COMMUNITY COURT OF JUSTICE, ECOWAS

(2011)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

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[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, THE 9TH DAY OF FEBRUARY, 2011

SUIT NO: ECW/CCJ/APP/12/09
RULING NO: ECW/CCJ/RUL/02/11

BETWEEN
1. SIDI AMAR IBRAHIM - *PLAINTIFF*
2. OUSMANE SIDI ALI
V.
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
MOUSSA COULIBALY (ESQ.) - *FOR THE PLAINTIFF*
ZADA H. HAROUNA (ESQ.) - *FOR THE DEFENDANT*

Human rights -Admissibility of application -Effective remedy before the courts -Liability in committing offences and crimes -Damages

SUMMARY OF FACTS

Messrs. Alkassoum Ibrahim and Hamadi Haran, acting respectively in their capacity as authorized agent and legal representatives of the heirs of Sidi Amar and Ousmane Sidi Ali came before the Court for human rights violations of the deceased estate by the Republic of Niger and sought for compensation for these violations.

Messrs. Sidi Amar Ibrahim and Ousmane Sidi Ali who were travelling in a zone of insecurity took the trouble to inform the military authorities of the Republic of Niger who informed them the route and axis to follow which they followed. That in spite of the fact that they informed the Niger military authorities of their presence in the area, Sidi Amar and Ousmane Sidi Ali were tortured before being executed by the Niger military.

The Republic of Niger argued that it was a tragic error which occurred during a military operation.

The Plaintiff cited the provisions of the ECOWAS Revised Treaty, African Charter on Human and Peoples' Rights, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Convention Against Torture; the Plaintiff maintained that the Republic of Niger violated their fundamental rights and should compensate them as a result of this violation.

The Republic of Niger dismissed these allegations of human rights violation brought against her and stated that, following an agreement signed with the armed rebels, an amnesty was granted to the masterminds and the accessories of the crimes committed in the name of armed insurgency.

The Republic of Niger concluded that the incident that led to the death of Sidi Amar and Ousmane Sidi Ali occurred during this period of armed insurgency and therefore is covered by the amnesty agreement.

LEGAL ISSUES

- *Is the Application filed by the heirs of Sidi Amar and Ousmane Sidi Ali admissible before the Court?*

- *Is the right of effective remedy before the National Courts of the Plaintiff violated?*

- *Can the Court order the Republic of Niger to find and bring to justice all the persons involved in the incident that led to the death of Sidi Amar and Ousmane Sidi Ali?*

- *Is the Plaintiff entitled to the compensation sought?*

DECISION OF THE COURT

- *The Court declared the Application of the heirs of Sidi Amar and Ousmane Sidi Ali admissible, on the grounds that it complied with the provisions of Articles 10 (d) and 9 (4) of the Supplementary Protocol on the Community Court of Justice, ECOWAS.*

- *The Court held that the rights of the Plaintiffs to effective remedy before National Courts, as provided for by the African Charter on Human and Peoples Rights and the Universal Declaration of Human Rights, was violated as a result of the inability of the Republic of Niger to initiate a public criminal proceedings despite several requests by the Plaintiffs.*

- *The Court held that it was impossible for the Republic of Niger to prosecute those involved in the incident that led to the death of Sidi Amar and Ousmane Sidi Ali on the grounds that there is an amnesty law.*

- *The Court declared the application for compensation by the Plaintiff admissible on the grounds that the Republic of Niger is the principal of the military men responsible for the acts that led to the death of Sidi Amar and Ousmane Sidi Ali.*

PRELIMINARY RULING OF THE COURT

1. By Application filed at the Registry of the Court on 2nd October, 2009, by Messrs. IBRAHIM Alkassoum acting in the capacity of agent and legal representative of the heirs of SIDI AMAR IBRAHIM, and Hamadi HATARI, acting as agent and legal representative of the heirs of OUSMANE SIDI ALI, seeking to Condemn the Republic of Niger for the violation of relevant provisions of the following international instruments:

   - Paragraph g of Article 4 of the ECOWAS Revised Treaty;
   - Articles 1, 4, 5, 7 paragraph 1 (a) of the African Charter on Human and Peoples' Rights;
   - Articles 3, 5, 8 and 13 of the Universal Declaration of Human Rights
   - Paragraphs 1, 3(a), 3(b) and 3(c) of Article 2, paragraph 1 of Article 6 and Article 7 of the International Covenant on Civil and Political Rights;
   - Paragraphs 1, 2 and 3 of Article 2, Articles 12, 13 and 14 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment.

