COMMUNITY COURT OF JUSTICE, ECOWAS

(2010)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

COMMUNITY COURT OF JUSTICE, ECOWAS

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MR. TONY ANENE-MAIDOH
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Chief Registrar

Original text in FRENCH

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

HOLDEN AT ABUJA, IN NIGERIA

ON WEDNESDAY, THE 17TH DAY OF FEBRUARY, 2010

GENERAL LIST N°: ECW/CCJ/APP/03/09
JUDGMENT N°: ECW/CCJ/JUD/01/10

BETWEEN

DAOUDA GARBA - ***PLAINTIFF***

V.

REPUBLIC OF BENIN - ***DEFENDANT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE HANSINE DONLI** - *MEMBER*
3. **HON. JUSTICE SOUMANA D. SIDIBE** - *MEMBER*

ASSISTED BY

MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. ***Olushola Egbeyinka Esq.*** - *for the Plaintiff*
2. ***Maitre Hippolyte Yede*** - *for the Defendant*

- Human rights violations - right to human dignity -free movement of persons - domicile - anonymous application.

SUMMARY OF THE FACTS

Mr. Daouda Garba claims that an immigration officer from Benin Republic assaulted him at the Nigeria-Benin border of Seme on 13th January, 2008 because he refused to give 300 FCFA to get his passport stamped on entry into Benin. He said he suffered serious injuries to his face, eyes and wrists. He therefore filed this action before the Court against the Republic of Benin for violation of his right to human dignity and freedom of movement as guaranteed by the African Charter on Human and People's Rights.

The Republic of Benin, in response raised a preliminary objection on the admissibility of the Application for failing to disclose applicant's domicile and signature. On the merits, they contended that the facts as expressed are baseless, and asked the Court to dismiss the Application.

LEGAL ISSUES

1. *Whether or not an application that does not state the domicile of an Applicant or bear the signature of an Applicant is rendered inadmissible.*

2. *Whether or not the Applicant has discharged the burden of proof.*

DECISION OF THE COURT

The Court dismissed the objection raised by the Republic of Benin and held that the mere absence of the residential address on the application cannot be an obstacle to its admissibility, and also that the failure by the Applicant to personally sign an application does not make it an anonymous application if it contains information that could identify the Applicant.

The Court dismissed the application on the merits when it found that the allegations of human rights violation of the Applicant are not supported by sufficient and convincing evidence.

JUDGMENT OF THE COURT

1. By Application dated 19th December 2008, Mr. Daouda Garba, a Nigerian national, and Programme Officer for *"Peace and Security"* at the Centre for Democratic Development (CDD), an NGO based in Abuja, Nigeria, brought his case before the Community Court of Justice, ECOWAS pressing charges against the Republic of Benin, the Defendant, for violation of his right to human dignity and his right to freedom of movement as guaranteed by the African Charter on Human and Peoples' Rights.

2. The case, which was argued in two parts, was amply pleaded by common consent among the two parties and the interlocutory application was joined to the merits. The first part dealt with the merits, and constituted arguments submitted by the Applicant asking the Court to find that there has been violation of his rights, whereas the second part constituted the Preliminary Objection raised by the Defendant asking the Court to dismiss the arguments of the Applicant on the grounds of defect of procedure.

THE FACTS

I. FACTS ALLEGED BY THE APPLICANT

3. The Applicant indicated in his Initiating Application that on 13 January 2008, while on his way on a mission to Ouagadougou, in Burkina Faso, with his colleague Mr. Dele Sonubi, a Beninese Immigration Officer at the Benin- Nigeria border asked him to pay 300 Naira before having his international passport marked with the "Entry" stamp to permit him to enter the Republic of Benin.

4. After demanding from the Beninese Immigration Officer an explanation for the payment of the said sum of money, the Officer indicated that it was the usual practice, and the Applicant therefore replied that they would pay that sum of money only if an official receipt would be issued for it. The Officer refused and pushed him and his colleague back, kicking their bag which contained a laptop computer.

5. Consequently, the Applicant's comment regarding how unhappy he was with the behavior of the Immigration Officer resulted in an act of assault and battery on the Applicant's person, perpetrated by certain Beninese immigration officers who were at post that day. The Applicant further claimed that he was handcuffed and severely beaten up. The Applicant also averred that he sustained serious wounds on his wrist, had bruises on his face, and developed blood clotting on his left eye. He tendered, in support of his claims, an annexed photograph marked "Exhibit B".

6. The Applicant added that Dele Sonubi, his colleague, went to alert officers of the State Security Services (SSS) of Nigeria as well as the Nigerian immigration officers, to request them to intervene in the plight of his colleague. At the end of the intervention, the immigration Officer from Nigeria wrote a letter of commitment which enabled the Applicant to be released.

   The latter contended that after his release, he received medical attention at Iduna Specialist Hospital Ltd. on 21 January 2008, from Dr. Jaafar Kadiri ***(annexed evidence is marked "Exhibit C")***.

IN LAW

II. PLEAS-IN-LAW INVOKED BY THE TWO PARTIES

Applicability of the African Charter on Human and Peoples' Rights

7. The Applicant, in support of his Application, referred to Article 4 of the Revised Treaty of ECOWAS, where the signatory States pledged allegiance to the principles of recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

   Particularly, he cited Articles 2, 4, 5 and 12 of the said Charter, relating respectively to the enjoyment of rights and freedoms, the inviolability of human beings and respect for the life and integrity of the human person, respect for human dignity, and finally the right to freedom of movement.

8. He concluded thereby that these rights, as protected by the African Charter on Human and Peoples' Rights, were violated by the Republic of Benin, and asked the Court, under Article 1(1) of the Protocol on the Definition of a Community Citizen and Article 10(c) of the 2005 Supplementary Protocol, to:

    1. Declare that the demand by the Beninese Immigration Officer for the payment of 300 Naira without the issue of an official receipt before stamping the Applicant's passport, constitutes a violation of his right to free movement as protected by Protocol A/P.1/5/79 on free movement of persons, right of residence and establishment; and Article 12 of the African Chapter on Human and Peoples' Rights.

    2. Declare that the Defendant and/or its Officers have no legal justification to demand payment from a Community citizen before allowing him or her to travel from one Member State to another.

    3. Declare that the physical assault and wounds caused to the Applicant by the Officer of the Defendant constitute a violation of the right to the respect of human dignity, as provided for in Article 5 of the African Charter on Human and Peoples' Rights.

    4. Issue an order of perpetual injunction restraining the Defendant and its Officers from any further intimidation and harassment of the Applicant.

    5. Order the Defendant to pay Three Hundred Thousand US Dollars (US$ 300,000) in Compensation.

    6. Adjudge that the Applicant's fundamental human rights relating to the dignity of his person and to his freedom of movement have been violated, and as such he is entitled to an amount of Three Hundred Thousand American Dollars (US$ 300,000), for general damages.

9. In reply to the Application by Mr. Daouda Garba, the Republic of Benin, on 15 May 2009, deposited at the Registry of the Court, its Memorial in Defence in which it raised in *limine litis* the incompetence of the

Court. It considered that the action by the Applicant must be declared inadmissible, for violation of Article 33 (a) of the Rules of the Community Court of Justice, ECOWAS and of Article 10 (d)-i of the Supplementary Protocol on the Court.

As to the first plea-in-law in connection with the Preliminary Objection

10. In regard to the first plea-in-law, the Republic of Benin cited Article 33 of the Rules of the Court, which states that the Application must contain the address of the Applicant. It indicated that this formality was not fulfilled in the Application of Mr. Daouda Garba, in that his address did not feature in his application. That instead of the required address, it is rather his place of work which is indicated; and that the indication of the professional address of his Lawyer does not remedy this defect of procedure.

11. Relying on this defect in address, Counsel for the Defendant contended that the action by Plaintiff is improperly filed and defective and that it must be dismissed; whereas Counsel for the Plaintiff maintained that on the contrary, his action was properly filed at the Registry of the Court and that it must be admitted.

As to the second plea-in-law of the Preliminary Objection

12. As regards the plea-in-law of the Preliminary Objection, the Defendant referred to Article 10 (d)-I which provides that in bringing cases before the Court: ***"Access ... is open to ... individuals on application for relief for violation of their human rights; the submission of the application for which shall not be anonymous",*** to maintain its stance that the Application remains anonymous, even if the name of the Applicant was indicated therein without him signing it in his own hand.

13. Therefore, in regard to these two pleas-in-law, the Defendant asked that the Court to declare that the action brought by Mr. Daouda Garba is inadmissible in terms of formal presentation, and to ask him to bear the costs.

14. Counsel for the Plaintiff responded to this and made reference to the incident which occurred on 13 January 2008 when the Applicant was travelling to Ouagadougou, and stated that he was attacked and beaten up by the Benin Immigration Officer who asked for the sum of 300 Naira before stamping his international passport. He added that it was because he refused to comply with that demand that he and his colleague came under those attacks.

15. Counsel for the Plaintiff referred to Exhibit "A" and argued that Mr. Daouda Garba's international passport was issued by the Federal Republic of Nigeria, and that for the Benin Immigration Officer to have refused to stamp it, he had failed to carry out his duties, and equally by kicking the bag containing the laptop computer.

16. He maintained that the Applicant was pushed outside and severely beaten up; that he sustained bruises on his face, resulting in blood clotting on his left eye, and he tendered in evidence Exhibit "B" which shows that he received medical attention at Iduna Specialist Hospital Ltd. on 21 January 2008 from Dr. Jaafar Kadiri (refer Exhibit "C"), and that Mr. Daouda Garba had no other choice than to have recourse to a lawyer in order to plead his cause.

17. He relied on Article 4(g) of the Revised Treaty of ECOWAS and on Articles 1, 2, 4, 5, 12 of the African Charter on Human and Peoples' Rights in arguing that his request sufficiently demands that he be remedied for the violations of his rights.

18. On these last arguments, Defendant responded and averred that the facts as adduced by Counsel for Mr. Daouda Garba, are neither established nor proven and added that certain evidences must be removed from the case-file because they are inadmissible in law, and asked in particular, that the photograph showing the face of Mr. Daouda Garba must not be taken into account during proceedings, for it can easily be manipulated.

19. The Defendant added that the fact that Mr. Daouda Garba's passport was not stamped means that he did not pass through the Benin border and moreover, he did not provide any name of the Nigerian or Benin Immigration Officers so that they can be heard in Court, upon the orders of the Court.

20. The Defendant equally contended that the Applicant did not take the trouble to report his case to the judicial authorities of Benin or even to the Embassy of Nigeria in Benin, in order to raise the issues complained of in his Application.

21. The Defendant considered therefore that there are doubts surrounding the medical report of Dr. Jaafar Kadiri, and asserted that since it was not signed, this report has no legal value; that the report did not also indicate the link between Mr. Daouda Garba's injuries and the facts adduced by him in his Application.

22. The Defendant concluded that there was a lot of doubt on the authenticity of the attack which the Applicant claimed was carried out against him by the Benin Immigration Officers.

    The Defendant also asked the Court to dismiss, purely and simply, the orders sought by Mr. Daouda Garba in his Application, in all its intents and purposes, and ask him to bear the cost of the proceedings.

III. ANALYSIS OF THE COURT

As regards incompetence of the Court

23. The Republic of Benin raised the objection regarding incompetence of the Court on the grounds that firstly, Article 33(a) of the Rules of the Court was violated, in that the address of the Applicant was not indicated in his Application, and that secondly, Article 10(d) of the Supplementary Protocol on the Court was violated because Mr. Daouda Garba's Application was anonymous.

As regards violation of Article 33(a) of the Rules of the Court

24. The Republic of Benin blamed the Applicant for violating Article 33(a) of the Rules of the Court which provides that ***"An application ... shall state ... the name and address of the Applicant;"*** The Republic of Benin therefore considered that a mere indication of his place of work cannot be substituted for the address of the Applicant.

25. The Defendant contended that the requirement for the address of the Applicant as provided for in Article 33(a) of the Rules of the Court will enable one to identify the Applicant and that Mr. Daouda Garba did not only fail to indicate his address but did not indicate his status and place of work, the town where he resides and his country of origin, namely Nigeria.

26. On these two points, the Court considers, on its part, that the mere absence of the citation of the Applicant's address on his Application cannot constitute an obstacle to the admissibility of the Application, and that in this respect, the Court dismisses that argument.

As regards violation of Article 10 (d) of the Supplementary Protocol on the Court

27. The Defendant considered that the non-signing of the Application by the Applicant constitutes a violation of Article 10(d) of the Supplementary Protocol of the Court, which provides 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 not be anonymous."***

28. Article 10(d) of the Supplementary Protocol on the Court certainly requires that for an application to be admissible it must not be anonymous; but the anonymity of an application presupposes that the author is not identified; that implies that neither the name nor status nor profession or nationality of the Applicant are known.

29. But, the Court finds that the Application of Mr. Daouda Garba contains all these indications for his identification. Besides, the Court finds that Mr. Daouda Garba, having engaged the services of a lawyer for his defence, has fulfilled all the conditions required for the representation in issue.

30. That within the context of the instant action, the lawyer adduced memorials and other pleadings before the Court for and on behalf of his client; that by engaging the services of a lawyer, the Applicant gave his lawyer the mandate to defend him and file all documents to that effect. The Court concludes, in this circumstance, that the Application filed by Mr. Daouda Garba does not need any form of signature from him in order to be admissible. The Court is equally of the view that the absence of the indication of the place of residence cannot constitute an obstacle to the admissibility of his Application and that these incidental facts must be joined to the merits.

31. Consequently, the Court finds that the Preliminary Objection raised by the Defendant in regard to the admissibility of the Application and the incompetence of the Court fails.

As regards violation of human rights

32. The Applicant considered that following the attack on him by the Benin Immigration Officers, his right to dignity and to freedom of movement as guaranteed by Articles 1, 2 and 12 of the African Charter on Human and Peoples' Rights, have been violated by the Defendant.

33. In reply, the Defendant maintained that the Applicant did not provide sufficient evidence as to the allegations of violation of his rights and cast doubt not only on the facts as pleaded by the Applicant, but also on the evidence in support of his allegations (medical certificate).

The issue at stake therefore is the proof for the facts alleged by the Applicant, and refuted by the Defendant

34. Article 9 of the Supplementary Protocol of the Court states that the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State. The cases of violation of human rights must be backed by indications of evidence which enable the Court to find that such violation has occurred in order for it to prefer sanctions if need be.

35. It is a general rule in law that during trial the party that makes allegations must provide the evidence. The onus of constituting and demonstrating evidence is therefore upon the litigating parties. They must use all the legal means available and furnish the points of evidence which go to support their claims. The evidence must be convincing in order to establish a link with the alleged facts. In the instant case, the Applicant pleaded a photograph showing a bruised left eye and argued thereby that following the medical visit (not signed) he made to Iduna Specialist Hospital Ltd., the chief ophthalmologist, Mr. Jafaar Kadiri, issued him with a report; but this report is equally not covered by a letter-head from the hospital.

36. As indicated by the Defendant, between the alleged attack on Mr. Daouda Garba and the medical visit to acknowledge the attack, six days elapsed; which indeed poses a problem of link between the said attack and the injuries sustained by the Applicant.

37. The facts of violation as filed by the Applicant were refuted by the Defendant. During the oral proceedings, the Applicant had the possibility, if he wished, to call witnesses who may have been present on the scene of his attack; but no witness was cited by the Applicant so as to enable the Court adjudge as to the truth of the facts alleged by the Applicant, and denied by the Defendant.

38. Furthermore, the Applicant had the possibility of reporting the case to the police authorities, who could have set off judicial proceedings against the attackers or proceeded to gather evidence. In that manner, the Benin Immigration Officers who may have carried out the attack on the person of Mr. Daouda Garba would have been identified. A mere pleading of

the medical certificate for a bruised eye does not enable one to identify the culprits of an alleged attack, neither does it establish a direct link with the said attacker.

39. Similarly, if the photocopy of the Applicant's passport proves that he actually crossed the Nigeria-Benin border, it does not establish a particular link with the supposed attacker. Indeed, to enable the Court find that violations have occurred, particularly in the instant case, the Applicant was expected to file sufficiently convincing, and not equivocal evidence.

40. In that, it is a well-established legal principle that the party claiming a right must show evidence of that right, by all means. In civil matters, as in the instant case, where a party is claiming reparation of harm, that party must show evidence of the harm done as required by the law in criminal matters. In the case concerning **Kodilinye v. Odu 2 W.A.C.A. 336**, the West African Court of Appeal, comprising five English-speaking West African States as at then, recalled the said principle in adding that to obtain reparation for a harm done, the Plaintiff must rely on concrete evidence and not on the weaknesses of the Defence.

41. This is similar to the Applicant's position in the instant case. His version of the facts shows inconsistencies and inaccuracies; such that they tend to discredit his cause, more so when he has not backed up his claim with any evidence. The Court is of the view that the only point of evidence provided by the Applicant is neither sufficient nor compelling enough to convince the Court of the truth of the alleged attack committed by the Benin Immigration Officers, in order for the Court to implicate the State in any offence.

Consequently,

FOR THESE REASONS,

The Court,

In a public sitting, after hearing both sides, in first and last resort, in a matter concerning human rights violation,

As to Formal Presentation,

42. Dismisses the objection regarding incompetence of the Court as raised by the Republic of Benin and declares that it has jurisdiction to adjudicate on the case.

As to Merits

43. Adjudges that the allegations of human rights violations by the Applicant are not backed by sufficient and convincing evidence. Consequently, the Application filed by the Applicant is dismissed.

As to the Court

44. Article 66 of the Rules of the Court states that the unsuccessful party shall be ordered to pay cost. However, in the instant case, the circumstances permit the Court to order that each party bears its own costs.

Thus made declared and delivered in a public sitting at Abuja, by the Community Court of Justice, on the day, month and year stated above.

And the following Members of the Court hereby append their signatures:

Hon. Justice Awa Nana DABOYA - *Presiding*

Hon. Justice Hansine DONLI - *Member*

Hon. Justice Soumana D. SIDIBE - *Member*

Assisted by
Maitre Athanase ATANNON **-** *Registrar*

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

HOLDEN IN ABUJA, NIGERIA

ON TUESDAY, THE 3RD DAY OF JUNE, 2010

SUIT N^O: ECW/CCJ/APP/10/06
JUDGMENT N^O: ECW/CCJ/JUD/04/10

BETWEEN

1. **THE FEDERAL REPUBLIC OF NIGERIA**
2. **ATTORNEY GENERAL OF THE FEDERATION**
3. **COMPTROLLER GENERAL OF PRISONS**
4. **INSPECTOR GENERAL OF POLICE**

} ***APPLICANTS***

V.

1. **DJOT BAYI TALBIA & 14 OTHERS**
2. **CHIEF OF NAVAL STAFF**

} ***RESPONDENTS***

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA D. NANA -** *PRESIDING*
2. **HON. JUSTICE HANSINE N. DONLI -** *MEMBER*
3. **HON. JUSTICE ANTHONY. A. BENIN -** *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **Nnanna O. Ibom** - *for the Applicants*
2. **Pamela Ohabor** - *for the Respondents*

-Application for review of judgment - Limitation period - Interpretation of Articles 25 of Protocol A/P1/7/91 on the Court and 92 of its Rules

SUMMARY OF FACTS

On 30th July 2009, the Applicants came before the Court for a review of Decision ECW/CCJ/JUD/07/09, delivered on 28th January 2009, by the Court in the case of Djot Bayi Talbia and 14 others V. Federal Republic of Nigeria. To justify the validity of their claim, the Applicants relied on Article 25 of Protocol A/P1/7/91 and evoked, as new facts, the fact that they did not take part in the hearings of the Court and in addition that the Court awarded damages to the respondents without sufficient evidence in support.

The respondents contended that the Court should reject the application for review because it was lodged beyond the time limit provided in Article 92 of the Rules of Procedure.

LEGAL ISSUE

What is the limitation period within which an application for review of a judgment has to be lodged for it to be admissible?

DECISION OF THE COURT

Under Article 92 of the Rules of Court, a party must exercise the right to apply for a review within three months after the discovery of new facts that support the application for review. Therefore, the Court held that the application for review filed beyond three months from the date on which the new facts were found was inadmissible.

JUDGMENT OF THE COURT

1. The Applicants herein, being dissatisfied by a judgment of this Court, (ECW/CCJ/JUG/07/09) brought the instant application for its revision pursuant to Article 25 of the Protocol on the Court of Justice (A/P1/7/91).

   The application for revision of the judgment was predicated on two grounds, namely:

   a. Oral proceeding was not conducted at the trial.

   b. Evidence was not adduced by the respondents to ground the award of damages.

2. The Applicants stated that these facts are new and decisive and therefore warrant a review of the judgment delivered by this Court. They argued that under Article 13 of the Court's Protocol (A/P.1/7/91) as amended by Article 14 of the Supplementary Protocol of the Court (A/SP.1/01/05), proceedings shall be of two parts; written and oral. They continued that Article 40 of the Rules of the Court also lends credence to the fact that the procedure before the Court shall also include an oral part except in special circumstances. Applicants contended that the present case does not fall within the exceptions permitted under Article 40 of the Court's Rules where the Court can dispense with the oral part of the procedure. They concluded that the Court should make an order setting aside the said judgment so that oral proceedings might be conducted in the matter.

3. Counsel for the Applicants also submitted that no evidence was led by the respondents (Plaintiffs) in the substantive case to justify the award of damages in their favour. Counsel contended that the award of damages must be based on evidence and principles of law and not on the estimation of the Court and that evidence should have been adduced before the award of damages in the respondents' favour. Counsel concluded by stating that both local and international decisions support the view that evidence should be led before the award of damages.

4. In response, learned Counsel for the respondents argued that the application is incompetent and should be dismissed with heavy costs.

   Counsel stated that the Applicants were ably represented in the entire proceedings in the substantive matter and were aware of any defect in the case but these are not new facts for the reason that counsel for the Applicants was always in Court and took an active part in the entire proceeding. It is therefore untenable for the Applicants to claim that any issue with respect to the trial is a new fact. Counsel argued that under Article 92 of the Rules of the Court the Applicants had three months from the date on which judgment was given to file the application for review since their grounds for the review are all procedural in nature. Counsel concluded that this review application was filed out of time as judgment was delivered in January 2009 and the review application was filed in July 2009, without the Applicants filing an application for extension of time.

5. Learned Counsel to the Applicants in reply stated that the application was brought within five years so it was properly brought under the Protocol A/P1/7/91 and contended that the issues raised are fundamental to justice in that evidence was not led before the award of damages. Counsel stated that there seems to be a conflict between Protocol A/P1/7/91 and the Court's Rules and concluded that the Protocol is superior to the Rules so in the event of a conflict the Protocol prevails.

6. An application for review of a judgment / decision of this Court is governed principally by Article 25 of the Protocol on the Court of Justice (A/P1/7/91) and Article 92 of the Rules of the Court. The relevant portions thereof read thus:

   Artic1e 25 of the Protocol

   1. *An application for revision of a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence.*

4. *No application for revision may be made after five (5) years from the date of Decision.*

Article 92 of the Rules of Court:

An application for revision of judgment shall be made within three months of the date on which the facts on which the application is based came to the Applicant's knowledge.

7. A critical reading of the Articles quoted above indicates that there are three conditions precedent to a successful application for review of judgment / decision of this Court. The three conditions are as follows:

   a. An application for a review must be made within five years of the delivery of the decision which is sought to be reviewed.

   b. The party applying for a review must file his application within three months of his discovering the new fact/facts upon which his application is based.

   c. An application for a review must be premised on the discovery of new facts that are of a decisive nature, which facts were unknown to the Court or the party claiming revision provided that such ignorance was not due to negligence.

8. Therefore, a party wishing to succeed with an application for review must satisfy these three conditions above. Learned counsel to the Applicants stated that there seems to be a conflict between Article 25 of Protocol A/P1/7/91 which requires review applications to be filed within five years of the delivery of the judgment / decision which is sought to be reviewed and Article 92 of the Rules of the Court which requires parties to file their application for review within three months upon coming into knowledge of the facts on which the review application is based. However, there is no conflict between the two provisions at all. In fact Article 92 of the Rules of the Court is complementary to Article 25 of Protocol A/P1/7/91. Article 25 of the Protocol requires parties to apply for review within five years of the delivery of the judgment / decision in question whilst Article 92 of the Court's Rules imposes a duty on parties

to file their application for review within three months upon coming into knowledge of the new facts which necessitate the review application. In other words, parties have up to five years to discover the new facts which constitute the basis of their application for review, but they have only three months to file the application for review upon coming into knowledge of the new facts which support the application.

9. Applicants herein base their application on two grounds namely; that oral proceeding was not conducted at the trial and that evidence was not adduced by the respondents to ground the award of damages. Applicants argue that these are new and decisive facts which came to their knowledge after the decision was given.

10. Respondents contend that these are issues that concern the nature of evidence or the procedure at the trial and cannot be said to be new facts as contemplated by the provisions of Article 25 of Protocol A/P1/7/91 as Applicants were represented throughout the trial. Respondents concluded by stating that the application for review is statute barred having been filed after three months upon the delivery of the judgment.

11. The first condition that must be satisfied for a successful review of a judgment /decision of this Court is that the application for review should have been filed within five years of the date of delivery of the judgment/ decision. From the record, the judgment in the original case was delivered on the 28th of January 2009. The application for review was filed on the 30th of July 2009. The application for review was filed in the same year as the Judgment was given in the substantive matter. This fulfills the first condition as it was filed within the stipulated five year duration within which parties are permitted to discover the facts that constitute the basis for the review application.

12. We shall consider together whether the facts upon which the application for review is based are new and decisive and whether they came to the knowledge of the Applicants over three months before they filed their application. We consider a joint consideration of these two issues to be expedient having regard to the documents filed by the parties.

13. It is important to state at this point that the issue as to when a particular fact came to the knowledge of the Applicant is a question of fact to be determined by the Court after carefully considering all the information available to it. The facts on which the Applicants premised their application for review are that oral proceedings were not conducted at the trial and that evidence was not adduced by the Respondents herein to ground the award of damages in their favour.

14. Applicants were represented in Court on the date of judgment by their counsel, N. O. Ibom. They therefore knew on that date that oral proceedings were not conducted at the trial and that oral evidence was not introduced before the award of damages in Plaintiffs favour.

15. For the foregoing reasons, the application is inadmissible as same was filed out of time, and same is dismissed.

Cost

The Defendants / Applicants are to bear the costs of this application.

Hon. Justice Awa D. NANA - *Presiding*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Anthony A. BENIN - *Member*

Assisted by

Tony ANENE-MAIDOH - *Chief Registrar*

Original text in FRENCH

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

HOLDEN AT ABUJA, IN NIGERIA

ON THE 8TH DAY OF JULY, 2010

SUIT N^{O}: ECW/CCJ/APP/05/09
JUDGMENT N^{O}: ECW/CCJ/JUD/03/10

EDOH KOKOU - *APPLICANT*

V.

ECOWAS COMMISSION - *DEFENDANT*

BEFORE THEIR LORDSHIPS

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *MEMBER*
3. **HON. JUSTICE HANSINE N. DONLI** - *MEMBER*
4. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
5. **HON. JUSTICE DIRAROU SIDIBÉ** - *MEMBER*

ASSISTED BY

ATHANASE ATANNON *ESQ.* - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **Maria Mireille Barry Esq**.,
Lawyer Registered with the Court of Appeal of Ouagadougou, Burkina Faso;
And her Partner,
K. Frederic Hermann Minoungou, - *for the Applicant*

2. **Mr. Lago Daniel**,
Principal Legal Officer at the ECOWAS Commission, Abuja, Nigeria.- for the Defendant

-Breach of Disciplinary Procedure - Wrongful Dismissal - Mode of Termination of a fixed-Term Contract - Deemed Renewal of a Fixed Term Contract - Interpretation of Article 59 of the ECOWAS Staff Regulations.

SUMMARY OF FACTS

Edoh Kokou, Accounting Assistant/Cashier in the ECOWAS Observation and Monitoring Zone II (Conflict Prevention and Management Programme) at Ouagadougou, Burkina Faso, alleged that he was a victim of premeditated attack while carrying out his duty by his immediate superior officer, Mr. Mohammed Fadhel Diagne.

He lodged a complaint against Mr. Mohamed F. Diagne and at the same time reported the case to the ECOWAS Commission which dispatched an investigation team to the venue of the incident.

Rather unexpectedly, and without prior notice, by a letter dated 28 January 2008, the ECOWAS Commission declared that Edoh Kokou's name had been expunged from the staff list.

By Application dated 28th January 2009, Edoh Kokou filed a case before this Court, against the ECOWAS Commission, for wrongful dismissal.

LEGAL ISSUE

Whether or not the appointment of an employee who is on a fixed term contract, which had already been renewed, be terminated on grounds of "conduct inimical to the well-being of the Community", without complying with the disciplinary procedure as spelt out in Article 59 (e) of the ECOWAS Staff Regulations.

DECISION OF THE COURT

The decision to terminate the appointment of Edoh Kokou is based on Article 59 (a) of the ECOWAS Staff Regulations, and therefore constitutes a dismissal.

The fact that the said dismissal was carried out without respecting the guarantees provided for in Article 59 (d) renders it illegal, null and void.

The Court therefore declared that Mr. Edoh Kokou's dismissal was wrongful, and it ordered that all his entitlements and benefits must be paid to him.

JUDGMENT OF THE COURT

The Court delivers the following Judgment:

Summary of the Procedure Followed:

1. By Application dated 28th January, 2009, received at the Registry of the Court on 21st April, 2009, Mr. Edoh Kokou filed his case before the Community Court of Justice, ECOWAS, against the ECOWAS Commission, for unlawful dismissal.

2. By letter dated 30th July, 2009, the Applicant requested that an external court session be held by the Court at Ouagadougou (Burkina Faso), his place of residence, in order to continue the proceedings of the case, on the grounds that the financial circumstances he was faced with made it impossible for him to bear the transport costs to Abuja. The Defendant did not object to this request

3. At the court session of 25th September, 2009, the Court, by an Interim Ruling, decided to hold an external court session at Ouagadougou in Burkina Faso, in accordance with Article 26 of Protocol A/P1/7/91 on the Community Court of Justice, which states that ***"...where circumstances or facts of the case so demand, the Court may decide to sit in the territory of another Member State"***.

4. At the external court session held at Ouagadougou, the two Parties brought forth their arguments and called witnesses in support of their allegations.

Facts and Arguments of the Applicant

5. Mr. Edoh Kokou indicated in his Application that by letter referenced ECW/PER/01-00107-G/l/pi of 29th July, 2002, he was employed as Accounting Assistant/Cashier in the ECOWAS Observation and Monitoring Zone II (Conflict Prevention and Management Programme) at Ouagadougou, Burkina Faso.

6. He affirmed that on 10th March, 2007, he was a victim of an attack by his immediate superior officer, Mr. Mohamed Fadhel Diagne, Head of Bureau, in the course of official duty, of the said Zone. He equally affirmed that he was admitted at the hospital and benefited from a three-day temporary break from work; that he was still suffering from neck trauma and headaches; that he made a complaint against Mr. Mohamed Fadhel Diagne before the Burkina Faso courts, and that an investigation mission was immediately dispatched, following these events; that he sought transfer to another Department of ECOWAS; that in response, his appointment was purely and simply terminated, without notice, by letter No ECW/PER/01-00107-G/28-01/aca dated 28th January, 2008.

7. Mr. Edoh Kokou affirmed moreover that he had exhausted the local remedies provided under the ECOWAS Staff Regulations, without success.

8. That consequently, he brought his case before the Court, relying on Articles 9, 10, and 24 of the Supplementary Protocol of 25th January, 2005, for:

   a. Non-assistance to a person in danger;

   b. Complicity of physical premeditated aggression of an officer in the exercise of his functions, following a refusal to give support and backing to financial improprieties;

   c. Maltreatment and endangering the life of an officer at post;

   d. Discrimination and marginalisation;

   e. Injustice arid segregation;

   f. Exploitation and non-observance of the terms of his appointment contract;

   g. Favouritism and nepotism;

   h. Wrongful dismissal upon unclear grounds;

9. He therefore asked for the following compensations from the ECOWAS Commission:

   (a) Fifty Million CFA Francs (CFA F 50,000,000) in damages;

   (b) Payment of his salary arrears from March 2008 to January 2009 and the issuing of his pay slips from January 2007 to January 2009; (c) His immediate and unconditional reinstatement as Accounting Assistant/Cashier;

   (d) Fulfillment of his request for transfer to another ECOWAS establishment;

   (e) Payment of his annual leave allowances from 2006 to 2007;

   (f) Lifting the diplomatic immunity of the Head of Bureau so that judicial proceedings may be instituted against him;

   (g) Application of sanctions against his attacker in accordance with the provisions of the ECOWAS Staff Regulations;

   (h) Immediate recognition of all his rights, in accordance with the ECOWAS Staff Regulations.

Facts and Arguments of the Defendant

10. The ECOWAS Commission refuted the facts as brought by Mr. Edoh Kokou (the Applicant) and contends that:

11. The ECOWAS Commission affirmed that the Applicant was recruited for a period of one year as Accounting Assistant/Cashier in the ECOWAS Observation and Monitoring Zone II at Ouagadougou, in Burkina Faso.

12. That the conduct of the complainant, in the exercise of his functions, was marked by his inability to carry out his functions correctly, sheer indiscipline, well-known by all, and he also divulged and communicated official and administrative documents to the press. The Defendant pleaded Exhibits No. 1 to No. 5 in support of its allegation.

13. That as a result, Mr. Edoh Kokou's contract of employment was not renewed.

14. The ECOWAS Commission (the Defendant) argued that the dispute raised by the Applicant before the Community Court of Justice is related to the public service of ECOWAS and governed by the ECOWAS Staff Regulations. It considered that the grievances brought by the Applicant have no basis in law.

15. As to the termination of Mr. Edoh Kokou's appointment, the ECOWAS Commission cites paragraphs (g) and (c) of Article 59 of the ECOWAS Staff Regulations, which stipulates:

    "Retirement and non-renewal of a fixed term contract appointment shall not be considered as termination of appointment";

    "The Head of Institution may also terminate the appointment of a staff member holding a fixed term contract appointment before the expiration of the contract for any of the reasons set out in his letter of appointment"

16. The Commission maintained that Mr. Edoh Kokou's contract was tacitly renewed five times as from the 1st day of February, 2008; that the renewal of his contract constitutes a legitimate and sufficient ground for terminating his working relations with the Community.

17. As to the payment of severance pay, the ECOWAS Commission maintained that there had not been a dismissal and that severance pay cannot be claimed by the Applicant, on the grounds that his contract was simply not renewed.

18. As to the payment of salary arrears, the Commission affirmed that in response to the Applicant's letter asking for payment of arrears, the Finance Department paid to him the sum of Five Million Three Hundred and Thirty-Seven Thousand Five Hundred and Ninety Two CFA Francs (CFA 5,337,592).

19. As to the grievance on non-assistance to a person in danger, complicity of premeditated physical aggression, maltreatment, and refusal to give support and backing to financial improprieties, the Commission maintained that the above-cited allegations made by the Applicant are of a criminal nature. It contended that, at any rate, the Applicant had taken his case before the Burkina Faso courts, to that effect. If affirmed that the Court has no jurisdiction to adjudicate on criminal offences as brought by the Applicant.

20. As to discrimination, marginalisation and segregation, the Commission considered that these grievances were unfounded. It maintained that upon the request of Mr. Edoh Kokou, an investigation mission was sent to Ouagadougou in connection with the allegations of financial impropriety levelled against the Head of Bureau; that having been heard in connection with that audit, he cannot claim that he had been singled out for discrimination or segregation.

21. The ECOWAS Commission on the whole asked the Court to dismiss all the requests of Mr. Edoh Kokou as ill-founded.

FACTS WHICH THE COURT CONSIDERS AS PROVEN

22. After examining the allegations of the two Parties and evidences supported by documents as well as other points pleaded in the course of the proceedings, the Court of Justice considers the following facts as proven:

23. By appointment letter ECW/PER/01-00107-G/l/pi of 29 July 2002, signed by the President of ECOWAS Commission, Dr. Mohamed Ibn Chambas, the Applicant, Mr. Edoh Kokou, was employed as Accounting Assistant/Cashier in the ECOWAS Observation and Monitoring Zone II (Conflict Prevention and Management Programme) at Ouagadougou, Burkina Faso.

24. The contract of employment, which was signed for a one-year period renewable, took effect from the date of assumption of duty of Mr. Edoh Kokou.

25. The contract of employment was renewed five times until the President of ECOWAS Commission decided to address to the Applicant the letter of 28th January, 2008 whose content goes thus:

    "I have carefully considered the representation of the Commissioner, Political Affairs, Peacekeeping and Security and upheld his recommendation to terminate your appointment on account of your conduct which is inimical to the well-being of the Community.

    Accordingly, your appointment is hereby terminated with effect from 1st January, 2008. By a copy of this letter, the Acting Director of Finance is advised to pay you one (1) month basic salary in lieu of notice as provided in Article 59 (a) and (b) of the Staff Regulations and your other entitlements as a contract staff from 1st August, 2002 to 31st December, 2007.

    You are requested to submit all ECOWAS property in your custody including the ECOWAS Laissez Passer to the Head of Bureau, Zone II, Ouagadougou.

    I wish you success in your future endeavours.

    Yours faithfully;'

26. The Commission paid Mr. Edoh Kokou the sum of Five Million Three Hundred and Thirty-Seven Thousand Five Hundred and Ninety Two CFA Francs (CFA 5,337,592).

27. After a close look at these consistent and proven facts, it is worthy to proceed to the legal description of those facts, in order to determine whether the claims of the Applicant are well founded in law.

ANALYSIS OF THE COURT

28. The appointment letter, addressed to Mr. Edoh Kokou by the President of the Commission and accepted by the Applicant, establishes the existence of a contract of employment which binds the two Parties, thus

bringing their relations in terms of rights, duties and guarantees, under the clauses of the contract and the provisions of the ECOWAS Staff Regulations.

29. This contract of employment being subject to the Staff Regulations, it goes without say that its regime of termination must equally be governed by this important instrument.

30. After analysing the allegations of the Parties, it is easy to notice that the core issue of the dispute lies in the legal description of the termination of the contract of employment.

31. For the Applicant, it is a case of wrongful dismissal whereas for the Defendant, it is a case of the non-renewal of a contract of temporary employment.

32. The Court must therefore, in the first place, analyse the conditions of the termination of the contract and proceed to give a legal description of those conditions, in regard to the relevant provisions of the Staff Regulations.

33. To this end, the letter of termination of the contract whose content has already been reproduced, as addressed to the Applicant by the President of the ECOWAS Commission, is, without doubt, the most important document. A reading through it reveals that the grounds invoked for the termination of the contract of employment by the ECOWAS Commission was as follows: *"your conduct is unacceptable and inimical to the well-being of the Community"*

34. Supposing the Court admits that, in principle, and on condition that the procedures are observed, the reasons adduced by the Defendant may be considered as legitimate grounds justifying that the Head of Institution may terminate a contract of employment entered into with his officers.

35. As attested to by the provisions of Article 59(a) (vi) of the Staff Regulations when they empower the Head of Institution to terminate the

contract of employment of a staff member ***"where the staff member is guilty of conduct inimical to the well-being of the Community".***

36. If such is the grounds invoked by the employer in his letter terminating the contract of employment of the Applicant, he cannot allege and maintain later that it was nothing but a mere non-renewal of a temporary contract.

