassador or the Embassy of a Member State or against a Member State, is not against a Community official as provided for by Article 10 (c). The Application is inadmissible on this ground.

The Court can only adjudicate on a contractual dispute when an agreement has already been signed between the Member States granting powers to the Court to that effect, as provided for in Article 9(6) of the Supplementary Protocol. In the instant case, such an agreement extending the competence of the Court does not exist. It is therefore incompetent to adjudicate on the Application.

JUDGEMENT OF THE COURT

1. The Applicant is a limited liability company, registered under the laws of the Federal Republic of Nigeria, represented by Obainoke Akhabue Friday, its lawyer;

   The 1st Defendant is the Ambassador of the Republic of Mali accredited to the Federal Republic of Nigeria.

   The 2nd Defendant is the Embassy of the Republic of Mali in the Federal Republic of Nigeria.

   The 3rd Defendant is the Republic of Mali, a Member State of the Economic Community of West African States (ECOWAS).

   The three Defendants are represented by His Excellency Boubacar Karamoko Coulibaly, Ambassador of the Republic of Mali to the Federal Republic of Nigeria.

SUMMARY OF FACTS

2. The Applicant claims to be a corporation registered as a limited liability company under the laws of the Federal Republic of Nigeria. That in October 2003, the Defendants have used his services to facilitate and ensure the allocation of land for their benefit on the Federal Capital Territory, Abuja, to build their Embassy. That it carried out the instructions of the Defendants successfully. That on 3rd August, 2004, it sent them a letter informing them of the allocation of plots of land by the Minister in charge of Federal Capital Territory, in their name (copy of letter of offer of the Minister dated 29th July, 2004 is attached as Exhibit E). That after lengthy negotiations the plots allocated to the Defendants were valued at 180 million Naira.

3. That on 26 August 2004, the Defendants sent him a letter in which they confirmed their agreement to pay 10% of the total value of the plots which were allocated and made available to them.

4. That on 30th October, 2004, the Defendants sent another letter in which they agreed to pay 10% of the 180 million Naira, but, this was in vain.

   But that, despite several reminders dated 19th January, 2006 and 22nd January, 2007 addressed to Defendants, it never received payment of the 18 million Naira.

5. Based on the foregoing, the Applicant requests, as it may please the Court to:

   i. **DECLARE** that Applicant is entitled to receive payment of Eighteen Million Naira, representing 10% of the agreed value of the parcel of land allocated to them, with the support of the Applicant, for the construction of the Chancery of the Defendants.

   ii. **ORDER** the Defendants to pay forthwith the sum of Eighteen Million Naira.

   iii. **ORDER** the Defendants to pay 10% interest in excess of the amount claimed and payable by 29 July 2004, until full payment of the amount specified in the decision of the Court.

   iv. **CONDEMN** the Defendants as to costs, in the amount of (5) five million Naira.

ARGUMENTS OF THE PARTIES.

6. At the hearing of 12th March, 2009 before the Court, the Applicant tried to prove the existence and breach of contract of service delivery linking it to the Defendants. It relied on Exhibits C and D, attached to the Application and signed by the Ambassador of Mali to substantiate his allegation that the Defendants have agreed to pay eighteen million Naira. The Applicant argued in his argument that there is a contract in due form linking the Defendants, and legally protected.

7. The Defendants denied the existence of such a contract and argued that they had no financial obligation towards the Applicant.

According to the Defendants, there is only an agreement between the Government of the Federal Republic of Nigeria and the Republic of Mali under which each State should provide one another a parcel of land in the capital to build their respective Embassies.

That it is within the framework of this agreement that the Federal Republic of Nigeria allocated the Defendants the plot. That the Applicant had no role in this allocation and is not entitled to any payment.

CONSIDERATION OF THE MATTER BY THE COURT.

8. During the hearing of the parties, the Court drew attention to the provisions of Article 88 of the Rules of Court which provides that:

   "1. Where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the parties and without taking further steps in the proceedings, give a decision.

   2. The Court may, at any time of its own motion, consider whether there exists any absolute bar to proceeding with a case or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it ... ".

9. In response, counsel to the Applicant argued that the Court was seized with this case pursuant to the provisions of Article 10 (c) of the Supplementary Protocol on the Community Court of Justice (A/SP.1/01/05) as follows:

   "Access to the Court is open to:

   (c) Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official, which violates the rights of the individuals, or corporate bodies;

10. The Applicant stated that under Article 1 0 (c) of the Supplementary Protocol on the Community Court of Justice (quoted above), the Court has jurisdiction to hear applications by ***"Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official, which violates the rights of the individuals, or corporate bodies"*** according to the counsel, the case falls within the scope of the said Article because the Applicant is a corporation whose rights were violated and that the Defendants were agents of the Community.

11. The Court holds that Applicant's argument is only valid if the two conditions set out in Article 10 (c) of Supplementary Protocol are met, namely that the Applicant is a corporation and that the Defendants were agents of the Community. If there is no dispute on the status of the Applicant, what could be said of the Defendants?

12. The Revised Treaty as well as Protocols or other ECOWAS Texts do not provide any definition of the term "officer of the Community."

    Consequently, the Court must give a definition to this term based on various ECOWAS laws and other legal documents.

13. The provisions of Article 9 (1) of the Protocol on the Community Court of Justice, and Articles 1 and 2 of the Revised Treaty give a better idea of the meaning of the term **"Officer of the Community."** Article 9 (1) (f) of the Supplementary Protocol provides that:

    "The Court has competence to adjudicate on any dispute relating to: f) the Community and its officials."

    Under Article 1 of the Revised Treaty, the term **"Community"** means the Community of West African States referred to in Article 2 of this Treaty.

    Article 2 provides as follows:

    "1. By this Treaty the High Contracting Parties reaffirm the establishment of the Economic Community of West African States (ECOWAS) ...

> ***2. Members of the Community hereinafter referred to as "Member States" are those States, which ratify this Treaty. "***

14. It is clear that the term "Community" under Article 9 (1) (f) of Additional Protocol refers to the Economic Community of West African States (ECOWAS), as defined in Article 1 of the Revised Treaty. The Community is, without doubt, all fifteen (15) Member States. Each State within the Community is a **Member** of the Community, and may not be likened to the Community, as clearly stated in Article 2 (2) of the Revised Treaty. The Community has a separate legal personality, different from each Member State composing it. Clearly, one Member State alone is not the Community, which consists of all Member States that compose it.

    Also, an act taken by one Member State is not that of the Community and the community cannot be held responsible for it.

15. The 7th edition of Black's Law Dictionary, published by Bryan A. Garner defines the term "Official" as:

    > ***"a person holding or saddled with the responsibilities of public office.***
    >
    > ***2. a person authorised to act on behalf of a corporation or organization, especially in the capacity of a subordinate."***

16. The Applicant initiated this action against three Defendants: the Ambassador of Mali, the Embassy of the Republic of Mali and the Republic of Mali. It follows from the provisions of Article 10 (c) of the Protocol on the Court, on which the Applicant relies, to justify the jurisdiction of this Court to entertain the suit, that the three Defendants in the case must be officials of the Community for the application to be admissible.

17. The first Defendant is the Ambassador of Mali, who is the legal representative of the Republic of Mali and whose main function is to protect and promote the interests of the State of Mali. He has no

public office relating to the Community and cannot act on its behalf. It is clear that the Ambassador of Mali is not an official of the Community but rather a representative of the Republic of Mali.

18. The second Defendant, the Embassy of Mali is a diplomatic representative and not a corporate body. The Embassy of Mali cannot act on behalf of the Community, as it is not invested with any public responsibility of the Community. Hence it follows that the second Defendant cannot be qualified as an official of the Community.

19. The third Defendant is the State of Mali who is a Member of the Community. It is not a corporate body and is neither invested with any public office of the Community. It cannot therefore be likened to an official of the Community.

    It appears clearly from the foregoing that the three Defendants are not officials of the Community.

20. Article 10(c) of the Supplementary Protocol on the Court relates to acts improperly, illegal, negligent, etc. committed by officials of the Community and causing injury or damage to another individual or legal entity. It also concerns the failure of an official of the Community in the discharge of their functions that the texts of the Community authorise or impose on him. In any case, an individual or a corporate body, victim of such a breach and with an interest to act, may bring an action against the Community.

21. The first Defendant, that is, the Ambassador of Mali is the only individual among the Defendants in the case and, although it can be described as an Official of the Community, according to the understanding of Counsel to Applicant, he cannot be said to have violated a text of the Community either by action or inaction, on his part.

22. Moreover, it is generally recognized in law that the jurisdiction of a Court is determined by the nature of the Application by the Applicant and not by that of the defence.

It is clear that the application of the Applicant concerns the claim for a sum of money (Eighteen Million Naira) which he claims that the Defendants owed him for services rendered to them.

The Applicant states that he is entitled to this sum as well as to costs in this proceeding. The submissions of the Applicant, including Exhibits B, C and D, tend to establish the existence of a contract between the parties, which would give him right to receive payment of the sum of Eighteen Million Naira.

23. The Applicant stated at the hearing that the Defendants are indebted to it for engaging the company to provide services that were never paid for. It follows therefore that the claim of the Applicant is contractual in nature.

24. This Court may not consider applications relating to contractual matters except when they are in accordance with the provisions of Article 9 (6) of Supplementary Protocol of the Court which provides that:

> ***"The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement."***

However, in this case, there is no document proving that the parties have indicated in their alleged contract that this Court would have jurisdiction to settle any dispute that would arise from their agreement. This action is therefore not admissible under Article 88 (2) of the Rules of Court. Consequently:

DECISION

i) Whereas the Defendants are not officials of the Community pursuant to the provisions of Article 10 (c) of the Protocol on the Court;

ii) Whereas the Defendants were not authorised by the Community to act on its behalf;

iii) Whereas this action, although contractual in nature, does not contain provisions that the parties, by prior agreement, would have given jurisdiction to this Court to settle their disputes under Article 9 (6) of the Protocol,

25. The Court declares that it has no jurisdiction to hear this case.

FOR THESE REASONS

The Community Court of Justice, ECOWAS, adjudicating in a public sitting, after hearing both parties, in accordance with the ECOWAS Revised Treaty and the Supplementary Protocol on the Court in first and last resort, declares its lack of jurisdiction to entertain the matter.