2. Applicants, while relying on the above legal provisions, plead that the Court should, on the one hand, order the authorities of Niger Republic to find, arrest and bring before the competent courts, the perpetrators, sponsors and accomplices of acts of torture and murder suffered by Messrs. AMAR SIDI IBRAHIM, OUSMANE SIDI ALI and Others.

3. Applicants equally solicit that the Court should grant the legal parties (heirs) of the victims adequate compensation sequel to the immeasurable damage suffered by them due to the tragic death of the victims, the amount of compensation which shall be determined in due course.

FACTS

The facts as related by Applicants

4. It is related in the Application that on 8th December, 2007, Mr. SIDI AMAR IBRAHIM and OUSMANE SIDI ALI left Dirkou in the Department of

Bilma on their way to Agadez; they were accompanied by their drivers Messrs. Lawali ABDOU and Ali BOUA, as well as Mr. Habu MANZO, Mr. Amini DJIBRIL and Mr. Tantane Alh Kizi.

That, knowing full well that they were in an area of insecurity, they took care to notify the military hierarchy based in Dirkou who instructed them on the itinerary to follow; that on the second day of their journey, they noticed that a military helicopter was flying above them; They claimed that they immediately notified Mr. SIDI LAMINE and Member of Parliament CHERIF ASIDINE as well as the military hierarchy namely the High Commandant of FSIN in Niamey, the Gendarmerie Group in Agadez as well as the Governor of the region of Agadez;

5. The narration of the facts goes further to state that, following this information, instruction was given to the travelers to leave the road on which they were traveling, and to link-up to Zinder road, which they did without any hesitation, while still keeping Mr. SIDI LAMINE abreast of the developments. That later, another instruction was again given to the travelers, to return to the earlier road that they had abandoned, on the grounds that that road was now secured. The travelers once again obeyed, and still got Mr. SIDI LAMINE informed, and that was the last time they got into contact with him.

6. The following day, some Niger armed forces officers were seen entering into the town of Agadez in the vehicles of the victims; later, it was in a shocking and revolting manner and through an official Communiqué that the families of the victims got the information that the travelers had ran into the operations areas of the armed forces and that they were hit by stray bullet; that this statement is far from being the truth because the killers of the victims were not unaware of the presence of the victims on that axis, and that there was mark of bullets on the vehicles of the victims not ignored;

Furthermore, there was no trace of blood (not the least) on the said vehicles, and everything suggests that the occupants were forced out from their vehicles and murdered in cold blood, after they were stripped of their valuables; that when the victims' bodies were unearthed from the mass grave in which they had been buried, it was noted that they had suffered serious physical (blow, burn, torture) before they were executed, while none of them was armed.

7. That On 11th December, 2007, the Joint Brigade Force of Agadez Gendarmerie wrote a handing-over note No. 4351 on the restitution of the four Toyota vehicles and a variety of materials.

8. That on 27th December, 2007, Applicants filed a petition against X before the Minister of Defence in accordance with Articles 3, 31, 45, 74 and 271 paragraph 2 of Law No. 2003-10 of 11th March, 2003 on the Code of Military Justice; that on 18 February 2008 another letter was addressed to the same Minister of Defence; that on 17th March, 2008 the reply from the Minister informed them that a preliminary investigation on the SIDI AMAR and others case against X was conducted by the Prosecutor of the Republic at the High Court of Agadez;

9. That they again wrote to the Minister of Defence a letter dated 29th April, 2008 asking for a legal follow up on their petition of 27th December, 2007; and that, as a reply, or 16th September, 2008, the Minister of Defence informed them that, henceforth, they should refer themselves to the Prosecutor of the Republic at the Tribunal de Grande Instance of Agadez on any follow up relating to the case; and thus, by letter dated 1st October, 2008, they sent a letter to the Prosecutor of the Republic in Agadez, together with the letters exchanged with the Minister of Defence.

10. That on 2nd December 2008, the Prosecutor of the Republic at the High Court of Agadez informed them on the notice of *nolle prosequi*, because the case in question, falls within the military jurisdiction; that on 10th December, 2008, they brought this information to the kind attention of the Minister of Defence, to whom they expressed their desire that justice be rendered to their clients; that up till today, although the perpetrators of such acts of extreme gravity are well known, the State of Niger stubbornly refuses to respect the above stated international obligations which it has ratified with sovereignty.

The facts as related by the Defendant

11. Replying through Zada Dan Lami (Esq.) and Bachir Maidagi (Esq.) Lawyers registered with the Bar in Niger republic, Defendant contests the facts, as narrated by Applicants, and submits that the Republic of Niger has been witnessing, in the last two decades, acts of rebellion and aggression from armed bandits in the Agadez Administrative Region.

That in order to put an end to this situation of permanent insecurity, the Republic of Niger issued a warning in the said region, pursuant to law 2002-30 of 31st December, 2002 on general organisation of national defence.