37. Besides, it is the very terms of the letter of termination of the contract which confirm that it is not a question of non-renewal of contract of employment. On the contrary, in this letter, dated 28th January, 2008, the employer affirmed that the termination of the employment took effect from 1st January, 2008.

38. Now, according to common rules, the non-renewal of a temporary contract of employment is normally communicated with prior notice, that is to say that the indication of a decision of non- renewal of a contract takes effect in the future. For, one cannot imagine an employer communicating to a worker the non-renewal of his temporary contract of employment whereas it had already been renewed.

39. Thus, reasoning in logical terms, one must conclude that if the notification of the non-renewal of a contract was made with the intention of producing retroactive effects, whereas the contract had already been renewed, one will not be dealing with non-renewal but rather, termination.

40. In the instant case, the termination of the appointment reposed on a special ground, provided for in the Staff Regulations, that is to say, ***"conduct inimical to the well-being of the Community"***. There are therefore grounds to conclude that it is not a question of non-renewal of a temporary contract of employment, but rather a dismissal, founded upon a disciplinary offence by a member of staff.

41. In these conditions, the approach to be adopted consists of finding out whether in his act of terminating the contract of employment by a dismissal, the Head of Institution had conformed to the procedure provided for by the Staff Regulations.

42. The said Regulations provides in its Article 59(d) thus:

> ***"The appointment of a staff member may be terminated only after the case of the staff member has been examined by the appropriate Advisory Committee on Appointments and Promotions, or Discipline (excluding paragraphs (c) and (g) above) and after the committee has submitted its report to the Head of Institution for approval and the Head of Institution has approved, in accordance with the provisions of these Regulations".***

43. It can be deduced from these provisions that the termination of a contract of employment upon the initiative of the Head of Institution, when reposed on one of the grounds provided for in section (a) of Article 59, with the exception of cases relating to medical reasons and withdrawal of a Member State of the Community, must, before all else, be examined by the Advisory Committee on Appointments and Promotions, or by the Disciplinary Committee, as the case may be. The Head of Institution cannot terminate the contract of the said officer without respecting the procedure provided for by Article 59(d) and described by paragraphs (c), (d), and (e) of Article 69.

44. Indeed, Article 69 (c) provides that ***"where the Head of Institution considers the proposed disciplinary action justified, he shall notify the Disciplinary Committee"***. Consequently, in the instant case, if the Head of Institution upholds the recommendations of the Commissioner for Political Affairs, Peacekeeping and Security, as he affirmed in the letter addressed to the Applicant, he has to transmit the file on the matter to the Disciplinary Committee before taking a final decision.

45. If the gravity of the situation was such that ***"the continued maintenance of the staff member in situ may be inimical to the interests of the Community or the interests of the case, the Head of Institution may suspend the staff member, pending such a time as a final decision is taken",*** in accordance with the provisions of Article 69(e) of the said Regulations.

46. At this stage, it is worthy to make an observation on the difference in content between the French and English versions of Article 69(e).

47. The French version only confers on the Head of Institution the powers to suspend when it provides: *"le Chef de I' institution peut suspendre le membre du personnel";* whereas in the English version, in addition to conferring powers to suspend, it is stipulated there that: ***"where the evidence of an offence is irrefutable, the Head of Institution may summarily dismiss a staff member".***

    Thus, the difference between the two texts results from the fact that the English text empowers the Head of Institution to dismiss an officer with immediate effect, whereas that is not the case in the French version.

48. This irreconcilable difference between two versions of the same Community text requires that the Court determine the version which should prevail.

49. The Court observes, from the foregoing, that there is a glaring contradiction within the English version, as evidenced by a comparative analysis of Articles 69(e) and 68(b) and (c).

50. Indeed, Article 68 deals with criminal charges against staff members, and concerning such offences, and even more serious ones like criminal offences, we understand that the Staff Regulations confers powers on the Head of Institution to suspend the staff member, as it clearly stands out in Article 68(b) and (c). And it is certainly for the sake of the principle of presumption of innocence that the Staff Regulations permits that a staff member be suspended only, not dismissed instantly.

51. It is true that in a case where the staff member is acquitted and discharged, he shall be reinstated into his functions and shall be entitled to his salaries and allowances accruing, as stipulated in Article 68(d). Whereas if he is convicted and sentenced, he forfeits his job (Article 68(e)).

52. Thus, if an officer who is accused of an offence of a criminal nature has a right to protection, similarly, he must all the more benefit from the same protection for his employment in cases of a disciplinary offence which is of a less serious nature.

53. Also, the Court accords priority to the French version of the text in Article 69(e) of the Staff Regulations, which does not authorise instant dismissal, and is more in conformity with the guarantee of fairness recognised in disciplinary matters.

54. Articles 59(d) and 69(6) thus make provision for the guarantee of fair proceedings, as granted to staff members of the Institution, in such manner as to protect them against arbitrariness, particularly in matters concerning dismissal. Hence, any dismissal effected without the observance of this guarantee, violates the provisions of Article 59(d) and is thereby illegal, null and void.

55. In the instant case, the Court observes that the dismissal of Mr. Edoh Kokou, founded on Article 59(a), was done without observance of the guarantee provided for in Article 59(d).

    Consequently, the Court adjudges that the said dismissal is illegal, null and void. In that regard, what are the consequences thereof?

56. The ECOWAS Staff Regulations is completely silent on what remedies are available to a staff member whose appointment is found to have been illegally terminated. The reason being that to arrive at a decision where the Court finds that there has been a case of dismissal of this nature, the Court must take into consideration:

    a) <u>the facts and circumstances of the case;</u>

    b) <u>the general principles of employment law relating to termination of employment contract.</u>

57. In the instant case, the Applicant, Edoh Kokou, was on fixed-term contract for one year, renewable at the instance of the Defendant, i.e. the ECOWAS Commission.

58. The decision, taken in January 2008 by the employer to terminate the functions of Mr. Edoh Kokou, though not in conformity with the rules, presumes a clear intention of not renewing the said contract which, at any rate, would have expired in January 2009.

59. In these circumstances, and having regard to the fact that the Applicant in his claim asked for damages by way of compensation as one of his reliefs, the Court considers that an order for reinstatement is not the most appropriate remedy. And that it is rather appropriate to award Mr. Edoh Kokou damages as compensation. He is also entitled to all the benefits he would have received for the rest of the mil course of his contract if his appointment had not been terminated.

60. The Applicant had eleven months left on his contract at the time it was terminated and for this period he is entitled to be paid all salaries and allowances as well as benefits, including education grant, which every staff is entitled to receive under the Staff Regulations.

61. Moreover, he is entitled to recover every outstanding unpaid claim. Being a fixed term one-year contract, the minimum notice for non-renewal would have been one month and for the reason that he was not given such notice, the Court considers that the Applicant should be paid a month's salary and allowances in lieu of notice, by virtue of Article 59(g) of the Staff Regulations.

62. The Court finally observes that in his Application, the Applicant asked for the due recognition of his rights, and compensations from the Commission to be paid to him in reparation for the harm done.

63. In this regard, the Court adjudges that in terms of the application for compensation for injuries caused, the Applicant did not prove during the proceedings, that he had suffered injuries other than those tied to his own dismissal, and which requires just reparation.

64. As to the grievances regarding non-assistance to a person in danger, complicity in physical aggression, maltreatment, and endangering the life of an officer at post - which the Applicant accuses the ECOWAS Commission (the Defendant) of - they constitute criminal offences, which do not fall within the jurisdiction of this Court.

65. Besides, the Court considers that the Applicant has not provided evidence in regard to discrimination, marginalisation, segregation, exploitation, or that the Defendant had acted with favouritism and nepotism.

66. As to the Applicant's request to be assigned to another Community establishment, as well as his request that the diplomatic immunity of his Head of Bureau must be lifted, and that sanctions must be applied against the said Head of Bureau for attacking him, the Court declares that it is not within its power to decide on those matters, and that such decisions come under the powers of the competent Community bodies.

DECISION

67. The Court

For These Reasons

(a) **Whereas** the decision relating to the termination of the appointment was based on Article 59(a) of the ECOWAS Staff Regulations, and therefore constitutes a dismissal;

(b) **Whereas** the dismissal of Mr. Edoh Kokou, effected without observance of the guarantee provided for in Article 59(d), is illegal, null and void;

(c) **Whereas** he has a right to all the entitlements and benefits he would have received from the time of his dismissal up to the end of his contract;

(d) **Whereas** the Applicant has not however proven that he suffered injuries other than those tied to his dismissal;

68. After hearing both Parties in a public sitting, on a dispute concerning Community public service, and after deliberating in accordance with the law,

Declares that the Application of Mr. Edoh Kokou is admissible,

Adjudges that the dismissal of Mr. Edoh Kokou is unlawful,

Orders the payment of all the entitlements and benefits due to Mr. Edoh Kokou,

Adjudges that the ECOWAS Commission is obliged to pay to Mr. Edoh Kokou the amounts equivalent to:

- One month salary and allowances for notice;
- 11 months of salaries due him from the date of the dismissal to the end of the contract, with all sums due as entitlements and related benefits;
- The sum equivalent to three months of basic salary as for moral harm.

Dismisses all other claims brought by Mr. Edoh Kokou. Asks the ECOWAS Commission to bear the costs.

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:

Hon. Justice Awa NANA DABOYA - *Presiding*

Hon. Justice Benfeito Mosso RAMOS - *Member*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Anthony A. BENIN - *Member*

Hon. Justice Dirarou SIDIBE - *Member*

Assisted by
Athanase ATANNON - *Registrar*

Original text in French

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

HOLDEN AT ABUJA, NIGERIA

ON THE 14TH DAY OF MAY, 2010

SUIT N°: ECW/CCJ/APP/07/08
INTERIM RULING N°: ECW/CCJ/RUL/03/10

BETWEEN
HISSEIN HABRE - PLAINTIFF/RESPONDENT

V.
REPUBLIC OF SENEGAL - DEFENDANT/APPLICANT

INTERIM RULING (PRELIMINARY OBJECTIONS)

BEFORE THEIR LORDSHIPS
1. **HON. JUSTICE AWA NANA DABOYA -** *PRESIDING*
2. **HON. JUSTICE M. BENFEITO MOSSO RAMOS -** *MEMBER*
3. **HON. JUSTICE HANSINE N. DONLI -** *MEMBER*
4. **HON. JUSTICE ANTHONY A. BENIN -** *MEMBER*
5. **HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - ** *MEMBER*

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

REPRESENTATION TO THE PARTIES

Me. Francois Serres,
Me. Mamadou Konate,
Me. Pierre Olivier Sur *- for the Plaintiff/Respondent*

H. E. the Ambassador of Senegal to Nigeria,
Daouda Sene *(Agent to the Republic of Senegal)*
Mr. Mafall Fall,
Mr. Ndeye Fatudo,
Me. Sadel Ndiaye,
Mes. Mayacine Tounkara *- for the Defendant/Applicant*

-Human rights- Lack of jurisdiction- inadmissibility- Non-retroactivity of criminal law, effective remedy – Res judicata – Right to fair trial.

SUMMARY OF FACTS

The Applicant, former President of the Republic of Chad from 1982 to 1990 brought an action against the defendant by an application dated 1st October, 2008 in which he alleged that following the overthrow of his regime by a military coup d'etat, he was granted political asylum by the defendant and has been residing in Senegal since 1990. He alleged that Senegal undertook legislative and Constitutional reforms in conformity with the recommendations of the African Union to enable it try the applicant. He further alleged that several actions were instituted against him by a group called "Association of Victims of Political Repression and Crime" which also took him before the United Nation's Committee against Torture. He stated that despite his acquittal by the various Courts, in particular the Senegalese Courts, the defendant proceeded to amend its Constitution and Penal laws in order to try him. He therefore brought this application contending that the said Constitutional amendments carried out by the defendant constitutes a violation of his Fundamental Human Rights and the principle of res judicata and non-retroactivity of criminal law since he had already been tried by Senegalese Courts.

The Defendant raised a preliminary objection on the Court's competence, stating that the Court lacked jurisdiction and that the case is not admissible. The defendant maintained that the Constitutional and Legislative reforms it carried out was in order to conform to its international obligations, therefore, this cannot be said to amount to the violation of the applicant's rights.

LEGAL ISSUES

- *Whether the matter is admissible before the Court.*

- *Whether the Court has jurisdiction to entertain this matter.*

- *Whether or not the African Union and the United Nations Committee against Torture are International Courts as contemplated under Article 10(d)(ii) of the Protocol on the Court, as amended.*

DECISION OF THE COURT

The Court in dismissing the preliminary objection held:

- *That it has jurisdiction to entertain this matter on the grounds that the dispute relates to whether there was violation or non-violation of rights enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. That the State of Senegal, is a signatory to the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. That the alleged violations were committed on the territory of Senegal.*

- *That the application is admissible based on the provision of Article 10(d) of the 2005 Supplementary Protocol of the Court because the initiating application mentioned the name of the applicant. The Court therefore declared that the application is not anonymous and also that it has not been instituted before another International Court. Secondly, that the African Union is not an International Court in the ordinary sense of the expression, for its mandate is not the administration of justice, particularly international justice. Furthermore, that the jurisdiction of the United Nations Committee against torture is limited to the monitoring of States Parties' implementation of the Convention against Torture and that adjudicating on the violation or not, of the Rights provided for by the African Charter on Human and peoples' rights is not within the jurisdiction of the committee. The Court therefore declared the application admissible.*

INTERIM RULING OF THE COURT

Delivers the following Interim Ruling:

SUMMARY OF FACTS AND PROCEDURE

1. By Application dated 1st October 2008, filed at the Registry of the Court on 6th October 2008, Mr. Hissein Habré, former President of the Republic of Chad from 1982 to 1990, brought a case before this Honourable Court for it to take cognisance of:

(a) Violation by the State of Senegal:

(i) Of the principle of non-retroactivity of criminal law as enshrined in Article 11(2) of the Universal Declaration of Human Rights, Article 7(2) of the African Charter on Human and Peoples' Rights, and the Preamble of the Constitution of Senegal;

(ii.) Of the right to effective remedy as enshrined in Article 8 of the Universal Declaration of Human Rights and Article 3(a) of the International Covenant on Civil and Political Rights;

(iii.) Of the principle of equality before the law and before the law courts and tribunals as enshrined in Articles 7 and 10 of the Universal Declaration of Human Rights, Articles 14(1) and 26 of the International Covenant on Civil and Political Rights, Article 3 of the African Charter on Human and Peoples' Rights, and Article 7(4) of the Constitution of Senegal;

(iv) Of the principle of res judicata, which is contrary to the Constitution of Senegal;

(v) The principle of separation of powers as enshrined in Article l(a) of the Protocol on Democracy and Good Governance and in the Preamble of the Constitution of Senegal;

(vi) The principle of independence of the judiciary as enshrined in Article l(a) of the Protocol on Democracy and Good Governance and Article 88 of the Constitution of Senegal;

(vii) Of the right to fair trial as enshrined in Articles 10 and 11 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, and Article 1 of the African Charter on Human and Peoples' Rights;

(b) The contrariness between the Community law of ECOWAS (particularly the Protocol on Democracy and Good Governance) and the criminal law of Senegal, considering that violation of the principle of non-retroactivity of criminal law is also a violation of the principle which has been positioned on the same level as the principle of constitutional convergence, sanctioned by the said protocol.

2. He also asks the Court to:

- ***"adjudge and declare that all proceedings instituted upon the bases indicated in the Application would be of a nature as to perpetuate the said violations;***

- ***adjudge and declare that the violation of these principles and rights debar the holding of any proceedings against Mr. Hissein Habré;***

- ***order accordingly that the Republic of Senegal must conform to the rights and principles recalled above and to cease all proceedings and/or actions against Mr. Hissein Habré."***

In support of his Application, he adduces the following facts:

3. Following the ousting of his regime by a military coup d'etat, he was granted political asylum by the Senegalese authorities. Thus, he has been residing with his family in Senegal since 1990, where he benefited from a diplomatic passport which was not renewed when it expired; moreover, he pays tax on the fixed assets he owns in that country;

4. In the course of the year 2000, certain persons, all Chadian nationals, and the Association called ***"Association of Victims of Political Repression and Crime"***, claiming to be victims of offences they describe as crimes against humanity, acts of barbarity, tortures, summary executions and other abuses committed under his regime from 1982 to 1990, instituted several proceedings against him before the *Tribunal regional hors classe of Dakar and before the Cour de Cassation* of Senegal. These actions having failed, some of them took their case before the United Nations Committee against Torture whereas others brought him before other Belgian courts;

5. The Belgian investigating judge issued on 20th September 2005 an international arrest warrant against him and requested for his extradition. He was therefore arrested on 25th November 2005 by the State of Senegal. The *Chambre d'accusatio*n of the Dakar Court of Appeal held that it was without jurisdiction to render an opinion on the request for his extradition and placed him under house arrest; he declared that it was within such a context that the Senegalese Head of State unilaterally decided, to take Mr. Hissein Habre's case before another body which is non-judicial, i.e. the African Union, upon grounds still unexplained - whereas the Senegalese judicial authorities had already adjudicated upon the case and delivered final judgments carrying the weight of res judicata.

6. During the session of 1st and 2nd July, 2006, the Authority of the African Union decided to give Senegal the mandate **"to prosecute, and have Hissein Habré tried on behalf of Africa, (...) in a competent Senegalese court with the guarantees of fair trial"**. In disregard for the court decisions already made in its own courts of law and thus in flagrant violation also of several general principles of law, Senegal thus undertook legislative and constitutional reforms in conformity with the recommendations of the United Nations Committee against Torture, and set in motion the procedure for ratification of the Treaty of Rome. Through Law No. 2007-02 of 17th February 2007 on Amendment of the Penal Code of Senegal, the State of Senegal introduced amendments

empowering it to prosecute and punish the offences of crimes against humanity, war crimes, crimes of genocide, torture, cruel, inhuman and degrading treatments.

7. Mr. Hissein Habré contended that the said constitutional amendments carried out by Senegal have no other objective than to make his prosecution unavoidable, in as much as these legislative and constitutional reforms have a retroactive effect, and hence, that these facts constitute a violation of his fundamental rights.

8. On 14th October, 2008, in accordance with Article 34 of its Rules of Procedure, the Court served the Application of Mr. Hissein Habré on the State of Senegal.

   On 5th January, 2009, the Lawyers for the State of Senegal, acting in line with paragraphs 1 and 2 of Article 87 of the Rules of the Court, deposited a separate pleading dated 23rd December, 2008 at the Registry of the Court, in which they raised, as Preliminary Objections, the incompetence of the Court and the inadmissibility of the Application by Mr. Hissein Habré, by relying, respectively, on Article 9(4) and Article 10 of the Supplementary Protocol A/SP. 1/01/05 relating to the Community Court of Justice.

9. On 16th January, 2009, the Court served the Lawyers of Mr. Hissein Habré with the preliminary procedure regarding the Preliminary Objections. The said Lawyers deposited at the Registry of the Court, their written observations on the Preliminary Objections, in accordance with the provisions of Article 87(3) of the Rules of Procedure.

10. On 27 April 2009, the Court served the Lawyers for the State of Senegal with the written observations of Mr. Hissein Habre's Lawyers on the Preliminary Objections.

11. On 14th January, 2010, the Court held a public hearing on the Preliminary Objections, in accordance with Article 87(4) of the Rules of the Court. During the sessions of oral pleadings on the Preliminary

Objections, the lawyers of the Parties adopted mutatis mutandis the arguments and pleas-in- law they brought forward during the written phase of the procedure.

ARGUMENTS OF THE PARTIES

AS TO THE JURISDICTION OF THE COURT

The Position of Senegal

12. Through its Lawyers, the State of Senegal, the Applicant in the instant cause, maintained that the Court has no jurisdiction to entertain the suit and argued that, *"A close look at the Application by Mr. Hissein Habré sufficiently establishes the point that the grievances he alleges only refer to Senegal's adoption of new reforms which touch upon its Constitution, Penal Code and Code of Criminal Procedure. It maintained that the adoption of legislative provisions of a general and impersonal nature may not amount to human rights violation."*

As regards the non-retrospectivity of criminal law

13. The Lawyers for the State of Senegal maintained that, "The 2005 Supplementary Protocol on the Court in its Article 9(4) empowers the Court to adjudicate on cases of human rights violation occurring in each Member State." They allege that the first case of human rights violation invoked by the Applicant relates to violation of the principle of non-retroactivity of criminal law, in support of which he claims that "the constitutional reform of 7 August 2008 was adopted with the sole aim and objective of bringing proceedings against him and to prosecute him."

14. They then observed that, "At the time Mr. Hissein Habré brought his case before the Court, there was no pending case against him before the Senegalese courts of law." They affirmed that the alleged violation therefore stems from a mere assumption, such that the lawyers of Mr. Hissein Habré were compelled, themselves, to speak in the conditional sense, incapable of bringing forward precise charges and grievances."

15. They added that, "In the absence of any proceedings having been instituted against him, it is difficult to uphold the claims of torture, crimes of genocide, war crimes and crimes against humanity, against Mr. Hissein Habré."

16. They thereby concluded that, "The so-called violation of the principle of non-retroactivity of criminal law has not been established in the instant case, the Applicant Mr. Hissein Habré not going ahead to cite the particular court decision which may have been delivered against him, or the pending proceedings which may have been instituted against him before a Senegalese court, following these reforms."

As regards the right to effective remedy and the right to fair trial

17. Regarding violation of the right to effective remedy, as alleged by Mr. Hissein Habré, Counsel to the State of Senegal considered that, "The right to effective remedy, as defined in Article 14 of the International Covenant on Civil and Political Rights, does not signify the right to attack a constitutional law. It is rather defined as the recognition, among human rights, of the right of every person to require that ***"his rights and obligations in a suit at law ... shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"*** which shall either decide on the grounds for any criminal offence brought against the person or on disputes of civil rights and obligations."

18. They affirmed that one cannot make a complaint against Senegal for infringing upon the right to effective remedy, upon the grounds that Senegal does not put the necessary structures in place to enable individuals file cases against the promulgation of a constitutional law, by court action. Like many constitutions of modern countries, Senegal, in the structural disposition of its judicial system, only makes provision for receiving cases brought on exceptional grounds. But when in the present circumstances, the country has put in place courts of law which are competent to handle issues in general law, and these courts function on the bases of respect for the independence of judges, presumption of innocence, a two-tier

court system, and the right to the services and defence of a lawyer registered with an independent body, such a complaint cannot be upheld. They emphasised that the implementation of the right to effective remedy, at any rate, enabled Mr. Hissein Habré to file his case before the *Chambre d'accusation*, which, in any case, received his Application.

19. They contended further that, to lay claim to such violation of human rights, Mr. Hissein Habré should have presented to the Court, concrete cases which had come before the Senegalese courts and which exemplify non-observance of the right to effective remedy, or more generally, the right to fair trial, not hypothetical violations. That such a principle had been affirmed by the European Court of Human Rights in the **Airey v. Ireland** (Judgment of 9th October, 1979) and **Artico v. Italy** (dated 13th May, 1980), which the Cour de Cassation of Senegal concurred with and referred to.

As regards equality before the law and before the law courts and tribunals

20. In terms of violation of the principle of equality before the law and before the law courts and tribunals, the pleas-in-law invoked in support of the violation of such rights relate to the right to fair trial, already extensively argued out and maintained by Counsel for Senegal.

As regards the other grievances

21. All the other grievances brought forward by Mr. Hissein Habré are only deduced from the adoption of the new legislative and constitutional provisions aimed at incorporating into the domestic legal system, provisions contained in International Treaties, none of which nominally targets Mr. Hissein Habré as a person. But Counsel for Senegal considered that Senegal did no more than respect its conventional obligations, in adopting the legislative and constitutional measures for guaranteeing the actual implementation of the international treaties it had ratified, to enable its courts and tribunals apply the said provisions when examining disputes brought before them. They cited, in that regard, Article 1 of the African Charter on Human and Peoples' Rights, which makes it

mandatory upon Member States of the Organisation of African Unity to ***"recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them";*** and on the other hand, Article 2(2) of the International Covenant on Civil and Political Rights which makes similar provisions. Indeed, the Covenant provides: ***"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant"***

22. They further contended that Articles 4(1), 4(2) and 5(8) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides, among others, that ***"Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."*** Article 5(8) of the same Treaty makes it obligatory upon each State Party to take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8(1).

23. They emphasised that the objective of international conventional law, today, is to protect concrete and effective rights and not theoretical or illusory rights, as pleaded by Mr. Hissein Habré, whose Application was rather aimed at bringing charges against Senegal for adapting its national laws (which comprise nothing but general and impersonal provisions) in conformity with its international commitments. But, in refraining from doing so, the State of Senegal would be violating its international obligations and hence, the rights of victims to fair trial and the independence of the domestic courts.

24. They further contended that Articles 1 and 62 of the African Charter on Human and Peoples' Rights and Article 2(2) of the International Covenant on Civil and Political Rights imposes an obligation on States Parties to adapt their domestic laws to the provisions of human rights. The Revised Treaty of 1993, which is the Constitution of ECOWAS, in its Article 4(g), compel Member States to respect, promote and protect human rights, in accordance with the provisions of the Charter.

25. Hence, in conforming to these requirements, Senegal did no more than observe the prerogatives of the Community Court of Justice as arising from Article 19 of its Protocol A/P1/7/91, which stipulates that the Court shall examine the dispute before it in accordance with the Treaty and its Rules of Procedure, that the Court shall also apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice, and as a result, the principles of law recognised by civilised nations. Counsel for Senegal concluded in that respect, that the step taken by Senegal cannot thus be interpreted as a human rights violation.

26. In the light of the foregoing, they asked the Court to declare that it has no jurisdiction to adjudicate on the case, by virtue of Article 9(4) of the Supplementary Protocol A/SP. 1/01/05 relating to the Court.

The Replies of Mr. Hissein Habré

27. In reply to the pleas-in-law brought forth by the State of Senegal, on the scope of the legislative and constitutional amendments, Counsel for Mr. Hissein Habré maintained that the subject-matter of Mr. Hissein Habre's Application was not to ask for any intervention whatsoever on the constitutional or legislative order of Senegal or to state that it was the adoption of new provisions which may have amounted to human rights violations. On the contrary, they affirmed that in regard to the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights, the flagrant violation of these rights becomes obvious.

Violation of the right to free movement

28. Counsel for Mr. Hissein Habré contended that in French law, the nature of the decisions made by the Senegalese courts is synonymous with a *refus d 'informer* (the impossibility of conducting a pre-trial criminal investigation into a matter), that means adjudging that there is a *non-lieu* (a dismissal of the case); that according to the *Cour de cassation* of France, a decision of *refus d'informer*, which has become irrevocable and acquired the force of *res judicata*, has the effect of terminating the public proceedings; that however, the said decisions have conferred on Mr. Hissein Habré acquired rights whose violation is not merely potential. That indeed, since 2005, Mr. Hissein Habré had been under house arrest, his right to free movement had been gravely flouted, and his passport had been withdrawn from him. That in such conditions, where the Defendant is exceptionally not free to move, with Senegal talking of the adoption of administrative measures in conformity with the Convention Against Torture, should one still doubt that there is a human rights violation?

Actual violations deduced from constitutional and legislative reforms: violation of the principle of equality before the law and before the law courts and tribunals, violation of the principle of retroactivity of criminal law, violation of the principle of resjudicata and of the principle of independence of the judiciary

29. They contended that it is imperative to observe that the constitutional and legislative reforms were adopted in Senegal:

- Solely for the purposes of implementing a decision of the African Union empowering Senegal to institute proceedings against Mr. Hissein Habré;

- Solely for purposes of removing the substantial legal bars found by the Senegalese courts in the decisions which had become irrevocable and acquired the force of res judicata, whereas in the absence of these constitutional and legislative amendments, it would be impossible to institute new proceedings;

- For the purpose of making it possible for the said provisions to be applied retroactively, in violation of provisions of the African Charter on Human and Peoples' Rights and of the Universal Declaration of Human Rights, which constitute an integral part of Senegal's constitutional system; and that as such, the constitutional amendment was employed as a means of escaping the censure of the Constitutional Council, the latter having advanced the principle of non-retroactivity, and thereby, the State of Senegal had in effect violated the African Charter, the only legal instrument which does not provide for exception to international custom, that is to say crimes against humanity, which once recognised by civilised nations, may be brought as charges in certain cases. Whereas what the lawyers for Senegal are asking the Community Court of Justice is to ignore the Charter in favour of the Covenant. They maintained indeed that Mr. Hissein Habré was deprived of the right of contesting the constitutionality of this law;

- For the purpose of depriving former President Hissein Habré of the benefits of the acquired rights, by virtue of the above-mentioned court decisions;

- For the purpose of depriving former President Hissein Habré of constitutional guarantees, since the violation of the force of res judicata violated the principle of independence of the judiciary.

Potential violations deduced from constitutional and legislative reforms and acts preparatory to the proceedings: violation of the principle of independence of the judiciary, violation of the principle of separation of powers, and the guarantees of a fair trial

30. Concerning the plea-in-law relating to absence of proceedings, procedures or court decisions which may have been adopted or implemented against former President Hissein Habré, Counsel for the Defendant affirmed that it is certainly unnecessary to wait till former President Hissein Habre's accusation before bringing forth the violations

denounced in the Application instituting proceedings, which is as a result of his being deprived of the rights he had acquired by virtue of the judgments already delivered; that it is worthy to note rather, that Senegal had not remained inactive in the implementation of the mandate given by the African Union. That Senegal had taken measures which dealt directly with the holding of the trial itself and the conduct of investigations, which constitute substantial violations of the African Charter on Human Rights;

31. They indeed alleged that several measures were taken clearly indicating the will to institute proceedings, and that as things were, even if former President Hissein Habré was not formally charged, it was permissible to observe that he was substantively and exclusively the target, both in the recommendation of the Committee against Torture, where he is the subject-matter in the obligation upon Senegal to conduct a trial, and in the mandate received by Senegal, where in any case it is not only a question of bringing proceedings against him but trying him with "all the guarantees of a fair trial": in that mandate, it was precisely a question of the efficient and successful conduct of a trial.

32. They emphasised that the co-ordinator of the trial in Senegal, appointed by the Minister of Justice to assist him in the supervision and organisation of the trial, indicated at the defence of former President Hissein Habré that the President of the Republic of Senegal had put forward the mandate received from the African Union, before the Procureur General of the Court of Appeal of Dakar, which undeniably constitutes an initial act of execution of the said mandate;

33. They contended further that in such instance, it is a question of an act of submission of a case to a competent authority for the purposes of prosecution, within the meaning of the provisions of Article 7 of the Convention on Torture, since the judge in question is indeed the competent authority for criminal prosecution.

Violation of the principle of independence of the judiciary

34. Counsel for Mr. Hissein Habré pointed out that before the constitutional law was adopted, and before the Public Prosecutor issued orders for the opening of a judicial inquiry, investigating judges had been appointed by the Minister of Justice to conduct investigations into the Hissein Habré case;

35. That besides, from the end of year 2006, a working group and then a Monitoring and Communication Committee had been set up by the Minister of Justice; that it was a question of removing the entire framework of legal bars which prevented the trial of former President Hissein Habré, **in reality, the bars which had constituted the basis for the judgments delivered in his favour**; that the Committee was equally charged with advising the Minister and to supervise the preparation and conduct of the trial and set out the modalities and procedures to be applied in trying Hissein Habré. Provision had even been made - still according to the Defence of former President Hissein Habré - that the members of the Committee were to provide assistance, particularly during the investigations and in the course of the entire trial;

36. Counsel for Mr. Hissein Habré added that the terms of reference, in terms of the material and legal conditions, had at any rate been established based on the recommendations of this Committee, by the Minister of Justice i.e. by the Executive, and communicated to the press since the month of November 2008; according to them, the object of these recommendations was to map out strategies for instituting proceedings and for putting appropriate mechanisms in place for the conduct of investigations.

37. That moreover, it is provided for in the terms of reference that the Committee was going to work with the judges; that they would go to Chad and Belgium; that they were going to delimit the procedural scope of the trial; that this work was to be done by civil servants of the Senegalese Executive including the investigating judge appointed by the former Minister of Justice, Mr. Madike Niang, who exercises control over the Public Prosecutor's Department and gives them instructions.

38. They declared that in such conditions, these decisions, which touched on the organisational strategies of the Judiciary and the conditions for initiating and conducting the said trial, cannot but gravely affect the independence of the judge "in the handling of his case".

Guarantees of the right to fair trial

39. Counsel for Mr. Hissein Habré pointed out that even civil parties including Human Rights Watch had access to archives at the headquarters of the DDS before the Belgian investigating judge and that they had concerns regarding the legal value of these documents obtained outside the investigation.

40. The said Counsel expressed surprise that whereas the facts date back to 2001, no tribunal was created for Chad as at that time in the name of the United Nations and the African Union, as the case was for Rwanda and Sierra Leone, and the appointment of a prosecutor to conduct the investigations. They emphasised the fact that the said entities, particularly the African Union and Belgium, had challenged the universal jurisdiction, and sought to rely on personal and passive jurisdiction, in the case of Mr. Hissein Habré. They recalled that in an expert's report dating back to 2009, the African Union had prescribed that the competent national judicial authorities who envisage exercising universal jurisdiction in regard to individuals are required to take into account all the immunities that State personalities may enjoy; that this was not applied to Mr. Hissein Habré.

41. Besides, according to them, only an international court may have the means to adequately finance the conduct of credible investigations and proceed to do a hearing of witnesses for the defence and ensure their protection, etc., whereas a national court is obliged to respect the laws of the country. That this was what Senegal did at the time, and which was challenged in the name of international principles without recourse to the required means, in terms of finance and in terms of the guarantee of impartiality of the judges.

42. They considered that the Hissein Habré case is not a legal matter but a financial affair, in terms of the cost of the proceedings, as evaluated by the State of Senegal, at 48 Billion at the beginning and reduced to 18 Billion, following comments in the international press.

43. The lawyers of Mr. Hissein Habré alleged further that the fact that these funds will be used for the payment of judges' salaries, their training, and for equipping the Senegalese courts, is an indication of the absence of the guarantee of a fair and impartial trial.

44. That they observed that in the Hissein Habré case, there are complicities which are harmful to the exercise of justice. In that regard,-they had doubts about the interest shown by France, Belgium and the European Union in the financing of the case, whereas no African State put in a penny.

AS TO THE ADMISSIBILITY OF THE INITIATING APPLICATION

The Position of Senegal

45. Counsel for the State of Senegal equally maintained that the Application of Mr. Hissein Habré is inadmissible in that it was not in agreement with Article 10 of the Supplementary Protocol A/SP. 1/01/05 on the Community Court of Justice. Indeed Article 10 provides that the application must not be anonymous, and that the case must not already be pending before another International Court competent to adjudicate on the case.

46. They contended that the victims of the acts of torture and crimes against humanity alleged to have been committed by Mr. Hissein Habré, brought a complaint before the United Nations Committee against Torture, pleading that in failing to try or extradite Mr. Hissein Habré, the State of Senegal had defaulted in its international obligations. They therefore maintained that, considering the fact that competence in matters of human rights is conferred on several bodies, customary international law has always made provision for an "alternative jurisdiction".

47. Besides, they added that the African Union had mandated Senegal to institute proceedings against him and have him tried, with all the guarantees of a just and fair trial.

48. Relying on Article 22 of the United Nations Convention against Torture, Article 35 of the European Convention on Human Rights, and Article 56 of the African Charter on Human and Peoples' Rights whose provisions are almost identical, they contended that if inquiries into cases of that nature are pending before courts applying the said Conventions, the instant Court cannot adjudicate upon them.

The Responses of Mr. Hissein Habré

49. On the contrary, Counsel for Mr. Hissein Habré maintained that their Application is admissible.

    They expressed surprise that Senegal does not advance any argument in support of the grounds upon which the inadmissibility is raised; in their opinion, they have only contented themselves with the affirmation that the Court of Justice of ECOWAS may run into contradiction with the United Nations Committee against Torture whereas they had admitted that the said Committee are in contradiction with the Senegalese courts. In other words, Counsel for Senegal considered that the Court of Justice of ECOWAS is not a court of cassation but as for the Committee against Torture, it can constitute itself into a court of cassation vis-a-vis the Senegal Court of Cassation.

50. They opposed this argument by maintaining that the subject-matter of the dispute before the Court and before the Committee is totally different; they indicated that it is not the issue of the principle obligation cited in Article 7 of the Convention against Torture (the subject-matter of a dispute between Senegal and certain private persons, not between Mr. Hissein Habré and these same persons) which is being examined here by the Court; that besides, if it is proved that the Applicants before the Committee against Torture are the same as the complainants before the Senegalese courts, conversely, Mr. Hissein Habré was not a party to

that procedure and could therefore not defend his interests before that UN body. They thereby affirmed that the parties in the proceedings before this Court are not identical.

51. They further submitted that the composition and functions of the Committee against Torture differ from those of a judicial body, and that the decisions they make, not binding in nature, depend, as to their enforcement, on the good will of the States; they therefore considered that the said Committee cannot be equated to an International Court, within the meaning of Article 10(4) of the Protocol on the Community Court of Justice, ECOWAS.

52. They finally asked for the dismissal of these Objections, on the grounds that the State of Senegal attempts to prevent the merits of the case from being examined, whereas the rights of Mr. Hissein Habré have already been acknowledged; that contrary to the assertions of the State of Senegal, these rights have been violated and the violations thereof are marked by concrete evidences of preparations of the trial, legislative reforms, and appointment of judges, solely aimed at Mr. Hissein Habré, thus making him a potential victim, a concept recognised in the case-law of the European Court of Human Rights.

ANALYSIS OF THE COURT

AS TO THE JURISDICTION OF THE COURT

53. The Court considers that its jurisdiction or the lack of it, to adjudicate on cases of human rights violations, cannot be tied to the proven or non-proven nature of the said violations, which necessarily, before the final decision of the Court, do present a problematic feature and by their nature, have to do with a dispute which the Court is bound to resolve. It can only settle this dispute after following a line of reasoning whose point of departure is the examination of the Court's competence. At the stage of the Preliminary Objections, the Court cannot therefore entertain pleas-in-law or arguments relating to the merits of the law at suit, which is that of determining whether there have been violations or not.

54. The Court finds that the pleas-in-law and arguments brought forth by the Parties, in regard to the jurisdiction of the Court, in both the written and oral phases of the proceedings, demonstrate, on the part of Senegal, that there have been no violations of human rights; and on the part of Counsel for Mr. Hissein Habré, that there have indeed been and there is the possibility of there being human rights violations. The Court therefore finds that the arguments held by the Parties largely go to the merits of the case.

55. Indeed, Senegal maintains that the Court lacks jurisdiction on the grounds that the constitutional and legislative reforms it carried out in order to conform to its international obligations cannot amount to human rights violation, and that the jurisdiction of the Court may not be exercised in addressing fictitious violations.

56. On the contrary, Counsel for Mr. Hissein Habré holds that the Court has jurisdiction in respect of the concrete human rights violations suffered by their Client in regard to the constitutional and legislative reforms carried out in Senegal and the potential violations these reforms tend to suggest, as well as the adoption of preparatory measures for holding a trial.

57. The Court recalls that in the instant case, examining its jurisdiction implies finding out **whether it is invested with the power to make a declaration on a determined case**. To examine the Preliminary Objections on the jurisdiction of the Court therefore boils down to finding out whether **without going to the merits of the case**, the Court is manifestly endowed with the powers for examining and settling a case on which judgment has already been delivered, as submitted to it.