- That each party shall bear its own costs.

Thus made, adjudged and publicly pronounced by the Community Court of Justice, ECOWAS, on the day, month and year indicated above.

AND THE MEMBERS HAVE APPENDED THEIR SIGNATURES AS FOLLOWS:

1. **HON. JUSTICE AWA DABOYA NANA** - PRESIDING

2. **HON. JUSTICE H. N. DONLI** - MEMBER

3. **HON. JUSTICE ANTHONY. A. BENIN** - MEMBER

TONY ANENE-MAIDOH - CHIEF REGISTRAR

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 17TH OF DECEMBER, 2009

SUIT N°: ECW/CCJ/APP/01/09
RULING N°: ECW/CCJ/JUG/04/09

AMOUZOU HENRI
KILI ANGELINE
OBODJI HOUSSOU AMELAN
ELLOH AKA EVELYNE
DAGO SOPHIE LAURE
LOUKOU COFFI DOMINIQUE } *Plaintiffs*

V.

THE REPUBLIC OF COTE D'IVOIRE - *Defendant*

COMPOSITION OF THE COURT

1. **HON. JUDGE AWA NANA DABOYA** - PRESIDENT
2. **HON. JUDGE BENFEITO MOSSO RAMOS** - MEMBER
3. **HON. JUDGE ALFRED ANTHONY BENIN** - MEMBER

ASSISTED BY
ATHANASE ATTANNON - REGISTRAR

COUNSEL TO THE PARTIES

1. **Narcisse Aka** - *for the Plaintiff*
2. **Georgette Essis Mamenet** - *for the Defendant*

JUDGMENT OF 17TH DECEMBER, 2009

Human rights - procedural incidents - joinder - Discontinuance of proceedings - admission as part intervention - libel - defamation - presumption of innocence - the right to a fair hearing - arbitrary detention - the right of pregnant women and infants - competence - admissibility - disclaimer - reasonable time - dismissal.

SUMMARY OF FACTS

Mr. Amouzou Henri and five others are being investigated in a trial triggered by the Government of Cote d'Ivoire in the framework of a clean up in the Coffee/Cocoa sector. They came before the Court regarding the conduct of the investigation and the condition of their detention on the basis of which they alleged the following violations: the violation of the principle of presumption of innocence, libel, violation of the rules of preventive detention, infringement on the right to fair hearing and the violation of the right of pregnant women and infants in the peculiar situation of Mrs. Amelan Roselyne Obodji nee Houssou

LEGAL ISSUES

1. *Does the publication of information by the media relating to the indictment of the Applicants violate their right to presumption of innocence, their right to honour and reputation?*

2. *Is the preventive detention of the Applicants arbitrary?*

3. *Does the detention of a pregnant woman and the separation of an infant from the detained mother violate the rights of women and children?*

DECISION OF THE COURT

That the handling of the case by the media undoubtedly contributed to creating a general tendency that may affect the presumption of innocence but the Republic of Cote d'Ivoire cannot be held liable for this especially

if it offers the guarantee of independence of the judiciary and fair hearing.

A detention may be legitimate initially, but it may turn out to be unlawful later on if it extends beyond a reasonable time limit within which the detainee has to be tried. In this case, the time lapse of seven months for the preventive detention is not above a reasonable time limit.

The provisions of Article 30 of the African Charter of Human and Peoples' Rights do not impose any strict prohibitions on States in terms of the detention of pregnant women and mothers of infants. Considering that the infant did not remain in the prison house, the Court held that since a system was put in place whereby the mother of the infant received regular visits, the pangs of separation between the mother and the child were reduced to a bearable minimum.

JUDGMENT OF THE COURT

1. The Plaintiffs:

   Mr. AMOUZOU Henry, Economist, Chairman, Council of the Fund for the Development and Promotion of the Activities of Coffee and Cocoa Producers (FDPCC) resident of Abidjan, Deux Plateaux.

   Mrs. KILI Angeline, Staff of the Central Bank of Francophone West African States known as BCEAO, in secondment to the CNDD, Chairman of the Board of Directors of the Fund for the Regulation and Control of the Coffee/Cocoa sub-sector (FRC), resident of Abidjan, Plateau.

   Mrs. Roselyne OBODJI née HOUSSOU AMELAN, Director of Administration and Finance of the Fund for the Development and Promotion of the Activities of Coffee and Cocoa Producers (FDPCC) resident of Abidjan, Cocody Riviera Palmeraie.

   Mrs. ELLOH AKA Evelyne, Jurist, Director General, of COCO SERVICES Company, resident of Abidjan, Riviera Palmeraie.

   Mrs. DAGO Sophie Laure Adele, Finance Officer, former Director of Finance of the Coffee and Cocoa Board, resident of Abidjan Cocody.

   Mrs. LOUKOU COFFI AGBALESSI Dominique, Finance Director of the Agency for the Regulation of Coffee and Cocoa (ARCC), resident of Abidjan Cocody.

   Who for the purpose of this case, elected domicile in the Law Firm of Lawyer AKA Narcisse, Lawyer registered with the Bar in Cote d'Ivoire, 7 Boulevard Latrille Cocody - 09 BP 2556 Abidjan 09.

2. The Defendant is the Republic of Cote d’lvoire, a Member State of the Economic Community of West African States, ECOWAS. The Defendant is represented by Georgette ESSIS MAMENET (Esq.), of the Law Firm “ESSIS - KOUASSI - ESSI” situated in Abidjan

Cocody, II Plateaux, Rue des Jardins, Sainte Cecile, 16 BP 610 Abidjan 16.

3. By an Application brought before the Court on 15 January 2009, the Plaintiffs have a grievance against the Defending State, which they accused of violating their fundamental human rights. They urged the Court to recognise the said violation and to condemn the State of Cote d'Ivoire, as to the cost, for the reparation of the prejudice that they suffered.

SUMMARY OF FACTS

I. The facts as evoked by the Plaintiffs

4. Plaintiffs aver that On 11th August 2007, the Head of State of Cote d'Ivoire instructed the State Prosecutor and the Tribunal of First Instance of Abidjan, situated at Plateau, to investigate the activities of the Institutions of the Coffee and Cocoa sub - sector of the economy, and the cash flow of each of these Institutions since the liberalisation policy approved for that sector.

5. The State Prosecutor, having summed - up the facts for prosecution, the Doyen of the Trial Judges initiated a Judicial Enquiry which led, in June 2008, to the indictment, as well as to the preventive detention of the high ranking officials of the said Institutions of the Coffee / Cocoa sub - sector.

6. Following this indictment, the State Prosecutor held a press conference, during which he made public the preliminary findings of the enquiry, while stating that twenty - three (23) persons, who are specifically named are being investigated for "embezzlement, abuse of office, fraud, use of fake bank and business documents."

7. Still from the preliminary findings,

> ***"apart from over invoicing, investigators observed the non-functioning of some acquired companies or the non-remittance of dividends and the lack of proper sharing of resources and profits to farmers..."***

8. The Press Conference by the State Prosecutor was followed by the publication in the Newspapers of the nominal roll, together with pictures of the indicted officials, amongst whom are the Plaintiffs. On the front page of the Government owned Daily ***"Farternite Matin"***, apart from the nominal roll of the indicted persons, there was this bold caption "Heads shall roll"

   The Plaintiffs were thus subjected to a media lynching by public opinion which condemned them before an eventual trial.

9. On 16th July, 2008, the Doyen of the Trial Judges appointed, by Order, two Experts, requesting them to carry out a Financial Audit in all the Institutions of the sector, which are: the FGCCC, the BCC, the ARCC, the FDPCC and the FRC.

10. On 14th August, 2008, during its Meeting, the Council of Ministers in Cote d'Ivoire authorized the Doyen of the Trial Judges to interrogate five Members of the Government. They were so interrogated during the month of October 2008.

11. The Plaintiffs believed that in handling the case, the Ivorian Judicial and Political Authorities have seriously violated five series of their human rights.

As to the Law

II. Arguments of the Plaintiffs

12. In support of their Application, the Plaintiffs invoke Article 11 of the Universal Declaration of Human Rights, which provides that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty, according to law in a public trial at which he has had all the guarantees necessary for his defence."

13. They aver that the indictment is not a condemnation, and that it does not establish, in any manner whatsoever, the guilt of the persons who are investigated. So, it was wrong for some national media, especially the State owned Television to have labelled "presumed guilty", while referring to the indicted persons in the coffee/cocoa case.

14. They also invoked Article 12 of the Universal Declaration of Human Rights which provides, in a peremptory manner that: "none shall have his honour and reputation infringed upon. Every individual has the right, under the law, to be protected against ...such infringement" Whereas, for several months, high ranking officials of the sector, including the Plaintiffs, are severally portrayed as criminals, "thieves who stole billions" by the press, as well as some Judicial Authorities and certain political authorities.

15. The Plaintiffs affirm that, since they were only placed in preventive detention, they are to be presumed innocent, but the portrayal made of them was done in a way as to infringe seriously upon their honour and reputation. This constitutes intolerable violation of their rights.