That clashes between Government forces and armed bandits frequently occur in the said zone, and, as proof, the one that occurred on 8th December, 2007.

12. That on 9th December, 2007, a military detachment, which was searching for armed bandits that had been able to escape the previous day, with which another clash took place in the morning (Exhibit 6 and 7), received from the observation aircraft type ULM, information that a suspicious vehicle column was advancing towards it. Upon receipt of this information an ambush was laid, so as to neutralize the vehicles and capture the occupants. An Alternative Means of surrounding of those who were considered as armed bandits had been put in place so as to prevent any escape; but from the first warning shots, the occupants alighted from their vehicles to try and escape, while running for Shelter. It was during this flight that the military, from regulatory combat distance, shot the victims dead.

13. That later on, having visited the place where the incident occurred, to identify the victims, the Head of Military Operations recognised Mr. Sidi Amar Ibrahim among the victims, and thereafter, the Head of Operations hurriedly went back to inform his hierarchy, and members of the families of the deceased, who he took care to bury according to military tradition, within operation zone in two separate graves, and not a single one, as was claimed by Applicants.

14. The Republic of Niger adds that the presence of Mr. Sidi Amar and others, in that zone, was reported to the military authorities, with a well-known itinerary, as it is with any other traveler; that having expressed their interest to change their itinerary on two occasions, the military commander in the zone refused this request on each occasion; that the military commander could not imagine the presence of any traveler in the suspected zone.

15. That excuses were presented to the bereaved families, and that the National Gendarmerie returned the victims' vehicles, upon interrogation; that a high state delegation led by the Minister of State, and Minister of Internal Affairs, Public Security and Decentralization, was at the funeral ceremonies on 12th December, 2007, to present the President's and the nation's condolences to the bereaved families.

16. That later, exactly on 27th December, 2007, Applicants came before the Minister of Defence, with a complaint against X, pursuant to the provisions of the August 9th 1999 Constitution, Articles 2 and 13 of the Convention against torture and other cruel, inhuman and degrading treatments, Article 321 of the military code and Articles 238 of the penal code of Niger Republic.

17. That parallel to this move, another complaint was submitted against X, at the Gendarmerie at Agadez; that families of the victims also brought before the UN Special Rapporteur, a complaint bordering on extrajudicial, summary or arbitrary execution, with regard to the death of the victims.

18. The Republic of Niger explains that the State Prosecutor, through a Release No. 270/RP of 2nd December, 2008, put away the case file on the matter, on the ground that it fell within the purview of military jurisdiction;

19. Finally, the Republic observes that, having signed a peace accord with the rebel group, an amnesty was granted the authors, co-authors and accomplices of crimes and offences that were committed during the insurrection of 23rd October, 2009, by Order 2009-19.

    That this amnesty covers both members of the regular armed forces, their helpers, as well as anybody who belonged to the various armed groups that took part in the insurrection, and that above all, this Order is applicable to all persons who are charged, condemned, looked for or susceptible to be charged, for all crimes committed during that period.

THE PLEAS-IN-LAW BY PARTIES

The pleas-in-law invoked by Applicants.

20. The heirs of SIDI AMAR and of OUSMANE SIDI ALI object to the registration of Lawyer Djibrilou Saley, Counsel to Defendant, as member of the Bar in Paris, and therefore deduce that the writs presented by the said Lawyer are inadmissible, before the Court, on behalf of the Republic of Niger.

    At the hearing of 8th November, 2010, having noticed the absence of Lawyer Djibrilou Saley, who was initially constituted to stand for, and represent the Republic of Niger, and his replacement by Lawyer Zada Harouna, Counsel to Applicants backed down on the objection as to inadmissibility drawn from Lawyer Djibrilou Saley's lack of quality to act before the Court, as well as his earlier plea that the Court should throw out Lawyer Djibrilou Saley's writs earlier presented on behalf of the Defendant.

21. In support of their arguments Applicants invoke the violation, on the part of Defendant, of Paragraph g of Article 4 of the ECOWAS Revised Treaty; Articles 1, 4, 5, 7 paragraph 1 of the African Charter on Human and Peoples' Rights; Articles 3, 5, 8 and 13 of the Universal Declaration of Human Rights; of the International Covenant on Civil and Political Rights, as well as the Convention against Torture and other Cruel, Inhuman and Degrading Treatment.

22. Plaintiffs aver that all these provisions impose an obligation upon the Republic of Niger, to take all concrete measures to recognize, respect and protect the fundamental rights of people living on its territory, and who are subject to its courts; they then conclude that, in the instant case, the Republic of Niger has failed in its responsibility, and therefore, the Honourable Court should make a pronouncement on all their requests.