58. When seised on the basis of Article 9(4) of the 2005 Supplementary Protocol on the Court, which provides that ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"***, and the Court has to decide on the Preliminary Objections relating to its jurisdiction, it has to verify the criteria of the jurisdiction that must be in place as a result of the said Article. It is a question of the criteria of *ratione materiae* and *ratione loci*.

59. In the first place, the Court shall examine **if the issue submitted before it deals with a right which has been enshrined for the benefit of the human person**, whether it arises from the international and Community obligations of the State complained of, as human rights to be promoted, observed, protected and enjoyed, and **whether it is the violation of that right which is being alleged**.

    The Court shall verify whether the subject-matter of the dispute, as arising from allegations and claims of the parties, falls within the domain of human rights. It shall also ensure that these recognised rights are obligations binding on the State against which the matter is brought.

    Secondly, the Court shall examine whether the alleged violations were committed in a Member State of the Community.

60. In the instant case, the Court, adjudicating on the Preliminary Objections raised by the State of Senegal, finds:

    (i) That the dispute, as submitted by the Parties, deals with the issue of whether there was violation or not of rights enshrined in Article 7, 8, 10, 11 of the Universal Declaration of Human Rights, Articles 3(a), 14 and 26 of the International Covenant on Civil and Political Rights, and Articles 37(1) and 7(2) of the African Charter on Human and Peoples' Rights;

    (ii) That the State of Senegal, as a Member of the United Nations, is bound to respect the provisions of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in its Resolution 217 A (III) of 10 December 1948; that Senegal is also signatory to the International Covenant on Civil and Political Rights since 13 February 1978, and finally, signatory to the African Charter on Human and Peoples' Rights since 15 June 1982;

    (iii) That the violations are alleged to have been committed on the territory of Senegal;

61. Accordingly, and needless to examine the arguments brought forth by the Parties beyond the limits of what had been asked for in the instant proceedings, the Court declares that it has jurisdiction to adjudicate on the Application filed by Mr. Hissein Habré.

AS TO THE ADMISSIBILITY OF THE APPLICATION

62. The Court shall find out and verify if the initiating application was in agreement with the conditions set out in Article 10(d) of the Supplementary Protocol 2005 on the Court, in whose terms: ***"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 not be anonymous; nor be made whilst the same matter has been instituted before another International Court for adjudication."***

63. The Court finds that the initiating application mentions the name of the Applicant as well as those of the Lawyers designated to represent him, in accordance with the provisions of Article 13 of the 2005 Supplementary Protocol on the Court. The Court considers therefore that the Application is not anonymous.

64. As regards the second criterion of admissibility, the Court finds that Senegal maintains the inadmissibility of the Application, on the grounds that the case had been instituted before the United Nations Committee against Torture; that the African Union had declared that the Hissein Habré case falls within its jurisdiction and that it had given Senegal the mandate to try him.

65. The Court finds moreover that the communication filed before the United Nations Committee against Torture was made against the State of Senegal by persons claiming to be victims of acts of torture perpetrated under the regime of Mr. Hissein Habré; that the object of the communication in question is the implementation of the obligations binding on the State of Senegal in regard to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment; that the jurisdiction of the said Committee is limited to the monitoring of States Parties' implementation of the Convention against Torture.

66. The Court recalls on the other hand that it is seised by Mr. Hissein Habré for the purposes of finding the violation by the State of Senegal of the obligation to respect the rights provided for, among other instruments, by the African Charter on Human and Peoples' Rights; that adjudicating on the violation or not of the rights provided for by the African Charter, is not within the jurisdiction of the Committee against Torture.

67. Moreover, the Court declares that the African Union is not an International Court in the ordinary sense of the expression, for its mandate is not the administration of justice, particularly international justice.

68. Accordingly, the Court considers that the Application of Mr. Hissein Habré is not anonymous and that the case brought before the Court by Mr. Hissein Habré has not been instituted before another International Court. The Court therefore declares that the Application is admissible.

DECISION

69. **The Court**

(a) WHEREAS, in accordance with paragraphs 1 and 2 of Article 87 of its Rules of Procedure, Senegal raised, in the case between it and Mr. Hissein Habré, Preliminary Objections relating to the incompetence of the Court and the inadmissibility of Mr. Hissein Habre's Application;

(b) WHEREAS the dispute, as submitted by the Parties, finally looks forward to a determination of whether the remit of the Court empowers it to consider the merits as to whether there is violation or not of the rights enshrined in Articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights, Articles 3(a), 14 and 26

of the International Covenant on Civil and Political Rights and Articles 3, 7(1) and 7(2) of the African Charter on Human and Peoples' Rights;

(c) WHEREAS Article 9(4) of the 2005 Supplementary Protocol empowers the Court to adjudicate on cases of human rights violation in any Member State of the Community;

(d) WHEREAS by virtue of Article 19 of the 1991 Protocol on the Court, ***"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"***, that is to say international conventions, whether general or specific, establishing rules expressly recognised by the contesting States; international custom, as evidence of a general practice accepted by law; the general principles of law recognised by civilised nations; 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. And if the parties agree thereto, to decide a case *ex aequo et bono*;

(e) WHEREAS the State of Senegal, as a Member State of the United Nations, is bound to abide by the provisions of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in its Resolution 217 A (III) of 10 December 1948; whereas the State of Senegal is equally signatory to the International Covenant on Civil and Political Rights since 13th February, 1978 and that finally, it is signatory to the African Charter on Human and Peoples' Rights since 15th June, 1982;

(f) WHEREAS the violations are alleged to have been committed on the territory of Senegal;

(g) WHEREAS the Application filed by Mr. Hissein Habré before the Court is not anonymous;

(h) WHEREAS the said Application though brought before the United Nations Committee against Torture, has not been brought before any International Court competent to adjudicate on the matter.

70. Adjudicating in a public sitting, upon hearing both Parties, after deliberating on the Preliminary Objections, and in an Interim Ruling;

71. **DECIDES AS FOLLOWS**,

- The Court has jurisdiction to adjudicate on the case brought before it by Mr. Hissein Habré;

- The Court adjudges that the Application of Mr. Hissein Habré is admissible;

- Accordingly, the Court dismisses the Preliminary Objections raised by the State of Senegal;

- The Court orders that the case shall proceed further, on the merits.

COSTS

72. The Court reserves costs.

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:

Hon. Justice Awa NANA DABOYA - *Presiding*

Hon. Justice Benfeito Mosso RAMOS - *Member*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Anthony A. BENIN - *Member*

Hon. Justice Clotilde Medegan NOUGBODE - *Member*

***Assisted by* Tony ANENE-MAIDOH** - *Chief Registrar*

Original text in FRENCH

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

HOLDEN AT ABUJA, IN NIGERIA

ON THURSDAY 18TH NOVEMBER 2010

SUIT N^{O}: ECW/CCJ/APP/07/08
JUDGMENT N^{O}: ECW/CCJ/JUD/06/10

HISSEIN HABRE - *PLAINTIFF*

V.

THE REPUBLIC OF SENEGAL - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE M. B. MOSSO RAMOS -** *MEMBER*
3. **HON. JUSTICE HANSINE N DONLI -** *MEMBER*
4. **HON. JUSTICE ANTHONY A. BENIN -** *MEMBER*
5. **HON. JUSTICE ELIAM M POTEY -** *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

Mr. Mamadou Konate,
Mr. Francois Serres - *for the Plaintiff*

Mr. Sadel Ndiaye -*for the Defendant*

Human rights, non-retroactivity of criminal law, the right to effective remedy, res judicata equality before the law and justice, independence of the judiciary, separation of powers, right to fair hearing, contrariety between the Senegalese penal law and ECOWAS Community law, principles of constitutional convergence, jurisdiction, inadmissibility.

SUMMARY OF FACTS

By Application dated 1st October, 2008 and registered at the registry of the Court on 16th October, 2008, Mr. Hissein Habre, former President of the Republic of Chad, who was toppled in a coup d'etat in 1990 and has been living in Senegal since then, came before the ECOWAS Court of Justice. He avers that various judicial proceedings were initiated against him, between January 2000 and September 2005, following which the Senegalese Courts declared their lack of jurisdiction, on the grounds that the Senegalese law did not have provisions relating to the acts (crimes against humanity and torture) for which Mr. Hissein Habre was accused, and that the Senegalese Courts were not empowered with universal jurisdiction to judge him.

He also claims that following the pronouncement by the investigating Chamber of the Dakar Court of Appeal, that it lacked jurisdiction to entertain the request for extradition made by Belgian Judiciary, the Senegalese Authorities still went ahead, by referring his case to the African Union, which gave mandate to Senegal to try him on behalf of Africa in competent Courts with the guarantee of a fair hearing. It was in these circumstances that the Senegal carried out both legislative and constitutional reforms to its internal laws in order to try him. He therefore pleads with the Court to note the violation of human rights relating to the principle of retroactivity of the penal law, the principle of equality before the law, and the right to fair hearing.

These pleas in law were rejected by Senegal, which claims that it only carried out the legislative and constitutional modifications in order to

be in conformity with its international obligations. Senegal further avers that the claim of human rights violation is unfounded, since there was no proceeding against the Applicant in any Senegalese Court. Thus, Senegal pleads that the Court should reject all the claims of Mr. Hissein Habre.

LEGAL ISSUES

Whether the legislative and constitutional amendments carried out by Senegal are likely to infringe upon Mr. Hissein Habre's human rights. Do these amendments violate the principles of non-retroactivity of the penal law, the right to effective remedy and separation of powers?

DECISION OF THE COURT

The Court holds that the legislative and constitutional amendments carried out by Senegal are likely to infringe upon Mr. Hissein Habre's human rights. To this effect, the Court orders Senegal to respect the judgments made by its Courts, the res judicata, the absolute principle of the non-retroactivity of the penal law and to propose that Mr. Hissein Habre be tried within the framework of a Special International Court under International law.

JUDGEMENT OF THE COURT

1. By an Application dated 1st October, 2008, which was registered at the Court Registry on 6 October 2008, Mr. Hissein Habre, former President of the Republic of Chad brought a case before the Honourable Court, alleging various Human Rights violations committed against him by the State of Senegal, as follows: -

   - Violation of the principle of non-retroactivity of Penal Law as contained in Article 11.2 of the Universal Declaration of Human Rights, and Article 7.2 of the African Charter on Human and Peoples' Rights, as well as in the Senegalese Constitution;

   - Violation of the right to effective appeal as contained in Article 8 of the Universal Declaration of Human Rights, as well as in Article 3.4 of the International Covenant on Civil and Political Rights;

   - Violation of the principles of res judicata;

   - Violation of the principles regarding equality before the law and equal justice as enshrined in Articles 7 and 10 of the Universal Declaration of Human Rights. Articles 14.1 and 26 of the International Covenant on Human and Peoples' Rights and in Article 7.4 of Senegalese Constitution;

   - Violation of the principle of the independence of the Judiciary, as enshrined in Articles 10 and 11 of the Universal Declaration of Human Rights, in Articles 14 of the International Covenant on Human and Peoples' Rights as well as in Article 1 of the African Charter on Human and Peoples' Rights;

   - Violation of the principle of separation of powers as enshrined in Article 1 (a) of the ECOWAS Protocol on Democracy and Good Governance;

   - Violation of the right to fair trial as enshrined in Article 7.1 of the African Charter on Human and Peoples' Rights;

- Contrariety between the ECOWAS Community Laws and the Senegalese criminal Law.

2. **Mr. Hissein Habre avers that all proceedings initiated on the premises of the above-mentioned** legal principles are geared towards perpetuating the violations of his human rights. Applicant therefore solicits that the Court should note that the obligation on the part of the State of Senegal to respect these legal principles constitutes an obstacle towards initiating any proceedings against him, with a view to indicting him retroactively to the period that he was President of the Republic of Chad. He therefore enjoins the State of Senegal to abide by the principles stated above and to bring to an end all proceedings and/or actions against him, on the basis of the above-mentioned grievances.

3. By an Application for intervention dated 16 December 2008, some persons claiming to be victims or successors to the victims and association of victims seized the Court, pursuant to Article 89 of its Rules of procedure, and requested to be parties to the main proceedings.

4. In its Preliminary Ruling ECW/CCJ/RUL/09 of 17 November 2009, the Court:

   "declares that the Application for intervention is inadmissible.
   - ***orders that the case be heard.***
   - ***orders each party to bear the cost."***

5. In its Memorial in reply, to the case brought against it, the Republic of Senegal raised, on the one hand, a preliminary objection as to the lack of jurisdiction of the Court, on the strength that there were no proceedings initiated against Mr. Hissein Habre before the Senegalese Courts and on the other hand, the inadmissibility of the Application, on the strength that the case was already pending before the UN Committee against torture.

6. Ruling on the preliminary objections relating to the lack of jurisdiction and inadmissibility, the Court in its Judgement No. ECW/CCJ/RUL/03/10 dated 14 May 2010 states that:

"the Court has jurisdiction to hear the case brought before it by Mr. Hissein Habre:

- ***Declares that Mr. Hissein Habre's Application is admissible;***
- ***Consequently, rejects the preliminary objections raised by the State of Senegal;***
- ***Orders that the main proceedings be continued;***
- ***Makes no order as to the cost"***

1. FACTS

The facts as related by the Applicant

7. Mr. Hissein Habre avers that he ruled the Republic of Chad from 1982 to 1990 before he was overthrown by the current President Idriss Deby Itno in a military coup d'etat. He adds that after his overthrow, he settled down in Senegal in December 1990, where the authorities have granted him political asylum.

8. The Applicant claims that various proceedings were initiated against him by the Senegalese Courts; that in January 2000, seven Chadian citizens, and the *"Association of Victims of crimes and Political Repression in Chad"* (AVCRP) brought charges against him in Senegal before the Doyen of the Trial Judges at the *"Tribunal Regional Hors Classe"* in Dakar.

9. That after being indicted on 3 February 2000 on the charges of complicity in crimes against humanity, acts of torture and barbarity, he filed an appeal before the Investigating Chambers of the Court of Appeal in Dakar, in order to get his indictment quashed.

10. That on 4th of July 2000, the Criminal Chamber of the Dakar Court of Appeal granted his prayers by annulling the Minutes of the indictment and curtailed further proceeding, on the grounds that the Senegalese positive Laws does not contain provisions relating to crimes against humanity, and, therefore, by virtue of the *"principle of equality of charges and sentence, as enshrined in Article 4 of its Penal Code, the Senegalese Courts could not entertain materially, such cases"*.

11. That the Criminal Chamber also observed that acts of torture were not included in the provisions of Article 669 of the Senegalese Code of Penal Procedure, in which are enumerated cases for which a foreigner could be prosecuted in Senegal, for acts committed outside the Senegalese Territory.

12. That upon appeal by private party associating in a Court action with the public prosecutor in its Ruling of 20 March 2001, the First Chamber of the Criminal Court of Cassation declared observed that *"no text of procedure grants universal jurisdiction to the Senegalese Courts*" to adjudicate on the acts for which Hissein Habre is accused. The Court of Cassation considered that, even if the UN Convention against Torture of 10 December, 1984, which was ratified by the State of Senegal on 16 June 1986 has granted such jurisdiction, "the execution of such a Convention nonetheless necessitates that the State of Senegal takes prior legislative measures". The Court of Cassation thus struck out the appeal.

13. Applicant adds that by the end of year 2000, the Belgian Court before which a complaint was brought against him, carried out an investigation for crime against humanity. The investigating Judge in charge of the case issued on 20 September 2005 an international warrant of arrest against him.

    That when approached to make a pronouncement on the request for extradition made by Belgium, the Criminal Chamber of the Dakar Court of Appeal declared its lack of jurisdiction on it, through its Ruling of 25 November 2005.

14. Mr. Hissein Habre also avers that, despite the fact that the Senegalese Judicial Authorities have adjudicated on the case, and given their Decision in final and last resort, the President of the State of Senegal, against all expectations, took the case before the African Union.

    And that during its Session of 1st and 2nd July 2006, the Summit of African Union then gave mandate to Senegal to bring proceedings and try ***"on behalf of Africa, through a competent Court, and with all the guaranties of just and equitable trials."***

15. The Applicant alleges that with disregard for the Court Decisions already given, and in total violation of general principles of law, Senegal thereafter undertook a modification of its legislation and Constitution, in order to set in motion new proceedings and trying him afresh in a Senegalese Court, thus violating the conditions and guaranties for a just and equitable trial.

16. He therefore pleads with the Court to note the violation against him, of the principles of the non-retroactivity of the Penal Law of the principles of equality before justice and the right to fair hearing.

The facts as exposed by the Defendant

17. The State of Senegal, without refuting the earlier Decisions given by its Courts on the acts for which Mr. Hissein Habre, during the time of his stewardship in Chad, explain that its argument borders only on aligning its National Legislation onto its international obligations. To this effect, the Defendant avers that the same civil party that initiated proceedings against Mr. Hissein Habre before the Senegalese Courts, the UN Committee against torture reminded Senegal that: *"Pursuant to Article 5 paragraph 2, of the Convention, each State Party is bound to carry out necessary legislative reforms to establish its jurisdiction relating to the acts referred to in the communication"*.

18. The State of Senegal concludes that it was in order to be in conformity with its international obligations, sequel to international Conventions that

it carried out the reforms in its Penal Law, by effecting constitutional and legislative modifications, which Mr. Hissein Habre now believes have violated his human rights. It further avers that the State of Senegal has not brought any judicial proceedings against Mr. Hissein Habre.

SUMMARY OF THE PLEAS-IN- LAW

Applicant's claims

19. Mr. Hissein Habre invokes many international legal instruments relating to human rights. He notably cites Article 11.2 of the Universal Declaration of Human Rights, Article7.2 of African Charter on Human and Peoples' Rights to substantiate the claim that the State of Senegal has violated the principle of non-retroactivity of the penal law, when it carried out legislative and constitutional reforms with a view to trying him afresh.

    He states further that his right to effective appeal as enshrined in Article 8 of the Universal Declaration of Human Rights, as well as in Article 3.4 of the international Covenant on civil and Political Rights has been violated.

20. To support the violation of the principle of equality before the law and Justice, Mr. Hissein Habre invokes Article 7 and 10 of the Universal Declaration of Human Rights, 14.1 and 16 of the International Covenant on Civil and Political Rights and 7.4 of the Senegalese Constitution.

21. Applicant also alleges the violation of the principle of separation of Powers and the independence of the Judiciary, by invoking Article 1 (a) of the ECOWAS Protocol on Democracy and Good Governance, the Senegalese Constitution and the different international legal instruments cited above.

22. Finally, Mr. Hissein Habre claims that the new provisions included in the Senegalese criminal law are contrary to the provisions of the ECOWAS Community Laws, notably the Protocol on Democracy and Good Governance, which provides for the principle of constitutional convergence.

Defendant's claims

23. In its Memorial in Defence, the State of Senegal avers that as at the date the Applicant filed his Application before the Honourable Court, there was no judicial procedure initiated against Mr. Hissein Habre before any Senegalese Court. It states further that Mr. Hissein Habre was not standing any trial, and no Court within the Senegalese judicial order has sentenced him pursuant to the modified instruments that are referred to in his Application.

24. The Defendant claims that the Applicant's grievances are directed at her adoption of new constitutional and legislative reforms, notably in its Penal Code and Code of Penal Procedure, and that the adoption of such measures does not constitute a violation of his human rights.

25. Senegal submits that Mr. Hissein Habre has not demonstrated any violation of the principle of the retroactivity of the criminal law. That he only made hypothetical allegations, and not real violations.

26. With regards to the right to effective appeal, the State of Senegal avers that, its constitution does not allow individuals to attack a constitutional law through Court action. But that the right to effective appeal can be exercised in other areas. It adds that, it is because the right to effective appeal is well guaranteed in Senegal, that Mr. Hissein Habre was able to exercise it before the Criminal Chamber of the Dakar Court of Appeal, which acceded to his request.

27. Concerning the principle of equality before the law and justice, the Defendant avers, on the one hand that, the new provisions criticised by the Applicant are not targeted specifically at Mr. Hissein Habre; and that they are general and impersonal provisions, and on the other hand, since there is no proceeding initiated against, and which has incriminated the Applicant, It is not realistic to evoke the principle of equality before the law and justice.

28. In all the State of Senegal maintains that it only carried out its International obligations, by aligning its National Legislation unto the New York Convention of 10 December 1984, and to the Statute of the International Criminal Court, and concludes that all grievances formulated by the Applicant should be rejected.

Legal Analysis

29. The issues of human rights violations brought before the Court, for consideration can be grouped in five areas viz:

- the existence of proceedings initiated against Mr. Hissein Habre;
- the interpretation of the ECOWAS Protocol on Democracy and Good Governance;
- the right to effective appeal,
- the principle *of the separation of powers and the independence of the Judiciary*, and,
- the non-retroactivity of the penal Law.

As to the violations of human rights relating to the existence of proceedings initiated against Mr. Hissein Habre.

30. For the Court to consider and adjudicate on the issues of the violations of his human rights, relating to equality before the law and justice, the *res judiciata* and the right to an equitable trial as alleged by Mr. Hissein Habre, if these allegations were to be pertinent at all, there must be, in the first place, the existence of proceedings or acts initiated against Mr. Hissein Habre, on the basis of the reforms carried out by the State of Senegal.

At the present stage of the case, there is not the existence of any proceedings or acts initiated against Mr. Hissein Habre, as claimed by the State of Senegal; this is not contested by the Applicant, whose preoccupation mainly resides in the eventuality of new charges that could

be brought against him, on the basis of the alignment of the Penal Legislation of the State of Senegal in order to be in conformity with its international obligations.

In all, the alleged violations by the Applicant are tied to a hypothesis, thus the Court can state that they are but potential alleged allegations.

As to the violations relating to the interpretation of the Protocol on Democracy and Good

31. Relying on the following provision of the Protocol on Democracy and Good Governance, which states that:

> ***"The rights contained in the African Charter on human and Peoples' Rights, and in the international Instruments, are guaranteed in each ECOWAS Member State; every individual or corporate body shall ensure this guaranty by the Law Court, any special body or any other National Institution created for this purpose, relating to an international instruments on human rights",***

and which refers to the African Charter on Human and Peoples' Rights, Mr. Hissein Habre claims that the Senegalese National Law is in contradiction with the ECOWAS Community Law, and therefore violates the principle of non-retroactivity of the Penal Law, as well as the principle of constitutional convergence.

32. The Applicant relies on Article 9 of the Supplementary Protocol on the Court, which gives jurisdiction to the Court to determine cases of failure on the part of Member States to carry out their obligations relating to the Treaty and other Community Texts. He therefore pleads with the Court to note that Senegal has violated the principle of non-retroactivity of the Penal Law, consequently, it has failed in observing one Community obligation.

33. On this point, the Court observes that, as an individual, the Applicant lacks the legal status to bring this allegation before the Court, in regard to Article 10 of the Supplementary Protocol, since this has to do with the failure of Member State to Carry out its Community obligation; it therefore behoves the Court to reject this grievance formulated by Mr. Hissein Habre.

As to the violation relating to the right to effective appeal

34. While relying on the International Covenant on Civil and Political Rights, which guarantees: "effective appeal before competent national courts against acts that violate fundamental rights that are recognized by the Constitution and by the Law" the Applicant accuses the Defendant of violating, in his thinking, this right to effective appeal, in that Article 74 of the Senegalese Constitution excludes the exercise of this right by individuals. Mr. Hissein Habre avers that this exclusion has barred him to raise the issue of the violation of the non-retroactivity of the Penal law, when Senegal introduced new provisions into its Constitution.

35. But, whereas the right of appeal is analysed as a right of an individual to bring a case before a law Court, for the purpose of examining a right, or sanctioning the violation of a right, the right to effective appeal is different from the constitutional appeal which is limitedly reserved, by legal provisions of a State, to a certain number of individuals, for the examination of the unconstitutionality of one or some legislative provisions.

    Mr. Hissein Habre cannot invoke the right to effective appeal as enshrined in the international instruments on human rights protection, to insist that the State of Senegal must allow him have the constitutional control over a law, whereas the Senegalese Legal Texts do not allow such to any individual.

    That in any case, Mr. Hissein Habre has not brought concrete proof of the violation of the right to effective appeal, for, it is within the powers of the State of Senegal, in order for good functioning of its Institutions, to

provide whether it accedes to, or otherwise, if an individual could exercise constitutional appeal by a Court action. By the simple fact that this possibility was not provided does not preclude the existence of the right to effective appeal.

The Court is of a strong opinion that the alleged deprivation of Mr. Hissein Habre of not having the possibility of control over the constitutionality of the law that he believes is the source of the violation of his human rights, cannot be analysed as the right to effective appeal. The right to effective appeal, as envisaged by Applicant cannot apply in the instant case, thus the Court rejects this grievance.

As to the violation relating to the principle of separation of powers and independence of the Judiciary.

36. Mr. Hissein Habre claims that the legislative and constitutional reforms carried out by the State of Senegal constitute an interference of the Executive and Legislative Arms of Government into the affairs of the Judiciary.

37. On this point, the Court notes that, if the principle of separation of powers is a fundamental principle recognised by every democratic society, the fact that a State modifies its Constitution and its laws, cannot be invoked by all individual, as a violation of his human rights, unless there are other considerations.

38. The Court is of a strong opinion that the principle of non-separation of powers does not constitute in itself a violation of human rights if no consequence of such violation of this principle infringes on a specific right of the individual, who is protected by the international instrument and the Court holds that, in the instant case, the mere allegation of an interference of the Executive and Legislative Arms of Government into the affairs of the Judiciary, sequel to the modification of the Constitution and the Penal Law of Senegal, does not constitute a violation of a specific right of Mr. Hissein Habre, if the same modification does not show a

characteristic trait of the violation of the independence of the Senegalese Judiciary and this being the case, the Court holds that this argument cannot prosper.

As to the violation drawn from the principle of non-retroactivity of the penal law.

39. Applicant claims that the non-retroactivity of the penal law is enshrined in Articles 7.2 of the African Charter on Human and Peoples' Rights, and 11.2 of the Universal Declaration of Human Rights, in the following terms:

> *"No individual shall be sentenced for acts or omissions which, at the time of committal, did not constitute a punishable offence. No sanction shall be retained, if it was not provided at the time of committing an offence. The sanction is personal, and can only apply to the indicted person".*
> *"No individual shall be indicted for acts or omissions which, at the time of committal, did not constitute an offence, in national or international law. No punishment other than the one approved shall apply, at the time the offence was committed"*,

and he adds that this principle has been violated by the State of Senegal.

In support of this claim and still on this line of thinking, the Applicant cites Article 431 - 6 of the Senegalese Penal Code, which provides that

> *"notwithstanding the provisions of Article 4 of this Code, no individual shall be tried and sentenced for acts or omissions referred to in this chapter, and in Article 295 - 1 of the penal Code, which, at the time and place they constitute a criminal offence, according to the general principles of any recognised by all Nations, whether or not they constituted a transgression in the law in force at that time and place", "however, the preceding paragraph does not oppose charging, trying and sentencing any*

individual for acts or of omissions which at the time of committal, constitute criminal offences according to the rules of international law, relating to genocide, crimes against humanity and war crimes".

He then observes that, prior to the introduction of these provisions into the Senegalese Laws, through the instrumentality of the Constitutional and Legislative Reforms, the Senegalese Courts, while ruling on the charges of acts of genocide, crimes against humanity, war crimes and torture, for which he had been accused, noted and declared that these charges were not in the Senegalese law.

40. Mr. Hissein Habre avers that the legislative and constitutional reforms carried out by Senegal were so done with the demonstrated sole aim of trying him afresh for the same offences. Thus, the State of Senegal would have violated the principle of the non-retroactivity of the penal law, and, by extension, his human rights, which are protected, as enshrined in Articles 7.2 of the African Charter on Human and Peoples' Rights, and 11.2 of the Universal Declaration of Human Rights.

41. Finally, Mr. Hissein Habre also refers to Articles 11 and 24 of the Statute of Rome on the creation of the International Criminal Court which fixes the principle of the retroactivity of the criminal law, in that they limit the jurisdiction of that Court and the criminal responsibility to the crimes which are committed after the entry into force of the said Statute.

42. In its defence, the State of Senegal refutes this argument, by averring that, it was in a bid to be in conformity with its international obligations that it carried out its legislative and constitutional reforms which the Applicant is criticising. It adds that the retroactive jurisdiction of the Senegalese Court, for cases of genocide, crimes against humanity and war crimes, does not institute new charging with retroactive effect, since these acts constitute criminal acts, according to the rules of international law, at the time of committal.

43. On this point, the Court observes that despite the claim to the contrary, by the Defendant, which is just in pure form, and beyond the official justification of making its National Legislation being in conformity with its international obligations, the State of Senegal seems to gravely misjudge the import of the provisions of Articles 7.2 of the African Charter on Human and Peoples' Rights, and 11.2 of the Universal Declaration of Human Rights, which forbid the retroactivity of a provision, which is penal in nature.

44. Indeed, the issue pending before the Court, in the instant case, is to determine if the various mechanisms put in place by the State of Senegal, namely the necessary structures to carry out the AU Mandate do not constitute a violation of the provisions of Artic1es 7.2 of the African Charter on Human and Peoples' Rights, and 11.2 of the Universal Declaration of Human Rights, as claimed by Mr. Hissein Habre.

45. Indeed, the Applicant himself does not link the violation of his human rights to any concrete act, but to the demonstrated wish of the State of Senegal to try him afresh, and to apply the newly introduced offences in its penal law, so much so that, viewed from this angle, the Court can only deduce that the alleged violation is tied to a hypothesis, that is an abstract violation.

46. To this effect, the Court, recalling its jurisprudence in its Judgment in the Case of **Hadidjatou Mani Koraou v. The Republic of Niger**, wherein it stated that its jurisdiction is not to determine cases of abstract violations, rather real and concrete violations. The Court also relies on the jurisprudence of the European Court of Human Rights in its Judgment in the case between the *"Federation Chretienne des Temoins de Jehova"* and the *Republic of France* wherein it is stated that Article 34 of the European Convention on Human Rights does not allow an individual *"to complain, in abstraction, of a law, by the simple fact that this law seems to violate the Convention"* Viewed from this angle, the Court agrees with the jurisprudence of the European Court that *"it does not suffice for an individual Applicant to claim that the simple fact of the existence of a law, violate the rights that he has been enjoying, under the Convention. The law must have been*

applied against his person" **(Judgement in Kloss et al v. Germany)**. Thus, in principle, the violation of a human right is examined, a posteriori, with proof that the violation has already taken place.

47. However, this jurisprudence has undergone a little toning down, sequel to the evocation of *"some exceptional circumstances"*, which allow the admittance of the fact that, there is a risk of future violation, which confers on an Applicant, the state of a victim of a violation of the Convention (**Application no. 282 or / 95 Noel Haru Tauira and 18 others v. France, Dec. 4.12.95 OR 83 p. 112).** This jurisdiction of the European Court of Human Rights, which is not an isolated case in itself, was quoted and confirmed in the Judgment in the case **Dudgeon v. United Kingdom of 22 October 1989**, and also in the Judgment in **Soering v. United Kingdom case of 7 July 1989**. This Jurisprudence admits that, before the Applicant can claim to be a victim, in such circumstances, ***"he must produce convincing and reasonable indices showing the probable realisation of a violation that would affect his person"***. This means that the mere suspicion or conjecture does not suffice.

48. In the instant case, does Mr. Hissein Habre's fear that the State of Senegal was going to try him afresh, following the Defendant's constitutional and legislative reforms represent mere suspicion or conjecture, or does it present ***"convincing and reasonable indices showing the probable realisation of a violation?"***

49. On the one hand, the Court observes that the State of Senegal has solicited and secured from the African Union, a Mandate to try Mr. Hissein Habre *"On behalf of Africa, in a competent Court, with all the guarantee of a fair trial"*.

50. On the other hand, the Court equally notes that, in order to carry out the Mandate given it by the African Union, the State of Senegal whose National Courts had earlier observed and made final judgments that there was lack of relevant provisions in their internal law, to try the acts

for which the Mandate was given, the Defendant went by other ways, that is, new constitutional and legislative provisions, to achieve its aims, whereas the retroactivity of these new provisions is attacked by the Applicant.

51. Furthermore, the Court notes that the State of Senegal appointed a trial judge to take charge of the procedure to be followed in trying Mr. Hissein Habre, and that Senegal got part of the fund to cover the cost of the trial.
    The Court finally notes that Mr. Hissein Habre's passport was withdrawn from him, that he has been put under house arrest and is not allowed to leave the Senegalese territory. These are indices that the State of Senegal does not deny.

52. Whereas, if seriously observed, the principle of the non-retroactivity, as is espoused in the Common Law, this principle recognises the fact that an invoked potential violation is equivalent to a real violation, and it is not necessary to insist that this violation must have taken place, as provided under Article 9.4 of the Supplementary Protocol on the community Court of Justice, ECOWAS. The only condition that must be met being that the prevailing circumstances should be reasonable, and the realisation of the violation highly probable, to the point that if these circumstances are not arrested on time, the foreseen violation would take place **(cf. Black's Law Dictionary p. 1317, on retroactive law) / Case Barbery v. Morris Mo.315 S. W. 2d 711,714. Also, on page 1201 of the 2005 Ed.** of the Black's Law Dictionary, the probable word is defined as *the seeming reality or truth*, a ground for a high presumption which is close to reasoning. Thus, the Court can deduce that, in the instant case, the circumstances are reasonable and highly probable, and are targeted at the Applicant, thus making him a victim of the violation of his human rights to the principles of *non-retroactivity* and of the *res judicata*, in case he is brought afresh before the Senegalese Courts, following the new constitutional and legislative reforms. On the strength of these elements, the Court strongly holds that the violation raised by the Applicant on the basis of the new constitutional and legislative reforms is true, and it behoves the Court to make a pronouncement on it.

53. However, pursuant to Article 19 of the 1991 Protocol on the Court, and since the main thrust of the instant case is sequel to the Mandate given to Senegal by the African Union, to *"on behalf of Africa, in a competent Court, with all the guarantee of a fair trial",* the Court must find the equilibrium between the Mandate and the methods that are generally used, in international law, in such circumstances.

The Court notes that the main thrust of the Mandate given by the African Union expresses the idea of the international Covenant on Civil and Political rights as provided in its Article 15, thus:

1. *"No individual shall be sentenced for acts or omissions which, at the time of committal, did not constitute a punishable offence either in national or international law. Also, no severe punishment than the one approved shall apply, at the time the offence was committed if after the offence was committed, the law approves the application of a lighter punishment, the offender shall enjoy same.*

2. *Nothing, in the present Article is opposed to the trial and condemnation of any individual, for acts or omissions, which, at the time of committal, constituted criminal acts according to the general principles of law, as recognised by all Nations."*

54. From paragraph 1 of this provision, the Court notes that, if the acts that form the reason for trying Mr. Hissein Habre did not constitute criminal Offences, in the Senegalese National Law, they are considered as such, according to international law.

55. Whereas, it is for the sake of avoiding impunity for the acts *that are considered criminal acts, according to international law* that Article 15 (2) of the International Covenant provides for the possibility of trying or condemning *"any individual for acts or omissions, which at the time of committal constituted criminal acts according to the general principles of law, as recognised by all Nations."* The Court thus shares the noble objectives contained in the Mandate of the African Union and

which expresses the adherence of this High Organisation to the principles of impunity of grave human rights violations, and the protection of the victims' rights.

56. Nevertheless, the Court is of the strong opinion that the implementation of the Mandate given by the African Union must be done according to the norm in international circle, where, in similar situations, Special Courts are created. Could it not be inferred that the expression ***« competent Court...»*** as contained in the Mandate, refers to the creation of such a Special Court, whose functions would get a backing from the provisions of Article 15.2 of the International Covenant on civil and Political Rights, and which Senegal should propose to the Principal (the African Union), together with its forms and workability? Taken otherwise, any other endeavour by the State of Senegal, outside this framework would violate, on the one hand, the principle of the non-retroactivity, as enshrined in international legal instruments on human rights, as being inalienable rights, and, on the other hand, it would reduce the scope of application of the principle of impunity, as enshrined in the same international instruments.

JUDGMENT

The Court,

- Having regard to the Revised Treaty of ECOWAS of 24th July, 1993;
- Having regard to the Universal Declaration of Human Rights of 10th December, 1948;
- Having regard to the African Charter on Human and Peoples' Rights of 27th June, 1981;
- Having regard to the International Covenant on Civil and Political Rights of 16th December, 1966;
- Having regard to the Supplementary Protocol of ECOWAS on Democracy and Good Governance;

- Having regard to the 1991 Protocol and the Supplementary Protocol of 2005 on the Community Court of Justice, ECOWAS;
- Having regard to the Rules of Procedure of the Court of 28 August 2002;
- Having regard to the Preliminary Rulings ECW/CCJ/ADD/11 of 17th November, 2009 and ECW/CCJ/RUL /03/10 of 14th May, 2010 delivered, as related to the instant case, and as cited above.

The Community Court of Justice, ECOWAS Adjudicating publicly, in first and last resort, after hearing both Parties on the issue of human rights violation;

- Notes the existence of serious indices which agree with the probability that Mr. Hissein Habre's rights shall be infringed upon, sequel to the constitutional and legislative reforms carried out by Senegal;
- Declares that, in this regard, the State of Senegal must obey and respect the sanctity of the Decisions already given by its National Courts, especially the absolute respect for the principle of non-retroactivity;
- Consequently, the Court orders that Senegal to respect the principle of non-retroactivity;
- Declares that the Mandate given by the African Union, rather confers upon Senegal, a mission of suggesting the conceptual framework on the distinct modalities of trial, in the strict sense of a Special International Court, as is done in international law, by all civilised nations;
- Rejects any other claims by Mr. Hissein Habre.

Costs

Orders each Party to bear the costs

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.

Hon. Justice Awa NANA DABOYA - *Presiding*

Hon. Justice Benfeito Mosso RAMOS - *Member*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Anthony A. BENIN - *Member*

Hon. Justice Eliam M. POTEY - *Member*

Assisted by
Tony ANENE-MAIDOH - *Chief Registrar*

Original text in FRENCH

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

HOLDEN AT ABUJA, IN NIGERIA

ON THE 4TH DAY OF MARCH, 2010

SUIT N°: ECW/CCJ/APP/11/08
JUDGMENT N°: ECW/CCJ/JUD/05/10

Dr. MAHAMAT SEID ABAZENE } **PLAINTIFF**

V.

1. **THE REPUBLIC OF MALI,**
2. **AFRICAN UNION,**
3. **AFRO -ARAB CULTURAL INSTITUTE**

} **DEFENDANTS**

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA -** *PRESIDING*
2. **HON. JUSTICE HANSINE DONLI -** *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN -** *MEMBER*

ASSISTED BY

MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

Dr. Mahamat Seid Abazene, - *the plaintiff appeared for self.*
H.E Boubacar Karamo Coulibaly,
the Ambassador of Mali in Nigeria - *for the 1st Defendant.*
2nd and 3rd Defendants - *No Representation.*

Human rights violation-African Union International Public Service rationae materiae jurisdiction of the Court-rationae personae jurisdiction of the Court-privileges and immunities of international organization-modalities for appeals by international public servant-lack of jurisdiction to hear disputes arising from the African union Public service-lack of jurisdiction to hear appeals against decisions delivered by national courts.

SUMMARY OF THE FACTS

Dr. Mahamat Seid Abazene, a Chadian national and former Deputy Director General of the Afro-Arab Cultural Institute was removed from his position by the Chairman of the Board of the Institute with headquarters in Bamako, Mali. He then came before the Supreme Court of Mali on 15 January 2006, with an administrative appeal which was rejected on 17 January for lack of jurisdiction, being an issue within the competence of the international civil service tribunal of the African Union. Dissatisfied, he appealed for a review to the same court which dismissed the application.