16. In addition, the Applicants invoked Article 137 of the Ivorian Code of Criminal Procedure which provides on the one hand that: "Freedom is of right", and on the other hand that: "Preventive Detention is an Exceptional Measure", before questioning the rationale behind the detention of the Plaintiffs. They observe that this provision rightly affirms the presumption of innocence, in a way that, for an individual whose culpability is yet to be determined, must enjoy a provisional freedom. That the Judicial Authorities should also have observed the strict respect for the presumption of innocence, since the Plaintiffs are presenting all the guarantees of representation and they have voluntarily been responding to the summons from both the police and the Trial Judge.

17. But, to justify their refusal to grant the Plaintiffs' request for provisional release, the Judicial Authorities aver that "their detention remains a necessity for the manifestation of the truth" or that the investigation is still ongoing, thus keeping the Plaintiffs behind bars for the past seven months. And that, in these conditions, it then follows that, for these vague and non precise reasons, the preventive detention of the Plaintiffs could be likened to an arbitrary arrest.

18. Thus, the Applicants invoke Article 9 of the Universal Declaration of Human Rights, which provides that: "None shall be detained

arbitrarily" They claim that the arbitrary detention of the Plaintiffs results from their unjustified preventive detention, both constituting not only a violation of the Universal Declaration that are confirmed by the Ivorian Constitution itself, but also, they are likely to infringe upon their right to a fair hearing.

19. Whereas, Article 11 of the Universal Declaration of Human Rights provides that: "Every accused person has a right to a fair hearing, during which he enjoys all the necessary guarantees for his defence".

20. The Plaintiffs add that, having been in detention, they could not participate efficiently and with confidence in the ongoing audit exercise, which marks a very important step in the preparation for their eventual trial. Moreover, the fact that only one case file was opened for nearly twenty indicted persons, constitutes a hindrance for their counsels to effectively have access to it and defend them efficiently.

21. To support their claim on the violation of the right of the pregnant woman, who is one of them, the Plaintiffs invoke certain Articles of the United Nations Convention on the Rights of the Child of 20 November 1989, which provide that:

> ***" the child is entitled to assistance and special care ... He needs special protection and care, especially an appropriate legal protection, before and after birth"***

> that:

> ***" In all decisions concerning children, whether taken by the Courts ... the best interests of the child must be given primary consideration"***

(Art. 3) before deducing that the judicial protection of the child begins from the pregnancy, the moment the latter is confirmed.

22. Finally, the Plaintiffs invoke Article 30 of the African Charter on the Rights and Welfare of the Child of July 1990 which provides that:

> ***"The State Parties shall put in place a special treatment for pregnant women and nursing mothers who are accused of, or found guilty of a penal offence... State Parties shall ensure that another punishment, different from jail apply..."***

23. It thus shows that, even when pregnant women are found guilty of a penal offence, this Charter recommends that, "a punishment other than jail shall apply" When it has to do with a pregnant woman who has only been indicted, and who benefits from the principle of the presumption of innocence, the preventive detention should have been discarded.

24. That in the instant case, despite all the Medical Certificates on pregnancy produced, the Trial Judge did not consider the specific condition of Mrs. OBODJI Roselyne, rather, she was kept in preventive detention, thereby violating all international conventions entered into by the State of Cote d'Ivoire.

25. To conclude, Plaintiffs aver that the manner in which the Ivorian Political and Judicial Authorities have handled the case reveals that there was serious infringement to five series of their human rights, which are:

    - The violation of the principle of presumption of innocence;
    - An infringement on honour and reputation;
    - The violation of the rules of preventive detention;
    - An infringement on the right to fair hearing;
    - The violation of the rights of pregnant women and infants (particularly relating to Mrs. Obodji nee HOUSSOU AMELAN Roselyne's condition).

26. Plaintiffs therefore want the Court to:

    - Admit the Application of Mr. AMOUZOU Henri and five others, as filed within the legal norms;

- Declare that they have ground;
- Order their immediate temporary release;
- Condemn the State of Cote d'Ivoire, as to the cost of Six hundred Million CFA Francs, for the reparation of the prejudice that they have suffered.

III. The Defendant's Arguments.

27. Having been served notice of the Application, the State of Cote d'Ivoire filed its defence on 16th April, 2009. It avers that it is a democratic State that gives due respect to the principle of the separation of powers, the respect to, and protection of fundamental liberties, whether collective or individual. As proof of this, it invokes Article 1 of the Ivorian Constitution which provides that: "The State of Cote d'Ivoire recognises the fundamental liberties, rights and duties as enshrined in the present Constitution and shall take Legislative Measures and Regulations to ensure their effective application" and concluded that, owing to the constitutional principles thus stated, and the facts of the case, the grievances invoked by the Plaintiffs seem not serious.

28. The State of Cote d'Ivoire considers groundless the Plaintiffs' argument, by which they aver that the media portrayed them as guilty, and therefore this could be a violation of the principle of the presumption of innocence. For, in as much as Articles 19 of the Universal Declaration of Human Rights, 8 and 9 of the African Charter on Human and Peoples' Rights, and 9 and 10 of the New Ivorian Constitution of 2000 recognise the freedom of the press, the State has an obligation to guarantee such a freedom and to ensure that journalists perform their duty of informing the citizens satisfactorily, and without any hindrance. However, since they are free and autonomous corporate bodies, the media must account for their own actions.

29. The State of Cote d'Ivoire also invokes Article 12 of the Universal Declaration of Human Rights which provides that: “none shall have

his honour and reputation infringed upon. Every individual has the right, under the law, to be protected against ...such infringement" It considers the Plaintiffs' allegation relating to an infringement to their honour and reputation as vague, and not backed by any objective proof, since the acts imputed to the State of Cote d'Ivoire are sequel to a judicial enquiry that its Court initiated owing to penal offence, of which Plaintiffs are accused.

30. It adds that, when there are serious penal offences, which are likely to disturb public peace, it is the duty of the State Prosecutor to initiate proceedings and to inform both the national and international communities on the nature of the said proceedings and probable counts. It is the responsibility of the State to administer justice on its territory and to ensure that judicial procedure is adhered to in accordance with the law.

31. Also, the Defendant State equally considers groundless the Plaintiffs' argument against the State Prosecutor, relating to their preventive detention, which, according to them, was unjustified, simply because that judicial authority has not justified his action, whereas they all present guarantees of legal representation, and that they have always answered summons of the investigators and the Trial Judge.

32. It avers that the preventive detention is indeed, not only a means of ensuring the representation of the indicted person before the law, it is also a means of preserving the sanctity of the materials or indices which could serve as exhibits to the offence, of preventing an influence on the likely witnesses or a fraudulent deal between the indicted persons and their accomplices, of maintaining public peace and order and of protecting the indicted persons themselves against acts of retaliation from the aggrieved public.

33. That in the instant case, and owing to the weight of the acts relating to embezzlement of huge amounts of money from the cocoa and coffee funds, and with a resolve to establish transparency and good governance, it was necessary to take measures that could ensure the maintenance of public law and order, and the safeguard of the national economy. The preventive detention of the Plaintiffs is thus justified.

34. Moreover, the Defendant State believes that the Plaintiffs' argument relating to their inability to participate, efficiently and with confidence, in the ongoing audit exercise, owing to their detention, does not reflect the true situation of the facts, and shows their limited knowledge of the administration of justice in their own country.

35. Indeed, Articles 112, 113 and 115 of the Code of Criminal Procedure guarantee the rights of the indicted persons before the Trial Judge. In the instant case, it can never be denied, except otherwise and with proof, that all the indicted persons, within the framework of this procedure, were interrogated in the presence of their counsel. Moreover, all the Orders given by the Trial Judge, in accordance with the above quoted texts, are subject to appeal, once they were notified on the indicted persons.

36. Furthermore, the audit exercise in question is the responsibility of experts, and it must be carried out, pursuant to Articles 156 and others, of the Code of Criminal Procedure. Agreed, such expert accounting audit exercises are carried out generally without the indicted persons being present, yet the ensuing report is necessarily communicated to them for their consideration and, probably a request for a counter expert exercise. All said and done, such expert accounting audit exercises are carried out in conformity with the spirit of a fair hearing, and no violation of such a principle could be alleged against the Defendant State.

37. With regard to the interrogation of five Ministers of the Government, in this investigating procedure, the Defendant State avers that they were heard merely as simple witnesses.

38. While answering the grievances brought against it relating to the violation of the right of pregnant women and infants, the Defendant State avers that in Cote d'Ivoire, Decree No. 69 - 189 of 14 May 1969 relating to establishment of prisons and regulating the modalities for the execution of liberty deprivation sentences provides that:

> ***"The detained pregnant women are transferred to a hospital or a Maternity Home, when the pregnancy***

> ***has reached an advanced stage. The nursing mother is taken back to the prison, together with her baby, whenever the state of health of either of the two allows for it''.***

Thus, national laws allow for the incarceration of pregnant women.

39. While relying on the provisions of Article 30 of the African Charter on the Rights and the Welfare of the Child, the State avers that the Text recommends the substitution of prison terms for pregnant women, or nursing mothers, or under aged children, with more favourable means of detention, for the development of both mother and child, only in situations where such is possible.

40. The International Conventions relied upon recommend that detained pregnant women should be delivered of their babies in conducive environment, when the time for delivery has approached, either in a hospital or a Maternity Home. This was exactly what the prison officials have observed, when they allowed Mrs. OBODJI Roselyne nee HOUSSOU AMELAN to be delivered of a baby on 20th September, 2008 in *Clinique Notre Dame de l'incarceration*, situated at *Riviera, Palmeraie,* Abidjan. She was admitted there on 14th September, 2008 and stayed till 12th October, 2008. The Caesarean method through which she put to bed could not, in any way be as a result of the torture that she might have been put through, while in detention, or the pains endured during child birth.

41. The Defendant State avers further that the Plaintiff enjoyed special treatment, owing to her social status, and her detention was effected in a mild manner. It therefore concluded by saying that the argument relating to the violation of the rights of pregnant women is groundless and should be thrown out.