After exhausting all available legal remedies in Mali, the Applicant came before the ECOWAS Court of Justice with an application for violation of human rights against the Defendants herein. In its defense, Mali invoked the lack of jurisdiction of the Court on the grounds that the case properly belongs to the Public Service of the African Union and that it is wrong for the applicant to bring the case before this Court. The defense added that the applicant has lodged an appeal which is pending before the Administrative Tribunal of the African Union.

LEGAL ISSUES

- *Does the Court have ratione personae jurisdiction as regards the African Union and the Afro-Arab Cultural Institute?*

- *Does the Court have ratione materiae jurisdiction to hear a case under litigation before the African Union public service?*

DECISION OF THE COURT

International Organizations such as the African Union and the Afro-Arab Cultural Institute generally enjoy immunity from jurisdiction and execution. The immunity from jurisdiction is to remove them from the effect of any action whether it is judicial, administrative or executive.

However, these organizations have their own rules, which organize their internal life and govern the status of their officials as well as the terms of settlement of disputes between employees and the organization or between employees and their superiors. The right of appeal available to the officials is exercised within the framework of the Organization's rules and regulations.

The Court has no jurisdiction to hear the disputes of the public service of the African Union. It has the exclusive jurisdiction to hear dispute arising from Community Public Service of the Economic Community of West African States, with the exclusion of those of other international organizations.

The Court is not a Court of Appeal against decisions delivered by National Courts of ECOWAS Member States regarding their area of jurisdiction.

JUDGMENT OF THE COURT

FACTS AND PROCEDURE

I. The facts as related by Applicant.

1. The Applicant is a Chadian national. He was appointed on 12 May, 2005 to the post of Deputy-Director General of the Afro-Arab Cultural Institute whose seat is at Bamako, Mali.

2. The first Defendant is the State of Mali, a Member State of the Economic Community of West African States (ECOWAS), the second Defendant is the African Union, an International Organisation; the third Defendant is the Afro-Arab Cultural Institute, a specialized institution of an international organization (the African Union).

3. The Applicant who was employed by the third Defendant, which has its Headquarters in Bamako, Mali, had his appointment terminated, together with all the emoluments attached to his job.

4. Applicant brought an Application filed on 4 December 2008, and registered the same day, at the Registry of the Court, in which he claims the violation of his human rights, and he relies on Articles 9(4) and 10(4) (new), of the Supplementary Protocol, Articles 11 (1) and 13 of Protocol A/P.1/7/91, and Article 33 of the Rules of the Court.

5. Applicant contends that he was employed as the Deputy Director General of the Afro-Arab Institute of the African Union, but that he was dismissed by the Chairman of the Executive Council of the said Institute, in violation of the Staff Regulations of the African Union and of the Staff Rules of the Institute.

6. He claims that, pursuant to Art. 50 of the said Staff Regulations, which provides that: ***"The appointment of a Staff shall be terminated after his case has been examined by the Recruitment, Appointments and Promotions Board, and the Board's opinion***

has been made known to the Secretary General, in accordance with Article* 56 *of these same Regulations”, his appointment can, therefore, not be terminated in so an illegal manner.

7. He also considers that the Chairman of the Executive Council of the Institute has no powers to relieve him of his job; he adds that such powers are vested in the Council and upon a *2/3* majority decision of Council members. Applicant avers that after exhausting all local remedy, he brought his case before the Supreme Court of Mali, pursuant to Article 5 of the Headquarters Agreement which provides that: ***“a) Malian laws shall be applicable to the internal operations of lCAA; b) Malian courts shall have jurisdiction over acts and transactions from within the operational activities of ICAA”***. He states that on 15 November 2006, he filed his case before the Supreme Court of Mali, challenging the legality of his dismissal by the Chairman of the Executive Council. But the Supreme Court of Mali declared that it was incompetent to adjudicate on the case, on the grounds that ***“the Applicant is an international civil servant, even though the organisation he belongs to may have its seat in Mali”.***

8. Following this Judgment, delivered on 17 January, 2008 by the Administrative Chamber of the Supreme Court, Applicant claims that he filed an application for revision on the grounds that the judgment was delivered in violation of the Malian Code of Civil Procedure, on the one hand, the Headquarters Agreement, the UN Declaration on Human Rights, the African Charter on Human and Peoples’ Rights, and especially, the ECOWAS Protocol A/SP.1/12/01 on Democracy and Good Governance, on the other hand.

9. When his application for revision was dismissed by the Supreme Court, Applicant therefore concluded that the Court of Mali acted under pressure from the African Union and from the State of Mali. Indeed, on the one hand, he blamed the State of Mali for ordering the Supreme Court of Mali *“in diplomatic terms”* to declare its lack of jurisdiction over the case, and on the hand, he laid blame on the African Union,

claiming that the latter advised the AACI, through the President of the African Union Commission, *"to avoid resorting to judicial proceedings since that could turn out to be long and costly"*.

10. Applicant also blamed the State of Mali for orchestrating the attack on him, then his kidnapping by the District III Police in Bamako, on 5 August 2008. Applicant also avers that all these facts constitute a denial of justice, on the part of the Malian Authorities, and therefore pleads that, it may please the Court to declare that it has jurisdiction over the case, to admit his Application, and to declare and adjudge that:

    - *the Afro-Arab Institute, has voluntarily given accent to his dismissal, for failing to reply the Plaintiff, on the basis of the Headquarters Agreement establishing it, thereby violating its own Statute and the Malian Law of* 16 *December* 1996, *which should conventionally be applicable within the Institute.*

    - *pursuant to Protocol A/SP.1/12/01 of ECOWAS on Democracy and Good Governance, the Mali's Constitution and its Code of Civil Procedure, the Malian Court can neither jettison its jurisdiction which is expressly recognised by the Headquarters Agreement, nor invoke the Malian Law, nor legal Instrument of the institute to fail to exercise its jurisdiction.*

    - *the Decision that he is contesting does not exist, for the lack of quality to act, on the part of those who took it; there is lack of grounds, and the diversion of procedure (violation of Articles 50 and* 56 *of the Staff Regulation of both the African Union and of the Institute.)*

    - *Plaintiff's complaints which are premised on the general principles of Labour Law, the provisions of the Statutes and Regulations of both the African Union and the Institute, as well as the consent of the latter to his dismissal, are partially justified, and he should therefore be given a benefit of all his claims.*

- *as a family man, Plaintiff could not be retained further on his job without his emoluments, and with the denial of his rights and seizure of his travel documents, in the expectation of a judicial settlement, which has been obstructed in total violation of the Law and Conventions that the State of has regularly ratified, namely the African Charter on Human and Peoples' Rights (its Article* 7), *the UN Declaration on Human Rights (its Article 11) and Protocol A/SP.1/12/01 of ECOWAS on Democracy and Good Governance (its Article 1). That the Court may wish to, in a Preliminary Ruling, order for the payment of the entire arrears of his emoluments, allowances, Leave entitlements as well as all his rights relating to his job.*

- *the State of Mali and the African Union are severally responsible, together with the Afro-Arab Institute, for obstructing (by substitution), and through the violation of the African Charter of Human and Peoples' Rights, the UN Declaration and the ECOWAS Revised Treaty, a case which has been duly filed before a competent Court of an ECOWAS Member State, and for persecuting a man and his family.*

- *they should be respectively held liable to pay him compensation, exclusively as regards the Institute:*

  1) *10% of the total sum attributable to the Institute, for the State of Mali*

  2) *Twenty millions US Dollars to be awarded against the African Union, for staging an administrative Coup and supporting a degrading treatment against its Staff, violating the latter's status, and for participating actively in obstructing his case before competent Courts.*

II. The facts as related by the first Defendant; the State of Mali.

11. In reply to the allegations of the Applicant, the State of Mali affirms that it was informed that the Applicant was no more a staff member of the Institute, following his dismissal, upon a decision of the Council of the Afro-Arab Cultural Institute.

    That by the letter dated 2nd December 2006, the Director General of the Afro-Arab Cultural Institute requested that the State of Mali should put measures in place, to protect the Institute and its assets from any harm that could be caused by its former Deputy Director-General, the Applicant

    By the same correspondence, the Institute also requested that Dr. Abazene (Plaintiff) should relinquish his official vehicle -a Mercedes car -, and also requested the intervention of the Malian security services for the purposes of retrieving the said vehicle.

12. The State of Mali also contends that, upon request from Applicant, it took steps towards an amicable settlement of the rift between him and the Institute, and that despite the steps taken, the Applicant demonstrated bad faith. The State of Mali claims that it was unjustifiably brought before the Honourable Court by the Applicant in a dispute between him and his former employer (AACI).

13. The State of Mali further avers that, in any case, the Honourable Court lacks jurisdiction over the case, by maintaining that the dispute between the Applicant and the Institute comes under the employment laws of the African Union and that the latter has made provisions for the settlement of disputes arising between the organs of the Union and their staff.

14. The State of Mali equally maintains that Applicant has already started exploiting those avenues, and that such processes are still pending before certain organs of the African Union, like its Administrative Tribunal, and that the Application before the instant Court must be dismissed.

Arguments by the Parties.

15. Applicant blames the State of Mali and the Afro-Arab cultural Institute for violating his human rights. He relies on the provisions of the Malian Code of Civil Procedure, the African Charter on Human and Peoples' Rights, the UN Conventions and the Staff Regulations of the African Union, as well as the Statute of the Afro-Arab Cultural Institute.

16. He mainly blames the State of Mali, especially the Administrative Chamber of the Supreme Court, for declaring its lack of jurisdiction over his Application for the setting aside of the decision for his dismissal.

17. The Defendant on its part raises the issue of inadmissibility, for lack of jurisdiction on the part of the Court, on the ground that the instant case is within the jurisdiction of the African Union industrial Court. It therefore behooves the Honourable Court to first examine the incompetence raised by the Defendant.

Legal Analysis

On the preliminary objection as to the Competence of the Court.

18. A careful study of the facts and the pleas -in -law invoked by the parties can reveal that the instant case relates to a litigation of the African Union Public Service. Indeed, the main question that comes to mind is to determine whether the Community Court of Justice, ECOWAS has jurisdiction over the instant case. This poser becomes relevant, considering the subject -matter of the case, on the one hand, as well as the judicial nature of the Institution attacked.

As to the judicial nature of the Afro-Arab Cultural Institute.

19. The Afro-Arab Cultural Institute (ICCA) is an Institution of the African Union, having an International outlook, with its own organs and Regulations bordering on its functioning.

20. In general, International Organisations enjoy some privileges and immunity as legal entities. In other words, their Acts, properties and otherwise are covered by immunity, wherever they are located.

21. This immunity prevents any judicial, administrative or executive action from being taken against them. This immunity is recognised in International Conventional Law as well as Internal Jurisprudence (Italian C. Cass: International Institute of Agriculture v. Profili 1031.) There is an abundant international jurisprudence to support it.

22. Certainly, it is true that this immunity is not absolute, it finds its limitation in the wish of the Organisation which may jettison it. This jettisoning could be an expressive or a tacit one *(See J. F. Lalive: Jurisdictional Immunity of States and International Organisations: Rec. Lectures at the Hague 1963, III, t. 84, p. 239 -34).*

23. Yet, International Organisations also enjoy immunity from court judgments being enforced upon them, which is an absolute immunity.

    In general rule, International Law confers on International Organisations, the right to adopt Rules to regulate their activities within their Headquarters. They also adopt Rules that regulate the status of their employees. In this context, a cursory look at the different Legal Instruments of International Organisations shows that they explicitly provide for the modalities to resolve conflicts that may arise between the Organisations and their employees, or between the Management and their staff.

24. These modalities are of two types; administrative and judicial modalities of conflict resolution. In the case of the latter modality, Staff Members have the right to approach the adjudicating structure created within the Organisation, of the International Organisation itself, for the resolution of conflicts similar to the one in the instant case.

With regard to the subject-matter in the instant case.

25. Indeed, in the instant case, the Administrative Chamber of the Supreme Court of Mali declared its lack of jurisdiction to examine the sack of the Plaintiff, a staff of the Afro-Arab Institute, which is an Organisation created under the ambit of the African Union.

    To support its incompetence, the Mali Supreme Court based its judgment on the fact that Plaintiff is an International Civil Servant who enjoys some privileges and immunity relating to his post. It therefore believes that it could not sit on the case between Plaintiff and its employer, the ICCA.

26. Moreover, in its reply, the State of Mali referred to the case lodged at the Administrative Tribunal of the African Union. This case might still be pending before that Tribunal.

27. Plaintiff acknowledged this fact when he was served the reply from the State of Mali. Consequently, this Honourable Court finds that, in any case, the answer to the fundamental question relating to its jurisdiction, over the instant case, lies within its own Instruments defining its jurisdiction, as well as the conditions of admissibility of cases brought before it.

28. In actual fact, Art. 9 (4) of the Supplementary Protocol of 2005 on the Court, modifying the Protocol of 1991 empowers it to examine cases of Human Rights abuse in any Member State, and especially at its Art. 10 (d), it stipulates the conditions which govern the admissibility of cases that are brought before it.

    In the instant case, and with regard to the arguments expounded by the parties, the question that must be answered is to find out if the Court can have jurisdiction in examining the sack of an employee by his employer *(an International Organisation)*.

Put in other perspective, can a case bordering on the public service of the African Union be brought before the Community Court of Justice, ECOWAS?

Obviously, the answer to this poser is in the negative, Consequently, after consideration of the facts and the arguments developed it can be revealed that:

- the case relates to the public service of the African Union, because it was this Institution that terminated the appointment of its employee, the Plaintiff;
- the jurisdiction of this Court on matters relating to Community Public Service concerns only the Institutions of ECOWAS, with the exclusion of any other International Organisations;
- Plaintiff has exercised his right before the Malian Courts which considered their jurisdiction
- the Community Court of Justice, ECOWAS is not an Appeal Court before which cases decided by the Courts in Member States could still be brought, in order to determine the jurisdiction of the latter.

FOR THESE REASONS,

29. The Court, sitting in public and having heard from both parties,

As to the form,

30. And without having to consider the case on its merits,

Rules that:

- The termination of Dr. Mahamat Seid Abazene's appointment falls within the purview of the Public Service of the African Union.
- It lacks jurisdiction to examine this case.

Consequently,

Declares its lack of jurisdiction in the instant case,

As to Costs,

Rules that each party bears its own costs.

Thus adjudged, pronounced, and signed, in a public hearing at Abuja by the Community Court of Justice, ECOWAS on the day and month stated above,

And the following have appended their signatures:

Hon. Justice AWA NANA DABOYA - *President*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Alfred Anthony BENIN - *Member*

Assisted by
Athanase Atannon - *Registrar*

Original text in FRENCH

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

HOLDEN AT ABUJA, IN NIGERIA

ON MONDAY, THE 8TH DAY OF NOVEMBER, 2010

SUIT N°: ECW/CCJ/APP/05/09
JUDGMENT N°: ECW/CCJ/JUD/05/10

MAMADOU TANDJA } ***PLAINTIFF***

V.

1. **GEN. SALOU DJIBO**
2. **REPUBLIC OF NIGER**

} ***DEFENDANTS***

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE HANSINE N. DONLI** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH ***Esq.*** - *CHIEF REGISTRAR*

TO THE PARTIES

1. ***Souleye Oumarou, (Esq.)*** - *for the Plaintiff*
2. ***M. Bagri Fatima Lop*** - *for the Defendants*

Human rights violation, preliminary objection relating to lack of jurisdiction, inadmissibility, arbitrary arrest and detention, torture, representation by the parties, the quality of defendants before the Court, right to medical treatment.

SUMMARY OF FACTS

By Application dated 14th July 2010, Mr. Mamadou TANDJA, former President of the Republic of Niger, who was toppled in a coup d'état on 18th February 2010, brought a case against Gen. Salou DJIBO and the State of Niger, for human rights violation, before this Court. He alleges that his arrest and detention are arbitrary. He further claims that he was subjected to torture, cruel and inhuman treatments, and therefore pleads that the Court should order his release.

The State of Niger avers that the arrest and the detention of Mr. Mamadou TANDJA was sequel to the latter's wish to perpetuate himself in power, against the wish and yearnings of the whole political class in Niger. Therefore, this could not be likened to a judicial detention. It also debunks the Plaintiff's claim of torture, cruel and inhuman treatments.

LEGAL ISSUES

- *Whether the arrest and detention of the Plaintiff, for political reasons are justified.*

- *Whether the allegation of torture is proven.*

DECISION OFTHE COURT

The Court holds that the arrest and detention must be premised on legal grounds, and that, in the instant case, the State of Niger has not invoked any legal basis for the arrest and detention of Mr. Mamadou TANDJA. The Court further declares that the allegations of torture, cruel, inhuman and degrading treatments by Plaintiff are unfounded.

JUDGMENT OF THE COURT

1. The Applicant, His Excellency Mamadou Tandja, is a citizen of the Economic Community of West African States and former President of the Republic of Niger. He is represented by Souleye Oumarou (Esq.), lawyer registered with the Bar in Niger Republic, and whose address for service is Etude d'Avocats (FKT): 834, Rue du Maroc. ST 23 CN3, B. P. 11466, Niamey, Niger.

   The 1st Defendant is His Excellency General Salou DJIBO, Head of the Supreme Council for the Restoration of Democracy (SCRD), and the 2nd Defendant is the State of Niger, a Member State of the Economic Community of West African States (ECOWAS). Both are represented by Fatima L. Lopy (Esq.), as well as a State Agent, in the person of the Secretary General to the Government.

2. By Application dated 14 July 2010, the Applicant brought before the ECOWAS Court of Justice a case in which he would want the Court to declare and adjudge that the Defendants have violated his human rights, when they arrested him on 18 February 2010 and put him under house arrest, since that date, without trying or indicting him.

3. By another Application of the same date, the Applicant seized the ECOWAS Court of Justice and prayed that his initial Application be given an expedited procedure. Mr. Mamadou Tandja cited, in support of his Application, the provisions contained in the following legal Instruments.

   a) Articles 4 and 5 of the ECOWAS Revised Treaty;

   b) Articles 1,2,3,5, 6 and 18 (1 and 3) of the African Charter on Human and Peoples Rights;

   c) Article 20 of the Protocol relating to the Court;

   d) Articles 2 (1 & 2), 3, 8 and 26 of the International Covenant on Civil and Political Rights;

e) Article 1 of Order No. 2010 -05 of 30 March relating to the Organisation of State Institutions during the Transition Period.

4. He prays the Court to declare that his arrest and detention by the Defendants are arbitrary, and that the Court should order his immediate release. He equally requests that the Court orders the Republic of Niger to take useful necessary measures to ensure the protection of his health, by providing him with adequate medical care as required by his state health, notably by availing him of such medical care that are available in specialist hospitals in Morocco and Tunisia, on Government bill.

   Lastly, Plaintiff prays the Court, pursuant to Article 15 (4) of the Revised Treaty of ECOWAS, to order immediate enforcement of its Decision.

FACTS

The Facts as related by Plaintiff

Plaintiff avers the following:

5. On 4 August 2009, while he was still President of the Republic of Niger, and upon his proposal, a Constitutional Referendum was carried out, which led to the adoption of the Constitution of the 6th Republic in his country. That the outcome of such a Referendum was validated by the Constitutional Court via its Ruling No. 07/09 dated 14 August 2009, thus the Constitution of the 6th Republic was promulgated on 18 August 2009 by Decree No. 2009 -256 of 18 August 2009.
   That all the political class was not satisfied with the adoption of that Constitution, and this created a political crisis in the country and, upon the initiative of ECOWAS, there were negotiations between the opposition parties and the party in power, with a view to finding solutions to the lingering political logjam then.

6. Thus, it was in this circumstance that the military coup d'etat of 18 February 2010 took place, which brought to an end the 6th Republic, thereby toppling the regime and the government that he was leading.

Plaintiff added that he was arrested when he was chairing a Meeting of the Council of Ministers, and he has been detained at the "Villa Verte" and placed under the control of the new authorities, who put in place an Administrative Organ called the Supreme Council for the Restoration of Democracy (SCRD) which is headed by General Salou DJIBO, the erstwhile Commandant of the Special Force, and this, for the Transition Period, which was to pave the way for new Institutions, following new general elections.

7. Since his arrest on 18 February 2010, Plaintiff claims he has been deprived of his freedom of movement, any contact with the outside world, and with his immediate family, except some scanty telephone calls; and that he has been locked-up by the New Political Authorities without any legal basis, and in the absence of any judicial procedure, That this amounts to an arbitrary detention followed by unjustified physical and psychological violence.

   That, in law, nothing is more arbitrary than to detain a person, without the latter knowing the grounds upon which he is arrested, That the practice of Administrative Detentions devoid of any judicial intervention is an infringement upon human dignity and constitutes a form of violence which should severally be condemned.

The facts as presented by the Defendants.

8. The two Defendants, General Salou DJIBO and the Republic of Niger aver the following facts:

   > *On 18 February 2010, the Armed Forces of the Republic of Niger led by its Squadron Leader, General Salou DJIBO (1st Defendant) toppled the regime of President Mamadou TANDJA (Plaintiff). The Army thereafter suspended the country's Constitution and dissolved all State Institutions, which it replaced with the Supreme Council for the Restoration of Democracy (SCRD), which put Mr. Mamadou*

TANDJA under house arrest. That the Military Coup d'état brought to an end a whole year of political crisis which threatened the unity and cohesion of the Niger social fabric.

9. The Defendants justify the coup d'état with the fact that, Mr. Mamadou TANDJA whose second Term in office was to come to an end in December 2009, thought he should manipulate the Constitution of the Republic of Niger, in order to pave the way for his elongated stay in power, against the popular wish of the political class, including some of his own party men. That after the trial of strength between him and the National Assembly, and the Constitutional Court, he dissolved these two Institutions and organised a sham Referendum to authenticate his continued stay in power, for three years, with a possibility to contest the subsequent elections which are to be organised, and which shall usher in a probable 6th Republic.

   That the international community severally condemned all his antics to remain in power.

   That, in reaction to the democratic deficit, ECOWAS suspended Niger Republic from all its Institutions, the same as the European Union which stopped its Budget Support and its other Developmental Aids to the country.

   That the mediation started under the auspices of ECOWAS was facing some reticence despite the effort of the Mediator and the representatives of civil society, to find a way out of the logjam

10. That it was in these circumstances of political, social and economic upheaval that the Army intervened.

    That the salvaging action of the Army was greatly saluted by the entire populace of Niger Republic, that all State Institutions hitherto suspended have been restored, that others are in the process of seeing the light of day, and that the Independent National Electoral Commission (CENI) is already preparing the next presidential elections.

THE PLEAS-IN-LAW EVOKED BY THE PARTIES

A. The pleas as evoked by Plaintiff.

11. In support of his Application, Mr. Mamadou TANDJA invokes, on one hand, the provisions of the 1991 Protocol and those of the Supplementary Protocol of 2005 relating to the Court, and on the other hand, International Judicial instruments namely the African Charter on Human and Peoples' Rights, the Universal Declaration on Human Rights, the International Pact on Civil and Political Rights, the UN Convention against Torture and other Degrading and Inhuman Treatments.

As to the violation of the African Charter on Human and Peoples' Rights

12. Applicant invokes Article 3, 6, 12 and 16, and avers that, going by the provision of the African Charter on Human and Peoples' Rights "every individual has equal right before the law, and that they shall be equally protected by the law."

    He also avers that while depriving him of his freedom of movement, the Defendants have violated the provisions of Article 6 of the African Charter on Human and Peoples' Rights which provides that:

    > ***"every individual has right to liberty and the security of his person. No one shall be deprived of his freedom except on the grounds and on the conditions as previously defined by law: particularly, no one shall be arbitrarily arrested or detained."***

    Plaintiff holds that, taking into consideration his frail health, by refusing him to go outside the country for medical treatment, the two Defendants have violated Articles 12 and 18 of the African Charter on Human and Peoples' Rights, which provide respectively that:

    > ***«Every individual has the right to move freely and to elect residence within a Member State... Every person***

has the right to leave any Member State, including his native country, and come back there ... » (Art. 12)

«Every individual has the right to enjoy the best state of physical and mental health that could be made available to him ... »

«State Parties to this Charter shall take necessary measures to protect the health of their citizens, and to ensure medical assistance to them, in case of illness. »(Art. 16)

As to the violation of the Universal Declaration on Human Rights.

13. Plaintiff avers that Articles 5, 7, 8, 9, 13 and 25 of the Universal Declaration of Human Rights were violated by the two Defendants, in that these Articles condemn both arrest and arbitrary detention.

As to the violation of the International Covenant on Civil and Political Rights.

14. Plaintiff invokes the International Covenant on Civil and political Rights, and cites particularly Article 9 of the said Covenant which provides that every individual has right to his liberty and to the security of his person, and that no one shall be arrested or detained arbitrarily; no one shall be deprived of his liberty, if not on grounds as approved by legal procedure.

    That, for the past four months, he has been arrested and detained without any warrant, nor any charges being brought against him, and without even being taken before any Court, where he could defend himself.

As to the violation of the UN Convention against Torture and other Cruel, Degrading and Inhuman Treatments.

15. Mr. Mamadou Tandja recalls that the UN Convention against Torture and other Cruel, Degrading and Inhuman Treatments was ratified by the Republic of Niger on 5 October 1998.

Plaintiff states that by depriving him of his freedom, and by keeping him isolated, General Salou Djibo and the Republic of Niger have violated Article 2 of the UN Convention against Torture and other Cruel, Degrading and Inhuman Treatments.

B. The pleas evoked by the Defendants.

The Defendants raised objections as to the form and the merit of the case.

Inadmissibility as to the form

16. General Salou Djibo and the Republic of Niger raised objection of in-admissibility for lack of jurisdiction of the Court, on one hand, due to the political nature of the case, and on another hand, inadmissibility for failure to notify all the Defendants, and for violating Article 32.4 of the Rules of the Court.

    At the Court hearing of 19 September 2010, upon the request of Lawyer Lopy, Counsel to the Defendants, who brought new facts, the Court accepted to postpone its deliberations, and reopened the case. Lawyer Lopy declared that she maintains all her earlier objections as to the inadmissibility, produced handwritten letter purportedly authored by Mr. Mamadou Tandja, which was countersigned by a solicitor, to confirm that the signature appended to the said letter was truly that of the writer. Lawyer Lopy affirms that, in the said letter, since Mr. Mamadou Tandja stated that he did not constitute Lawyer Souleye Oumarou, to defend him before the Court, Lawyer Souleye Oumarou lacks the *locus standi*, before the Court in that capacity, and that, the import of this development is that, the Application brought before the Honourable Court by Lawyer Souleye Oumarou is to be categorised as an anonymous Application, which the Honourable Court does not entertain. She also avers that the onus lies on Lawyer Souleye Oumarou to produce written evidence, contrary to this fact, which really proves that he is constituted by Mr. Mamadou Tandja himself. If he fails to do this, then the Application that he brought before the Court, on behalf of Mr. Mamadou Tandja, should be declared an anonymous Application.

a) Inadmissibility for lack of jurisdiction due to the political nature of the case.

The two Defendants aver that the detention of Mr. Mamadou Tandja, which was sequel to the coup d'état, is purely a political affair, and cannot be likened to a judicial detention that could follow the normal procedure before a Court. They aver further that, Plaintiff has, by himself, affirmed in the presence of a group of Human Rights and Democracy Organisations «CODDHD», on 10 June 2010, that he "was in political detention, for political reasons and that he has not been subjected to ill-treatment".

Defendants conclude by averring that, due to the political nature of Mr. Mamadou Tandja's detention, the Court should declare its lack of jurisdiction to hear the case.

b) Inadmissibility for failing to notify all Defendants.

The Defendants referred to Article 32 of the Rules of the Court (French version), which provides that "The original, accompanied by all annexes referred to therein, shall be lodged with Five copies for the Court and a copy for every other party to the proceedings ..."

That the notice of the lodging of the Application was given to only one of them, that is the Republic of Niger. And that by failing to notify General Salou DJIBO (1st Defendant) is consequently rendering the Application inadmissible.

c) **Inadmissibility for violating Article 32.4 of the Rules** of the **Court.**

The Defendants aver that Article 32.4 of the Rules of the Court, which provides that: "to every pleading, there shall be annexed a file containing the documents relied upon in support of it, together with a schedule listing them", has been violated.

That the absence of the schedule listing the documents relied on constitutes a violation of Article 32.4, and this should lead to the inadmissibility of the Application.

Inadmissibility as to the merit of the Application.

17. As to the merit of the case, the Defendants state that the Plaintiff's claims should be rejected. They reply to the arguments of the Plaintiff, and conclude that his claims lack any merit whatsoever.

Thus, they substantially submit that:

a) The Rules of the Community Laws have not been violated.

Indeed, the Defendants claim that on one hand, Plaintiff has invoked erroneously Article 13 of the 1991 Protocol on the Court, which provides that:

« (1) Proceedings before the Court shall consist of two parts; written and oral;

(2) the written proceedings shall consist of the Application entered in the Court, notification of the Application, the Defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support;

(3) Documents comprising the written proceedings shall be addressed to the Chief Registrar of the Court in the order and within the time -limit fixed by the Rules of procedure of the Court. A copy of each of the documents produced by one party shall be communicated to the other party;

(4) the oral procedure shall consist of hearing of parties, agent witnesses, experts, advocates and counsels.» only applies to the Plaintiff and not to Defendants, and on the other hand, Articles 3 and 4 of the Supplementary Protocol of 2005 do not apply in the instant case.

b) Articles 5, 7, 8, 9, 13 and 25 of the Universal Declaration of Human Rights were not violated.

The Defendants aver that Plaintiff did not support his claim of the violation of the above cited Articles with any legal text, justifying same. They therefore conclude that such a claim should be rejected.

c) The provisions of the International Covenant on Civil and Political Rights were not violated.

The Defendants refute the claim that they have violated the Articles of the International Covenant on Civil and Political Rights, namely its Article 9 that guarantees the right to freedom and security.

They aver that it is in obedience to this provision that Mr. Mamadou TANDJA has been placed at "Villa Verte" (Presidential Villa), in order to benefit from a very secured environment, a way of sheltering him from the risks connected with the current political situation in the country.

d) The provisions of the African Charter on Human and Peoples' Rights.

The Defendants claim that the provisions of the African Charter on Human and Peoples' Rights, particularly in its Articles 3 and 4 were not violated, contrary to the submission of Plaintiff.

And that, rather, Mr. Mamadou Tandja's tampering with the Constitution of the Republic of Niger, constitutes a great treason, and that charging him to Court can only be effected by the National Assembly, and a trial that could follow such charging shall be done by the High Court of Justice of Niger.

That, it was Mr. Mamadou Tandja himself who proceeded with the dissolving of all State Institutions, thereby creating the current absence of any judicial structure. The current political leaders therefore had no other choice than to keep him in a more secure place, while awaiting the decision of new leaders who would deliberate on his case.

e) The UN Convention against Torture and other Cruel, Degrading and Inhuman Treatments was not violated.

The Defendants refute the accusations of torture, cruel and degrading treatment allegedly committed against Mr. Mamadou Tandja. They refer to the report written by the Association of Human Rights Organisations, namely the FIDH and the CODDHD, who attested to the respect for the physical and Moral integrity, as well as the human dignity of Plaintiff. Lastly, the Defendants aver that the accusations of Plaintiff are ill founded and therefore, pray the Court to reject his Application.

ARGUMENTATION

Before examining the case on its merit, the Court has to consider the issues relating to the form, the lack of jurisdiction and the inadmissibility as raised.

a) As to the Court's jurisdiction to hear the case.

In the instant case, one of the important issues is to determine whether the Court has jurisdiction to try General Salou Djibo, the first Defendant. Despite the fact that this issue was not raised by the parties, the Court has a duty to clear this, once the issue of having jurisdiction has been raised, generally.

Could the Court try General Salou Djibo, as an individual, for human rights violations?

Article 9.4 of the Supplementary Protocol of 2005 on the Court provides that: «the Court has jurisdiction to determine cases of human rights violations that occur in any Member State»

Whereas, it is commonly admitted that proceedings relating to human rights violations are initiated against Member States, and not against individuals. Indeed, the obligation to respect and protect human rights is

placed upon Member States. The obligations of respect for and protection of human rights are derived from international conventions which were accepted and ratified by Member States.

In the line of this thinking, the Court has enough jurisprudence, established in its Judgements ECW/CCJ/JUD/06/08 of 27 October 2008 (in the case of Hadidjatou Mani Koraou v. The Republic of Niger) and in ECW/CCJ/JUD/03/10 of 11 June 2010 (in the Peter David v. Ambassador Ralph UWECHWE case) in which the Court has expressly approved, against the State of Niger, the admissibility of a case relating to human rights violations committed by an individual, and formally declined its jurisdiction on alleged human rights violations by an individual against another individual.

In the instant case, the Application relating to human violation was brought against General Salou Djibo (1st Defendant) and the Republic of Niger. As an individual, General Salou Djibo cannot be charged to the Court for human rights violations. It follows therefore that the Court lacks jurisdiction to determine the case of human rights violations brought against General Salou Djibo.

b) As to the jurisdiction of the Court relating to the Republic of Niger.

Whereas the Defendants raised an objection as to the lack of jurisdiction of the Court, due to the political nature of the case; they argue that the political nature of the case justifies the detention of Mr. Mamadou Tandja, and that a political detention does not necessitate a formalism of a judicial detention.

Whereas Article 9.4 of the Supplementary Protocol of 2005 on the Court provides that: "the Court has jurisdiction to determine cases of human rights violations that occur in any Member State".

The Article referred to above does not distinguish between the jurisdiction of the Court in relation to political human rights violations and other types of human rights violations; in any case, and at the level of preliminary

objections, the Court cannot, make a statement on the reality or otherwise of the human rights violation, as alleged by Plaintiff. The mere invocation of the violations over which the Court has jurisdiction only suffices for the Court to establish its jurisdiction. Whereas the alleged violations fall within the jurisdiction of the Court, in that, the Court guarantees the rights as provided in all the different international Instruments relating to human rights protection. Whereas the allegations of human rights may have been committed on the territory of Niger Republic, a Member State of ECOWAS, hence, the Court is competent to adjudicate on the instant case.

18. As to objections regarding inadmissibility of the application

a) In terms of inadmissibility drawn from a withdrawal of Applicant's complaint and the lack of quality on the part of Lawyer Souleye Oumarou to represent Mr. Mamadou Tandja.

The Defendants affirm that on 22 July 2010, Mr. Mamadou Tandja wrote a letter to the President of the Republic of Niger and to the President of the Community Court of Justice, ECOWAS in which he indicated that **"he had not authorised any person to act on his behalf in the instant proceedings"**; therefore, Plaintiff disowns his Counsel. Thus, the Defendants consider that the Application is futile. They furnish, in support of this withdrawal, letters purportedly written by Mr. Mamadou Tandja.

However, Mr. Mamadou Tandja's lawyer refutes the discontinuation allegedly made by Mr. Tandja and claimed that he had no knowledge of any correspondence other than those pleaded by the Defendants, and pleads that the Court should not admit them.

At the Court hearing of 19 September 2010, upon the request of Lawyer Lopy, Counsel to the Defendants, who brought new facts, the Court accepted to postpone its deliberations, and reopened the case. Lawyer Lopy declared that she maintains all her earlier objections as to the

inadmissibility, produced a handwritten letter purportedly authored by Mr. Mamadou Tandja, which was countersigned by a solicitor, to confirm that the signature appended to the said letter was truly that of the writer. Lawyer Lopy affirms that, in the said letter, since Mr. Mamadou Tandja stated that he did not constitute Lawyer Souleye Oumarou, to defend him before the Court, Lawyer Souleye Oumarou lacks the judicial quality to stand before the Court in that capacity, and that, the import of this development is that the Application brought before the Honourable Court by Lawyer Souleye Oumarou is to be categorised as an anonymous Application, which this Honourable Court does not entertain. She also avers that the onus lies on Lawyer Souleye Oumarou to produce written evidence, contrary to this fact, which really proves that he is constituted by Mr. Mamadou Tandja himself. If he fails to do this, then the Application that he brought before the Court, on behalf of Mr. Mamadou Tandja, should be declared an anonymous Application, and therefore, inadmissible before the Honourable Court.

While reacting to the new facts brought by Counsel to the Defendants, Lawyer Souleye Oumarou pleads that the Court should reject those facts and should render its decision. He avers that he is constituted ad litem by the family of Mr. Mamadou Tandja, and adds that a Counsel does not need to produce a proof for his constitution, and wonders if his client who has been detained since 18 February 2010 by the authors of a coup d'état is free, to the extent that a letter could be attributed to him, which Counsel to these authors could produce, and concludes that the Court should adjudge his client the entire benefit of his Application.

At this juncture, the Court must consider the said withdrawal of the Application by Plaintiff and the lack of quality of Lawyer Souleye Oumarou to represent Mr. Mamadou Tandja, These pleas-in-law are actually one, but divided into two sub-pleas, because, on the one hand, by the withdrawal of the Application, it is to mean an affirmation that Mr. Mamadou Tandja «indicates that he has not mandated anybody to act on his behalf, in the instant case», and on the other hand, Lawyer Souleye Oumarou's lack of quality to represent Mr. Mamadou Tandja,

to whom a purported handwritten letter was attributed, which plays down the mandate given to that Lawyer to defend the interest of Mr. Mamadou Tandja.

Whereas pursuant to the provisions of Article 12 of the 1991 Protocol on the Court, each party to a dispute shall be represented before the Court by one or more agents nominated by the party concerned for this purpose, whereas Oumarou Souleymane (Esq.) deposited at the Registry of the Court the legitimate documents certifying that he is qualified to practice in the courts of Niger, as provided for in Article 28(3) of the Rules of Procedure of the Court; Whereas by his constitution to defend the interests of Plaintiff, the fact that Lawyer Souleye Oumarou claims his attachment to the family of his client, cannot be disputed by the Defendants, under the pretext that this Counsel has not produced a written mandate, when, in addition, they do not doubt his engagement by the family of Mr. Mamadou Tandja. The Court is of the opinion that it is up to the representative of Mr. Mamadou Tandja to discontinue the proceedings, for and on behalf of his client; whereas in failing to do so and in challenging the letter asking for discontinuation, which was attributed to Mr. Mamadou Tandja, the Court cannot uphold this application for discontinuation of proceedings upon the basis of the documents filed by the Defendants, who are the opposing parties in the instant proceedings.

Whereas the date of withdrawal of the Application by Plaintiff; and that of the handwritten letter attributed to Mr. Mamadou Tandja disowning Lawyer Souleye Oumarou as lacking the quality to defend the interest of Mr. Mamadou Tandja before the Court, were posterior to the date when the Application instituting proceedings was filed, and these same dates depict a period when the Court starts wondering the degree of freedom available to Mr. Mamadou Tandja, as to acts and statements attributed to him, more so, when these acts and statements are reported only by Counsel to the Defendants.

Consequently,

The Court dismisses the application for discontinuation as presented by the Defendants, as well as the objection to Lawyer Souleye Oumarou as lacking quality to represent Mr. Mamadou Tandja.