42. In regard to the infant, who was separated from the mother, the State affirms that Article 162 of Decree 69-189 of 14th May, 1969 stipulates that:

> ***"Children could be left in the custody of their detained mother till age 2"***.

Yet, in the instant case, Mrs. OBODJI Roselyne decided to be separated from her baby, thus electing the infant to be fed on baby food (tin powdered milk), with the alleged harm evoked, never reported on.

43. From the foregoing, the State of Cote d'Ivoire respectfully pleads with the Community Court of Justice to kindly declare the grievances presented by the Plaintiffs as groundless and to strike out their Application pure and simple.

IV. The Court Hearing.

44. By Order of the Court, the Parties were summoned to appear before it, in a hearing slated for 24th September, 2009. During the hearing, and before the beginning of the session, the Republic of Cote d'Ivoire filed at the Registry of the Court a Defence Brief in which it raised an objection for the lack of competence of the Community Court of Justice, to hear the case, and the inadmissibility of the Application instituting proceedings, which were not earlier raised. This document was filed, and joined to the original writs.

45. The Republic of Cote d'Ivoire states that, following the notification, it had presented its own defence, by itself before constituting its counsel. It explains further that after designating its counsel, the latter applied for an extension of the time - limit for the Defence, but, that request could not be registered in the Registry of the Court. Finally, the Republic of Cote d'Ivoire adds that it is averse to the idea of allowing the Applicants sufficient time to submit their Rejoinder to the Defence Brief. If the Honourable Court so decides.

46. On the other hand, Plaintiffs were opposed to filing of the document presented by the Defendant State, on the ground that it has had sufficient time to constitute its counsel, who is duty bound to respect the time-limit.

47. They however recognised the fact that they too filed in a request in which they informed the Court of the withdrawal of three of the Plaintiffs from, and the inclusion of one new, whose inclusion was

earlier on inadvertent. Thus, they added that they were not opposed to an adjournment, to allow them the time to file more supplementary documents.

48. Finally, Plaintiffs pleaded that the Court should kindly order their physical appearance, as well as that of the Chairman of the National Human Rights Commission of Cote d'Ivoire, for them to be heard.

Interim Order

49. The Court,

Considering that, contrary to the provisions of Article 33, paragraphs 1 and 6 of the Rules of Procedure, no proof was added to the main Application by the Plaintiffs; but that the case was about being argued, has opted to consider the issues raised in the Ruling, and invited the parties to adopt their final conclusions.

50. Thus, Plaintiffs recalled the five series of human rights violation committed against them by the State of Cote d'Ivoire and reiterated their plea for reparation.

51. The State of Cote d'Ivoire, in turn, observed that three Plaintiffs have withdrawn from the case, while at the same time drawing the attention of the Court to the fact that a Member State was dragged before an International Court for a case of the violation of serious human rights with no proof to back that claim.

52. It thereafter concluded by raising the objection as to the incompetence of the Honourable Court, on the ground that the detention of the Plaintiffs was Ordered by National Judicial Authorities, in accordance with the provisions of the Legislation that allows for preventive detention. He further avers that the Plaintiffs had the opportunity to exercise their right of appeal, before the National Courts, which ruled that, "**their detention remains a necessity for the manifestation of the truth**". And that, in the instant case, the detention is not an arbitrary one, and that, it is not within the jurisdiction of the Community Court of Justice, ECOWAS, to hear the facts of the case.

53. Upon these incidents, the Court has really decided a joinder, as to the merit, and opted to adjudicate as follows.

V. ANALYSIS OF THE FACTS BY THE COURT.

On the jurisdiction of the Court

54. The jurisdiction of the Court is as defined in the Protocol A/Pl/7/91, together with the amendments introduced by the Supplementary Protocol A/SP.1/01/05 relating to the Court. Thus, pursuant to Article 9(4) of the said Supplementary Protocol, "**The Court has jurisdiction to hear materially, cases relating to human rights violation that occur in any Member State of the Community**".

55. Such competence which is recognised for the Court, in principle, it is now left for the Court to demonstrate, in concrete terms, if it has jurisdiction to consider the Application that was brought before it. To settle this riddle, the Application instituting proceedings needs to be analysed, in the first place.

56. In their Application, Plaintiffs invoke the violation by the Defendant State, their right to enjoy the presumption of innocence (1), an infringement upon their honour and reputation (2), their right of not being deprived of personal liberty in an arbitrary manner (3), and their right to fair hearing (4).

57. To this effect, the Court recalls that:

    - The right to the presumption of innocence is guaranteed by the provisions of Articles 11(1) of the Universal Declaration of Human Rights, 7(1) (c) of the African Charter on Human and Peoples' Rights and 14(2) of the International Covenant on Civil and Political Rights.

    - The right to honour is guaranteed by Articles 12 of the Universal Declaration of Human Rights, 4 of the African Charter on Human and Peoples' Rights and 17 of the International Covenant on Civil and Political Rights (ICCPR).

- The right of not being deprived of personal liberty in an arbitrary manner is guaranteed by Articles 9 of the Universal Declaration of Human Rights, 6 of the African Charter on Human and Peoples' Rights, and 9 (1) of the International Covenant on Civil and Political Rights (ICCPR).

- The right to fair hearing is guaranteed by Articles 10 of the Universal Declaration of Human Rights, 7 of the African Charter on Human and Peoples' Rights, and 14 of the International Covenant on Civil and Political Rights.

58. The Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights are Legal Instruments that all ECOWAS Member States, including the State of Cote d'Ivoire are signatories. At the Community level, their eminent importance has been underlined, notably by the affirmation from all Member States which vowed to expressly respect them.

59. The commitment to the African Charter on Human and Peoples' Rights is derived from its ratification by each of the ECOWAS Member States, of two fundamental Instruments, which are: the ECOWAS Revised Treaty and the Protocol relating to Democracy and Good Governance (Art. 1 h).

60. As to the commitment to the Universal Declaration of Human and Peoples' Rights its pre-eminent place in human rights law, as recognised by the ECOWAS Community is as shown by its mention in the preamble of the aforementioned Protocol.

61. The rights recognised and affirmed by these Instruments constitute international obligations, for Member States, within the scope of general international law and Community law By affirming their commitment expressly to these International Instruments relating to Human Rights, the Community and its component Units (State Parties) have surely in mind, the core element of the United Nations' System which is enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,

as well as the core element of the African system as the expression values of authentic civilisation, which they are ready to uphold .

62. Consequently, while examining the extension of its jurisdiction over cases of human rights violation within the Community landscape, the Court takes into consideration, not only the African Charter on Human and Peoples' Rights, but also, the United Nations' basic Instruments, namely the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These United Nations Instruments were, at least, accepted by Cote d'Ivoire, which ratified or signed them.

63. The Court notes that the State of Cote d'Ivoire ratified the International Covenant on Civil and Political Rights on 26 March 1992 and ratified the Supplementary Protocol to that Convention on 5 March 1997.

64. Thus, there is no doubt, that all the rights that are guaranteed in these Instruments, which relate to human rights issues, are part of human rights that Cote d'Ivoire must protect on its territory.

65. Equally, by signing the Supplementary Protocol amending the Protocol A/P.1/7/91 relating to the Court of Justice of ECOWAS on 19th January, 2005, Cote d’Ivoire accepts, by so doing, the jurisdiction of the Court on cases relating to issues of human rights violation which occur in its landscape.

    Consequently, the Court has jurisdiction to hear the instant case.

On the admissibility of the documents brought before the Court.

66. The first document relates to the one the State of Cote d'Ivoire presented, to substitute or correct its Defence Brief.

67. The Court holds that the State of Cote d'Ivoire was notified of the Application, and was accorded a time - limit during which it could file its defence. A Defence Brief was filed by the Defendant State within the time - limit. There was no Rejoinder from Plaintiffs. A date was fixed for the pleas to be made and the parties were duly summoned.

68. A document which had already been tendered, a little before, or in a hearing, and which features some aspects of a new request in a subsequent hearing shall be deemed as constituting a violation of the provisions of the Rules of the Court. Thus, pursuant to the provisions of Article 35 of the Rules of Procedure of the Court, and owing to the principle of legality, the Court simply rejects the said document.

69. The second document is the one that was introduced by Counsel to the Plaintiffs, and through which he informs the Court on the withdrawal of three of the Plaintiffs, and the inclusion of a new one, whose name had been omitted earlier, when the main Application was filed.

70. The Court accedes to the first request, since the Applicants are at liberty to withdraw from the case at any stage of the procedure.

71. As for the second request, the Court observes that, pursuant to the Rules of procedure applicable before it, notably Articles 21 of the 1991 Protocol relating to the Court, and 89 of the Rules of Procedure, a third party who was not mentioned in the main Application, as principal party, can only intervene in the procedure, through a voluntary application to intervene. "To this end, the intervener shall mention the grounds that justify such an intervention". These grounds are beyond a mere omission from the main Application.

72. Consequently, the request from Counsel to Plaintiffs, which tends to introduce a new Applicant, is rejected.

As to the merit of the case.

73. The Court considers as proven, the following facts between the parties:

- On 11th August, 2007, the Head of State of Cote d'Ivoire instructed the State Prosecutor in the Tribunal of First Instance of Abidjan, to investigate the financial management of the Institutions of the Coffee and Cocoa sub - sector of the

economy, in order to shed light on the cash flow of each of these institutions.

- The State Prosecutor held a press conference on 12 June 2009 during which he made public the findings of the enquiry, while stating that twenty - three (23) persons, are being investigated for "embezzlement, abuse of office, fraud, use of fake bank and business documents."

- Equally, the Doyen of the Trial Judges Ordered, in June 2008, the arrest of some of the Applicants, namely Mr. AMOUZOU Henri, Mrs. Obodji Houssou Amelan Roselyne and Mrs. Aka Elloh Evelyne.