As to the expedited proceedings

By a separate Application different from the main one, registered at the Registry on 14 July 2010, the Applicant filed his case before the Court for the purposes of bringing the case under an expedited procedure; The Defendants maintained that the Application for expedited procedure does not fulfil the conditions prescribed in Article 59(1) of the Rules of Procedure of the Court, which states that:

> ***"on the basis of the facts before him, after hearing the other party, the President may decide that a case be determined pursuant to an expedited procedure, where the particular urgency of the case requires that the Court shall give its ruling with the minimum of delay"***

The Defendants maintained that since they had not been previously heard, the conditions of admissibility of the Application for expedited proceedings are not met. But whereas after the lodgement of the Application for expedited proceedings, the two Defendants deposited on 30 July 2010 their Memorial in Defence, in which the issue of the relevance of an expedited procedure was brought up, and the arguments for its dismissal were presented;

Whereas from the report by the International Federation of Human Rights League and the Nigerien Association for the Defence of Human Rights, following their visit to Mr. Mamadou Tandja, the Applicant had been detained since the coup d'état which took place on 18 February 2010 in Niger;

Whereas Mr. Mamadou Tandja, despite indicating that his conditions of detention were satisfactory, he indicated that his health problems would require a visit outside Niger;

Whereas it is up to the Court to decide, in the light of the material furnished, if there is any particular urgency to bring the case under an expedited procedure; Whereas this urgency is related materially to the state of health of the Applicant, independently of whether he should be treated in Niger or outside Niger;

Whereas in this sense, the existence of health problems on the part of Mr. Mamadou Tandja justifies the application of an expedited procedure, and the Court approves of it.

c) As to the inadmissibility drawn from violation of Article 59(2) of the Rules of Procedure of the Court

The Defendants complained that the Applicant violated Article 59(2) of the Rules of Procedure of the Court, for not lodging simultaneously the main Application and the one seeking an expedited procedure;

Whereas Article 59(2) states that "**An application for a case to be decided under an expedited procedure shall be made by a separate document lodged at the same time as the application initiating the proceedings or the defence, as the case may be**";

Whereas the Application of Mr. Mamadou Tandja seeking an expedited procedure was deposited at the Registry of the Court on 14 July 2010, which is the same day as the main application was lodged;

Whereas the main requirement of Article 59(2) is the lodgement of a pleading seeking expedited proceedings, separate from the main application, it is not necessary that the lodgement of the two applications must be simultaneous, the concept of simultaneity being absent from Article 59(2) and not corresponding to the spirit of that article; There

are thus grounds to dismiss the objection regarding inadmissibility as drawn from a purported violation of Article 59(2) of the Rules of Procedure of the Court as ill-founded.

d) As to the inadmissibility drawn from violation of Articles 34 and 32(4) of the Rules of Procedure of the Court

The Defendants maintained that the Application is inadmissible because it was not served on General Salou Djibo, the 1st Defendant;

But whereas service of the pleading was certainly not effected on General Salou Djibo personally, and that such non service, though a formal violation of the terms of Article 34 of the Rules of the Court, is of no consequence, because this laps is already covered by the fact that the Legal Representative of the State of Niger which is attached to the function of Head of State, is already borne by the First Defendant, to whom the knowledge of the Application would not be hidden, because of his exalted position;

In this regard, the Court holds that the service of one party on another party is meant to notify the latter of the claims and arguments the former party intends to bring forth in the case, and which the opposing party must take note of, so as to defend itself and maintain the balance in the procedure;

Whereas this balance is not broken up in the instant proceedings, the 1st Defendant having responded to all the claims and arguments of the Applicant;

Whereas moreover, it is up to the Court to ask one of the parties to fulfill part of the prescribed conditions, and where necessary, pronounce a sanction if it considers that the default affects the procedure;

Whereas in this regard, the Court notes that in the instant case, the absence of service on the 1st Defendant did not prevent him from defending himself by depositing his memorials and by putting up a defence

at the court hearing, through his lawyer. The Court concludes that the non-service of the Application on him is not of a nature as to affect the procedure; therefore, the inadmissibility of the Application as claimed on such grounds must be dismissed as ill-founded;

The Defendants equally consider that the absence of a schedule listing the documents filed by the Applicant may be of a nature as to deprive the Defendants of a guarantee in the proceedings, as provided for under Article 32(4) of the Rules of Procedure of the Court;

Since this argument was developed earlier, the Court reserves itself on it, and now opines that this affects neither the procedure nor the rights of defence, consequently, it must also be dismissed.

19. AS TO MERITS

In support of his Application, the Applicant alleged several human rights violations, particularly his arbitrary arrest and detention, being subjected to torture, inhuman and degrading treatment, and being deprived of medical care;

He cites several international instruments of human rights protection, namely the two Protocols relating to the Court, the African Charter on Human and Peoples' Rights, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

Mr. Mamadou Tandja equally asks the Court to order the State of Niger to take all suitable measures to ensure the protection of his health through appropriate medical care as required by his condition of health, notably by his evacuation to specialised health centres in Morocco or Tunisia, at the expense of the State of Niger; The Applicant, in line with Article 15 paragraph 4 of the ECOWAS Revised Treaty, also asks that the Court pronounce the immediate enforcement of the Decision so made.

19.1 Regarding arbitrary arrest and detention

Whereas Mr. Mamadou Tandja accuses the Defendants of arbitrarily arresting and detaining him at the 'Villa Verte' since the 18 February 2010 coup d'état;

He contends that since this arrest and detention are not backed by any arrest warrant and have not come under any judicial procedure, they are arbitrary and constitute a violation of the provisions of the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

As for the Defendants, they maintain that the arrest and detention of Mr. Mamadou Tandja are in response to political exigencies and that they must be considered as such;

But whereas the Universal Declaration of Human Rights provides in its Article 9 that, "No one shall be subjected to arbitrary arrest, detention or exile";

Its Article 10 states further that "Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" All these international instruments provide for the right to freedom and security and forbid every form of arbitrary or unlawful arrest, except in situations where they may be permitted;

The issue at stake is to know therefore when an arrest and detention are arbitrary;

The Human Rights Commission of the United Nations, to determine the powers of the Working Group on Arbitrary Detention, considered as arbitrary, denial of freedom which for one reason or the other, were

contrary to the relevant international norms enshrined in the Universal Declaration of Human Rights or in the relevant international instruments ratified by Member States;

To determine the arbitrary nature of a detention, it is worthy to consider one of the following three criteria as outlined by the above-mentioned Working Group, namely, that:

1. It is manifestly impossible to invoke any legal basis whatsoever to justify denial of freedom;

2 The denial of freedom results from the exercise of the concerned person's rights as enacted or proclaimed from the freedoms guaranteed by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights, much so when the States concerned are parties to the International Covenant on Civil and Political Rights;

3 The non-observance, partial or total, of the international norms relating to the right to fair trial, stipulated in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity that the denial assumes an arbitrary nature;

These criteria are based on the general principles of the Universal Declaration of Human Rights, the International Covenant on Human and Political Rights and other international instruments;

In order to consider in the instant case the unlawful nature of Mr. Mamadou Tandja's detention, it is worthwhile to analyse the facts in the light of the above-mentioned criteria;

The State of Niger does not contest the arrest and detention of the Applicant and it justifies such arrest and detention on political grounds;

It is incontrovertible that the arrest and detention of Mr. Mamadou Tandja is as a result of the 18 February 2010 coup d'état;

The State of Niger does not adduce any judicial document or make allusion to any judicial proceedings instituted against Mr. Mamadou Tandja. The State of Niger contents itself with justifying the arrest and detention of the Applicant on political grounds and it acknowledges the absence of any judicial proceedings brought against him;

The only argument of the State of Niger regarding the "political nature of the detention" is all the more contrary to the provisions of the international instruments because the objective of the said instruments is indeed to protect the individuals from this kind of denial of freedom;

Whereas the measures of detention, be they political or not, may not be taken against a person except within the context of the strict respect for his rights as established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples Rights etc.;

The protection guaranteed by these international instruments concerns every human person without distinction of race, religion, political opinion or other distinctions;

International case-law has largely contributed to strengthening the guarantee of the right to freedom and security, which aims at protecting the individual against arbitrary arrest and detention. This is the import of the Judgment in the case concerning **ENGEL ET AL V. NETHERLANDS, 8 June 1976, GACEDH, no. 4 §58** of the European Union Court of Justice;

The same Court affirmed the central role played by this law in the machinery for the protection of individual rights, by solemnly recognising its special importance in a democratic society, in the Judgment of the case concerning **DE WILDE, OOMS AND VERSYP V. BELGIUM, 18 June 1971, GACEDH, no. 19, §64-65**;

Even if the right to freedom is subject to restriction, such restriction must respect "legal channels". That is the substance of the Judgment in the case concerning **WINTENVERP V. NETHERLANDS, 24 October 1979, HACEDH, 3rd edition, no. 16**;

According to international case-law, the respect of “legal channels” supposes that the denial of a freedom must have “a legal basis” in the domestic law of the State **(RANIMEN V. FINLAND, 16 December 1997, Reports, 1997,2804, § 46);**

Generally, denial of freedom is provided for in very limited terms in the texts which constitute the legal basis for so doing; whereas irrespective of the accusation brought against an individual, the individual can only be arrested and detained within the framework of a judicial procedure, and such an individual must be brought before a court of law to defend himself;

Whereas it is up to the State to see to the application of the international instruments ratified, by conforming to their provisions, whereas in the instant case, the State of Niger, having ratified the said instruments, is obliged to conform to such provisions;

Whereas since his arrest and detention, Mr. Mamadou Tandja has neither been accused of anything, nor have judicial proceedings been brought against him, nor has he been arraigned before any judge or court in the State of Niger;

Whereas it is up to the State of Niger, if it considers that Mr. Mamadou Tandja has committed any offences, to institute judicial proceedings against him and possibly bring him before the competent courts, or take the necessary steps to that effect;

Whereas the arrest and detention of a person cannot be justified on political grounds, even as a result of a coup d’état;

Whereas the arrest and detention of a person must be justified upon legal grounds as provided for by the international instruments, no matter what that person has been accused of;

In this regard, the Court is of the opinion that it is manifestly impossible for the State of Niger to invoke any legal basis whatsoever to justify the arrest and detention of Mr. Mamadou Tandja;

Consequently, the Court is of a strong opinion that the arrest and detention of Mr. Mamadou Tandja by the State of Niger were carried out without any legal basis, and therefore, they are arbitrary.

19.2 Regarding the accusation of torture

Whereas Mr. Mamadou Tandja accuses the State of Niger for subjecting him to torture, cruel, inhuman and degrading treatment;

But whereas it can be deduced from the reports of the organisations for the defence of human rights who visited Mr. Mamadou Tandja that the latter was well treated, that he was being attended to by a doctor, and that he was in contact with certain close relatives;

Whereas it is therefore worthwhile to dismiss the accusation of torture, cruel, inhuman and degrading treatment.

19.3 Regarding the application for the immediate release of Mr. Mamadou Tandja

Whereas the Applicant asks for his immediate release;

Whereas the arrest and detention must have a legal basis, whereas in the instant case, the State of Niger provides no justifiable legal grounds for the arrest and detention of Mr. Mamadou Tandja;

Whereas it is worthwhile, as a result, to grant the request for release

19.4 Regarding measures relating to the **state of health of Mr. Mamadou Tandja**

Whereas Mr. Mamadou Tandja asks the Court to order the State of Niger to take all suitable measures for protecting his health by appropriate medical care as required by his condition of health, notably by his evacuation to specialised health centres in Morocco or Tunisia, at the expense of the State of Niger;

Whereas it can be deduced from the written applications and declarations of the two Parties that Mr. Mamadou Tandja has access to his personal doctor;

Whereas it can also be deduced from the report by the International Federation of Human Rights League and the Nigerien Association for the Defence of Human Rights, cited by Mr. Mamadou Tandja, that the latter expressed concerns about his condition of health and desired to go for medical attention outside Niger;

Whereas it is incontrovertible that it is up to the State of Niger to provide medical care for detained persons, whereas by enabling Mr. Mamadou Tandja to gain access to his doctor, the State of Niger is fulfilling its obligation, and it is not up to the Court to decide if the State of Niger must evacuate the Applicant to another country to receive medical care.

20. Regarding the application for immediate enforcement of the Court's decision

The Applicant finally asks the Court for an immediate enforcement of the decision of the Court, in line with Article 15 paragraph 4 of the ECOWAS Revised Treaty;

Whereas the Member States of ECOWAS have an obligation to enforce the decisions of the Court, pursuant to the provisions of Articles 22 of the ECOWAS Revised Treaty and 24 of the Supplementary Protocol;

Whereas the States must take all the necessary measures to that effect, therefore, the Court does not need to order the immediate enforcement of its own decisions, more so, when these decisions do not carry any pecuniary obligations.

FOR THESE REASONS

After postponing deliberations, reopening the case, and taking the case to deliberations for the second time, before the decision to be given this day,

21. The Court, adjudicating in a public session, after hearing both parties, on the subject-matter of human rights, and after deliberating in accordance with the law, as a last resort.

21.1 In terms of technicalities

a. Dismisses the objection regarding incompetence as raised by the Defendants;

b. Dismisses the inadmissibility raised by the State of Niger;

c. Declares that General Salou Djibo, a natural person, cannot be brought before the Court for human rights violation;

d. Declares admissible the Application filed by Mr. Mamadou Tandja against the State of Niger.

e. Adjudges that the new facts presented by Defendants, are nothing more than the facts that were presented at the re-opening of the debates;

21.2 In terms of merits

1. Declares as arbitrary, the arrest and detention of Mr. Mamadou Tandja by the State of Niger;
2. Orders the release of Mr. Mamadou Tandja by the State of Niger;
3. Declares that the charges of torture, cruel, inhuman and degrading treatment alleged against the State of Niger are unfounded;

21.3 As to the costs

21.4 Asks the State of Niger to bear the costs.

Thus pronounced, and signed on the day and month stated above,

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES

Hon. Justice Awa NANA DABOYA - *Presiding*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Eliam POTEY - *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 30TH DAY OF JUNE, 2009

SUIT N^O: ECW/CCJ/APP/11/07
RULING N^O: ECW/CCJ/RUL/04/09

BETWEEN:
MUSA SAIDYKHAN - ***PLAINTIFF***

V.
REPUBLIC OF THE GAMBIA - ***DEFENDANT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI -** *PRESIDING*
2. **HON. JUSTICE AWA D. NANA -** *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN -** *MEMBER*

ASSISTED BY

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

REPRESENTATION TO THE PARTIES

1. **Sola Egbeyinka** *Esq.* - *for the Plaintiff*
2. **Marie S. Firdaus (Mrs.)**, Attorney - General of the Gambia, with **Martin U. Okoi** *Esq.* -*for the Defendant*

Human Rights jurisdiction, exhaustion of local remedies, Article 39 of the Protocol A/SP.1/12/01 on Democracy and Good Governance.

SUMMARY OF FACTS

The Plaintiff's newspaper published the names of alleged coup plotters and he was arrested six days later without a warrant of arrest by armed soldiers and policemen, detained for 22 days without trial at the National Intelligence Agency Headquarters and tortured.

Upon his release on bail he fled to Senegal where he received treatment for injuries sustained as a result of the torture. He filed this action for a declaration that his arrest, detention and torture are illegal and contrary to Articles 5, 6 and 7 of the African Charter on Human and Peoples' Rights and for damages.

The defendant raised a Preliminary objection on the Court's lack of jurisdiction to entertain the suit due to the Plaintiff's failure to exhaust local remedies before accessing the Court.

LEGAL ISSUES

- *Whether or not the protection of human rights is a matter exclusively within domestic jurisdiction.*

- *Whether by Article 39 of Protocol A/SP.1/12/01 on Democracy and Good Governance the Human Rights jurisdiction of ECOWAS Court is subject to the exhaustion of local remedies.*

DECISION OF THE COURT

1. *The Court held that it has concurrent jurisdiction with Member States in respect of Human Rights and that a Member State cannot claim that a matter is exclusively within its domestic jurisdiction*

having freely ceded such sovereign power to ECOWAS whose laws supersede those of Member States by virtue of its supranationality.

2. *That by Article 10(d) of the 2005 Supplementary Protocol of the Court, Member States dispensed with the customary international law rule of the exhaustion of local remedies as a precondition for accessing the Court for Human Rights violation.*

3. *That the intended review of the Protocol on the Court that was captured by the said Article 39 of the Protocol on Democracy and Good Governance was carried out in 2005 by the Supplementary Protocol on the Court, which stated specifically in its Article 10(d) the conditions under which the Community Court of Justice should decline human rights violation causes but excluded the need for petitioners to exhaust local remedies. Therefore, the drafters of the said Supplementary Protocol clearly decided against making the exhaustion of local remedies a condition precedent to the accessibility of this Court in human rights violation cases. It would therefore be fatal for one to import words into the Supplementary Protocol because the drafters could have done so if they so desired.*

RULING OF THE COURT

1. The Plaintiff is a community citizen by virtue of Article 1 (1) (a) of the Protocol A/P3/5/83 relating to the definition of Community Citizen, being a national of The Gambia. He is a journalist and a former editor of ***The Independent*** Newspaper based in Banjul, The Gambia.

   The Defendant is a Member State of the Economic Community of West African States (ECOWAS).

   Sola Egbeyinka Esq. appeared for the Plaintiff whilst Marie S. Firdaus (Mrs.), Attorney-General of The Gambia with Martin U. Okoi Esq. appeared for the defendants.

2. Plaintiff has come to this Court seeking the following reliefs:

   (a) A declaration that the arrest of the plaintiff in Banjul, The Gambia on March 27th, 2006 by the armed agents of the defendant is illegal and unconstitutional as it contravenes the plaintiff's human rights to personal liberty as guaranteed by ***Article 6*** of the African Charter on Human and Peoples' Rights.

   (b) A declaration that the detention of the plaintiff by the defendant's agents at the National Intelligence Agency detention centre at Banjul, The Gambia for 22 days without trial is illegal as it violates the plaintiff's right to personal liberty and fair hearing as guaranteed by ***Articles 6 and** 7* of the African Charter on Human and Peoples' Rights.

   (c) A declaration that the torture inflicted on the plaintiff by the defendant's agents during his 22 days detention at the headquarters of the National Intelligence Agency in Banjul, The Gambia is illegal as it violates the plaintiff's right to personal dignity as guaranteed by ***Article 5*** of the African Charter on Human and Peoples' Rights.

(d) An order restraining the defendant from harassing or intimidating members of the plaintiffs family who are based in The Gambia in any manner whatsoever and howsoever.

(e) US$2,000,000.00 (Two Million United States Dollars) being compensation for the violation of the plaintiff's human rights to dignity, personal liberty and fair hearing.

3. The plaintiff in filing this application is relying on the following:

   1. The African Charter on Human and Peoples' Rights of which the Republic of The Gambia is a signatory.

   2. The Economic Community of West African States (ECOWAS) Revised Treaty dated 24th July, 1993.

   3. Protocol Relating to the Definition of Community Citizens.

   4. Supplementary Protocol A/SP. 1/01/05, relating to the Court.

   5. Constitution of the Republic of The Gambia.

SUMMARY OF THE FACTS

4. Plaintiff is a journalist and a former editor of ***The Independent*** Newspaper based in Banjul, The Gambia.

   Following the alleged coup of March 21st, 2006 in The Gambia, The Independent Newspaper published the names of soldiers and civilians arrested by security forces in connection with the incident. Consequently, the plaintiff was arrested late at night on March 27th, 2006 by a combined team of armed soldiers and policemen without a warrant of arrest and taken to the detention centre in the Headquarters of the National Intelligence Agency in Banjul, The Gambia.

5. Plaintiff was accused of disloyalty to the President Yaya Jammeh regime for allegedly inviting President Thabo Mbeki of South Africa to pressurize the government to expedite investigations into the brutal killing of a

newspaper editor, Deyda Hydara and attacks on newspaper houses. He was also accused of embarrassing The Gambia government by writing stories on the mysterious killings of over forty Ghanaians, Nigerians, Togolese and Senegalese by The Gambia security forces in 2005.

6. Plaintiff was tortured whilst in custody by officials of the Presidential Body Guards including Lieutenant Musa Jammeh, a cousin of President Yaya Jammeh and Regimental Sergeant Major (RSM) Tamba. He was stripped naked and electrical shocks were administered on his body including his genitals. He was also not allowed to take a bath, wear shoes or change his clothes for three weeks. In order to extract a confessional statement from him implicating him in the alleged coup, he was threatened that he would be buried alive.

7. Due to the physical, mental and psychological torture inflicted on the plaintiff, he was left with scars on his back, legs, arms and a bayonet cut on his left jaw. The plaintiff was held incommunicado for 22 days, without access to either his lawyers or family members.

8. After his release from detention on bail, security officers continued to put the plaintiff under surveillance which frightened his pregnant wife, aged mother and younger siblings. The situation became unbearable and plaintiff together with his wife fled The Gambia, sneaking out on the night of May 13th, 2006.

   They travelled through small villages into Ziguivichor, the capital of the Southern Senegalese province of Casamance, from where they travelled by ship to Dakar, Senegal.

9. Since the plaintiff and his wife arrived in Dakar on 15 May 2006, security agents of The Gambia based in Senegal have continued to monitor his activities.

   Consequently, plaintiff is worried about the security of his family members left in The Gambia, particularly his brother, Abubacarr Saidykhan who bailed him when he was in detention.

10. In the 2005 Global Human Rights Report compiled by the United States Bureau of Democracy, The Gambia government was indicted for gross human rights violations. The Committee to Protect Journalists (CPJ) has had cause to protest the deterioration of press freedom in The Gambia to no avail.

    It is for these reasons that the plaintiff seeks the reliefs set out above against the defendant.

PRELIMINARY OBJECTION BY DEFENDANT

11. Following the service of the application on the defendant, the defendant filed a preliminary objection to the suit. The grounds for the objection are:

    i) That this Honourable Court lacks jurisdiction to entertain the claim of the Plaintiff/Respondent.

    ii) That the Plaintiff/Respondent's suit is an affront to the internal sovereignty of the Defendant / Applicant and violates Article 39 of the Protocol A/SP1/12/01 on Democracy and Good Governance as well as Articles 26, 50 and 56(5) of the African Charter on Human and Peoples' Rights.

    iii) That the Plaintiff/ Respondent's suit is not before the appropriate court.

12. Consequently, Defendant/Applicant is seeking the following orders:

    a) An order striking out or dismissing the Plaintiff/Respondent's suit for want of jurisdiction.

    b) An order that the claim is before a wrong or incompetent court.

    c) And for such further order / orders as the Court may deem fit to make in the circumstances.

SUMMARY OF THE FACTS IN SUPPORT OF PRELIMINARY OBJECTION

13. Defendant/Applicant relied on the following set of facts to support the preliminary objection against the jurisdiction of this Court.

Defendant/Applicant states that the Plaintiff/Respondent is a citizen of The Gambia and was living and doing business in The Gambia until the commencement of this suit and that The Gambia is a member State of ECOWAS.

14. Defendant/Applicant states further that the facts/circumstances and cause of action of the Plaintiff/Respondent stem from alleged violation of his fundamental human rights, the alleged violations occurring in The Gambia where he resided.

15. Defendant/Applicant also avers that they are a Sovereign nation operating a democratic constitution based on the Rule of Law and provides for the protection of her citizens' fundamental rights and freedoms. They stated also that the 1997 Constitution of The Gambia and the national courts provide adequate protection of human rights such as those complained about by Plaintiff/Respondent. That as a citizen of The Gambia, the Plaintiff/Respondent has not approached any of the courts in The Gambia for redress, where the alleged violations are said to have occurred.

16. Defendant/Applicant contends that there is no contractual relationship between the parties in which they agreed to submit to the specific jurisdiction of this honourable Court. Consequently there is no fact or combination of facts or any law that grants jurisdiction to this Honourable Court in the circumstances of this application/suit.

17. Defendant/Applicant states that the ECOWAS Community Court of Justice is the court of first instance where the alleged human rights violations have been lodged for redress and there is no evidence that the parties have agreed for the matter to be brought to the ECOWAS Court

without first exhausting available local remedies. That to approach the Community Court of Justice without first exhausting local remedies is tantamount to undermining the internal sovereignty of The Gambia and the jurisdiction of its national courts.

PLEAS OF LAW IN SUPPORT OF PRELIMINARY OBJECTION

18. Defendant/applicant relied on the following to support their preliminary objection.

1. Articles 87 and 88 of the Rules of Court of the Community Court of Justice, ECOWAS.
2. Article 9 of the Supplementary Protocol on the Court of Justice (A/SP. 1/01/05).
3. Articles 1, 4(g), and 92(1) of the Revised Treaty of ECOWAS.
4. Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.
5. Article 19(1) of the Protocol on the Court of Justice (A/Pl/7/91).
6. Article 38 of the Statute of the International Court of Justice.
7. Articles 26, 50, and 56(5) of the African Charter on Human and Peoples' Rights.
8. Article 39 of the Protocol A/SP1/12/01 on Democracy and Good Governance.
9. Customary International Law
10. Sections 17, 18, 19, 21, and 24 of the 1997 Constitution of The Gambia.

SUMMARY OF ARGUMENTS BY THE PARTIES

19. Defendant/Applicant relied on provisions of the African Charter on Human and Peoples' Rights to support their claim that this Court lacks jurisdiction to hear and determine the present suit.

20. They also relied on provisions of the Revised Treaty of ECOWAS, the Supplementary Protocol on the Court of Justice (A/SP. 1/01/05), the Protocol on the Court of Justice (A/P.l/7/91), the Rules of the Community Court of Justice, the Protocol on Democracy and Good Governance (A/SP.1/12/01), the 1997 Constitution of The Gambia as well as rules of customary international law.

21. Defendant/Applicant contends that by a proper interpretation of the Revised Treaty of ECOWAS, this Court lacks jurisdiction to entertain Plaintiff/Respondent's claim. They argue that the various Protocols of ECOWAS, by the definition of "Protocol" in Article 1 of the Revised Treaty are instruments of implementation of the Treaty and have the same legal force as the Treaty itself.

    Therefore, they postulate that the provisions of the Treaty should be read together with the provisions of the protocols. They posit that Article 39 of the Protocol on Democracy and Good Governance (A/SP1/12/01) should be read with the Revised Treaty in order to ascertain the extent of the jurisdiction of this Court. The said Article 39 reads thus:

    Protocol A/P. 1/7/91 adopted in Abuja on 6 July, 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.

22. Defendant/Applicant contends that the Revised Treaty, together with the Protocol on Democracy and Good Governance, as an international instrument must be interpreted by the rules on interpretation of treaties as laid down by Articles 31 and 32 of the United Nations Convention on the Law of Treaties, 1969. These provisions are:

    Article 31:

    General rule of interpretation

    1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

a. *Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

b. *Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

3. *There shall be taken into account, together with the context:*

   a. *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

   b. *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

   c. *Any relevant rules of international Law applicable in the relations between the parties.*

A special meaning shall be given to a term if it is established that the parties so intend.

Article 32:

Supplementary means of interpretation

Recourse may be had to supplement any means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

23. Defendant/Applicant states that the effect of Article 39 of the Protocol on Democracy and Good Governance read together with the Revised Treaty and properly interpreted by the rules of the Vienna Convention on the Law of Treaties is that this Court has no jurisdiction over human right causes in the absence of the exhaustion of local remedies. Therefore, the Defendant submits that the Plaintiff/ Respondent's claim is not properly before this Court, having failed to exhaust the local remedies available to him in The Gambia.

24. Defendant/Applicant stated further that this Court is a product of Treaty as it was established by the Revised Treaty of ECOWAS which is a product of the agreement between the Member States of ECOWAS. This Court is therefore the creature of an international agreement and should necessarily apply international law.

25. Further, they relied on the provisions of Article 19(1) of the Protocol on the Community Court of Justice (A/P1/7/91) to postulate that this Court has to apply international law as and when necessary. The said Article 19(1) states thus:

"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 Statute of the International Court of Justice".

26. It is of essence to state the relevant provisions of Article 38 of the Statute of the International Court of Justice, and it reads:

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.*

Article 38(1) (b) of the said Statute thus recognises the applicability of rules of customary international laws. Since the said Article 38 is applicable to this Court, then rules of customary international law are applicable.

27. Defendant/Applicant contends that there is a customary rule of international law to the effect that before a party can come to an international court such as this honourable Court, that party must exhaust all available local remedies and that rule is binding on this Court. They contend that since the plaintiff has not approached any of the domestic courts of The Gambia, he has not satisfied the condition precedent that will clothe this honourable Court with jurisdiction to hear and determine the present suit. In essence, plaintiff should have gone to the local courts of The Gambia and exhausted all available remedies before approaching this Court. Defendant/Applicant concludes that failure to do that extinguishes his right to come before this Court.

28. Defendant/Applicant also contends that by the provisions of the African Charter on Human and Peoples' Rights upon which the Plaintiff/Respondent based his claim, the action filed by Plaintiff/Respondent is not ripe as the Charter supports the view that local remedies ought to be exhausted before a party approaches an international court. Defendant/Applicant rested his claim on Articles 26, 50 and 56(5) of the Charter.

They provide thus:

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all 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 (Article) 55 received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

29. Defendant/Applicant contends that the Human Rights' Commission established under the African Charter for the protection of human rights recognised the need for exhaustion of local remedies. The defendant therefore submitted that it made sense that the Plaintiff seeking redress under this Charter is made to exhaust local remedies before he can go before an international Court such as this Court. This Plaintiff/Respondent has failed to do so, therefore this Court ought to decline jurisdiction.

30. At the hearing of the preliminary objection, Counsel for the Plaintiff/ Respondent sought to orally respond to the arguments raised by the Defendant/Applicant Counsel who objected to this application because under the Rules of the Court, a defence to the preliminary objection should have been filed within one month upon service of the application

on the Plaintiff/ Respondent before oral argument could be adduced in support. Defendant/Applicant contended that since Plaintiff/Respondent has failed to file a defence to the preliminary objection, he should not be allowed to adduce oral argument in defence to the preliminary objection. The Court, after careful consideration of these arguments, rejected Plaintiff counsel's request to address the Court orally.

OPINION

31. The thrust of Defendant/Applicant's argument supporting their claim that this Court lacks jurisdiction to hear and determine the present suit and should therefore declare itself incompetent stems from the fact that Plaintiff/ Respondent has failed to exhaust local remedies available to him in the national courts of The Gambia.

32. Defendant/Applicant contends that the Revised Treaty should be read together with Article 39 of the Protocol on Democracy and Good Governance and that will establish clearly that this Court does not have human rights violation jurisdiction unless the applicant has exhausted local remedies available to him. They posit that the Revised Treaty, if read together with Article 39 of the Protocol on Democracy and Good Governance and properly interpreted by the rules of interpretation laid down by Articles 31 and 32 of the Vienna Convention on the Law of Treaties, one would come to the conclusion that this Court does not have human rights jurisdiction save where available local remedies have been exhausted.

33. Defendant/Applicant argues that a close reading of Article 39 of the Protocol on Democracy and Good Governance lends credence to the fact that the Revised Treaty only intended to grant human rights jurisdiction to this Court after the exhaustion of available local remedies. Article 39 of the Protocol on Democracy and Good Governance, though quoted above, is being repeated here because of the heavy reliance on it by Defendant/Applicant. It reads thus:

Protocol A/P. 1/7/91 adopted in Abuja on 6 July, 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.

34. Defendant/Applicant contends that if the above provision is read together with the provisions of the Revised Treaty, the obvious conclusion is that the drafters of the Treaty intended to give this Court human rights jurisdiction only after the exhaustion of available local remedies.

35. Defendant/Applicant rightly pointed out that under Article 1 of the Revised Treaty the Protocols of ECOWAS are the instruments of implementation of the Treaty and have the same force as the Treaty itself. They contended that Article 39 of the Protocol on Democracy and Good Governance must be read as an integral part of the Treaty.

36. It is important to state at this point that ECOWAS has other protocols that are essential with respect to the nature and functions of this Court. The Protocol on the Court of Justice as well as the Supplementary Protocol on the Court of Justice are protocols that were made specifically to govern the functioning of this Court and must be read together with the Treaty.

37. Article 10(d) of the Supplementary Protocol on the Court of Justice (A/SP. 1/01/05) which amended the Protocol on the Court of Justice (A/Pl/7/91) states thus:

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;

This provision clearly does not call for the exhaustion of local remedies before a party can access this Court in a human rights violation cause. It sets out the limitations for an intending applicant. The above provision is clear in its disposition of the requirement of the exhaustion of local remedies. This provision is clearly at variance with Article 39 of the Protocol on Democracy and Good Governance which Defendant/ Applicant so heavily relies on. The question then is, which of them takes precedence over the other?

38. It is pertinent to note that the Protocol on the Court of Justice (A/P1/7/ 91), which the Protocol on Democracy and Good Governance reckoned will be reviewed to ensure that this Court will have jurisdiction over human rights violations after the exhaustion of local remedies, is the same one that was specifically amended to grant human rights jurisdiction to this Court, save that the application ought not to be anonymous and same matter must not be pending before another international court.

39. It is interesting to note that the Protocol on Democracy and Good Governance was drafted in the year 2001. Article 39 thereof said the Protocol on the Court of Justice would be reviewed in order to grant the Court human rights violations in cases where local remedies have been exhausted. Indeed, the Supplementary Protocol on the Court of Justice which amended the Protocol on the Court of Justice came into force in 2005, granting jurisdiction in human rights causes to the Court without the proviso of exhausting local remedies. It is only logical for one to conclude that the intended review of the Protocol on the Court that was captured by Article 39 of the Protocol on Democracy and Good Governance was carried out in 2005 by the Supplementary Protocol on the Court of Justice. The drafters of the Supplementary Protocol were aware of the provision in Article 39 of the Protocol on Democracy and Good Governance, and yet chose to grant jurisdiction over human rights violation to this Court without making the exhaustion of local remedies a condition precedent. It would therefore be fatal for one to import words into the Supplementary Protocol because the drafters

could have done so if they so desired. Article 10 (d) of the Supplementary Protocol on the Court of Justice stated specifically the conditions under which this Court should decline human rights violation causes but excluded the need for petitioners to exhaust local remedies. Therefore, the drafters of the Supplementary Protocol clearly decided against making the exhaustion of local remedies a condition precedent to the accessibility of this Court in human rights violation causes.

40. It is also worth noting that the Protocol on Democracy and Good Governance came into force in February 2008. Plaintiff/Respondent was arrested in 2006. The cause of action in these proceedings therefore arose in 2006. Therefore, even if the Protocol on Democracy and Good Governance was deemed applicable, it could not have been given a retrospective effect for it to extinguish a cause of action that had already arisen and was properly before a court of law.

41. Even granted that the Supplementary Protocol on the Court of Justice came into force at the same time as the Protocol on Democracy and Good Governance, it is significant to state that all the Protocols of ECOWAS have the same status with regards to each other. It is only an express provision of the Treaty that supersedes a contrary provision in a Protocol. If the Supplementary Protocol on the Court of Justice has the same status as the Protocol on Democracy and Good Governance, then it stands to reason that with issues pertaining to this Court, the Supplementary Protocol takes precedence over the Protocol on Democracy and Good Governance as the Supplementary Protocol was specifically made in respect of this Court whilst the Protocol on Democracy and Good Governance was not. The general rule of law is that a specific rule supersedes an inconsistent general rule, the specific is deemed to have impliedly amended the general.

42. Again, it is trite law that jurisdiction is a creature of statute. It cannot be assumed. It must be expressly conferred and cannot be ousted by implication.

Article 10 (d) of the Supplementary Protocol on the Court of Justice expressly grants jurisdiction to this Court with regards to human rights violations except that the application should not be anonymous and the same matter should not be before another international court. This is a provision of the statute which cannot be ousted by implication. Therefore, in order for this Court to decline jurisdiction on account of a failure by the plaintiff to exhaust local remedies it will require an express amendment of Article 10 (d) of the Supplementary Protocol on the Court of Justice which gave this Court jurisdiction in human rights causes without the need to exhaust local remedies. In short, this Court's jurisdiction cannot be taken away by implication; the statute has to expressly take away the jurisdiction that it has specifically conferred upon it.

43. Another ground on which Defendant/Applicant sought to challenge the jurisdiction of this Court is that there is a customary rule of international law in favour of the exhaustion of local remedies before a party can go before an international court such as this one.

It is a fact that customary rules on international law are applicable in this Court by virtue of Article 19 (1) (quoted above) of the Protocol on the Court of Justice, which states that the body of rules stated in Article 38 of the Statute of the International Court of Justice are applicable to this Court. Article 38 of the Statute of the International Court of Justice clearly permits the application of customary rules of international law. The fact that there is a rule of customary international law in support of the view that local remedies ought to be exhausted before a plaintiff can properly go before international courts is not in doubt. However, this is not an inflexible rule. It can be legislated away or even parties can compromise it. Article 10 (d) of the Supplementary Protocol is an example of legislating out of the rule of customary international law regarding the exhaustion of local remedies. With the enactment of the Supplementary Protocol, ECOWAS Member States expressly dispensed with the customary international law rule regarding the exhaustion of local remedies before access is granted to plaintiffs coming before this Court. Therefore, though there is in existence a customary international

law rule requiring plaintiffs to exhaust local remedies before approaching international courts, that rule is not applicable to this Court.

44. Defendant/Applicant also relied on provisions of the African Charter on Human and Peoples' Rights to support their proposition that this Court lacks jurisdiction in this matter because the Plaintiff/Respondent failed to exhaust local remedies. In this regard, Defendant/Applicant relied on Articles 26, 50 and 56 (5) of the African Charter on Human and Peoples' Rights. All these articles are quoted above.

45. Article 26 of the African Charter is to the effect that States parties to the African Charter shall establish, promote and guarantee the independence of national institutions entrusted with the promotion and protection of the rights and freedoms enshrined in the Charter. Article 50 is to the effect that the African Commission on Human Rights can only deal with a matter submitted to it after ensuring that local remedies have been exhausted unless they are not available. Similarly, Article 56(5) is to the effect that communication with respect to human and peoples rights shall be considered after the exhaustion of local remedies, if any, unless it is obvious that the procedure is unduly prolonged.

46. Article 26 of the African Charter which seeks to promote the establishment of national institutions entrusted with the promotion and protection of the rights and freedoms enshrined in the Charter has nothing to do with the jurisdiction of this Court. Articles 50 and 56 (5) of the Charter deal with the African Commission on Human Rights and not directed to Member States of ECOWAS.

    It is of some persuasive value to argue that if the African Commission on Human Rights has to ensure that local remedies are exhausted before acting on human rights complaints, then other international bodies seeking to protect human rights under the African Charter should do same. However, these provisions are not binding on this Court. Be that as it may, these provisions cannot oust jurisdiction expressly conferred on this Court by a Protocol.

47. Defendant/Applicant also argued that the suit filed by the Plaintiff/ Respondent is one that falls squarely within the domestic jurisdiction of The Gambia and thus this Court should not exercise jurisdiction over it until and unless the Plaintiff/Respondent has exhausted local remedies. They relied on Article 2 of the United Nations Charter which provides that:

> ***Nothing contained in the present charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state....***

48. However, ECOWAS is a supra national authority created by the Member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest. Therefore, in respect of those areas where the Member States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual Member States if they are inconsistent. The Revised Treaty of ECOWAS was ratified by all the Member States of ECOWAS, including the Defendant/Applicant herein. This Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of Justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Treaty, to adjudicate on issues of human rights arising out of the Member States of ECOWAS.

49. Therefore, it is untenable for a Member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdictions in respect of that matter. Defendant/Applicant herein, being bound by both the Revised Treaty and the Supplementary Protocol on the Court of Justice which granted jurisdiction over human rights causes to this Court, cannot be heard to say that human rights causes are matters essentially within their domestic jurisdiction and for which reason this Court ought not to interfere with them.