- On 18th July, 2008, the Doyen of the Trial Judges appointed, by order, a Team of Experts, to carry out a Financial Audit in all the Institutions of where the Applicants are working.

- On 14th August, 2008, the Council of Ministers authorised the Doyen of the Trial Judges to interrogate five Members of the Government, still in relation to the same case.

- Some media organisations, namely the State owned Television Station and the daily News paper Fraternite Matin gave information relating to the results of the investigation and alluded to presumed guilty and that sanctions shall be taken against the indicted persons.

- Plaintiffs were thus arrested and detained. They applied for bail, which was turned down; they appealed following their detention and the Court of Appeal adjudicated on the appeal as unfounded.

- The Applicant OBODJI was pregnant while she was in detention. Mrs. OBODJI was still in custody when she was taken to a clinic, and she was delivered of a child.

- The baby does not live with the mother in detention; to this effect, the baby is being fed with artificial milk.

74. The Applicants claim that the State of Cote d'Ivoire violated their fundamental rights stated as follows:

- Violation of the principle of the presumption of innocence;
- Infringement on honour and reputation;
- Violation of the rules of preventive detention;
- Infringement on the right to fair hearing.

The Applicant OBODJI alleges that the State of Cote d'Ivoire infringed on the right of pregnant women and nursing mothers.

75. There is, therefore, the need to analyse each of these alleged rights, so as to determine whether there was a violation of each of them.

On the violation on the right of presumption of innocence

76. To illustrate the violation of the right of the presumption of innocence, the Applicants aver that some information outfits in the country namely the state owned Television Station and the Government Daily Fraternite Matin portrayed them as potential culprits and that "heads shall roll".

77. In regard to the alleged grievance, following the publicity made by the media outfits, the Court holds that the Applicants do not establish the link between the News Items made public and the journalistic treatment by the media outfits, talk less of any potential liability of the State of Cote d'Ivoire.

78. In any case, the news that was published, relating to the ongoing investigation, wherein the Applicants were portrayed as presumed guilty by the press, was done in the strict exercise of the right or the freedom of information. Even if such has infringed upon their honour and reputation, there is no way the State of Cote d'Ivoire could be held responsible for this. The Court wishes to recall its jurisprudence in the case of **Hadijatou Mani Koraou against the**

Republic of Niger (ECW/CCJ/JUD/04/08 paragraph 71 of 27/10/08) where the Court states that

> ***"... if the complaint drawn from discrimination - to which the Applicant lays claim for the first time before the Court - is founded, that violation is not attributable to the Republic of Niger but rather to El Hadj Souleymane Naroua, who is not party to the instant proceedings"***.

79. The Court does not loose sight of the fact that the broadcast made by the press, of the facts of the case under investigation, or of the judgement, with a view to portraying the suspects as guilty before hand, could give credence to a general predisposition that could lead to a judgement based on culpability, and thus, could have effect on the principle of presumption of innocence. Yet, for as long as the guarantees of the independence of the judiciary, and fair hearing could be given to the suspects, such an action from the press cannot become a liability for the State of Cote d'Ivoire.

On the infringement on honour and reputation

80. The same analysis that the Court has made for the principle of presumption of innocence, also applies to the allegation of infringement on honour and reputation.

81. Indeed, the State of Cote d'Ivoire could only be held responsible, if by omission, it had not made laws that would protect the honour and reputation of citizens, and if it had not created the Courts, which the citizens could access, to enable them initiate proceedings, and enforce their rights. But, in the instant case, the Applicants have not imputed to the Defendant State, any omission.

82. Consequently, in the instant case, since the Applicants feel they have been wronged, following the journalistic handling of the case, it behoves them to lodge a complaint to the appropriate quarters, to hold the authors of the alleged violations responsible, either in civil or criminal suits. In the contrary, they cannot hold the State of Cote

d'Ivoire responsible for a purported violation that they might have suffered, and which might have been committed by a third party.

83. On this issue too, their claim cannot prosper.

On the Arbitrary Detention

84. The Applicants claim that they have been arbitrarily detained and were not given fair hearing.

85. The parties recognise the fact that the Applicants' detention was carried out, on the Order of a competent judicial authority of the Respondent State, namely the Doyen of Judges, as part of an investigation into a case of embezzlement or poor management of public funds, which, in general, constitute a crime of a certain gravity and punishable under the law.

86. Whether one relies on domestic law or on international instruments that the State of Cote d'Ivoire is committed to, preventive detention of indicted persons is allowed persons when verifying such facts.

87. The Applicants had an opportunity to challenge the reasons for that detention before a Court of Appeal in their country. Their appeal, having been stricken out in their country, the Court concludes accordingly that the Applicants' detention was based on legal grounds (on reasonable cause) and was carried out according to legally determined procedure in their country. Thus, the claim of the Applicants that their detention is arbitrary is unfounded.

88. Agreed, a detention may be initially free of observations, that is a lawful detention, yet, it can become thereafter, illegal, beyond a reasonable time - limit, by which the convict must be tried.

89. Indeed, Article 9(3) of the International Covenant on Civil and Political Rights provides that "**Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or shall be released**".

90. The Applicants alleged that their preventive detention is being prolonged excessively, thereby violating their rights as recognised by the aforementioned international instruments.

91. Given the difficulty in finding a quantitative criterion that could be used in all situations, neither the African Charter on Human Rights, nor the International Covenant on Civil and Political Rights or any similar international instrument, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Inter-American Charter on Human Rights, do not define clearly, what is meant by reasonable time-limit during which to effect the trial of suspects in preventive detention.

92. Some Constitutions and domestic laws have been careful in establishing a maximum time -limit beyond which nobody can remain in custody.

93. International Courts, which are competent in applying the relevant international instruments on human rights consider that the reasonable time - limit to effect the trial of detainees must be determined on the merit of each case, given the specificity of procedure, its degree of complexity, and depending on the nature of the offence, of the difficulty in the investigation or the number of people involved.

94. In the instant case and given the alleged facts, the Applicants are suspected of having committed a crime of embezzlement or mismanagement of public funds, in a case where 23 persons were already involved. Five cabinet members have also been interrogated.

95. Considering the nature of the crime for which the Applicants are charged, the number and the level of responsibilities of those involved, and the complexity of investigations relating to offences which are of financial in nature, one cannot confirm that, the time that has elapsed, (seven months) between the beginning of their detention, and the date on which the Applicants brought their case before the Court, is enough to believe that their preventive detention is gone beyond a reasonable time-limit.

96. Agreed, in examining the question of the observance of reasonable time-limit, one must take into account the conscientiousness of the authorities in their way of expediting the proceedings of the case. But, concerning this aspect, the pleadings filed on the case, including those by the Parties themselves, give the impression that the authorities made conscious efforts to conduct the trial without unjustified delay.

97. Indeed, the accused were detained in June 2008 and immediately after, investigative proceedings were begun, such as the conduct of a financial audit of the companies, as well as hearing of five members of the Government in August. The Court holds that there are no indications that may lead her to judge that the Defendant State is slow in conducting the trial of the Applicants within the said time-limit.

98. And that, however, it shall be up to the Defendant State to take appropriate steps to ensure that a reasonable time-limit is strictly adhered to, or where it is impossible to observe such a time-limit, the detainees may have to enjoy the rights as enshrined in Article 9 (3) of the above-cited Covenant.

As regards violation of the rights of the pregnant woman and those of the infant

99. This last plea - in - law concerns the particular situation of Applicant OBODJI, who, according to the Application filed, was pregnant during her detention, and gave birth to a living child during the preventive detention, but the infant is not kept in the prison house.

100. It is obvious that the Applicant was pregnant and that during the preventive detention period, she gave birth to a child who did not however remain in prison in the company of his mother.

101. In the Application, it is claimed that the detention of the Applicant and the fact that she was kept in prison before and after child birth, violates the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

102. The Court acknowledges the important role played by these two instruments in the protection of the interests of a minor as well as those of a pregnant woman and of a mother of minors.

103. Such instruments, in as much as they make reference to detention and imprisonment, must be taken into consideration by the States in the administration of justice, the reform of prisons, the making of laws which define the regime of incarceration of persons in penitentiary establishments, and in the administration of penitentiary services.

104. In this regard, special attention must be accorded Article 30 of the African Charter on Human and Peoples' Rights, which provides that:

"***State Parties to this Charter shall put in place, a special treatment for pregnant women and mothers of infants and minors who have been indicted or found guilty of a penal offence, and shall ensure particularly that:***

1. A sentence other than jail term shall be given, in all cases, against pregnant women;

2. Measures aiming to replace the imprisonment of pregnant women shall be taken and promoted;

3. Specialised Institutions shall be established, wherein the detention of such mothers shall be carried out;

4. All measures shall be put in place to forbid the imprisonment of a mother and her child;

5. All measures shall be put in place to forbid that a death sentence be passed against such mothers;

6. The prison system shall essentially aim at reforming, reintegrating the mother into her family and rehabilitating her into the society."

105. However, the Court understands that the provisions cited above do not absolutely debar the States from detaining pregnant women and nursing mothers. It is true that it is the Charter itself which brings the States under the obligation of "<u>creating special institutions for taking</u>

care of the detention of mothers". This confirms the fact that there is no absolute prohibition on deprivation of freedom in such an instance.

106. What the States are bound by, is that they are under an obligation to make a preference for alternative measures, as regards the imprisonment of pregnant women where this is possible, and to create special institutions for the detention of pregnant women and nursing mothers.

107. As emphasised by Habib Gherari in Etudes Internationales, vo1.22, No 4, 1991, pp. 735- 751, with regard to the rights that are guaranteed by the African Charter,

"In order for the African Child or the Child who is on the African continent to truly enjoy the generality of these rights, two conditions must be met. On the one hand, and in the majority of cases, the State must make adequate Regulations and necessary concrete Measures (Art. 1.1 of the Charter); indeed, if civil rights and fundamental liberties have, as we all know, direct applicability, it is not the same for such rights that are highly social in nature, which, except for few, like Primary Education, which is free and obligatory in nature (Art. 11.3a), require great and constant effort. And this is well emphasised in the Charter, their enforcement is highly dependent on the availability of resources."

108. In the instant case, there is no evidence that the Defendant State makes provision for conditions which enable her to accord greater attention to the non deprivation of the Applicant's freedom, or her incarceration in a special prison, without compromising, all the same, the rationale behind the preventive detention.

109. Whatever the case may be, the infant did not remain in the company of his mother in the prison house. Besides, an arrangement for enabling visitors to come on visits, may minimise and attenuate the effects related to the separation of the mother from the child.

CONSEQUENTLY

110. Whereas the publication of information by the media on the investigation and preventive detention of the Applicants do not constitute a violation of the principle of presumption of innocence, by the State of Cote d'Ivoire, such as to trample on the honour and reputation of the Applicants;

111. Whereas the preventive detention of the Applicants is not arbitrary, since it arose from a judicial procedure;

112. Whereas the circumstances of the instant case do not permit to adjudge that the time-limit for the conduct of the proceedings, by means of which the Applicants were detained, is unreasonable;

113. Whereas the detention of the Applicant OBODJI, nee HOUSSOU Amelan Roselyne, does not constitute a violation by the State of Cote d'Ivoire, of her rights as a pregnant woman and the rights of her child.

FOR THESE REASONS

114. The Community Court of Justice, ECOWAS, adjudicating in a public sitting, after hearing both parties in issue of human rights violation, in first and last resort:

- **Having** regard to the 24th July, 1993 Revised Treaty of ECOWAS;

- **Having** regard to the 10th December, 1948 Universal Declaration of Human Rights;

- **Having** regard to the 28th June, 1981 African Charter on Human and Peoples' Rights;

- **Having** regard to the 11th July, 1990 African Charter on the Rights and Welfare of the Child;

- **Having** regard to the Supplementary Protocol of ECOWAS on Democracy and Good Governance;

- Having regard to the 1991 Protocol relating to the Community Court of Justice, ECOWAS, and the 2005 Supplementary Protocol on the Community Court of Justice, ECOWAS;

- Having regard to the 28th August, 2002 Rules of Procedure of the Court;

1. Dismisses the objection regarding the incompetence of the Court, as raised by the Republic of Cote d'Ivoire;

2. Declares that the facts adduced by the Applicants do not amount to a violation of their human rights, as alleged to have been committed by the State of Cote d'Ivoire;

Accordingly,

3. Dismisses the Application with in all its intents and purposes;

4. Asks the Applicants to bear the costs.

Thus made, adjudged and publicly pronounced by the Community Court of Justice, ECOWAS, on the day, month and year indicated above.

SIGNATURES

1. **HON. JUSTICE AWA NANA DABOYA - PRESIDING**

2. **HON JUSTICE BENFEITO MOSSO RAMOS - MEMBER**

3. **HON. JUSTICE ALFRED ANTHONY BENIN - MEMBER**

Assisted by **Athanase Atannon (Esq.) - Registrar**

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 17TH DAY OF DECEMBER, 2009

SUIT N°: ECW/CCJ/APP/02/09
JUDGMENT N°: ECW/CCJ/JUD/05/09

BETWEEN

THE NATIONAL CO-ORDINATING GROUP OF DEPARTMENTAL REPRESENTATIVES OF THE COCOA-COFFEE SECTOR (CNDD) - *Plaintiffs*

V.

REPUBLIC OF COTE D'IVOIRE - *Defendant*

COMPOSITION OF THE COURT
1. **HON. JUSTICE AWA NANA DABOYA - PRESIDING**
2. **HON. JUSTICE BENFEITO MOSSO RAMOS - MEMBER**
3. **HON. JUSTICE ALFRED ANTHONY BENIN - MEMBER**

ASSISTED BY
TONY ANENE-MAIDOH ESQ. - CHIEF REGISTRAR

COUNSEL TO THE PARTIES
1. ***Narcisse Aka*** - *for the Plaintiff*
2. ***Georgette Essis Mamenet*** - *for the Defendant*

JUDGMENT OF 17TH DECEMBER, 2009

Legal personality of an association - Interpretation of Article 10 (d) of the Supplementary Protocol - right to just and equitable remuneration - the principle of equality of citizens in matters of taxation – burden of proof

SUMMARY OF FACTS

The Plaintiff, (CNDD) a non-profit association of cocoa and coffee producers sued the Republic of Cote d'Ivoire for the violation of its rights. According to the Plaintiff, in a report of the Director of Operations of the World Bank, the producers of coffee and cocoa in Cote d'Ivoire only receive 40% of the fixed price in the international market because of multiple levies, including those due under the sole right to exit "DUS". The Plaintiff seeks for these violations to cease and is claiming a total sum of 200 million CFA francs in damages and interest.

In its defense, the Government of Cote d'Ivoire raised two objections: the lack of legal personality of the Plaintiff to sue, **Locus Standi** *and lack of jurisdiction of the Court.*

LEGAL ISSUES

1. *Does the CNDD have legal personality?*

2. *Can a corporate body come before the Court to argue violations of human right?*

3. *Can the right to a fair and equitable compensation exist between two people who are not bound by any employment relationship?*

4. *Is there any violation of the principle of equality in matters of taxation, when the taxable products are not identical?*

DECISION OF THE COURT

The Court rejected the plea of inadmissibility and held that there is a presumption of existence of legal personality of the association, given its detailed presentation on the name, the legal basis of its establishment, the address and the full name of its legal representative.

The Court held that the provisions of Article 10(d) of the Protocol of the Court and that of Article 1 (h) of the Protocol on Democracy and Good Governance give to individuals the legal standing to sue for breach of human rights.

The Court held that no employment relationship exists between the Respondent State and the Plaintiff as to establish for the producers a right to just and equitable remuneration.

Finally, the Court held that there was no violation of the principle of equality of citizens before taxation, to the extent of which equality implies that equal treatment should be reserved for individuals in the same situation. The Court rejected the Plaintiffs' claims.

JUDGMENT OF THE COURT

1. The Applicant, the National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD), is a non-profit making Association governed by Ivorian Law No. 60-315 of 21st September, 1960, with its headquarters at Abidjan, Cocody II Plateaux, Vallons 28 BP 398 Abidjan 28, in Cote d'Ivoire.

2. The Applicant is represented and defended by Maitre Narcisse Aka, Lawyer registered with the Cote d'Ivoire Bar Association, whose address is: 7 Boulevard Latrille, Cocody - 09 BP 2526, Abidjan 09.

3. The Defendant, the Republic of Cote d'Ivoire, is a Member State of ECOWAS.

4. The Defendant is represented by Maitre Georgette Essis Mamenet, whose address is: Societe Civile Professionnelle d'Avocats Essis-Kouassi-Essis, Abidjan Cocody II Plateaux, Rue des Jardins, Sainte Cecile, 16 BP 610 Abidjan 16.

5. The Applicant brought a complaint against the Defendant State for violation of its fundamental human rights and asked the Court to find the said violation and to ask the Republic of Cote d'Ivoire to pay damages for reparation of the harm done.

SUMMARY OF FACTS

6. On 16th January, 2009, the National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector, a non-profit Association with headquarters at Abidjan, in Cote d'Ivoire, filed an Application before the Community Court of Justice, ECOWAS in which it asserted that Cote d'Ivoire is the highest producer of cocoa in the world, and that it occupies an important position in terms of coffee production.

7. The Applicant argued that whereas Cote d'Ivoire derived a significant portion of its revenue from these two raw materials, cocoa and coffee producers constitute one of the most disadvantaged

groups in the Ivorian society. This situation allegedly arose from excessive taxation which considerably eroded the purchasing power of the coffee and cocoa producers in Cote d'Ivoire.

8. The Applicant stated that according to a report by the Director of Operations of the World Bank for Cote d'Ivoire, due to the multiple levies imposed on them, notably those imposed through the instrumentality of the DUS (Single Exit Right) system, cocoa and coffee producers in Cote d'Ivoire hardly receive 40% of the fixed price on the international market, whereas their counterparts in Ghana receive 70%, and those in Nigeria, 90%.

9. The Applicant pointed out that this situation seriously violated the rights of the producers in two ways: firstly, it violated their right to fair remuneration, and secondly, it violated the principle of equality of all citizens before the law.

10. In support of its action, the Applicant cited Article 23(3) of the Universal Declaration of Human Rights, which provides that "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection".

11. The Applicant prayed the Court to:

    - Adjudge and declare that its Application as filed was well-founded;

    - Immediately issue an order of injunction requiring the Republic of Cote d'Ivoire to adopt all necessary and appropriate measures to ensure that the violations in question had ceased;

    - Order the Republic of Cote d'Ivoire to pay the symbolic sum of Two Hundred Million CFA Francs (CFA F200,000,000) of damages as reparation for the harm caused the cocoa and coffee producers represented by the National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD).

12. The Defendant maintained, on its part, that the Applicant has neither the capacity nor status to come before the Court; that even if it had the capacity and status to do so, the Court will have no jurisdiction to adjudicate on the case; that the filing of the case before the Court violated the provisions of public order and the Ivorian law; and finally, that the allegations of the Applicant are unfounded, and it therefore asked the Court not to grant the requests made by the CNDD.

THE COURT'S ANALYSIS OF THE PLEAS IN OBJECTION

As to the objection regarding defect in the legal status of the Applicant

13. The Defendant maintained in its Memorial in Defence that the Applicant limited itself to indicating that "it is a non-profit making association governed by Ivorian Law No. 60-315 of 21 September 1960" without justifying it by adducing all necessary legal documents which prove its actual standing as conferred on it by law, in terms of its legal status; that failing the fulfilment of such requirement, the Applicant's request must be declared inadmissible before the Court.