50. Article 2 of the United Nations Charter, which seeks to prevent interference in the domestic affairs of sovereign states is not applicable here. Article 2 of that Charter applies to matters that are essentially domestic in nature and over which the state in question has not acquired any international obligation in respect thereof. When a sovereign state freely assumes international obligations and is being held accountable in respect of those obligations, that state cannot renounce those obligations under the pretext that the matter in question is one that falls essentially within its domestic jurisdiction. Defendant/Applicant, being a Member State of ECOWAS, is bound by the obligations that it has assumed under the Revised Treaty and the Protocols thereof. Consequently, Article 2 of the United Nations Charter does not ensure the benefit of Defendant/ Applicant in this case.

51. Finally, this Court has held in previous cases that a plaintiff in a human rights violation case need not exhaust local remedies before filing his application in this Court. In suit number ECW/CCJ/APP/05/05 between **PROFESSOR ETIM MOSES ESSIEN V. REPUBLIC OF THE GAMBIA AND ANOR.** decided on the 29th of October 2007, this Court held that the exhaustion of local remedies was not a condition precedent to the filing of claims before this Court though the defendants had argued that this Court lacked jurisdiction on account of the failure by the plaintiff to exhaust local remedies. Again in suit number ECW/ CCJ/APP/08/07 between **HADIJATOU MANI KORAOU V. THE REPUBLIC OF NIGER** decided on the 27th of October, 2008, this Court confirmed that the exhaustion of local remedies is not a requirement for plaintiffs approaching it with human rights complaints. The decision in these two cases remains valid even though some of the arguments now raised here were not canvassed in those cases. The present arguments do not influence a change in the Court's earlier stance on the issue.

DECISION

52. Having regard to

(i) Articles 87 and 88 of the Rules of the Community Court of Justice (ECOWAS);

(ii) Articles 9 and 10 of the Supplementary Protocol A/SP. 1/01/05 amending the Protocol A/P1/7/91 on the Community Court of Justice;

(iii) Articles 31 and 32 of the United Nations Convention on the Law of Treaties 1969;

(iv) Articles 1,4, 15 and 92 (1) of the Revised Treaty of ECOWAS;

(v) Article 19 (1) of the Protocol A/Pl/7/91 on the Community Court of Justice;

(vi) Article 38 of the Statute of the International Court of Justice;

(vii) Articles 26, 50 and 56 (5) of the African Charter on Human and Peoples' Rights;

(viii) Article 39 of the Protocol on Democracy and Good Governance;

(ix) The Rules of Customary International Law;

(x) This Court's earlier decision in the two cases cited above, namely, **Professor Etim Moses Essien V. Republic of The Gambia** and **Hadiiatou Mani Koraou V. Republic of Niger;**

The Court sitting in public in Abuja, in the first and last resort, decides that the preliminary objection filed and argued by the Defendant/Applicant fails in its entirety.

Hon. Justice Hansine N. DONLI (Mrs.) - *Presiding*

Hon. Justice Awa NANA DABOYA (Mrs.) - *Member*

Hon. Justice Anthony Alfred 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 16TH DECEMBER, 2010

SUIT N^{O}: ECW/CCJ/APP/11/07
JUDGMENT N^{O}: ECW/CCJ/JUD/08/10

BETWEEN
MUSA SAIDYKHAN - *PLAINTIFF*

V.
REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE AWA NANA DABOYA** - *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY

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

REPRESENTATION TO THE PARTIES

1. ***Sola Egbeyinka*** - *for the Plaintiff*
2. ***Martins U. Okoi*** - *for the Defendant*

Human Rights violation - Unlawful arrest, detention and torture - Articles 5, 6, and 7 of African Charter on Human and Peoples' Rights - Article 4(g) ECOWAS Revised Treaty.

SUMMARY OF FACTS

The plaintiff was on the 27th March, 2006 arrested without warrant by armed soldiers and policemen. He was detained for 22 days without trial at the Headquarters of the National Intelligence Agency, Banjul. While in detention, he was interrogated by the Director of the National Intelligence Agency and tortured by soldiers of the Presidential guards as a result of which he sustained injuries. Upon release on bail, he fled to Senegal where he sought for and obtained treatment for his injuries. He then filed this action asking for a declaration that his arrest, detention and torture is illegal and contrary to the provisions of Article 5, 6 and 7 of the African Charter on Human and Peoples' Rights for damages.

LEGAL ISSUES:

1. *Whether the plaintiff was unlawfully arrested, detained and tortured by the agents of the defendant.*
2. *Whether or not the Plaintiff sustained injuries as a result of torture by the defendant.*
3. *Whether or not the plaintiff is entitled to damages.*

DECISION OF THE COURT

The evidence by the plaintiff being uncontroverted stands in proof of the alleged facts that he was unlawfully arrested, detained for 22 days and tortured while in detention by the defendant's agents. Article 4(g) of the ECOWAS Revised Treaty allows the Court to apply the African Charter. The defendant's action is a violation of the provisions of Articles 5, 6 and 7(a) and (b) of the African Charter. The Plaintiff was thus awarded damages in the sum of Two hundred thousand US Dollars (US $200,000.00).

JUDGMENT OF THE COURT

Parties

1. The Plaintiff is a journalist by profession and a national of the Republic of The Gambia and sues his own country which is a Member State of the Economic Community of West African States (ECOWAS).

The Plaintiff's Case

2. By application filed with this Court on 19th November 2007, the Plaintiff complained of violation of his human right to personal liberty, dignity of his person and fair hearing guaranteed by Articles 1, 5, 6 and 7 of the African Charter on Human and Peoples' Rights (ACHPR). From the narration of the facts, the Plaintiff was the Editor of The Independent newspaper based in Banjul, The Gambia. According to the Plaintiff, his newspaper published the names of alleged coup plotters on 21st March 2006. Six days later, to be precise on 27th March 2006, he was arrested at night by a combined team of armed soldiers and policemen, without a warrant of arrest. They took him to a detention centre in the headquarters of the National Intelligence Agency in Banjul. For the next twenty-two (22) days, the Plaintiff claimed he was held totally incommunicado.

3. The facts continue that during those three weeks the Plaintiff was not allowed to take a bath, put on shoes or change his clothes, he was stripped naked whilst electric shocks were administered to his body, all in effort to extract a confession from him of his involvement in the coup plot. Among those who tortured him were officials of the Presidential Bodyguards including the President's cousin Lt. Musa Jammeh and RSM Tamba.

4. The Plaintiff further averred that during the interrogations he was accused of being disloyal to the government because he had invited President Thabo Mbeki of South Africa to pressurize the government of The Gambia to expedite investigations into the brutal killing of one Deyda

Hydara, a newspaper editor, and attacks on newspaper houses. He was also accused of embarrassing the government by writing stories about the mysterious killings of over forty ECOWAS nationals by the Gambian security forces in 2005.

5. The Plaintiff claimed that he suffered injuries on his back, legs, arms and a bayonet cut on his left jaw. He also suffered mental and psychological torture.

6. He was released on bail, yet the security officers continued to put him under surveillance and this put his wife, aged mother and junior brothers to fright. The situation became unbearable so he and his wife decided to flee the country for security reasons. Therefore on the night of 13th May 2006 they fled the country and arrived in Dakar, Senegal on 15th May 2006. However, the Defendant has continued to harass and intimidate his family members in Banjul, especially his brother who stood surety for his bail. He stated that it was in Dakar that he received medical attention at the expense of Amnesty International.

Pleas in law

7. The Plaintiff stated in his application that he would rely on Article 4 of the ECOWAS Revised Treaty. He also stated that he would rely on Articles 1, 2, 5,6, 7 (b) and (d) of the ACHPR. These enactments will be referred to as and when appropriate in this judgment.

Reliefs and Orders sought

8. The Plaintiff sought the following reliefs and orders from the Court:

   a) A declaration that the arrest of the Plaintiff in Banjul, The Gambia on March 27, 2006 by the armed agents of the Defendant is illegal and unconstitutional as it contravenes the Plaintiff's human right to personal liberty as guaranteed by Article 6 of the ACHPR.

b) ***A declaration that the detention of the Plaintiff by the Defendant's agents at the National Intelligence Agency detention centre for 22 days without trial is illegal as it violates the Plaintiff's right to personal liberty and fair hearing as guaranteed by Articles 6 and 7 of the ACHPR.***

c) ***A declaration that the torture inflicted on the Plaintiff by the Defendant's agents during his 22 days detention is illegal as it violates the Plaintiff s right to personal dignity as guaranteed by Article 5 of the ACHPR.***

d) ***An order restraining the Defendant from harassing or intimidating members of the Plaintiffs family who are based in The Gambia in any manner whatsoever and howsoever.***

e) ***US$ 2 million being compensation for the violation of the Plaintiffs human rights to dignity, personal liberty and fair hearing.***

The Defence Case

9. The Defence consisted largely of a complete denial of all the averments contained in the initiating application. The Defendant denied any knowledge of the publication of the names of coup plotters and denied sending any security agents to arrest any journalists. The Defendant further stated they did not receive any reports of any arrests, detention or torture and put the Plaintiff to strict proof.

10. The Defence stated that Lt. Musa Jammeh and RSM Tamba are not identifiable persons. A person known as Col. Musa Jammeh is deceased. That the names Musa Jammeh and Tamba are very common names in the Gambian Armed Forces, with many persons bearing those names and with similar ranks.

11. In respect of the matter concerning President Thabo Mbeki, the Defendant stated that this was a calculated and mischievous attempt to plant seed of discord and contempt between The Gambia and South

Africa. The general traverse is sufficient to put the Plaintiff to strict proof of all averments contained in the application.

12. The Defence also delved into arguments which should not be engaged in during pleadings; the arguments will be considered during the analysis of the case. The Court reiterates that the pleadings should be confined to a concise and precise presentation of facts and brief summary of evidence in support including references to documents. All arguments shall be reserved for the oral phase of the proceedings. Reference is hereby made to Articles 33 and 35 of the Court's Rules of Procedure.

Oral Procedure

13. The Plaintiff (PW1) gave oral testimony and called a medical doctor (PW2) to give expert evidence. They put in some documents, including medical certificates to buttress the Plaintiff s case. The Defendant did not proffer any evidence. Instead they tried to put across their case during the cross examination of the Plaintiff and his witness, whilst at the same time trying to punch holes in the Plaintiffs case and attack his credibility. Let us now examine the evidence.

14. At the hearing on the 3rd June 2010, Plaintiff gave evidence by himself and called one expert witness. The Plaintiff stated that he was at home in Banjul, The Gambia on the 27th day of March 2006 when security operatives and police officers invaded his home around midnight and arrested him. He indicated that he was first taken to the National Intelligence Agency Headquarters in Banjul and subsequently to different detention centres.

15. Plaintiff posited that he was interrogated by the Director of National Intelligence Agency, Captain Saeed. Thereafter he was tortured around 2:00 am on the nights of 8th and 9th April, 2006 by a group of soldiers, part of the President's own bodyguards and led by Lieutenant Musa Jammeh and RSM Tamba. Plaintiff made it known that he was stripped naked and beaten with sticks. Furthermore, he was also dragged on the

floor and electric shocks were administered on his body. He also intimated that his right hand was broken and was also threatened with death by the soldiers claiming that they had already killed and buried some suspects.

16. He went on to state that he was questioned as to the reasons for his arrest but he replied that he did not know. According to him, the soldiers then told him he was being tortured because he was a traitor and had tarnished the image of the country by telling the former President of South Africa, Thabo Mbeki that there were human rights violations in The Gambia, and in particular that the Gambian government was responsible for the killing of the Point Newspaper Editor, Deyda Hydara. He responded by telling the soldiers that he was not a traitor and all that he told Thabo Mbeki was that there were human rights violations in the country which were not being investigated by the Gambian government including two arson attacks on his newspaper and the killing of Deyda Hydara. Furthermore, Plaintiff said he was told by the soldiers to assure them that he was going to stop practising journalism but he declined that request.

17. Plaintiff continued his testimony that about a week later the soldiers brought Lamin Laddy, a reporter of the Independent Newspaper and Madi Ceesay, the General Manager of the Independent Newspaper and himself together and tortured them. He stated that he was told that they have put the three of them together because their newspaper published a story about the failed coup attempt on 21st March 2006; that the story contained a lot of errors and was not factual. He went on to say that this time electric shocks were administered on his whole body, including his genitals until he became unconscious and went into coma for about thirty minutes.

18. The Plaintiff's evidence continued that he was later released on bail after his brother had tendered in his passport as a surety. He stated that he was informed that a decision had been taken at a meeting held at the National Intelligence Agency to incarcerate him soon after the African Union Summit which was to be held in July 2006. Plaintiff said that he

was released because President Thabo Mbeki of South Africa had made his release a condition precedent to his attending the African Union Summit and the subsequent payment of a sum of money to The Gambia. Plaintiff further stated that after coming into knowledge of the plan by the Gambian authorities to incarcerate him and the fact that security officials of the state with unidentified vehicles used to keep surveillance of his compound late into the night, he decided to flee the country with his pregnant wife, Accordingly he and his wife left The Gambia on the 13th of May 2006.

19. The evidence continued that the Plaintiff escaped to Senegal, where he was able to seek medical attention through the assistance of Amnesty International and subsequently a Medical Certificate was issued to him. He sought medical assistance in Senegal because whilst in The Gambia no medical practitioner was bold enough to examine him, let alone issue him a Medical Certificate, He subsequently sought and was granted political asylum in Senegal but was relocated to the United States of America in 2008 for security reasons as officers of the Gambian National Intelligence Agency in Dakar kept monitoring him. When he got to the United States of America, he also received some medical treatment.

20. Plaintiff identified photographs that were taken after his torture to confirm the injuries he sustained as a result of the torture, The photographs were tendered in evidence by counsel to the Plaintiff Counsel to the Defendant stating that the pleadings of the Plaintiff did not disclose this aspect of the evidence but nonetheless did not object to their admission and stated that he would deal with that in his written address. Copies of Medical Certificates issued to the Plaintiff whilst he was in Senegal were also admitted in evidence without objection from learned counsel to the Defendant. Documents to support the fact that the Plaintiff received medical attention in the United States of America were also admitted in evidence, although learned counsel to the Defendant intimated the Court that he wanted to place it on record that these were new documents which were never brought to his knowledge before their introduction but he was going to deal with it in his address.

21. During cross-examination by learned counsel to the Defendant, Plaintiff told the Court that he spoke French though he preferred the cross-examination to be conducted in English. He also told the Court that the medical procedures he went through in the United States of America were called out in 2008. Plaintiff refused to name the person(s) who informed him that there was a plan by the Gambian authorities to put him behind bars after the African Union Summit but stated that he had his sources within the National Intelligence Agency.

22. Plaintiff stated that he knew the vehicles patrolling his area at night were security vehicles because they were without number plates and other vehicles were generally not permitted to drive around without number plates especially at night. He also informed the Court that he has a problem with his manhood but refused to state categorically whether he was impotent or not. Plaintiff continued that he did not have a copy of the newspaper publication in respect of the alleged coup plotters, which Plaintiff had said was one of the reasons for his arrest. He also said that he had a copy of the petition he sent to President Thabo Mbeki but not with him in Court. He further stated that he was beaten to a state of unconsciousness by the soldiers and he estimated that he was unconscious for thirty minutes. Finally, Plaintiff stated that the security officials who arrested him were in uniforms except one; two of them were in police uniforms and four others in military uniforms.

23. The Plaintiff's only witness Dr. Jalojo Dior (PW2) is a Senegalese medical practitioner resident in Dakar, Senegal. He stated that he has been in medical practice for the past twenty-eight years. He continued that he received the Plaintiff in his office at the hospital and examined him when he was referred to him by the Senegalese section of Amnesty International. According to him, the Plaintiff narrated his whole story to him. He stated that he conducted a medical examination on him and the examination was in two parts: questioning and physical examination. He subsequently issued the Plaintiff with a Medical Certificate. He referred him to a female dermatologist who subsequently referred him to another dermatologist, Professor Khan. He stated that though he did not treat

the Plaintiff personally, he observed his injuries and accordingly issued him with a Medical Certificate. PW2 identified the Medical Certificate he issued through his handwriting, his letter head and his signature. At the instance of the Court. PW2 read the Medical Certificate in French which was simultaneously interpreted in English to the Court. The Medical Certificate was tendered in evidence by Plaintiff's counsel.

24. During cross-examination by learned counsel to the Defendant, PW2 stated that he did not know the time interval between when Plaintiff left the detention camp and when they first met because he did not know when Plaintiff left the camp but they met for the first time on 27th June 2006. He also told the Court that Plaintiff was referred to him by telephone. PW2 also made it known that he does not know the number of times he met Plaintiff after their first meeting but they met on several occasions as Plaintiff often came by his office to tell him how his treatment was going and also brought prescriptions from time to time.

25. The witness further stated that the doctors he referred Plaintiff to made some referrals to him in the form of prescriptions and also mentioned that the documents involved belonged to the Plaintiff so he gave them to him. He looked at some documents placed at the disposal of the Court by the Plaintiff and identified some as the prescriptions by Professor Khan.

26. Following a question from the Court, PW2 stated that he did not reveal the identity of Plaintiff to his colleague doctors as they were not members of Amnesty International. He continued that he would have had to disclose the identity of the Plaintiff to the other doctors in order to secure another Medical Certificate but he declined to do that for security reasons. Finally, he said that he gave a copy of the Medical Certificate he issued to the Plaintiff to Amnesty International and added that he did not report to Amnesty International as an employee as the relationship between them was not one of employer and employee.

Issues to be resolved

27. From the pleadings, the issues that are clearly identifiable are the following:

    (a) Whether or not the Plaintiff was arrested and detained by agents of the Defendant;

    (b) Whether or not the Plaintiff was tortured whilst in detention;

    (c) Whether or not the Plaintiff sustained any harm or injury, physical or otherwise; if so, whether or not Plaintiff received medical treatment for any physical injury; and finally,

    (d) Whether or not Plaintiff is entitled to damages or compensation from the Defendant.

Burden of proof

28. From the pleadings and the issues set out above, it becomes certain that the Defendant assumes no burden of proof. The Plaintiff assumes the entire evidential burden of producing evidence and of persuasion, since he asserts the affirmative of all the issues. The defence, as pointed out earlier, consists largely of denial and they put the Plaintiff to strict proof. This rule, that proof rests on he who asserts the affirmative and not on he who denies, *"is an ancient rule founded on consideration of common sense and should not be departed from without strong reasons"* according to Lord Maugham in the case of **CONSLANTINE LINE V. IMPERIAL SMELTING CORPORATION (1942**) A. C. 154 AT P. 174.

    In assuming the burden of proof, it means that if at the end of the day the Plaintiff has not produced evidence to discharge the burden on him he must lose the decision on the particular issue. However, being a civil matter the burden that the Plaintiff assumes is one of a proof by preponderance of probability or sometimes called reasonable probability.

Analysis of the issues

29. The first issue is whether or not the Plaintiff was arrested and detained by the agents of the Defendant. The Plaintiff testified on this issue by himself. No witness was called. Before we proceed the Court has to state that failure to call a witness does not derogate from the evidence adduced by one person only, nor does it prevent the Court from accepting and relying on the evidence of a sole witness. It all depends on credibility and the nature of the evidence adduced. And also as decided in the case of **Morrow v. Morrow (1914)** 2 I.R. 183 in a civil case where such testimony is unimpeached the Court should act on it.

30. The Plaintiff testified that during the night of 27th March 2006, he was arrested by a group of armed security agents of the Defendant. He gave details about the places he was taken to as well as the names of some of the security personnel. He did not know why he was arrested until the security personnel told him it was in connection with inaccurate reportage his newspaper carried in respect of the alleged coup plot against the government, and also his lack of patriotism in making complaints against the government to the then South African President Thabo Mbeki. He was detained for 22 days before being released on bail.

31. In his address, Counsel for the Plaintiff submitted that the evidence stood uncontroverted so the Court must act upon it. He cited some decided cases in support including the decision of this Court in **Chief Ebrimah Manneh v. Republic of The Gambia (2009)** CCJLR (Pt 2) 116**.**

32. In his submission, Counsel for the Defendant stated that whilst they did not admit that the Defendant's agents arrested and detained the Plaintiff, yet even if they did arrest him he the Plaintiff called for it through his admission of confrontational and unpatriotic acts against the government. Moreover, since the head of the National Intelligence Agency did not know the reason for the Plaintiff's arrest, it cast a doubt on the Plaintiff's story that it was the Defendant who ordered his arrest.

33. Having regard to the detailed narration of events and their consistency it is difficult to say that the Plaintiff was just framing up a story. The reasons he said were given by the security agents for arresting him were all matters which in fact occurred and for which he was the actor and author. So they were not falsehoods. That led the defence counsel to say that even if the Plaintiff was arrested by the Defendant's agents, his acts and conduct called for it. This was some kind of justification, which is belated since the Defendant did not admit the acts complained of in the first place. In other words, justification must be pleaded before the Court could consider any facts or submission in support thereof. And even if justification had been properly raised in the defence, it would not justify an arrest without warrant, detention for 22 days without trial and without recourse to Counsel even under the 1997 Constitution of The Gambia, chapter IV thereof.

34. Counsel for the Defendant also said the fact that the head of the National Intelligence Agency did not know the reasons for the Plaintiffs arrest cast doubt on the Plaintiff's story. This argument does not hold. The reason being that the Court has no evidence that it is only the head of the National Intelligence Agency who has the power to order the arrest of somebody. Nor is there evidence that he must necessarily know the reason for the arrest of everybody who is brought there under arrest. And even if there is such evidence, nonetheless that will only be an internal matter for the Agency to deal with their officers who acted outside their rules or regulations in arresting the Plaintiff without authorisation from the head of the Agency.

35. Counsel for the Defendant also submitted that the fact that the Plaintiffs brother secured his bail with an expired passport and the fact that Plaintiff jumped bail throw the Plaintiff's character into doubt so the Court should not believe him. This argument too is untenable. Desperate situations call for desperate measures. Who would not have acted the way the Plaintiff did given the situation that he found himself in? Even if he had succeeded in escaping from the National Intelligence Agency detention centre without bail he would have been justified. The Court rejects the

call to declare the Plaintiff as a person of bad character since he was justified in using every reasonable means to secure his freedom and flee for safety.

36. The Court considers that the evidence of the Plaintiff is consistent and credible and stands largely uncontroverted so we accept it and find he was arrested and detained by security agents of the Defendant on the night of 27th March 2006. The Court also accepts the evidence and finds the Plaintiff was detained for 22 days before being granted bail with his brother as surety. The Court accordingly rejects the submission of counsel for the Defendant that the Plaintiff might have been arrested by some other persons and not the Defendant's agents. It was more probable for the Defendant to arrest the Plaintiff for his alleged unpatriotic acts and confrontational stance against the Defendant than for any other unnamed person or institution, without cause. Again if the Plaintiff was arrested by some persons other than Defendant's agents, the probability is that he would have sought state protection against those persons, rather than flee the country for safety. Counsel's assertions are clearly not realistic.

37. The second issue is whether the Plaintiff was tortured. The Plaintiff said he was stripped naked, beaten with sticks and dragged on the ground. He also said electric shock was administered to his body, including his genitals and they kicked him with their boots. He said he went into coma for some minutes. His clothes were torn and he tendered them in evidence as Exhibit A1, without objection. Counsel for the Plaintiff submitted that since the Defendant did not proffer any contradictory evidence, it amounted to an admission. That is not, with respect, an accurate representation of the law. The reason is that the Defendant was under no duty to lead contradictory evidence, having put the Plaintiff to strict proof. What it means is that the Plaintiff must produce sufficient evidence to discharge the evidential burden that rests on him. When he succeeds in doing that, and the evidence stands unimpeached, the Court will then accept and act on it. *See* **Morrow v. Morrow**, (supra).

38. In the absence of any facts and circumstances from which the Court can say the Plaintiff was not speaking the truth, and as the evidence stands unimpeached, the Court is able to accept the Plaintiffs evidence and find the Plaintiff was tortured by the Defendant's security agents while in detention.

39. The third issue is whether the Plaintiff did suffer any harm or injury as a result of which he received medical attention. According to the Plaintiff as a result of the torture he suffered physical injuries and bodily pains. He tendered photographs-Exhibits B 1-B8- which he said were taken after his release from detention showing facial wound, broken hand, wounds on his hips, back and arm. They were admitted without objection from defence counsel who reserved the right to address on them. The Plaintiff said whilst in The Gambia, there was no medical officer who dared to treat him, so it was when he arrived in Dakar that he got medical attention with the aid of Amnesty International, Senegal branch. PW2 was the medical doctor who first attended to him. PW2 also referred him to a lady specialist dermatologist who in turn referred him to another specialist Professor Khan in Dakar. And when eventually he arrived in the United States of America on asylum he continued to receive treatment. All the medical reports were tendered and marked as Exhibits D1-D8. PW2 substantially confirmed the various medical procedures the Plaintiff said he underwent in Dakar.

40. In his address, counsel for the Plaintiff referred to the medical reports and submitted that these attest to the fact that the Plaintiff was tortured and sustained injuries in the process. For his part, Counsel for the Defendant submitted that the evidence of PW2 was nothing but hearsay, following his admission in cross examination that his knowledge of the facts derived from what the Plaintiff told him. It is common knowledge that an expert's opinion is usually based on his training and experience. In law an expert is permitted to give an opinion on the basis of hearsay information, provided that it relates to specific matters of which he does have personal knowledge. Thus a doctor can give evidence of what he was told by a patient about his condition for the purpose of evaluating

his diagnosis; though his testimony is inadmissible to show what symptoms were actually being experienced by the patient; *see* **R. V. BRADSHAW (1985)** 82 CR. APP. R. 79, CA**.** Thus PW2's testimony, whilst it cannot be utilised as confirming torture as counsel for the Plaintiff submitted, yet it is relevant to confirm whether the Plaintiff had any form of physical injury that he PW2 saw and referred him to an expert for treatment.

41. The evidence of the Plaintiff on the wounds was direct and credible enough for this Court to accept it. It is more probable than not that a person who has been detained and beaten for 22 days would suffer some form of physical harm. The Court therefore finds as a fact that the Plaintiff suffered physical injuries as he testified to. The Court also finds as a fact that he underwent medical treatment in Dakar.

42. Concerning the medical treatment in the USA, having regard to the time lapse between the events and the treatment, there ought to be evidence of a direct link between the torture and the treatment. The Court is not very certain about this. The medical reports-Exhibits D6-D8 do not provide any conclusive proof of the link between the torture that took place over two years before the treatment.

43. The fourth and final issue is whether the Plaintiff is entitled to damages or compensation. The Plaintiff claimed the sum of two million US dollars in damages for the problems he had and still has with his health, the injuries he suffered loss of his manhood and others. In the case of **Chief Ebrimah Manneh v. Republic of The Gambia**, supra, decided on 5th June 2008, this Court set out some principles that will guide it in the award of damages. Though by no means exhaustive, the principles set out in that decision are relevant to this case. Principally the object of an award in human rights violation is to vindicate the injured feelings of the victim and to restore his rights and human dignity. Monetary compensation may also be awarded in appropriate cases but the objective of such an award must not be punitive. The following cases decided by the European Court of Human Rights are of relevance to this discussion on damages: **Ahmed Selmouni v. State of France (2005) CHR 237;**

and Miroslav Cenbauer v. Republic of Croatia (2005) CHR 424, where the Court awarded damages in circumstances similar to the present case, wherein the Plaintiff was tortured.

44. Among the factors that the Plaintiff testified to and urged the Court should consider in assessing what damages to award are the fact that the Plaintiff had to abandon his job and flee his country, the physical injuries he suffered and loss of manhood. The Court has already found that he suffered physical injuries. The Plaintiff did not talk about the mental and psychological torture that he pleaded, so it's taken to have been abandoned. There is no doubt that the Plaintiff abandoned his job and fled the country.

45. It is the question of whether the Plaintiff suffered a loss of his manhood that there was some uncertainty about. The Plaintiff pleaded and testified that the torture inflicted upon him during the period of his detention, particularly the electric shocks, affected his manhood. However, during the cross-examination he tried to be evasive when pressed to answer whether he was impotent or not.

    The Court reproduces this excerpt from the cross-examination of the Plaintiff by Counsel for the Defendant:

> ***Martins:*** *".....Are you impotent?*
> ***PW1:*** *I have a problem with my manhood.*
>
> ***Martins:*** *No, are you impotent? Yes I am, no I am not.*
> ***PW1:*** *I cannot clarify my potency.*
>
> ***Martins:*** *Okay, you have not been able to ascertain it.*
> ***PW1:*** *Since then I have not had any medical examination, but what I know is that I have problem with my manhood.*

> ***Martins:*** *If you don't mind since you put this in evidence; is your wife with you right now?*
> ***PW1:*** *In the United States?*
>
> ***Martins:*** *Yes. But all you know is that you have problems with your manhood?*
> ***PW1:*** *Yes.*
>
> ***Martins:*** *What kind of problem?*
> ***PW1:*** *I cannot function sexually the way I was supposed to and as a result my doctor gave me some prescriptio*ns."

From the foregoing evidence, there is no certainty about Plaintiff's loss of manhood. The Court is unable to find that it is more probable than not that the Plaintiff has lost his manhood. In such a scenario of uncertainty or doubt, the case of **Rhesa Shipping Co. SA V. Edmunds,** otherwise called **The Popi M. (1985) 2 All E.R. 712 at p. 718 per Lord Brandon**, decided that the party on whom lies the burden of proving the existence of the fact should fail. In view of the foregoing, the Court is unable to conclude that the Plaintiff has lost his manhood as he claimed. Consequently, the Court will not consider it as a factor in awarding damages or compensation.

Thus the Court will consider the loss of job and for that matter, loss of earnings, illegal detention for 22 days as well as physical injury which no doubt would have caused him pain and suffering, in assessing the damages for the Plaintiff.

DECISION

46. Having regard to Article 4(g) of the ECOWAS Revised Treaty, which enables the Court to apply the ACHPR, and having regard to the following provisions of the ACHPR: Article 5-prohibition against torture; Article 6- prohibition against unlawful arrest; Article 7(b) presumption

of innocence until proven guilty; Article 7(d)-right to be tried within a reasonable time; and having regard to the findings of fact made herein, the Court decides that the Plaintiff has established his case that he was arrested, detained and tortured by the Defendants agents for 22 days, without any lawful excuse and without trial.

47. Consequently, the Court grants Reliefs (a), (b) and (c) set out above. There is no satisfactory evidence that the Plaintiff's family is being harassed or intimidated so the Court refuses to grant Relief (d). On Relief (e) the Court decides to award the Plaintiff damages in the sum of two hundred thousand US dollars (US$200,000.00).

COSTS

48. The Plaintiff is entitled to costs in this action which shall be borne by the Defendant. The Chief Registrar is directed to assess the costs taking into account the relevant provisions in Articles 66-69 of the Court's Rules of Procedure.

This Decision has been given in open Court in accordance with Article 61 of the Court's Rules of Procedure at the seat of the Court in Abuja this 16th day of December, 2010 in the presence of:

Hon. Justice Hansine N. DONLI - *Presiding Judge*

Hon. Justice Awa Nana DABOYA - *Member*

Hon. Justice Anthony A. BENIN - *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 TUESDAY, THE 27TH DAY OF OCTOBER, 2009

SUIT N^{O}: ECW/CCJ/APP/12/07
RULING N^{O}: ECW/CCJ/RUL/08/09

BETWEEN

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP)	*PLAINTIFF*

V.

1. FEDERAL REPUBLIC OF NIGERIA **2. UNIVERSAL BASIC EDUCATION COMMISSION (UBEC)**	*DEFENDANTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY BENIN** - *MEMBER*
3. **HON. JUSTICE SOUMANA .D. SIDIBE** - *MEMBER*

ASSISTED BY

ATHANASE ATANNON, ESQ. - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. ***A.A. Mumuni Esq.*** - *for the Plaintiff.*
2. ***No Representation*** - *for the 1st Defendant*
3. ***John Gaul Esq.*** - *for the 2nd Defendant.*

Jurisdiction - right to education -justiciability - Article 17 of the African Charter and Chapter II of the 1999 Federal Constitution of Nigeria.

SUMMARY OF FACTS

The plaintiff, a human rights non-governmental organization registered under the laws of the Federal Republic of Nigeria, filed an action against the defendants alleging the violation of the various rights guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights. The second defendant filed a Preliminary Objection challenging the jurisdiction of the Court to entertain the suit on the grounds that the jurisdiction of the Court is limited to the provisions of Article 9 of the 2005 Supplementary Protocol. He also alleged that the Compulsory and Basic Education Act of 2004 and the Child's Right Act 2004 are municipal laws of Nigeria and not subject to the jurisdiction of the Court. And that the educational objective of the Federal Republic of Nigeria is not justiciable. The plaintiff thus has no locus standi to institute or maintain this action.

LEGAL ISSUES

- *Whether the Court has jurisdiction to adjudicate on the application filed by the plaintiff.*
- *Whether the right to education is justiciable and can be litigated before this Court.*
- *Whether the plaintiff lacks the locus standi to initiate or maintain this action.*

DECISION OF THE COURT

Article 9(4) of the 2005 Supplementary Protocol grants the Court subject-matter jurisdiction over human rights violation by the African Charter on Human and Peoples' Rights. The right to education

recognized under Article 17 of the African Charter is justiciable and independent of the right to education under the directive principles of State Policy of the 1999 Federal Constitution of Nigeria. The Court therefore held that notwithstanding the fact that the right to education is not justiciable under the 1999 Constitution of Nigeria, the Court can enforce the right to education as provided for under Article 17 of the African Charter. The Court held that the Plaintiff has locus standi to initiate and maintain this suit.

RULING OF THE COURT

RULING ON PRELIMINARY OBJECTION BY THE SECOND DEFENDANT

1. Plaintiff is a human rights non-governmental organization registered under the laws of the Federal Republic of Nigeria whilst the first Defendant is a Member State of the Economic Community of West African States and second Defendant is the Commission on Universal Basic Education established by the first Defendant.

2. The Plaintiff filed an application against the Defendants alleging the violation of the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights.

3. Before the Court could go into the merits of the application, the second Defendant filed a motion alleging that this Court lacks jurisdiction to entertain the action filed by the Plaintiff. They objected to the jurisdiction of the Court on the following grounds:

    1. That the jurisdiction of the Court is limited to the provisions of Article 9 of the Supplementary Protocol and that the Court lacks jurisdiction to determine the subject matter of the suit:

    2. That the Compulsory and Basic Education Act 2004 and the Child's Rights Act 2004 are Municipal Laws of Nigeria and not subject to the jurisdiction of the Court because it is not a treaty, convention or protocol of ECOWAS.

    3. That the educational objective of the Federal Republic of Nigeria is provided for under Section 18 (1), (2) and (3) of Chapter II of the 1999 Constitution and is non-justiciable or enforceable and cannot be determined by the Court.

4. That the Plaintiff has no *locus standi* to institute or maintain this action against the second Defendant.

4. In considering the preliminary objection raised by the second Defendant, grounds two and three thereof would be considered together, as both arise from the Constitution as well as the domestic laws of the Federal Republic of Nigeria, as against the Treaty and Protocols of ECOWAS.

ISSUE 1.
WHETHER THE COURT HAS JURISDICTION TO ADJUDICATE ON THE APLICATION FILED BY THE PLAINTIFF

5. Second Defendant contends that under Article 9 of the Supplementary Protocol the Court does not have the competence to adjudicate on subject matters outside a Treaty, Convention or Protocol of the Community. They contend that the issues complained by the Plaintiff are grounded in the municipal law of the Federal Republic, a matter which the Court has no jurisdiction over. They relied on paragraph 1 (a) (b) and (c) of Article 9 of the Supplementary Protocol on the Court to conclude that this Court lacks subject-matter jurisdiction over the suit filed by the Plaintiff.

6. Second Defendant continues that this Court has not the competence to adjudicate on the claim as filed by the Plaintiff because this Court lacks the subject-matter jurisdiction to so do. Second Defendant relied on the provisions of Article 9 (1) (a), (b) and (c) to conclude that this Court lacks subject matter jurisdiction in the present suit. Article 9 (1) (a), (b) and (c) stipulates thus:

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

      (a) the interpretation and application of the treaty convention and protocol 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.

7. Second Defendant concluded that from the above provisions of the Supplementary Protocol, the jurisdiction of this Court is limited to the interpretation, application, legality or implementation of treaties, conventions or protocols of ECOWAS.

8. In response to the above submissions by second Defendant, Plaintiff stated that the suit is not based solely on the domestic legislation of the Federal Republic of Nigeria, to wit the Compulsory and Basic Education Act and the Child's Right Act but also on legally enforceable international and regional human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. Plaintiff contended that Nigeria has a duty to fully implement its international human rights obligations, and to make necessary legislations to implement them. Plaintiff also averred that this Court is statutorily empowered to hear cases of violations of human rights.

9. Plaintiff argued that the position canvassed by the second Defendant is fundamentally flawed as the issues raised by the Plaintiff in his application are based not only on the domestic laws of Nigeria but on international human rights instruments over which the Court clearly has jurisdiction, Plaintiff further states that the Court is statutorily empowered to hear cases of violations of human rights, even if such cases rely in part on national laws.

10. It is a well-established principle of law that jurisdiction is a creature of statute. The statute that spells out the jurisdiction of this Court is the Supplementary Protocol on the Court of Justice, specifically Article 9

thereof. For this Court to have subject- matter jurisdiction over the suit as instituted by the Plaintiff, the subject matter of the suit must fall within the confines of Article 9 of the Supplementary Protocol on the Court.

11. The subject matter of the application filed by the Plaintiff respondent in the instant proceedings is the violation of the right to education and human dignity. They further alleged a violation of the right of peoples to their wealth and natural resources as well as the right of peoples to economic and social development. They claim these rights are guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights.

12. Article 9 of the Supplementary Protocol which governs the jurisdiction of this Court has eight subsections, which grant the Court jurisdiction on several different issues. Second Defendant relied on the provisions of Article 9 (1) (a), (b) and (c) to conclude that the Court lacks jurisdiction as those sub- sections of Article 9 only govern issues relating to the application and interpretation of ECOWAS texts. However, Article 9 has several other sub-sections which grant other forms of jurisdiction to the Court.

13. Under Article 9 (4) of the Supplementary Protocol, the Court clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS. Article 9 (4) stipulates in part that: **The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.**

14. The thrust of Plaintiff's suit is the denial of the right to education for the people of the Federal Republic of Nigeria, denial of the right of people to their wealth and natural resources and the right of people to economic and social developments guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights of which Nigeria is a signatory. The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria, cannot oust the jurisdiction of the Court. Second Defendant's reliance on Article 9 (1)

(a) (b) and (c) of the Supplementary Protocol of the Court to argue that the Court does not have subject-matter jurisdiction over human rights issues is misconceived as they failed to take cognizance of the entire provisions of Article 9. In law, an enactment must be read as a whole. This Court clearly has subject matter jurisdiction over human right violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Artic1e 4(g) of the Revised Treaty of ECOWAS. As the Plaintiff's claim is premised on Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights, the Court does have subject matter jurisdiction of the suit filed by the Plaintiff.