14. On this point, the Court is of the view that the production of evidence on the status of the Association and on Law No. 60-315 of 21 September 1960 could have been a considerable asset to it for the purposes of assessing the legal status of the said association.

15. However, the Court holds that in the initiating application, it is indicated that,

> ***"The National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD), is a non-profit making Association governed by Ivorian Law No. 60-315 of 21 September 1960, with its headquarters at Abidjan, Cocody II Plateaux, Vallons 28 BP 398 Abidjan 28, represented by Mr. Zahi Monboni Bonfils, the President of the said Association"***.

16. From the content of the text cited above, the Court notes the following:

    - The name of the association (National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD);
    - The legal basis of its creation (Ivorian Law No. 60-315 of 21 September 1960);
    - The type of association (non-profit making Association);
    - The location of its headquarters (Abidjan, Cocody II Plateaux, Vallons 28);
    - The postal address of the association (BP 398 Abidjan 28);
    - The surname and forenames of the legal representative of the association (Mr. Zahi Monboni Bonfils).

17. The points thus singled out establish a mere existence and a legal status of the association, which may however be contested by any person having serious doubts thereon. Moreover, the Court states that if in criminal matters, the burden of proof in regard to presumption of innocence lies on the accused, in civil matters, good faith is presumed and the onus is therefore on the party contesting any claim to provide evidence to the contrary.

18. In the instant case, it is therefore up to the party objecting to the legal status of the National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector to bring evidence, either on the non-existence of the said association or on the claim that within the terms of the above-cited law, the said association does not possess the legal status alleged. In demanding that the Applicant evince its existence and legal status, the Defendant attempts to reverse the burden of proof.

19. Consequently, in the absence of contrary evidence, the Court considers the indications contained in the Application as evidence establishing the proof of existence of the National Co-ordinating

Group of Departmental Representatives of the Cocoa-Coffee Sector as an association created in accordance with the law of Cote d'Ivoire and having a legal status. The objection regarding defect in the Applicant's legal status therefore fails.

As to the objection regarding the status of the Applicant

20. The Defendant further maintained that even if the Applicant existed, it possessed neither the status nor the capacity to bring a case before the Court.

21. The issue of existence of the Applicant Association having been resolved, what remains to be considered is whether a legal person may file a case before the Court in relation to a human rights issue; on this point, the Applicant contended that in the terms of the texts relating to the Court, any person may bring a case before the Court for human rights violation and that there was no ground for differentiating between a legal person and a natural person. It contended that according to a general principle of law, there is no point in making a distinction where the law does not do so.

22. To determine who may bring cases before the Court, it is appropriate to refer to the provisions of Article 10(d) of the 2005 Supplementary Protocol, which provide that

    "Access to the Court is open to ... individuals on application for relief for violation of their human rights; the submission of application for which shall: (i) not be anonymous; (ii) nor be made whilst the same matter has been instituted before another International Court for adjudication".

23. The Court holds that the said text talks of *"toute personne victime"* without stating whether it is a question of natural person or legal person, or still, whether it is the two at the same time; but the Court would like to emphasise, moreover, that the word *"victime"*, and more precisely the concept of *"victime"* enables one to understand that it is a question of adjudicating on complaints from any person

who may claim that he/it has been harmed or that he/it has suffered from violation of his/its recognised rights to freedom.

24. Whereas, if it is trite that rights and freedoms guaranteed by international instruments relating to human rights are so made for individuals, it is nonetheless the case that legal persons equally have rights they can claim.

The Court recalls that there is abundant case-law in support of this view, among which it cites the following:

25. As regards limited companies:

    - Case concerning **STRAN AND STRATIS ANDREADIS GREEK REFINERIES V. GREECE**: Stran, a fuel refinery company, brought a case before the European Court of Human Rights, for having been denied fair hearing within a reasonable time-limit in a national case between it and Greece for violation of its right to property. In its Judgment delivered on 9 December 1994, Series A, No. 301-B, the Court entertained the application of the said company, and granted its request.

    - Case concerning **AUTRONIC AG *V.* SWITZERLAND:** In an application filed before the European Court on 13th December, 1988, Autronic AG Company alleged ignorance of its right to receive information, as a right guaranteed by Article 10 of the European Convention.

Before the European Court of Human Rights, Switzerland claimed that freedom of expression and the right to receive information are only guaranteed to individuals and not to corporate bodies, on the grounds that Article 10 of the Convention provides that

> ***"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".***

On 22nd May, 1990, the Court held, in regard to this matter, that:

> ***"neither its legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression could deprive Autronic of the protection of Article 10 of the Convention. This article applies to "everyone", whether natural or legal persons, and concerns not only the content of the information but also the means of transmission and reception. Reception of television programmes by means of an aerial comes within the right laid down in Article 10-1. There was an interference with the exercise of the freedom of expression".***

26. As regards associations:

- Case concerning **PLATTFORM ERZE FUR DAS LEBEN *V.* AUSTRIA: 21 June 1988, Series A, No 139 or Series E No 35**. Plattform Erze Fur das Leben is an association of doctors campaigning against abortion who filed a case before the European Court against Austria for being denied the necessary protection during two demonstrations organised by the said association, which were violently disrupted. The Applicant Association invoked violation of Articles 9, 10, 11 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

- In response to the objection regarding inadmissibility as raised before the Court by Austria and concerning Article 13 (right to effective remedy), the Court affirmed that,

> ***"Under its case-law, Article 13 secures an effective remedy before a national "authority" to anyone claiming on arguable grounds to be victim of a violation of his rights and freedoms as protected by the Convention; any other interpretation would render it meaningless".***

- In its judgment of 21st June 1988, the Court declared that it was not necessary for it to differentiate between a legal-person victim and a natural-person victim.

- **Informationverein Lentia and Others *v.* Austria**: Informationverein is an association of co-proprietors and inhabitants of a housing project at Linz. They filed a case before the European Court of Human Rights for violation of Article 10 of the Convention, upon the grounds that the Austrian authorities had refused to grant them their request for a licence for creating and setting up an internal radio and television cable network for running programmes which were to be restricted to issues relating to their common rights and the rights of their members.

- In its Judgment of 20th November 1993, Series A, No 176, the European Court held that the Applicant possessed the status to enable it claim the rights in the provisions of Article 10 of the Convention and affirmed that the Court would fall into a trap it had to differentiate between natural persons and legal persons, for the purposes of that case.

27. From the foregoing examples, it could be deduced that legal persons can institute proceedings before a legal adjudicating body, for violation of rights guaranteed by instruments relating to human rights.

28. At ECOWAS, access before the Court by corporate bodies, for human rights violation, is invested in the provisions of Article 1(h) of the Protocol on Democracy and Good Governance, which provides:

    "The rights set up in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the

framework of an international instrument on Human Rights, to ensure the protection of his/her rights".

29. The Court holds that in application of the principle whereby in matters of human rights protection, whenever two measures tend to be applicable at the same time, primacy shall be accorded the measure granting greater protection; and in implementing its mandate on interpretation of the Community texts of ECOWAS; in the present circumstances, the Court declares that Article 10(d) of the 2005 Supplementary Protocol must be interpreted in accordance with the spirit and letter of Article 1(h) of Protocol A/SP1/12/01 of 21st December, 2001 on Democracy and Good Governance.

30. The Court consequently declares that the objection regarding inadmissibility as raised by the Defence, and concerning a defect in the status of the Applicant, is dismissed.

As to the objection regarding inadmissibility allegedly arising from violation of the provisions on public order in the Ivorian civil law and violation of Article 33 of the Rules of Procedure of the Court

31. The Defendant Council of State contended that it was illegal for the Applicant to bring its case before the Court and that doing so violated the Ivorian civil law as well as Article 33(1) of the Rules of the Court.

32. The same Defendant contended, on one hand, that the citation *"Etat de Cote d'Ivoire"* has no legal effect, once in Ivorian law, any action brought before the judicial and arbitration bodies and before the national and international commissions, for the purpose of declaring that the Republic of Cote d'Ivoire either owes or is owed a sum of money, must be instituted by or against the Agent *Judiciaire du Tresor*, or otherwise be declared a nullity.

33. It added, on the other hand, that in the terms of the provisions of Article 33 (1) of the Rules of the Court, the Application before the Court must contain, among others indications, the designation of the party against whom the application is made.

34. The Court recalls, on this issue, that the ECOWAS Member States, as contracting parties of the ECOWAS Community law, or as guarantors for the implementation of the human rights recognised in the Revised Treaty of ECOWAS, are obliged to subscribe to these rights, and may in that regard be sued before the principal legal organ of ECOWAS, i.e. the Community Court of Justice. Consequently, the Court declares that an individual may bring proceedings against a Member State of the Community, before the Community Court of Justice.

35. In the instant case, the act of instituting proceedings was done before the national authority that is designated by the domestic law of Cote d'Ivoire to represent the State in court proceedings; it was the said national authority that filed a Memorial in Defence dated 9 April 2009, which was received at the Registry on 16th April, 2009.

    It follows therefore that, without having recourse to the provisions of Article 33(6) of the Rules of Procedure of the Court, the procedure followed before the Court, in the instant case, is legally founded, and the case was properly brought before the Court.

36. Consequently, the Court dismisses the objection made in regard to this last plea-in-law and declares that the case was properly filed before it and that it has jurisdiction to adjudicate on the matter.

ANALYSIS OF THE COURT CONCERNING PLEAS ON THE MERITS OF THE CASE

37. The Applicant cited two violations of rights guaranteed him by international texts, notably Articles 7 and 23(3) of the Universal Declaration of Human Rights.