ISSUE 2.
WHETHER THE RIGHT TO EDUCATION IS JUSTICIABLE AND CAN BE LITIGATED BEFORE THIS COURT

15. Second Defendant Applicant contends that the educational objective of the first Defendant, the Federal Republic of Nigeria, contained in Chapter II of the 1999 Constitution of the Federal Republic lies at the heart of the Plaintiff's suit. Second Defendant contends that the provisions of Chapter II of the 1999 Constitution are the directive principles of state policy and are therefore not justiciable. They postulate that the principles of state policy represent the ideals which the Federal Government ought to strive to achieve and do not confer any positive rights on any citizen. They stated further that the Federal Government of Nigeria has absolute powers over educational matters and that by Section 6 (6) (c) of the Constitution, jurisdiction over such issues is reserved exclusively for the Federal High Court. Again, second Defendant stated that though the Constitution has imposed a duty on all the three organs of government to strive to eradicate illiteracy and to provide free compulsory basic education, these are just educational policies which are non-justifiable. In short, the second Defendant contends that the subject-matter of the suit is covered by the provisions of the Nigerian Constitution on the directive principles of state policy and cannot be determined or enforced by this Court.

16. In response, Plaintiff contends that the second Defendant's argument on the non-justiciability and non-enforceability of the right to education before this Court is misconceived. They stated that the right to education is recognized by the African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights as legally enforceable human rights. Plaintiff contends that these international instruments which clearly recognize the right to education as an enforceable human right have been ratified by Nigeria and must be enforced as such.

    Finally, Plaintiff contends that the fundamental objectives and directive principles of state policy in the Nigerian Constitution contain norms which are internationally recognized as enforceable social and economic rights.

17. It is important to assess the basis of the Plaintiff s claims in determining the justiciability or otherwise of his claims with respect to the right of i and whether it can be litigated before this Court. Whilst second Defendant contends that the right to education is one of the fundamental principles of state policy enshrined in the 1999 Constitution of the Federal Republic of Nigeria and is therefore unenforceable, Plaintiff contends that the right to education is one that is internationally recognized as enforceable.

    Plaintiff in instituting the present action relied primarily on the International Covenant on Economic, Social and Cultural Rights as well as the African Charter on Human and Peoples' Rights to allege that there is a right to education which has been breached. Though they factually based their claim on the Compulsory Basic Education Act and the Child's Right Act of the Federal Republic of Nigeria, they alleged a breach of the right to education contrary to Article 17 of the African Charter on Human and Peoples' Rights and not a breach of the right to education contained under Section II of the 1999 Federal Constitution of Nigeria.

18. The directive principles of state policy of the Federal Republic of Nigeria are not justiciable before this Court as argued by second Defendant and that fact was not contested by the Plaintiff. And granted that the provisions under the directive principles of state policy were justiciable,

it would be the exclusive jurisdiction of the Federal High Court, being a matter solely within the domestic jurisdiction of the Federal Republic of Nigeria.

However, the Plaintiff alleges a breach of the right to education contrary to the provisions of the African Charter on Human and Peoples' Rights. The right to education recognized under Article 17 of the African Charter is independent of the right of education captured under the directive principles of state policy of the 1999 Federal Constitution of Nigeria.

19. It is essential to note that most human rights provisions are contained in domestic legislations as well as international human rights instruments. Some of the fundamental human rights, such as the right to life, have even been elevated to the status of "Ius Cogens", peremptory norms of international law from which no derogation is permitted. Hence the existence of a right in one jurisdiction does not automatically oust its enforcement in the other. They are independent of each other. Under Article 4 (g) of the Revised Treaty of ECOWAS, Member States of ECOWAS, affirmed and declared their adherence to the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. The first Defendant is a signatory to the African Charter on Human and Peoples' Rights and reenacted it as laws of the Federal Republic of Nigeria to assert its commitment to same. The first Defendant is also signatory to the Revised Treaty of ECOWAS and is therefore bound by their provisions.

20. It is trite law that this Court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and Article 17 thereof guarantees the right to education. It is also well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court. Therefore, since the Plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second Defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.

ISSUE 3.
WHETHER THE PLAINTIFF LACKS *LOCUS STANDI* TO INITIATE OR MAINTAIN THIS ACTION

21. The second Defendant herein contends that the Plaintiff lacks the requisite *locus standi* to initiate the present proceedings because Plaintiff has failed to show that he has suffered any damage, loss or personal injury in respect of the acts alleged in the suit. They contend that the Plaintiff has no right, interest or obligation that can give them the right to maintain this action; or alternatively that Plaintiff does not have a sufficient or special interest in the performance of the duty sought to be enforced by the institution of this action. Therefore, second Defendant urges the Court to strike out Plaintiff's action for lack of the necessary *locus standi*.

22. Plaintiff, in his reply to the preliminary objection, contends that second Defendant's argument with respect to *locus standi* is based on the restrictive and outdated interpretation of standing, especially in human rights matters. They contend that the modern trend in most national and international jurisprudence is to embrace a more flexible and progressive interpretation of the doctrine of standing, especially in human rights causes. They contend further that with the flexible approach in the interpretation of the doctrine of standing, any citizen is allowed to challenge a breach of a public right in Court. Plaintiff outlined a number of cases in which the sufficient interest or injury test in the determination of standing was rejected in order to buttress their point. Plaintiff concluded that since the right they are seeking to enforce is a public right, they have the requisite standing to maintain the action.

23. Second Defendant relied on a number of Decisions from the Supreme Court of the Federal Republic of Nigeria to support their argument that a Plaintiff cannot sustain an action unless he has personally suffered some injury or has shown that he has a special interest which must be protected; in the absence of that a Plaintiff has no justifiable ground to invoke the jurisdiction of a court. Second Defendant relied on the case of **ADESANYA V. PRESIDENT OF NIGERIA** (1981) NSCC vol.

12 146 at 147; where the Supreme Court of the Federal Republic of Nigeria stated that:

> ***"What constitute a fact of locus standi is the exercise of a right or interest that is "worthy of protection" by Judicial discretion; the matter must attach to a right and obligation".***

24. Second Defendant also relied on the case of **AJAGUNGBADE III V. ADEYELU (2000)** 9 W.R.N. 92 at 99; where the Court stated in part that:

    "there are two tests used in determining the *locus standi* of a person namely:

    (a) The action must be justifiable; and

    (b) There must be a dispute between the parties.

25. Further, second Defendant sought to buttress their point with the Decision in the case of **AG KADUNA STATE V. HASSAN** (1985) 2 NWLR (Pr.7) 483; where the Supreme Court of Nigeria stated inter alia that:

    > **The law is that when a party's standing to sue is in issue in a case, the question is whether the person whose standing is in issue is a proper person to request an adjudication of an issue and not whether the issue itself is justiciable. The question is whether or not a claimant has sufficient justifiable interest or sufferance of injury or damage depends on the facts and circumstances of each case.**

26. Second Defendant also used cases such as **FAWEHINMI V. AKILU** (1987) 11- 12 SCNJ 151 at 200**, OKOYE V. LAGOS STATE GOVERNMENT (1990)** 2 NWLR (Pt.136) 115**, ELENDU V. EKOABA (1995)** 3. NWLR 386**. ADEFULU V. OYESILE (1995)** 5 NWLR (Pt.122) 577 and others to support their contention that for a party to have standing, that party must have suffered some harm or prove to have some special interest which is worthy of protection. These cases clearly support the view put forward by the second Defendant that a party must have suffered injury or have some special interest that

warrants a judicial protection before that party would be clothed with *locus standi* to initiate and sustain a claim in respect of that matter.

27. The Plaintiff, on the other hand, produced a list of judicial decisions, both under domestic and international jurisdictions to argue their claim that there is a shift from a restrictive to a flexible approach to standing in cases of human rights violations and therefore a Plaintiff need not establish that he has suffered injury or has a special right in order to have standing. Instead Plaintiff has to show that the right alleged to have been breached is public in nature and that the matter is justiciable.

28. Plaintiff relied on the case of FERTILIZER CORPORATION KAMAGER UNION v. UNION OF INDIA (1981) A.IR (SC) 344; where it was stated:

    Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law. If a Plaintiff with a good cause is turned away merely because he is not sufficiently affected personally that could mean that some government agency is left free to violate the law. Such a situation would be extremely unhealthy and contrary to the public interest.

    Litigants are likely to spend their time and money unless they have some real interest at stake and in some cases where they wish to sue merely out of public spirit, to discourage them and thwart their good intentions would be most frustrating and completely demoralizing.

29. Plaintiff also relied in an observation in the case of **ABRAHAM ADESANYA V. PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA (1981)** 1 ALL N.L.R 1 at 20, to bolster their argument wherein Fatayi-Williams CJN said thus:

    I take significant cognizance of the fact that Nigeria is a developing country with multi-ethnic society and a written Federal constitution, where rumour mongering is the pastime of the market places and the construction sites. To deny any

member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our legislative Houses, whether Federal or State, is unconstitutional; access to a court of law to hear his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process. In the Nigerian context, it is better to allow a party to go to Court and to be heard than to refuse him access to our Courts. Non-access, to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which law is not! In any case, our courts have inherent powers to deal with vexatious litigants of frivolous claims.

30. Plaintiff relied on other decisions, including A**TTORNEY-GENERAL OF BENDEL STATE V. ATTORNEY GENERAL OF THE FEDERATION (1982)** 2 NCLR 1 **BRITISH AMERICAN TOBACCO V. ENVIRONMENTAL ACTION NETWORK LTD. (2003)** 2 EA 377**.**

    BENAZIR BUTTO V. FEDERATION OF PAKISTAN PLD (1988) (SC) 416**, KAZI MUKHLESUR V. BANGLADESH** 26 DLR (SC) 44**, NAACP V. BUTTON.** 371 US 415 (1963)**, THE SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (IRELAND) LTD. v. COOGAN (1989)** IR 734. to support their stance that in public interest litigation, the Plaintiff need not prove that he has personally suffered injury or that he has a special interest that has to be protected judicially.

31. The authorities cited by both second Defendant and Plaintiff support the viewpoints canvassed by them. However, we think that the arguments presented by the Plaintiff are more persuasive for the following reasons.

32. The doctrine 'Actio Popularis' was developed under Roman law in order to allow any citizen to challenge a breach of a public right in Court. This

doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court.

33. Plaintiff cited authorities from around the globe to support the position that in human rights litigation, every spirited individual is allowed to challenge a breach of public right. Decisions were cited from the United States, Ireland, Bangladesh, Pakistan, India, the United Kingdom and other jurisdictions which all concur in the view that the Plaintiff in a human rights violation cause need not be personally affected or have any special interest worthy of protection.

34. A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the Plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this Court must lend its weight to it, in order to satisfy the aspirations of the citizens of the sub-region in their quest for a pervasive human rights regime.

35. DECISION ON THE PRELIMINARY OBJECTION

a) Whereas the second Defendant filed a preliminary objection that the suit is not justiciable and that the Plaintiff had no *locus standi*ng to bring the action before this Court;

b) Whereas the respondent /Plaintiff argued that the Court has jurisdiction to hear the case on all the issues in the relief sought;

c) Whereas the Court having deliberated on the application and the issues therein together with the response by the Plaintiff;

d) Whereas the Court is satisfied that at this stage prima facie facts have emerged in support of the case that the Plaintiff has proper standing to bring the action and that the matter is justiciable in this Court.

ORDERS

This Court hereby orders that for the foregoing reasons the preliminary objection is overruled and refused accordingly.

COST

This Application having been refused, cost shall be within costs and in favour of the Plaintiff against the second Defendant.

This Ruling is read in the Open Court to the Public this 27th day of October, 2009.

Hon. Justice Hanisne N. DONLI - *Presiding*

Hon. Justice Anthony BENIN - *Member*

Hon. Justice Soumana .D. SIDIBE - *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

THIS 30TH DAY OF NOVEMBER, 2010

SUIT N^O: ECW/CCJ/APP/12/07
JUDGEMENT N^O: ECW/CCJ/JUD/07/10

BETWEEN

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) } ***PLAINTIFF***

V.

1. **FEDERAL REPUBLIC OF NIGERIA**
2. **UNIVERSAL BASIC EDUCATION COMMISSION (UBEC) -**

} ***DEFENDANTS***

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE .N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY ALFRED BENIN** - *MEMBER*
3. **HON. JUSTICE SOUMANA D. SIDIBE** - *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. ***A.A. Mumuni Esq.***
2. ***Sola Egbeyinka Esq.*** - *for the Plaintiff.*

1. ***Yemi Pitan Esq;***
2. ***Tolu Odupe Esq.*** - *for the 1st Defendant.*
3. ***John Gaul Esq.*** - *for 2nd Defendant.*

Human Rights violation, Article* 1, 2, 17, 21 *and* 22 *of ACHPR, Proper party.

SUMMARY OF FACTS

The Plaintiff relying on a report of investigation conducted by the Independent Corrupt Practices Commission (ICPC) on the mismanagement of funds for basic education in 10 States of Nigeria filed this action. He alleged that the first defendant's failure to address all allegations of corruption raised in the report contributed to the denial of the rights of the peoples to enjoy their economic and social right particularly their right to education. The plaintiff then sought this Court's declaration that every Nigerian child is entitled to free compulsory education and that the diversion of the funds of UBEC violates Articles 21 and 22 of the African Charter on Human and Peoples' Rights. The Court was urged to order the defendants to arrest and prosecute erring Public Officials and recognize Primary Teacher's Trade Union. The second defendant submitted that it is not the proper party to be sued in this case.

LEGAL ISSUES

- *Whether or not the 2nd defendant is the proper party to this case.*

- *Whether or not the plaintiff has established a case against the defendants as to entitle it to the reliefs sought.*

DECISION OF THE COURT

The 2nd Defendant being mandated by the law to receive grants from the Federal Government and allocate same to the States and not to disburse such further grants until satisfied that earlier disbursements are properly applied cannot be heard to say that they are not answerable. They are thus proper parties in this action. There must be a linkage between action of corruption and denial of right to education to bring

the action under human rights violation. The plaintiff's allegation of corruption needs to be strictly proven and such matters are for domestic Criminal jurisdiction. This Court thus lacks the competence to order the arrest and prosecution of such offenders which is the exclusive preserve of the Attorney-General.

JUDGMENT OF THE COURT

1. Parties and lawyers

The Plaintiff is a human rights non-governmental organization registered under the laws of the Federal Republic of Nigeria. The first Defendant is a member state of the Economic Community of West African States. The second Defendant is a body set up by the first Defendant to ensure the success of basic education in the country. The Applicant was represented by A. A. Mumuni and Sola Egbeyinka. The first Defendant was represented by Yemi Pitan and Tolu Odupe, whilst the second Defendant was represented by John Gaul.

2. Subject matter of the proceedings

The initiating application complains of violation of the human right to quality education, the right to human dignity, the right of peoples to their wealth and resources, and the right of people to economic and social development, guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights. (ACHPR).

Facts of the case

3. The genesis of this matter, according to the Applicant, is a report of investigations conducted into the activities of the second Defendant. Indeed the investigation centred on the mismanagement of funds allocated for basic education in ten states of the Federation of Nigeria. This report was submitted to the Presidency on April 13, 2006. The exact amount though has not been disclosed.

4. Besides, in October 2007, the Independent Corrupt Practices Commission (ICPC) reported having more than 488 million naira of funds looted from state offices and headquarters of the second Defendant and was still battling to recover another 3.1 billion naira looted by officials of the second Defendant.

5. The Applicant contends that this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria. The result is that Nigeria is unable to attain the level of education that she deserves in that over five million Nigerian children have no access to primary education, among others. The Applicant catalogued a number of factors that have negatively affected the educational system of the country, including failure to train more teachers, non-availability of books and other teaching materials etc.

6. The charge against the first Defendant is that she has "contributed to these problems by failing to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria."

7. The result is that this has "contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education.......SERAP contends that the destruction of Nigeria's natural resources through large scale corruption is the sole cause of the problems denying the majority of the citizens access to quality education."

8. Pleas in law

The Applicant quoted the provisions of Article 4(g) of the 1993 Revised Treaty of ECOWAS, as well as Articles1, 2, 17, 21 and 22 of the ACHPR and submitted that the first Defendant has violated the right to education, the right of the people not to be dispossessed of their wealth and natural resources and the right of the people to economic and social development.

9. Reliefs and Orders sought.

i. A declaration that every Nigerian child is entitled to free and compulsory education by virtue of Article 17 of the African Child's Rights Act, Section 15 of the Child's Rights Act 2003 and Section 2 of the Compulsory Free and Universal Basic Education Act 2004.

ii. A declaration that the diversion of the sum of 3.5 billion naira from the UBE fund by certain public officers in 10 states of the Federation of Nigeria is illegal and unconstitutional as it violates Articles 21 and 22 of the ACHPR.

iii. An order directing the Defendants to make adequate provisions for the compulsory and free education of every child forthwith.

iv. An order directing the Defendants to arrest and prosecute the public officers who diverted the sum of 3.5 billion naira from the UBE fund forthwith.

v. An order compelling the government of Nigeria to fully recognize primary school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policymaking.

vi. An order compelling the government of Nigeria to assess progress in the realization of the right to education with particular emphasis on the Universal Basic Education; appraise the obstacles, including corruption, impeding access of Nigerian children to school; review the interpretation and application of human rights obligations throughout the education process.

The Defence case

10. For their part, the Defendants totally rejected the claims by the Applicant. The Defendants filed separate statements wherein they identified some issues as being material to a determination of this matter. The first Defendant formulated three issues relating to the following:

    1. The court's jurisdiction over this matter;

    2. Failure on the part of the Applicant to exhaust local remedies before coming to this Court;

    3. Failure by the Applicant to establish their claims.

11. The second Defendant set out a number of issues, namely;

    1. Whether the second Defendant is the competent body to answer the allegations made by the Applicant.
    2. Whether the proper parties are before the Court.
    3. Whether the Applicant has established their case.
    4. Whether the Applicant has satisfied the condition precedent to bringing an action before this Court that is exhaustion of local remedies.

12. Preliminary issues

On 27th October 2009, the Court issued a ruling in an application for preliminary objection raised by the defence. These issues about the court's jurisdiction in this matter as well as the exhaustion of local remedies were decided in that ruling. It is thus inappropriate for Counsel to raise the same issues again. The principle of law is clear that when a Court has decided on some issues in the case, the decision creates issue estoppel as between the parties and/or their privies in the present and any subsequent proceedings in which same issue/s is/are raised. Besides, the decision of this Court is final and can only be altered through a revision if the correct procedure is followed. In view of the foregoing, the Court cannot re-open these two issues about its jurisdiction and exhaustion of local remedies.

Analysis of the main issues

13. The key issue is whether, having regard to the record before the Court, the Applicant has established a case against the Defendants or any of them. The other issue about whether the second Defendant is answerable for the education units of the states who they regard as the proper parties to this case will be addressed first. This is because if the second Defendant is a wrong party sued, there will be no point discussing the main issue with reference to them.

14. Among other duties they are mandated by law to perform, the second Defendant stated that they 'receive block grant from the Federal Government and allocate to the States and Local Governments and other relevant agencies implementing the Universal Basic Education......provided that the Commission shall not disburse such grant until it is satisfied that the earlier disbursements have been applied in accordance with the provisions of the Act'

15. It is clear from even a cursory reading of this provision in the Act which the second Defendant themselves relied upon that they have a responsibility to ensure that the funds they disburse to the States, inter alia, are utilised for the purposes for which they were disbursed. Thus the second Defendant cannot be heard to say that if funds given to the States are not properly accounted for they are not responsible, albeit vicariously. It is clear from the use of the mandatory expression 'shall not disburse' that the Act has placed the onus on them to be satisfied that the funds are properly utilised, hence the power given to them to refuse further disbursements. The language of the statute is so clear and unambiguous requiring no interpretation. Thus the second Defendant is a proper party in this action, despite the fact that the ten States mentioned in the Report might also have been joined to this action.

16. Turning next to the main issue, the Applicant relies largely on the ICPC Report which they annexed to their papers filed in this case. The ICPC report uncovered corrupt practices in the management of funds allocated for education. The Applicant further contends that the *"allegations of high level corruption have contributed to series of serious and massive violations of the right to education, including lack of access to quality primary education in Nigeria"*.

17. The Defendants are alleged to have contributed to the denial of education to a lot of Nigerians by failure to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria. This situation has contributed to the

denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of the right to education and other economic and social rights.

18. To begin with, the ICPC report is the product of investigations into the affairs of the basic education sector. And in law such investigative report is not conclusive of the facts stated therein, nonetheless they provide prima facie evidence of the facts investigated. If the report finds that there is evidence of corruption, it behoves the appropriate authority to act further on it, and secure a judicial verdict. It is only then that a person investigated can be said to be guilty of the allegations or findings of corruption contained in the report. And the fact that the report is not conclusive of the facts stated therein explains the use of such words and expressions as ***"allegedly"***, ***"reportedly"***, ***"according to reports"***, in the initiating application.

19. And coming to the crux of the matter, granting that the ICPC report has made conclusive findings of corruption that per se will not amount to a denial of the right of education. Admittedly, embezzling, stealing or even mismanagement of funds meant for the education Sector will have a negative impact on education since it reduces the amount of money made available to provide education to the people. Yet it does not amount to a denial of the right to education, without more. The reason is not far to seek. The Federal Government of Nigeria has established institutions, including the 2nd Defendant to take care of the basic education needs of the people of Nigeria. It has allocated funds to these institutions to carry out their mandate. We believe these are all geared towards fulfilling the right to education. Some officers charged with the duty of implementing the education mandate, are said to have misused, misapplied, embezzled or even stolen part of the funds. The Federal Government and the 2nd Defendant are said to have failed to act against such persons and for that reason, they are said to have denied the right of the peoples of Nigeria to education. There must be a clear linkage between the acts of corruption and a denial of the right to education. In a vast country like Nigeria, with her massive resources, one can hardly

say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education.

20. The Applicant appreciated this last point and so went on to argue that "this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria." This Court cannot accept such sweeping conclusion. It is a serious indictment on authorities of the Federal Republic of Nigeria which calls for strict proof; being a criminal matter. In the absence of such proof, the Court will reject any suggestion of high level corruption in the educational sector which has resulted in a denial of the right to education.

21. The Court takes note that in the course of implementing policies, especially financial policies, if funds are stolen or embezzled or misapplied, it behoves the matter to be dealt with internally, that is at the domestic level. This Court will only hold a State accountable if it denies the right to education to its people.

    Funds stolen by officers charged with the responsibility of providing basic education to the people should be treated as crime, pure and simple or the culprits may be dealt with in accordance with the applicable civil laws of the country to recover the funds. Unless this is done, every case of theft or embezzlement of public funds will be treated as a denial of human rights of the people in respect of the project for which the funds were allocated. That is not the object of human rights violation in this Court where every breach or violation must be specifically alleged and proved by evidence.

22. Indeed the ICPC report itself did not recommend prosecution in the first place. Paragraph (viii) of its recommendations is pertinent and germane to the ongoing discussion, and it reads:

    > *"All illegal and unauthorized payments including transfers, diversion, misapplied funds or fictitious claims discovered during the course of investigation should be*

refunded to the government, failure to accede to this request will lead to criminal prosecution of those involved or the Agency".

23. The Court notes that there is no time frame set in the report for the funds to be recovered. The Applicant has jumped the first step in the implementation of the report and is calling for prosecution which is the last resort.

24. Be that as it may, even if the report had recommended prosecution, this Court will not have the power to order the Defendants to arrest and prosecute anybody to recover state money. It is the duty of the Attorney-General to decide on what matter or who to prosecute, and that power is entirely his to exercise.
    And the Attorney-General is not a community official, within the meaning of Article 10(c) of the Supplementary Protocol on the Court, no. A/SP./1/01/05 that could be ordered for having failed to perform official act.

25. Another order sought by the Applicant was that the government of Nigeria should recognize school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making. There is no evidence in support of this. Besides, this is not a human rights issue, whether the government will include another organization in the planning and execution of its programmes. Be that as it may, the Act which established the second Defendant, which they annexed to their document, shows that the teachers are not ignored as the Applicant wants to imply from the order sought. The Nigeria Union of Teachers, as well as the National Parents/Teachers Association of Nigeria, and the National Teachers Institute are all represented on the board of the second Defendant.

Decision

26. In the light of the foregoing analysis of the facts, the Court is able to decide as follows:

    Relief 1: The Defendants do not contest the fact that every Nigerian child is entitled to free and compulsory basic education. What they earlier on said was that the right to education was not justiciable in Nigeria, but the Court in its earlier ruling of 27th October 2009 in this case, decided it was justiciable under the ACHPR.

27. **Relief 2:** As stated already, the report provides only prima facie and not conclusive evidence of the facts stated therein, and there is no judicial pronouncement on these findings. Also the alleged suspects are not parties before us in this action, so this Court is unable to make any declaration of illegality or unconstitutionality in this matter.

28. **Relief 3:** The Applicant is saying that following the diversion of funds, there is insufficient money available to the basic education sector. We have earlier referred to the fact that embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact; this is normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first Defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.

29. **Relief 4:** The Court cannot grant this order for the arrest and prosecution of the alleged suspects for reasons already explained.

30. **Reliefs 5 and 6:** For lack of evidence these orders are refused.

31. In conclusion, subject to reliefs 1 and 3 which the Court grants in terms as stated above, the Court rejects all the other reliefs and orders sought.

32. Costs.

Since the matter succeeds in part the parties shall bear their own costs.

This Decision has been read in open Court in Abuja this 30th day of November 2010 in the presence of:

Hon. Justice Hansine N. Donli - *Presiding*

Hon. Justice Anthony A. Benin - *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 11TH DAY OF JUNE, 2010

SUIT N^O: ECW/CCJ/APP/04/09
RULING N^O: ECW/CCJ/RUL/03/10

BETWEEN
PETER DAVID - ***APPLICANT***

V.
AMBASSADOR RALPH UWECHUE - ***DEFENDANT***

COMPOSITION OF THE COURT
1. **HON. JUSTICE BENFEITO RAMOS** - *PRESIDING*
2. **HON JUSTICE HANSINE N. DONLI** - *MEMBER*
3. **HON JUSTICE ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY
TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES
1. ***Sola Egbeyinka*** - *for the Plaintiff*

2. ***George Nwokocha Uwechue*** *(SAN) &*
3. ***Onyeka Obiajulu.*** - *for the Defendant*

Human Right violation, access to the Court, jurisdiction of the Community Court of Justice, Article 9 (4) of the Supplementary Protocol, proper party.

SUMMARY OF FACTS

The Plaintiff a national of the Federal Republic of Nigeria and an Inspector in the Nigerian Police Force filed this application against the defendant alleging the violation of his Fundamental Human Rights to property, right to respect and freedom from discrimination. According to the plaintiff he was drafted in January, 2005 on an ECOWAS mission as a security agent to the defendant who was then the special representative of the Executive Secretary of ECOWAS in Cote d'Ivoire. He specifically alleged that out of $294,000.00 (Two hundred and ninety four thousand dollars) which was approved to be paid to him by the defendant only $213,529.00 was paid to him by the defendant despite his repeated demands requesting for the payment of the outstanding balance.

He urged the Court to grant an order compelling the defendant to pay the outstanding estacode allowances being owed him and for general damages of One Million Naira (N1,000,000.00).

LEGAL ISSUES

- *Whether or not the Community Court of Justice has jurisdiction to entertain a suit filed by an individual against another individual.*

- *Whether or not an action for reparation/damages arising from the exercise of official function by a Community Official can be maintained against the official instead of the Community or the institution.*

DECISION OF THE COURT

The Court held that an action for reparation for damages caused against a third party by an act of the Community or by one of its Officials in the exercise of his functions must be filed against the Community. Thus it cannot examine the case in the light of Article 9(1) (f) of the 2005 Supplementary Protocol unless it is an action brought against the Community or any of its Institutions. It therefore held that it has no jurisdiction to entertain the action.

RULING ON THE JURISDICTION OF THE COURT

1. The Plaintiff, **PETER DAVID**, citizen of the Federal Republic of Nigeria, Inspector in the Nigerian Police Force, resident in Abuja, filed an application before the Community Court of Justice, ECOWAS against the Defendant, **Ambassador RAPH UWECHUE**, also citizen of the Federal Republic of Nigeria, resident in Abuja, alleging the violation by the Defendant of his Fundamental Human Rights to property, Right to work under equitable and satisfactory condition, Right to respect and freedom from discrimination as guaranteed by Articles 1, 14, 15, 28 of the African Charter on Human and Peoples' Rights.

The factual background to the Application

2. In January 2003, the Plaintiff was officially drafted on an ECOWAS Mission as a Security agent to the Defendant who was then the Special Representative of the Executive Secretary of ECOWAS in Cote d'Ivoire.

3. The Defendant in a letter signed and dated 30th April, 2004 officially notified the Plaintiff of the confirmation of his temporary assignment which took effect from 1st March, 2003 as Security Orderly, ECOWAS Grade Level G4 in the Office of the Defendant at Abidjan, Cote d'Ivoire.

4. The Defendant also issued and signed a letter dated 30th June, 2004, wherein he confirmed the renewal of the Plaintiff's temporary assignment for a further period of one (1) year from 1st July, 2004 till 30th June, 2005.

5. The sum of US$2,303,000 (Two Million, Three Hundred and Three Thousand United States Dollars) was approved by the President of the Federal Republic of Nigeria for the funding of the Office of the Special Representative of the Executive Secretary in Abidjan, Cote d'Ivoire.

6. The sum of $294,000 (Two Hundred and Ninety Four US Dollars) was approved to be paid to the Plaintiff between the periods of January

2003 to April 2006 but the sum of $213,529 (Two Hundred and Thirteen Thousand, Five Hundred and Twenty Nine US Dollars) was only paid by the Defendant.

7. The Plaintiff wrote a letter to the Defendant requesting for the payment of the outstanding balance of his Estacode Allowances in the sum of $80,471 (Eighty Thousand Four Hundred and Seventy One US Dollars).

8. Despite the letter written to the Defendant and other repeated demands made by the Plaintiff requesting for the payment of his outstanding Estacode Allowances, the Defendant had refused to pay the said sum.

Pleas in law invoked by the Plaintiff

9. Article 4 of the Revised Treaty of the Economic Community of West African States, (ECOWAS), 1993 provides for the applicability of the provisions of the African Charter on Human and Peoples' Rights to Member States of the ECOWAS as follows:

> ***"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:***
>
> ***"4(g) ... recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."***

Article 2 of the Charter Provides that:

> ***"Every individual shall be entitled to the enjoyment of the rights and freedom 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, social origin, fortune, birth or other status"***

10. Furthermore, Article 14 of the African Charter on Human and People's Rights provides that ***"The right to property shall be guaranteed. It may only be encroached upon in the interest of the public need or in the general interest of the Community and in accordance with the provisions of appropriate laws."***

11. Article 15 of the African Charter on Human and People's Rights provides thus ***"Every individual shall have the right to work under equitable and satisfactory condition and shall receive equal pay for equal work."***

12. Article 28 of the African Charter on Human and People's Rights provides thus ***"Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."***

13. From the facts in support of this application, the Plaintiff submitted that his human rights as enshrined in Articles 1, 14, 15, 28 of the African Charter on Human and People's Rights have been violated by the Defendant and that as a Community Citizen by virtue of Article 1 (1) (a) of the Protocol Relating to the definition of Community Citizen, the Plaintiff is entitled to secure the enforcement of his human rights.

14. Accordingly, the Plaintiff s application for the enforcement of his Human Rights to property, Right to work under equitable and satisfactory condition, Right to respect and freedom from discrimination was filed herein pursuant to Article 10 (c) of the Supplementary Protocol, Protocol (A/SP.1/01/05 amending the Protocol (A/P.1/7/91), relating to the Community Court of Justice which provides that access to the Community Court is open to ***"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."***

15. Orders sought by the Plaintiff

i. A declaration that the sum of US$80,471.00 (Eighty thousand four hundred and seventy one dollars) (N11,688.295 (Eleven Million, Six Hundred and Sixty Eight Thousand, Two Hundred and Ninety Five Naira) being the outstanding and unpaid Estacode Allowance being owed the Plaintiff by the Defendant is unlawful and unjustifiable in the circumstance.

ii. An order compelling the Defendant to pay over to the Plaintiff immediately the sum of US$80,471.00 (Eighty thousand four hundred and seventy one dollars) (N11,688.295 – Eleven Million, Six Hundred and Sixty Eight Thousand, Two Hundred and Ninety Five Naira) being the outstanding and unpaid Estacode Allowances being owed the Plaintiff by the Defendant.

iii. An order directing the Defendant to pay over to the Plaintiff the sum of Nl,000,000 (One Million Naira) as general damages due to the psychological trauma, embarrassment, intimidation caused the Plaintiff as a result of the Defendant's attitude.

iv. An order compelling the Defendant to bear the cost of this suit and the Solicitors fees being the sum of N2,000,000 (Two Million Naira) being the Solicitor's fees as well as the cost of this suit.

Facts stated by the Defendant

16. That he was a former Minister of Health of the Federal Republic of Nigeria in 1983 and later on was appointed Ambassador Extra-ordinary and Special Envoy of the President of The Federal Republic of Nigeria on Conflict Resolution in Africa. In January 2003 he was appointed the Special Representative of the Executive Secretary of ECOWAS in Cote d'Ivoire, a position he held until December 2006.

17. The Plaintiff was a member of staff at the ECOWAS Mission in Cote d'Ivoire, and not that of the Defendant, who was also an employee of the said mission.

18. The letter of appointment of the Plaintiff was signed by him the Defendant for and on behalf of the Plaintiffs employer - The ECOWAS, and signed in his capacity as "Special Representative" of the ECOWAS Mission in Cote d'Ivoire.

19. The funds referred to by the Plaintiff in his application belong to the said Mission, an office to which both parties are members of staff.

20. The Plaintiff is not entitled to any part of the funds other than his allowances since he was paid all his approved allowances in accordance with the ECOWAS rates for the period he was attached to the office, that is, from 1st of January, 2003 to 31st December 2005, when Plaintiffs temporary appointment was by a letter dated 30th November 2005 terminated.

21. The Plaintiff is not entitled to the sum of $80,471 or at all in that he was not employed by the Defendant and the Defendant is in no way liable to him for any purported money not paid to the Plaintiff in the course of the Mission.

22. The issue of any money being owed the Plaintiff as his allowance is the responsibility of his employer to whom the Plaintiff should properly approach for it.

Orders sought by the Defendant

23. An order dismissing the application on the ground that:

(i) It discloses no cause of action against the Defendant;

(ii) It is frivolous, ill-conceived, avaricious, unconscionable and outrageous abuse of process of this Honorable Court.

(iii) An order condemning the Plaintiff to pay substantial costs as well as N 3,000,000,00 (three million Naira) as the Defendant's solicitor fees.

Assessment of Jurisdiction of the Court

24. Article 88 of the Rules provides that:

    "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 steps in the proceedings, give a decision".

25. Based on that provision, at the early stage of the proceedings the Court raised the issue of its jurisdiction to entertain the case wherein the parties were invited to present their legal arguments in line with the directive of the Court.

26. The Plaintiff expressed the view that since the claims presented are based on violations of Human Rights recognized in the African Charter on Human and Peoples' Rights by the Defendant, the Court has jurisdiction to adjudicate the case based on Article 9(4) of Supplementary Protocol A/SP.1/01/05 .

27. The Defendant asserted that the reliefs sought by the Plaintiff in its application merely seek the recovery of purported *"outstanding and unpaid estacode allowances"* arising from his temporary employment which does not fall under Article 9 (4) of the Supplementary Protocol which empowers the Court with jurisdiction to determine cases of violation of Human Rights that occur in any Member State.

28. However the Defendant conceded that by the provision of Article 10 (c) of the same Protocol the Plaintiff is entitled to access the Court to present claims related to the employment relationship. But in that case the suit should be brought against the proper party which in the case is not him, but ECOWAS community or ECOWAS institutions that were at the time the actual employers of the Plaintiff. Based on that assertion the Defendant went further to conclude that if the proper party is not present to the dispute, as is the case, the Court has no jurisdiction to entertain it.

29. The Plaintiff opposed that view maintaining that the dispute between the parties arose from violation of his human rights by the Defendant and for that reason the latter, and not any ECOWAS institution, is the proper party to the dispute.

30. In addition to that, the Plaintiff asserted that according to the text of Article 9(4) of aforementioned Protocol, the Community Court of Justice is empowered with jurisdiction on cases of human rights violations that occur within any Member State, regardless of whether such violation is committed by State or individuals.

31. In the instant case, the Plaintiff, Mr. Peter David alleges that the Defendant, Mr. Ralph Uwechue, Ambassador, has violated his Human Rights, as enshrined in the African Charter on Human and Peoples' Rights, in refusing to pay him part of his salary related to the function of Personal Assistant (security) which he had exercised for the former when he was the Special Representative of the Executive Secretary of ECOWAS in Cote d'Ivoire.

32. The Court observes that as submitted before it, and judging by the situations resulting from the conclusions of the Parties, and their declarations at the hearing, the dispute is not between an individual and a State, or between an individual and the Community or its Institutions, but rather, between two individuals.

33. The Court considers that before establishing whether the allegation of the Plaintiff is well founded or not, it should examine and decide first of all, whether the object of the dispute - as emanating from the applications brought and the pleas invoked in support by the Parties, notably by the Plaintiff- fulfills the conditions for the exercise of its jurisdiction.

34. Consequently, the issues posed in order to determine the jurisdiction of the Court are the following: Can the Court adjudicate on cases of human rights violation brought by an individual against another individual? Can an action brought by an individual against another individual come under

disputes relating to the Community and its officials? Can an action for damages arising from an act by a Community institution or Community official be entertained without the Community being sued as the Defendant?

An Action Related to Human Rights

35. It is certain that Article 9(4) of the Protocol relating to the Court of Justice, as amended by Protocol A/SP.1/01/05 grants the Community Court of Justice jurisdiction to determine cases of human rights violation that occur in any Member State of the Community, without pointing out, inasmuch, the party against whom such an action may be brought.

36. A first look at the text of the Article 9(4) may lead to the assumption that since no delimitation is done by the statute, any case of human right violation that occurs within any ECOWAS Member State, no matter who is the perpetrator of the alleged violation, falls under the jurisdiction of this Court. Assuming that such interpretation is correct, as suggested by the Plaintiff, individuals can be sued before this Court for alleged violation of human rights. But, given that almost every dispute involving individuals can be related to human rights, the conclusion is that all those disputes, from small claims between neighbors on the fringes of their properties, through disputes between employees and employers on the amount of wages, as in the instant case, ending in the dispute between spouses on issues like child custody and so on and so forth, would fall under the jurisdiction of the ECOWAS Community Court of Justice.

37. The result of such reading could not be most clear: the mere allegation of human rights violation by any individual against another individual would be enough to lead the Community Court of Justice to replace the role of domestic courts which would become absolutely redundant. In other words, the Community Court of Justice would metamorphose itself from an international jurisdiction into a domestic one, overwhelmed by a flood of all kinds of disputes coming from all Member States.

38. A mere moment's thought is enough to demonstrate that neither the drafters of Article 9(4) of the 2005 Supplementary Protocol on the Court, nor the ECOWAS Authority, the Conference of Heads of State and Government, which enacted it in a statute, would never want such a result and unrealistic task for the Community Court of Justice, a mission never conferred on any international or regional body of a similar nature.

39. At this point the Court would like to observe that the interpreter cannot rely solely on the text of the statutes because sometimes it does not reveal by itself the real meaning it intends to express. In order to discover the real meaning of the text it is also necessary to take into account other elements of interpretation namely the main purpose envisaged by the statute, the social issues it intends to address, the historical context of its drafting and the role it reserves for the institutions it sets up.