    The Applicant considered that the Defendant State has violated, on one hand, his right to equal remuneration and on the other hand, the principle of equality of all citizens before the law.

As to violation of the right to equal remuneration

38. The Applicant asserted that in Cote d'Ivoire, the practice was adopted to mobilise contribution from rural areas, particularly from the cocoa-coffee sector, through the instruments of the DUS system (Single Exit Right) and registration taxation, for the purposes of increasing yield from the cadastral survey of rural areas. The Applicant contended that this mobilisation was carried out through exorbitant fiscal policies, which deprived the cocoa and coffee producers of the revenue they were entitled to, and finally eroded the purchasing power of the producers. That by so doing, the Republic of Cote d'Ivoire has violated the provisions of Article 23(3) of the Universal Declaration of Human Rights which provides that:

    "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection".

39. The Defendant State averred, in reply, that the alleged injustice claimed by the Applicant reposes on Ivorian laws, rules and regulations or on its administrative decisions on taxation in the cocoa and coffee sector, and as such, the Court has no jurisdiction to adjudicate upon the Applicant's request.

40. For the Defendant State, the Court cannot examine the legality of such legal instruments of the civil law of Cote d'Ivoire, namely its taxation law in respect of levies imposed on coffee and cocoa.

41. The Court cannot agree with such a stance, which tends to exclude from the jurisdiction of the Court, human rights violation which may occur in any sector governed by national law, be it on taxation law or otherwise.

42. Indeed, if international instruments relating to human rights authorise States to amend, in certain circumstances, rights and freedoms they have pledged to guarantee, international bodies like this Honourable

Court do acknowledge their right to examine the legitimacy of the legal stance adopted by the States and their proportionality with the aims and objectives of guaranteed rights.

43. Such monitoring is intended to ensure that States, while employing the margin of freedom accorded them to amend rights through the adoption of national laws, do not end up emptying those rights or freedoms of the very essence of their meaning. To this end, the United Nations Committee on Human Rights on the right to privacy, family life, home, correspondence, and protection from violations of honour and reputation, states that State intervention can only be tolerated within the context of a law, which law must be in conformity with the provisions, aims and objectives of the Covenant.

44. It was in this sense that the European Court of Human Rights in its judgment on **OPEN DOOR AND DUBLIN WOMAN *VS.* IRELAND**, **29 October 1992, Series A, No 246, §70 and §72**, affirmed that it had to examine if the disputed legal measure was in response to an urgent social need and particularly if it was proportional to the legitimate goal pursued by Ireland; and the Court had to monitor closely its compatibility with the principles of a democratic society.

45. In the instant case, the two Parties affirmed that the levies imposed on the coffee and cocoa products were a contribution towards raising the low level of yields from the cadastral survey of the rural areas.

46. As such, and as the Applicant does not disapprove of it, the Court considers that the objective intended by the DUS (Single Exit Right) is legitimate, since it is justified on solid grounds and is of a general interest.

47. Moreover, the Applicant invoked Article 23(3) of the Universal Declaration of Human Rights, which provides that,

> ***"Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity,***

and supplemented, if necessary, by other means of social protection",

and considered that the DUS was rather exorbitant; and that it constituted a violation of its right as guaranteed by the said article.

48. The Court finds that **"the right to just and favourable remuneration"** presupposes the existence of a relationship of work between a debtor, responsible for remuneration, and a beneficiary; which assumes that the beneficiary of the remuneration must carry out for the debtor, a job that is duly remunerated.

    In its judgment on **PROFESSOR ETIM MOSES *VS* REPUBLIC OF GAMBIA, 29th October, 2007, ECW/CCJ/RUL/05/07, §24**, the Court adjudged that violation of **"the right to just and favourable remuneration"** arises in a situation where an individual who normally carries out a remunerated work, is not remunerated at all, or if he is, the remuneration received is below the real value of the work done.

49. Whereas, the Court finds that in the instant case, the Applicant is a private producer of coffee and cocoa and it conducts its agricultural activities entirely autonomously and receives neither salary nor honorarium from any given State organ; that there is no employment relationship between the Applicant and the Defendant State such as to establish a salary obligation on the Defendant towards the Applicant; that the latter derives its revenues from the sale of its produce to exporters, and such revenues cannot be considered as remuneration.

50. Consequently, the Court cannot admit the plea-in-law brought forth by the Applicant requiring the Court to declare that the Defendant State has violated its right to fair remuneration; that plea is therefore dismissed.

As to violation of the principle of equality of all citizens before the law

51. The Applicant alleged a manifest breach of the principle of equality of all citizens before the law; it affirmed that the Defendant State differentiates

between cocoa-coffee producers and producers of the other raw materials.

52. To buttress this plea, the Applicant argued that in Cote d'Ivoire whereas fiscal deductions and taxation policies affect 60% of the price of cocoa and coffee in the rural areas, levies imposed on pineapple is 6%, 2% on rubber, 0% on cotton and 30% on industrial and commercial profits.

53. That such breach of equality against cocoa and coffee producers violates Article 7 of the Universal Declaration of Human Rights which provides that:

    "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

54. For the Defendant State, one cannot allege a breach in equality of all citizens before the law in as much as in the terms of the Ivorian constitutional provisions, citizens make contributions in public duty as determined by their respective talents and abilities; that in this sense, the common good may justify differences in treatment, equality being neither blind nor ignorant of social conditions.

55. On this point, the Court finds that the equality in question presupposes that equal treatment be reserved for individuals finding themselves in the same situation; but from the examples given, of States like Ghana and Nigeria, the Court considers that one is dealing with States different from Cote d'Ivoire.

56. As already adjudged in the judgment on **PROFESSOR ETIM MOSES ESSIEN *VS.* REPUBLIC OF GAMBIA**, equality presupposes same treatment of persons placed in same situation, and that in salary matters, the principle of equality may not be invoked when the source of remuneration is not the same; **ECW/CCJ/RUL/05/07, 29th October 2007, §31.**

57. However, it is worthy to find out whether the Defendant State violated or not the principle of equality of all citizens before the law, in imposing different levies on cotton, pineapple, rubber, etc.

58. In general, equality is a requirement whose object is to fight against differential treatments based on race, ethnicity, colour, sex, language, religion, political opinion, social background, fortune, birth, or any other situation.

59. But equality as thus defined, does not exclude differentiated treatments when the situations are different or when it is a question of reducing disparities or inequalities. Differences in the imposition of levies among different agricultural products may be justified by reasons related to policies towards development, productivity, and the specific nature of certain products.

60. The Court holds that the specific nature of the exportation of cotton is a very particular case in the West African sub-region and that it is not surprising that in Cote d'Ivoire the levy on cotton is 0%, i.e. subsidised; indeed, in its 2008 annual report, page 28, the ECOWAS Commission states that the cotton initiative remains a central issue in the series of WTO negotiations at Doha, following the request made by the four cotton producing countries (cotton-4) concerning the creation of an emergency fund for cotton, to assist cotton producers in those countries; that the problem of subsidising cotton exports continues to have negative repercussions on the revenues of cotton-exporting ECOWAS member countries, namely Benin, Burkina Faso, Mali and Togo.

61. That is why the Court holds that in the area of taxation, States have a large margin of operation in determining the criteria for the tax base of each product, and that they are not compelled to apply the rate in force in other countries.

62. From the foregoing, it follows that since there was no mention of differences of tax rates among the cocoa and coffee producers, the Applicant's request cannot be admitted. The grievance in respect of violation of the principle of equality of all citizens before the law is therefore unfounded.

CONSEQUENTLY,

Whereas the various indications relating to the name, type of association, headquarters, address and identity of the legal representative, and the law on the legal basis of the creation of associations in Cote d'Ivoire as contained in the Application, constitute a presumption of the existence of National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector in Cote d'Ivoire as an association created in accordance with the Ivorian law and possessing due legal status;

Whereas in a matter of application for human rights violation, the Court cannot grant such right to natural persons only, to the exclusion of legal persons;

Whereas the right to a just and favourable remuneration presupposes the existence of an employment relationship between the one demanding the remuneration and the supposed debtor responsible for remuneration;

Whereas there is no breach of equality in terms of tax imposition when the taxable products are not the same;

FOR THESE REASONS

The Community Court of Justice, ECOWAS, sitting at Abuja, Nigeria, and in a public session, after hearing both Parties, in a matter on human rights violation, in first and last resort;

- Having regard to the 24th July, 1993 Revised Treaty of ECOWAS;

- Having regard to the 10th December, 1948 Universal Declaration of Human Rights;

- Having regard to the 27th June, 1981 African Charter on Human and Peoples' Rights;

- Having regard to Protocol A/SP1/21/01 of 21st December, 2001 on Democracy and Good Governance;

- Having regard to the Protocol of 1991 and the 2005 Protocol on the Community Court of Justice, ECOWAS;

- Having regard to the 28th August, 2002 Rules of Procedure of the Court;

And joining the interlocutory proceedings to the merits;

1. Dismisses the objection regarding inadmissibility of the Application as raised by the Republic of Cote d'Ivoire in its three points;

2. Adjudges that the Republic of Cote d'Ivoire is under no obligation of a just and favourable remuneration towards the Applicant;

3. Finds that there is no violation of the principle of equality of all citizens before the law;

4. Consequently dismisses the Application as filed by the Applicant, in all its intents and purposes;

5. Adjudges that each Party shall bear its own costs in accordance with Article 66(3) and (4) of the Rules of Procedure of the Court.

Thus made, adjudged and delivered in a public hearing at Abuja by the Community Court of Justice, ECOWAS, on the day, month and year mentioned above.

And the following hereby append their signatures:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*

2. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *MEMBER*

3. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*

Assisted by **Tony Anene-Maidoh** - *Chief Registrar*

THONIMARTINS (234) 8056666580, 8033982433