40. In this regard the Court emphasizes that it is an international Court established by a Treaty and, by its own nature, it should primarily deal with dispute of international character. Therefore, it essentially applies international law where it has to find out the source of the laws and obligations which bind those who are subject to its jurisdiction. The text of Article 19(1) of the ECOWAS Protocol A/P1/7/91 is clear in this respect:

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

41. As an international Court with jurisdiction over human rights violation the Court cannot disregard the basic principles as well as the practice that guide the adjudication of the disputes on human rights at the international level.

42. Viewed from this angle, the Court recalls that the international regime of human rights protection before international bodies relies essentially on

treaties to which States are parties as the principal subjects of international law. As a matter of fact, the international regime of human rights imposes obligations on States. All mechanisms established thereof are directed to the engagement of State responsibility for its commitment or failure toward those international instruments.

43. A comparative analysis of the different international system of human rights protection, be it on the universal echelon, as obtained in the case of the United Nations Committee on Human Rights (now Council), or at the regional level, as in the case of the European Court of Human Rights or the Inter-American Court of Human Rights, or yet in the case of the African Court of Human and Peoples' Rights, confirms the said conclusion on the State responsibility.

44. Even before the African Commission on Human Rights, the closest reference to this Court, only States parties to the African Charter on Human and Peoples' Rights are held accountable for the violation of the fundamental rights recognized in the said instrument.

45. Up till now the responsibility of the individuals at the international level for the violation of Human Rights is limited to criminal domain, and even in such circumstances, the international courts intervene only on subsidiary grounds, that is to say, where the domestic courts cannot or fail to hold the perpetrators of such violations accountable.

46. From what has been said, the conclusion to be drawn is that for the dispute between individuals on alleged violation of human rights as enshrined in the African Charter on Human and Peoples' Rights, the natural and proper venue before which the case may be pleaded is the domestic Court of the State party where the violation occurred. It is only when at the national level, there is no appropriate and effective forum for seeking redress against individuals, that the victim of such offences may bring an action before an international Court, not against the individual, rather against the signatory State for its failure to ensure the protection and respect for the rights allegedly violated.

47. Within ECOWAS Community, apart from Member States, other entities that can be brought to this Court for alleged violation of human rights are the institutions of the Community because, since they cannot, as a rule, be sued before the domestic jurisdiction, the only avenue left to the victims for seeking redress for grievance against those institutions is the Community Court of Justice.

48. Consequently, the Community Court of Justice does not have jurisdiction to entertain a dispute between individuals arising from alleged violation of human rights committed by one against another.

An Action Related to Community Public Service

49. The dispute between the parties can be analyzed from different angle as an issue arising from an employment relationship. In this case the rights in contention can be related to the financial benefits stipulated in the contract of employment within the framework of an ECOWAS mission in Cote d'Ivoire.

50. A closer look at the statement of facts presented in the initial application reveals that the basic disagreement between the Plaintiff and the Defendant lies on the different understanding of the salary amount and allowances the former was entitled to, under his contract of employment.

51. The factual background suggests a typical dispute between an employee and his employer wherein the instant case, the Plaintiff, Mr. Peter David, having been asked during the Court hearing who his employer was, replied that his employer was Ambassador Ralph Uwechue, the Defendant.

52. The Court stresses, however, that within the framework of the Community, the employer cannot be a natural person, namely the Defendant. The employer should necessarily be the Community or one of its institutions.

53. The Court cannot therefore examine a case within the context of an action being entertained in the light of a dispute between the Community and its officials, as provided for in Article 9 paragraph 1 (f), as amended by the 2005 Supplementary Protocol, except if the action is brought against the Community or one of its institutions, which should be the employer.

54. The Court therefore holds that if the action is a dispute on Community public service it shall not be competent to adjudicate the case because those disputes should necessarily be between an official and the Community or one of its institutions, as stated in the Article 9(1)(f) of the 2005 Supplementary Protocol.

An Action for Damages against a Community Official

55. The instant action can also be considered as an action for extra-contractual liability against an official of the Community, who at the time of the incident was the Special Representative of the Executive Secretary of the ECOWAS in Cote d'Ivoire.

56. In fact the English version of Article 9 paragraph leg) of the said Supplementary Protocol grants the Court the jurisdiction to adjudicate on any dispute relating to: *"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"*.

57. At this juncture it is worthy to point out a significant difference between the two texts of English and French version.

    Whereas the English version provides that the action can be brought alternatively against a *"Community institution"* or *an "official of the Community"*, the French version does not present the same alternative and does not state against whom the action shall be brought. According to the French version of article 9 (g), the Court has jurisdiction on *"les actions en reparation des dommages causes par une institution de*

la Communaute ou un agent de celle-ci pour tout acte commis ou toute omission dans I'exercice de ses fonctions". So, the possibility of bringing the action either against the Community or against the Official of the Community provided in the English version is neither confirmed by the French version nor by the Portuguese one.

58. Bearing in mind that discrepancy, the said Article 9(1) (g) of English version cannot be interpreted or construed only on its wording. It must be read and construed together with other provisions of the same Protocol on the Jurisdiction of the Court, other Community texts and general principles of Administrative Law.

59. In fact, the same Article 9 (2) provides that:

> ***"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".***

60. From the text above cited it is clear that it is the *"Community"* itself (not its *"institutions"*, neither its *"officials"*) that is officially held liable and shall be compelled to pay for any damages caused by its institutions or its officials, in the performance of official duties or functions. It is therefore the "Community" which shall bear full responsibility for such damages.

61. Article 2(d) of the Principles of Staff Employment of ECOWAS confirms this interpretation, in providing that:

> ***"The Community shall at all times ... accept full civil liability for any professional misconduct on the part of its staff during or in the performance of their official duties".***

Thus this is a general principle of administrative law, which dictates that the public legal person shall answer for acts committed by its officials in the exercise of their functions.

62. At the European Union, we find the same principle of liability of the Community for the acts of its officials. Indeed, Article 215 (2) of the Treaty establishing the European Economic Community provides that:

> ***"As regards non-contractual liability, the Community shall, in accordance with the general principles common to the laws of Member States, make reparation for any damage caused by its institutions or by its employees in the performance of their duties".*** On its part, Article 178 provides that ***"The Court of Justice shall be competent to hear cases relating to compensation for damage as provided for in Article 215, second paragraph".***

63. The principle of liability of legal persons, namely the State, institutions or corporate bodies, for the acts of their officials, is also present in the municipal law of ECOWAS Member States.

64. The Court thus considers that any action for reparation of damages caused to a third party by an act of the Community or by one of its institutions or its officials, in the exercise of their functions, must necessarily be brought against the Community.

65. As emphasized by Vlad Constantinesco et al in a Commentary on Article 178 cited above, *"The action must be aimed at the Community. This requirement means that the Court has jurisdiction only if the cause of the alleged damage may be attributed to the Community"*. Consequently, the Community must necessarily be the Defendant. Otherwise the Court will not have jurisdiction to adjudicate the dispute.

DECISION

66. Whereas the Court has no jurisdiction to entertain disputes between individuals on human rights violations.

67. Whereas in the matter of community public service only disputes between the Community and its officials fall within the jurisdiction of the Court;

68. Whereas any action brought for reparation of damages caused against a third party by an act of the Community or by one of its officials, in the exercise of their functions, must necessarily be filed against the Community;

69. The Court sitting and adjudicating in public, in the Community Court of Justice, in Abuja hereby holds that it has no jurisdiction to adjudicate on the case brought by the Plaintiff.

70. Accordingly, orders that the case be struck off the cause list.

71. The Defendant is entitled to costs.

This decision is delivered in the open Court in the presence of the parties in accordance with the Rules of this Court on Friday, the 11th day of June, 2010.

Hon. Justice BENFEITO RAMOS **-** *Presiding Judge*

Hon. Justice .H. N. DONLI **-** *Member*

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 FRIDAY, THE 10TH DAY OF DECEMBER, 2010

SUIT N^{O}: ECW/CCJ/APP/08/09
RUL. N^{O}: ECW/CCJ/RUL/07/10

BETWEEN

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT (SERAP) — *PLAINTIFF*

V.

1. **THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA**
2. **THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF THE FEDERATION**
3. **NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC)**
4. **ELF PETROLEUM NIGERIA LIMITED**
5. **SHELL PETROLEUM DEVELOPMENT COMPANY (SPDC)**
6. **AGIP NIGERIA PLC**
7. **CHEVRON OIL NIGERIA PLC**
8. **TOTAL NIGERIA PLC**
9. **EXXONMOBIL CORPORATION** -

— *DEFENDANTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE M. BENFEITO RAMOS** - *PRESIDING*
2. **HON. JUSTICE H. N. DONLI -** *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN -** *MEMBER*
4. **HON. JUSTICE CLOTILDE MEDEGAN -** *MEMBER*
5. **HON. JUSTICE E. MONSEDJOUENI POTEY -** *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH *Esq. - CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

Mr. A. A. Mumuni with Sola Egbeyinka *- for the Plaintiff*

Mr. T. A. Gazali for 1st and 2nd Defendants

Mr. Dafe Akpedeye SAN with ***Aruoture John*** *- for the 3rd Defendant*

Prof. Oditah QC, SAN with ***Jennifer Awa*** *- for the 4th Defendant*

Mrs. M. A. Essien, SAN with ***Mr. Aham Ekejelam*** and
Mr. C. B. Sigalo *- for the 5th and 9th Defendants.*

Mark Mordi with ***Mrs. O. Aliu*** *- for the 6th Defendant.*

Mr. N. A. Idakwuo with ***Mr. G. A. Ochegwu*** *- for the 7th Defendant.*

Mr. F. R. Onoja with ***Isah Alidu*** *- for the 8th Defendant.*

Legal Personality -locus standi - competence of Court - Access to Court.

SUMMARY OF FACTS

The Applicant, a Human Rights Non-Governmental Organisation, registered under Nigerian Laws, instituted this action against the President of Nigeria, the Attorney-General of Nigeria and seven (7) oil producing companies operating in the Niger Delta Region of Nigeria, for oil related pollution and environmental damages and for wide spread and unchecked human rights violations related to the oil industry. The 3rd - 9th Defendant oil companies raised preliminary objections challenging the competence of the plaintiff to institute the action and the jurisdiction of the Court to deal with disputes against companies.

LEGAL ISSUES

Whether the Plaintiff is a juridical person or legal entity under Nigerian law, and whether it has the locus standi to maintain this action. Whether the Court has jurisdiction to adjudicate on a suit against companies.

DECISION OF THE COURT

1. *The Plaintiff is an entity duly and legally registered under Nigerian laws. An NGO duly constituted according to national law of any ECOWAS Member State can file complaints against human rights violations even where the victim is not just a single individual, but a large group of individuals or even entire communities.*

2. *States and individuals can be held accountable internationally, while companies cannot. The process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts because companies are not parties to the treaties that International Courts*

enforce. The only available alternative is to sue companies before domestic Courts.

Only Member States and Community Institutions can be sued before the Court for alleged violation of Human Rights.

RULING OF THE COURT

ON PRELIMINARY OBJECTIONS BY THE DEFENDANTS

1. The Plaintiff, the Socio-Economic Rights and Accountability Project (SERAP), a Human Rights Non-governmental Organization registered under Nigerian Laws, and whose mandates and objectives include the promotion of respect for socio-economic rights of Nigerians, through litigation, research and publications, advocacy and monitoring filed on 24th July 2009 an application against the Defendants for alleged violation of Human Rights in the region of Niger Delta, Federal Republic of Nigeria.

2. The 1st Defendant is the President of the Federal Republic of Nigeria and Commander-in Chief of the Nigerian Armed Forces. The 2nd Defendant is the Attorney - General of the Federation, and as such the Chief Law Officer of the Federation. The 3rd Defendant is a state-owned Nigerian National Petroleum Corporation (NNPC), which is the majority stakeholder in all joint ventures. The 4th Defendant is Shell Petroleum Development Company (SPDC), a subsidiary of Royal Dutch Shell, is the main operator on land, and has 30% of oil joint ventures. The 5th Defendant is Elf Petroleum Nigeria Ltd, and has 10% of the joint ventures. The 6th Defendant is Agip Nigeria PLC, and has 5% of the joint ventures. The 7th Defendant is Chevron Oil Nigeria PLC. The 9th Defendant is Total Nigeria PLC. The 9th Defendant is Exxonmobil Corporation.

3. The complaint is based on violations of the right to adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment; and to economic and social development - as a consequence of: the impact of oil – related pollution and environmental damage on agriculture and fisheries; oil spills and waste materials polluting water used for drinking and other domestic purposes; failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws and regulations to protect the environment and prevent pollution.

NARRATION OF FACTS

4. The Applicant alleges that the Niger Delta, a region of Federal Republic of Nigeria, has suffered for decades from oil spills, which occur both on land and offshore. Oil spills on land destroy crops and damage the quality and productivity of soil that communities use for farming. Oil in water damages fisheries and contaminates water that people use for drinking and other domestic purposes. Widespread and unchecked Human Rights violations related to the oil industry have pushed many people deeper into poverty and deprivation, fuelled conflict and led to a pervasive sense of powerlessness and frustration.

5. Hundreds of thousands of people are affected, particularly the poorest and other most vulnerable sector of the population, and those who rely on traditional livelihoods such as fishing and agriculture. However, the Human Rights implications have received little attention from the government of Nigeria or the oil companies, the Defendants herein.

6. Devastating activities of the oil industry in the Niger Delta continue to damage the health and livelihoods of the people of the area. The failure of the oil companies and regulators to deal with them swiftly and lack of effective clean-up greatly exacerbates the Human Rights and environmental impacts of such spills.

7. Both African Commission on Human and Peoples' Rights and the UN Human Rights Committee have expressed serious concern about pollution and called on the government of Nigeria to take urgent action to deal with the Human Rights impacts of oil industry pollution and environmental degradation. However, the Defendants have failed individually and/or collectively to remedy the situation.

8. On 14th November 2005, a Federal High Court of Nigeria ruled that gas flaring in the Iwerekhan community of Delta State was a violation of the constitutional guaranteed rights to life and dignity, which include the right to a "clean, poison-free, pollution-free, healthy environment." Niger

Delta provides a stark case study of the lack of accountability of a government to its people and of multinational companies' almost total lack of accountability when it comes to the impact of their operations on Human Rights.

9. The environmental damage that has been done, and continues to be done, as a consequence of oil production in the Niger Delta, has led to serious violations of Human Rights. People living in the Niger Delta have to drink, cook, and wash with polluted water; they eat fish contaminated with oil and other toxins and the land they use for farming is destroyed because of the lack of respect for the ecosystem necessary for their survival. After oil spills the air they breathe reeks of oil and gas and other pollutants resulting in breathing problems, skin lesions and other health problems, but their common concerns are not taken seriously or addressed.

10. The Defendants individually and / or collectively are internationally obligated to respect, protect, promote, ensure and fulfill the right to an adequate standard of living in the Niger Delta.

11. The Federal Republic of Nigeria is a signatory to the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the African Charter on Human and Peoples' Rights. The Federal Republic of Nigeria is also a signatory to the Revised Treaty of the Economic Community of West African States dated 24th July 1993.

12. Although the government of Nigeria has some regulatory systems in place, the evidence from the Niger Delta is that these do not work. By failing to deal adequately with corporate actions that harm Human Rights and the environment, the government of Nigeria has compounded the problem. A culture of impunity has been reinforced for oil companies in the Niger Delta because of a lack of effective sanctions for bad practices that undermine Human Rights.

13. The failure of the government to allocate sufficient funding, via NNPC, to ensure safety and prevent pollution related to oil operations has contributed to violations of the Human Rights of the people of the Niger Delta. However, government's failure to protect rights does not absolve the non-state actors (Defendants herein) from responsibility for their actions and the human rights impact thereof.

14. When companies undermine or abuse Human Rights, it is sometimes the result of genuine lack of knowledge, but more often it is a consequence of lack of due diligence and proper planning, or because of deliberate actions. The Defendants individually and/or collectively either actually caused the Human Rights harms herein highlighted or contributed to them significantly.

15. The 4th - 9th Defendants herein aided and abetted the 1st - 3rd Defendants in the violations of Human Rights highlighted above. The 4th - 9th Defendants are active participants in the serious violation of the Human Rights of the Niger Delta people.

ORDERS SOUGHT BY APPLICANT

16. **A DECLARATION** that anyone in the Niger Delta is entitled to the internationally recognized human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to socio-economic development; and the right to life and human security and dignity.

17. **A DECLARATION** that the failure and/or complicity and negligence of the Defendants individually and/or collectively to effectively and adequately clean up and remediate contaminated land and water; to address the impact of oil-related pollution and environmental damage on agriculture and fisheries; and to establish an effective system of monitoring the impact of oil on humans, is unlawful and a breach of international Human Rights obligations and commitments as it violates

the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

18. **AN ORDER** directing the Defendants to ensure full enjoyment of the people of Niger Delta to an adequate standard of living, including adequate access to food, to health care, to clean water, to clean and healthy environment; to socio-economic development; and the right to life and human security and dignity.

19. **AN ORDER** directing the 1st and 2nd Defendants to hold the 4th, 5th, 6th, 7th, 8th, and 9th Defendants responsible for their complicity in the continuing serious Human Rights violations in the Niger Delta.

20. **AN ORDER** compelling the 1st and 2nd Defendants to solicit the views of the people of the area throughout the process of planning and policymaking on the Niger Delta.

21. **AN ORDER** directing the government of Nigeria to establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean-up and prevent pollutions and damage to Human Rights.

22. **AN ORDER** directing the government of Nigeria to carry out a transparent and effective investigation into the activities of oil companies (3rd - 9th Defendants herein) in the Niger Delta and to bring to justice those suspected to be involved and / or complicit in the violations of Human Rights highlighted above.

23. **AN ORDER** directing the Defendants individually and / or collectively to pay adequate compensation of 1 Billion Dollars (USD) ($1 billion) to the victims of Human Rights violations in the Niger Delta, and other forms of reparation that the Honorable Court may deem fit to grant.

24. The Applicant in filing this application is relying on the following:

    a) African Charter on Human and Peoples' Rights.

    b) The International Convention on Civil and Political Rights.

    c) The Rules of the Community Court of Justice.

    d) The Supplementary Protocol A/SP.1/01/05 Amending the Protocol (A/Pl/7/91) Relating to the Community Court of Justice.

25. The Initiating Application was duly served on the Defendants who have filed their Preliminary Objections respectively, except the 1st and 2nd Defendants who are yet to respond to the application.

PRELIMINARY OBJECTIONS BY DEFENDANTS

26. The 3rd Defendant began its defence by objecting to the competence of the Plaintiff to institute this action alleging that the Plaintiff does not have access to this Honourable Court. In addition to that, the 3rd Defendant contends that the jurisdiction given to the Court does not extend to disputes between individuals and therefore the Court lacks jurisdiction over the 3rd Defendant. The 3rd Defendant further states that the Plaintiff does not have *locus standi* to institute the action for and on behalf of the people of Niger Delta. Finally the 3rd Defendant asks the Court to stop the Plaintiff from relitigating issues and claims which have been settled or pending before competent courts in Nigeria.

27. The 4th Defendant starts its preliminary objection contending that the Plaintiff is not a legal person under Nigeria law and as such it has no capacity to institute proceedings before the Court. The 4th Defendant aligns itself with the 3rd Defendant on the issue of jurisdiction saying that the ECOWAS Court of Justice is not competent to adjudicate the dispute brought to it because it is neither a member of ECOWAS nor a Community Institution and is not otherwise subject to the jurisdiction of the Court.

28. Going further in its objection the 4th Defendant states that the instruments set out in section 8 of the application namely the ECOWAS Revised Treaty, African Charter on the Rights and Welfare of the Child, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Universal Declaration on Human Rights have not been incorporated into Nigerian domestic law and are therefore incapable of being sources of enforceable obligation on the part of the 4th Defendant who is a private legal person existing solely under Nigerian law. Moreover, although the African Charter on Human and Peoples' Rights has been incorporated into Nigerian law by the African Charter on Human and Peoples' Rights Act 1983, the ECOWAS Court is not one of the courts specified under section 6(5) of the Nigerian Constitution 1999 as having jurisdiction to adjudicate in respect of alleged infractions of domestic Nigerian law.

29. In any event the 4th Defendant contends that the Plaintiff has no cause of action against it in respect of the matters the subject of these proceedings.

    The preliminary objection is concluded by the allegation that the claims asserted in the proceedings are statute barred pursuant to Article 9(3) of the Protocol on the Community Court of Justice as amended by Article 3 of the Supplementary Protocol of 2005 (A/SP.1/01/05), because the oil spills alleged in the application occurred prior to June 2006 and therefore more than three years before the commencement of these proceedings on 23 July 2009.

30. The 5th Defendant bases its preliminary objection essentially on the same grounds invoked by the 3rd and 4th Defendants, that is lack of *locus standi* of the Plaintiff, absence of reasonable cause of action, incompetence of the Court to deal with the claims against the Defendants, action being statute barred, the non-disclosure by the Plaintiff of any authority to allow it institute the proceedings on behalf of any community in Niger Delta and finally that the Plaintiff is not a legal person under Nigerian law with capacity to lodge the suit.

31. The 6th Defendant apart from relying on the same objections raised by the 3rd 4th and 5th Defendants contends that the rights alleged to be infringed by it are economic and social rights and therefore are not justiciable as to confer jurisdiction on the Court.

32. The 7th Defendant's objection is on the grounds that the Plaintiff has no cause of action against it as its activities are solely on shore, to wit, marketing of oil products, and not oil exploration or production. In addition to that the 7th Defendant aligns itself with the 3rd, 4th, 5th, and 6th Defendants on the issues of limitation of action and *locus standi*.

33. The 8th and 9th Defendants align themselves with the issues raised by the other Defendants. The 9th Defendant also submits that the instruments relied on by the Plaintiff are unenforceable against it as a private person existing under the laws of the United States of America.

34. All Defendants who filed preliminary objection requested the Court to dismiss the proceedings against them with substantial costs against the Plaintiff.

PLAINTIFF'S RESPONSE TO THE PRELIMINARY OBJECTION BY THE DEFENDANTS.

35. In response to the objection raised by those Defendants the Plaintiff contends that the arguments they presented are fundamentally flawed, based on mistaken principles of law, and cannot be sustained having regard to sound legal reasoning established by the Court's Jurisprudence and other National and International jurisprudence.

36. The Plaintiff submits that, the 3rd, 5th, 6th, 8th &9th Defendants' argument on its legal capacity before the ECOWAS Court cannot stand because it is based on the limited and outdated interpretation of standing, especially in matters of Human Rights. The Plaintiff pointed out that the doctrine of "*locus standi*" has since been relaxed in favor of public interest litigation.

It relied on the case of **Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) V. The Federal Republic of Nigeria & Anor. Suit No ECW/CCJ/APP/08/08**.

37. On the issue of Jurisdiction raised by the Defendants, the Plaintiff contends that the Competence and Jurisdiction of the Court is not limited to adjudicating cases involving ECOWAS or Community Institutions. It submitted that the Court has both jurisdiction and the subject matter competence, to hear the present suit and that the Defendants are resident in the territory of a Member State of ECOWAS, and therefore subject to the jurisdiction of this Honourable Court.

38. The Plaintiff also contends that there is nothing in the Court's legal instruments to suggest that the 4th - 9th Defendants have to be Members of the ECOWAS or Community Institutions before it can be sued before an International Court like this one.

39. The Plaintiff stated further that the fact that the Defendants are private legal persons does not lessen their responsibility for the violations of Human Rights as guaranteed under the African Charter which the Court has correctly stated that it has jurisdiction to interpret and apply. He relied on Article 4(g) of the Revised Treaty of ECOWAS 1993, and the Ruling in **Registered Trustees of the Socio-Economic and Accountability Project (SERAP) V. Federal Republic of Nigeria & Anor. (supra)**. He also referred to the case of **Alhaji Hammani Tijani V Federal Republic of Nigeria & 4 Ors. Suit No ECW/CCJ/APP/01/06** and the case of **Chief Ebrimah Manneh V The Republic of The Gambia Suit No ECW/CCJ/APP/03/08.**

40. The Plaintiff also contends that under International Human Rights Law, people whose rights are violated should have access to effective remedy and that multinational corporations like the 3rd - 9th Defendants have obligation under International Law not to be complicit in Human Rights violations. He referred to Article 10(c) of the Supplementary Protocol (A/SP.1/01/05 Amending the Protocol (A/P.1/7/91) relating to the Court.

41. In addition to that, the Plaintiff stated that the present suit is primarily based on the violations by the Defendants of the provisions of the African Charter on Human and Peoples' Rights, which has been ratified by the Nigerian Government (a member of ECOWAS) and incorporated into Nigerian domestic laws, and therefore constitutes sufficient source of enforceable obligations on the Defendants.

42. On the question of whether this suit amounts to re-litigating issues and claims which have been settled or pending before the competent courts in Nigeria, the Plaintiff submits that the argument of the 3rd Defendant is misleading, as the present suit is distinctively different from any other previous cases, that this suit raises fresh, ongoing and continuing Human Rights violations in the Niger Delta. He relied on the case of **ALHADJI HAMMANI TIDJANI (supra).**

43. On the absence of reasonable cause of action raised by the Defendants the Plaintiff contends that given the weight of the information relied on in its application to the Court, including the report on the Niger Delta published by Amnesty International in 2009, it is misleading to argue that the present suit has not disclosed a reasonable cause of action against them. He referred to the Nigerian Case of **Thomas V. Olufosoye (2004) 49 WRN 37 S. C**. on the definition of "reasonable cause of action".

44. He further stated that the 4th, 5th, 7th, and 9th Defendants continuous action of extraction, dredging in the Niger Delta, contributes to the serious violations of the Human Rights recognized and guaranteed by the African Charter on Human and Peoples' Rights.

45. On the issue of its capacity to institute this suit, the Plaintiff contends that it is duly and legally registered under the Company and Allied Matters Decree 1 of 1990 of the Federal Republic of Nigeria with Certificate of Incorporation (CAC/IT/NO.17206) attached and marked ANNEXURE "A" in the Plaintiffs Brief of Argument. The Plaintiff further relied on its observer status with the African Commission, and also that the Court in the case of **Registered Trustees of the Socio-Economic**

Rights and Accountability Project Vs The Federal Republic of Nigeria and Anor. Suit No ECW/CCJ/APP/08/08, correctly observed that the "Plaintiff (SERAP) is a Human Rights non-governmental organization registered under the Laws of the Federal Republic of Nigeria".

46. In response to the Defendant's argument that the present suit is statute barred, the Plaintiff contends that through the "continuing violation" doctrine, Courts have recognized an exception to the rigid application of the statute of limitation. The Plaintiff referred to the case of **ALHADJI HAMMANI TIDJANI** (supra).

47. The Plaintiff urges the Court to dismiss the Preliminary Objections in its entirety as it lacks merit, and pray the Court to entertain and determine the present suit.

CONSIDERATION OF THE GROUNDS AND ARGUMENTS OF THE PARTIES

Applicability of the African Charter on Human and Peoples' Rights, and Other International Human Rights Treaties

48. Article 4 of the Revised Treaty of the Economic Community of West African States (ECOWAS), 1993 provides for the applicability of the provisions of the African Charter on Human and Peoples' Rights to Member States of the ECOWAS.

    Article 1 of the African Charter on Human and Peoples' Rights provides that:

    > ***"The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other means to give effect to them"***

Article 2 of the Charter provides that:

> ***"Every individual shall be entitled to the enjoyment of the rights and freedom 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, social origin, fortune, birth or other status".***

49. The same African Charter on Human and Peoples' Rights, Article 22 also provides that:

> ***"(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.***
>
> ***(2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development"***

Article 24 provides that:

> ***"All peoples shall have the right to a general satisfactory environment favourable to their development."***

50. Under international Human Rights law, people whose rights are violated should have access to effective remedy. International Human Rights treaties also require that States must take steps to protect peoples' economic, social and cultural rights from actions of non-state actors that would undermine the enjoyment of those rights.

ANALYSIS BY THE COURT

51. The issues raised by the Defendants that require analysis from the Court are the following: (a) The existence of the Plaintiff as a juridical person or legal entity under Nigeria law; (b) the capacity or *locus standi* of the Plaintiff to institute proceedings for alleged violation of human rights that affects people living in the region of Niger Delta; (c) the jurisdiction or

competence of the Court to deal with the suit lodged against the Defendants who are not Member States of ECOWAS, Community Institutions or Community Officials; (d) the existence or absence of a reasonable cause of action for the Plaintiff to sue the Defendants; (e) whether the Plaintiff's claims are statute barred; (f) enforceability of economic and social rights.

(a) On the existence of the Plaintiff:

52. The issue of the existence of the Plaintiff to access the Court was raised by the 3rd Defendant who bases its objection on the fact that the Plaintiff filed the action on behalf of the people of Niger Delta who is not a person known to law, and therefore cannot sue or be sued. To buttress that argument the 4th Defendant also stated that the Plaintiff itself is not a legal person under Nigerian Law.

53. This Court holds that the consideration made about the Niger Delta region or people from Niger Delta as a non-existing entity is based on the assumption that the action is a representative one, that is, the application was filed on behalf of people from Niger Delta. That assertion is, however, wrong because the Plaintiff in these proceedings is not the people from Niger Delta but the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP), a nongovernmental organization acting on its own without claiming to represent anyone else.

54. With respect to the existence of the Plaintiff itself and the regularity of its constitution under Nigerian Law, what emerges from the evidence produced before the Court, is that the Plaintiff is an entity duly and legally registered under the Company and Allied Matters Decree 1 of 1999 of the Federal Republic of Nigeria with Certificate of Incorporation (CAC/IT/NO.17206), as confirmed by ANNEXURE A in the Plaintiff's Brief of Argument. Furthermore, Plaintiff's legal capacity was admitted by this Court in a previous case involving the Plaintiff in **Registered Trustees and Accountability Project v. Federal Republic of Nigeria & Universal Basic Education Commission**. In a Ruling delivered on

27/10/2009 the Court stated thus ***"The Plaintiff (SERAP) is a human rights non-governmental organization registered under the Laws of the Federal Republic of Nigeria"***. Consequently, in the absence of compelling evidence to the contrary, the Court holds that the Plaintiff is a legal entity duly constituted.

(b) On the *locus standi* of the Plaintiff

55. With respect to the alleged lack of *locus standi* by the Plaintiff, the analysis of the Court firstly relies on the nature of the dispute brought before it for adjudication. In fact, the claim presented in the application is related to the alleged violation of the Human Rights of the people who inhabit the Region of Niger Delta. The framework presented in the initiating application is not only of violation of an individual's rights, but of rights of entire communities as well as environmental devastation without sufficient and protective intervention from public authorities.

56. There is a large consensus in international Law that when the issue at stake is the violation of rights of entire communities, as in the case of the damage to the environment, the access to Justice should be facilitated.

57. Article 2 (5) of Convention on ***"Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter"*** defines the ***"public concerned"*** with environment protection as ***"public affected or likely to be affected by, or having an interest in the environment decision-making. For the purposes of this definition nongovernmental organization promoting environment and meeting requirements under national law shall be deemed to have an interest"***.
Article 9 of the same instrument confirms the access to justice to the public concerned as defined in Article 2 (5).

58. Although the Convention is not a binding instrument on African States, its importance, as a persuasive evidence of an international communis opinion juris in allowing NGOs to access the courts for protection of Human Rights related to the environment, cannot be ignored or underestimated by this Court.

59. The capacity of NGOs to lodge complaints related to Human Rights is also recognized by The American Convention on Human Rights which provides in its Article 44 "that any person or group of persons, or any non governmental entity legally recognized in one or more member states of the organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a state party". This more liberal *locus standi* has been welcomed and recommended for the African Continent (Magnus Killander, The African Regional Human Rights System and Other Regional Systems: A Comparative Analysis, in Judiciary Watch Report, Publication from The Kenyan Section of the International Commission of Jurist, page. 182)

60. Article 33 of The Rules of Procedure of African Court of Justice and Human Rights also opens the door of that Regional Court to nongovernmental organizations which has observer status before the (African) Commission provided the requirements of Article 34 (3) of the Protocol are met. That is a solution that comes directly out of the African Commission on Human and Peoples' Rights experience. In its decision in **SOCIAL AND ECONOMIC RIGHTS ACTION CENTRE (SERAC) AND ANOTHER V. NIGERIA (2001)** AHRLR 60 (ACHPR 2001) the African Commission commended the role of NGOs and the "usefulness of action popularis, which is wisely allowed under African Charter".

61. Based on those authorities, and taking into account the need to reinforce the access to justice for the protection of human and people rights in the African context, the Court holds that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions, can file complaints against Human Rights violation in cases that the victim is not just a single individual, but a large group of individuals or even entire communities.

62. Thus, in considering the social purposes of the Plaintiff and the regularity of its constitution it does not need any specific mandate from the people of Niger Delta to bring the present lawsuit to the Court for the alleged violation of human rights that affect people of that region.

(b) Competence of the Court

63. The Community Court of Justice, established by Article 15 of ECOWAS Treaty is the main judicial organ of the Community. The Supplementary Protocol (AP/SP.1/01/05) modified the ECOWAS Treaty and conferred on the Court competence to determine cases of Human Rights violation that occur in any Member State of the Community. The Protocol on Democracy and Good Governance imposes on the States the obligation to apply the African Charter on Human and People's Rights as well as other International instruments in their respective territories. The Federal Republic of Nigeria signed the ECOWAS Treaty as well as other community instruments like the Protocols on Democracy and Good Governance and on the Competence of the Community Court of Justice.

    Therefore, there is no doubt with respect to the Jurisdiction of the Court of Justice to adjudicate any case of alleged violation of the Human Rights that occurs in the Federal Republic of Nigeria and for which it should be held accountable.

64. But the conclusion on the jurisdiction of the Court over the Federal Republic of Nigeria does not respond to the objection raised by the Defendants who contend that not being parties to the Treaty or other ECOWAS legal instruments, they cannot be sued before the Court.

65. That objection calls for the consideration by the Court of one of the most controversial issues in International Law which relates to the accountability of Companies, especially multinationals corporations, for violation or complicity in violation of Human Rights especially in developing countries. In fact, one of the paradoxes that characterize International Law presently is the fact that States and individuals can be held accountable internationally, while companies cannot.

66. This anomaly has been the reason for growing concern from Academia and institutions committed to the promotion and protection of Human Rights around the world. In an article entitled "Separating Myth from Reality about Corporate Responsibility Litigation" published in the Journal

of Economic Law (2004) 263, 265, Harold Hongju Koh makes the following observations with respect to the issue under discussion: ***"If states and individuals can be held liable under international law, then so too should be corporations for the simple reason that both states and individuals act through corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations of Human Rights through the mere artifice of corporate formation?"***

67. The same concern is shared by the United Nations High Commissioner for Human Rights in its Report on Corporate Responsibility and by the Committee on Legal Affairs of the European Parliamentary Assembly in its Report on Human Rights and Business presented in September this year of 2010.

68. This need to make corporations internationally answerable has led to some initiatives, namely the nomination of a Special Representative of the Secretary General of the United Nations whose Report titled *"Protect, Respect and Remedy: A Framework for Businesses and Human Rights"* (The *Ruggie Report)* is one of the greatest reference on the accountability of multinationals for Human Rights violation in the world.

69. Despite the campaign launched by advocacy organizations towards new developments, the bare truth, however, is that the process of codification of International Law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts. Any attempts to do so have been dismissed on the basis that the Companies are not parties to the treaties that the international courts are empowered to enforce. This understanding is widely shared among regional courts with jurisdiction over Human Rights.

70. That being the current situation at the international level, the only available alternative left to those seeking for justice against corporations has been domestic jurisdictions, as in the case of the United States where under the *Alien Tort Claims Act* (1789), it has been possible to make the

American companies operating abroad responsible for human rights abuses in developing countries in *violation of the law of nations (international law)*. Two leading examples of the disputes dealt with by American jurisdiction in this field of corporate liability are **WIWA V. SHELL, 2009 U.S. 2 d Cir., June 3, 2009,** for facts that occurred exactly in the region of Niger Delta and **DOE V. UNOCAL CORPORATION 248 F. 3d 915, 9th Cir. 2001**, for facts that occurred in Burma. But it is worthy to leave clear that even in the United States, notwithstanding a few decisions clear that even in the United States, notwithstanding a few decisions supporting corporate liability, a recent ruling from 2nd Circuit in **KIOBEL V. ROYAL DUTCH PETROLEUM CO. 2010 US App LEXIS 19382 (2d Cir. 2010)** held that Alien Tor Act does not authorize jurisdiction to hear claims against corporations.

71. In the context and legal framework of ECOWAS, the Court stands by its current understanding that only Member States and Community Institutions can be sued before it for alleged violation of Human Rights, as laid down in **PETER DAVID V. AMBASSADOR RALPH UWECHUE** delivered on the 11th day of June, 2010.

72. In that decision the Court held that:

> *"As an International court with jurisdiction over Human Rights violation, the Court cannot disregard the basic principles and the practice that guided the adjudication of the disputes on Human Rights at the international level. Viewed from this angle, the Court recalls that the international regime of Human Rights protection before international bodies relies essentially on treaties to which States are parties as the principal subjects of international Law. As a matter of fact, the international regime of Human Rights imposes obligations on States. All mechanisms established thereof are directed to the engagement of State Responsibility for its commitment or failure toward those international instruments. From what has been said, the*

conclusion to be drawn is that for the dispute between individuals on alleged violation of Human Rights as enshrined in the African Charter on Human and People's Rights, the natural and proper venue before which the case may be pleaded is the domestic court of the State party where the violation occurred. It is only when at the national level, there is no appropriate and effective forum for seeking redress against individuals, that the victim of such offences may bring an action before an International Court, not against the individuals, rather against the signatory State for failure to ensure the protection and respect for the Human Rights allegedly violated. Within ECOWAS Community, apart from Member States, other entities that can be brought to this Court for alleged violation of Human Rights are the institutions of the Community because, since they cannot, as a rule, be sued before domestic jurisdiction, the only avenue left to the victims for seeking redress for grievance against those institutions is the Community Court of Justice".

73. The same reasoning expanded above to justify the lack of jurisdiction of the Court on individuals sued for human rights violation applies entirely in the cases, as the instant, where the alleged perpetrators of the violation are other non state actors like corporations. Neither individuals nor corporations are parties to the treaties that the international Tribunal with jurisdiction over human rights are empowered to enforce.

74. Having arrived at the conclusion that it does not have jurisdiction to entertain disputes for alleged violation of Human Rights perpetrated by the Defendants, the Court does not need to go further in the analysis of the remaining issues raised in the preliminary objection.

DECISION

75. Whereas the existence of the Plaintiff has been established;

76. Whereas the Plaintiff has the requisite *locus standi* to initiate the present proceedings;

77. Whereas the Court has no Jurisdiction over the Defendants who are corporations for alleged violation of Human Rights;

78. The Court sitting and adjudicating in public, in the Community Court of Justice, in Abuja hereby holds that it has no jurisdiction to adjudicate on the case brought by the Plaintiff against the Corporate Defendants.

79. Pursuant to article 66 (12) of the Rules of Procedures of the Court which states that where the action does not proceed to judgment the costs shall he at the discretion of the Court and taking into account the real nature of these proceedings and circumstances of the case, each party shall bear their own costs.

This Ruling is read in the open Court to the public this 10th day of December, 2010.

Hon. Justice M. Benfeito RAMOS - *Presiding*

Hon. Justice H. N. DONLI - *Member*

Hon. Justice Anthony A. BENIN - *Member*

Hon. Justice Clotilde MEDEGAN - *Member*

Hon. Justice E. Monsedjoueni POTEY - *Member*

Assisted by
Tony Anene-MAIDOH *Esq.* - *Chief Registrar*

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