The pleas in law invoked by the Respondent.

23. The Republic of Niger points out that its initial Counsel, Lawyer Djibrilou Saley successively got himself registered at the Bar of Seine and Paris in

2002 and 2006; that he is currently appearing before courts as a member of the Seine Bar, and that, by virtue of a Convention signed between the Republics of Niger and France on 19th February, 1977, he is qualified to appear before the Courts in Niger Republic as well as before the Community Court of Justice, ECOWAS.

24. At the hearing of 8th November, 2010, Lawyer Zada Harouna who was constituted as a replacement for Lawyer Djibrilou Saley, to defend the interests of the Republic of Niger, declares that he takes full responsibility of the earlier writs presented by his predecessor, on behalf of the Republic of Niger.

25. With regards to the facts of the case, the Republic of Niger avers that it is a State where the rule of law is given prominence, and where due respect is paid for the human person, as is contained in Articles 10, 11 and 22 of its Constitution; the Republic of Niger adds that the judicial, political and institutional environment created within its territory favours this respect, and that, apart from these instruments, there is no other means through which it can protect its citizenry;

26. The Defendant notes that, above all, it is not within the purview of the Honourable Court to adjudicate *in abstracto,* the internal legislation of the Member States of the Community, and recalls that the Court ruled on this in its **JUDGMENT Nº. ECW/CCJ/JUD/06/08 of 27th OCTOBER 2008, IN THE HADIJATOU MANI KORAOU** case.

Thus, the Republic of Niger objects to the claim that the State Prosecutor put away the case file of the preliminary investigation on the matter, and that Applicants still had the possibility of taking advantage of the provisions of Article 80 of the Code of Penal Procedure of Niger Republic, to bring their case before the competent Court, on the matter; this, they failed to do, and it therefore deduces that Applicants' claim that the Republic of Niger failed in its Community and International obligation, is ill -founded.

27. While invoking Order No. 2009-19 of 23rd October, 2009, the Republic of Niger avers that this Law on Amnesty covers all the acts upon which the Application of Plaintiffs is premised; Defendant therefore deduces that the pleas of the heirs of SIDI AMAR and of OUSMANE SIDI ALI

seeking that the Honourable Court should order the Republic of Niger to search for, and try the authors, co-authors or accomplices of the said incidents should be rejected.

28. As to how the incidents happened, the Republic of Niger avers that Applicants failed to bring proof to the effect that soldiers brought the victims out of their vehicle, tortured before killing them.

Discussion

29. Going by the nature of the case brought before it, the Court is to make a pronouncement on the admissibility of the Application; the quality of Counsel of the Republic of Niger to appear before it; the rights of the heirs of SIDI AMAR and of OUSMANE SIDI ALI to appeal before the competent national courts of Niger; on the obligation of the Republic of Niger to search for, and try the authors, co-authors or accomplices of the incidents that led to the death of SIDI AMAR and of OUSMANE SIDI ALI, and lastly, on Applicants' request for the award of costs.

As to admissibility of the case

30. The Application brought before the Court, by the heirs of SIDI AMAR and of OUSMANE SIDI ALI is not anonymous, and it had not been taken before another competent international court; it is on issues of human rights violations, and recounts incidents that are alleged to have taken place on the territory of the Republic of Niger, an ECOWAS Member State; while all this is pursuant to the provisions of Article 10(d) and 9(4) of the 2005 Supplementary Protocol on the Court; Thus, it behoves the Court to declare it admissible.

As to the quality of Counsel of the Republic of Niger to appear before the Court, and the withdrawal of the writs presented in the defence of the Republic of Niger.

Plaintiffs aver that Counsel to the Republic of Niger has neither justified his being a registered Lawyer at the Paris Bar, nor his quality to plead before the courts of an ECOWAS Member State, so much so that the writs filed by this Counsel should be set aside, during the debates;

31. However, at the hearing of 8th November, 2010, Counsel to Plaintiffs, Lawyer Moussa Coulibaly, on the one hand, shows his embarrassment, while observing the absence of Lawyer Djibrilou Saley who was initially constituted to stand for, and represent the Republic of Niger, and because of whom he (Lawyer Moussa Coulibaly) earlier raised the issue of lack of quality to appear before the Court, and, on the other hand, his (Lawyer Djibrilou Saley's) replacement by Lawyers Zada, Bachir and Boukari, who claim responsibility for the writs filed by Lawyer Djibrilou Saley, on behalf of the Republic of Niger.

32. While drawing the consequences of his own observations, Lawyer Moussa Coulibaly declares that he backs down on the objection, which he earlier raised, as to the inadmissibility of the writs earlier filed, on behalf of the Republic of Niger, by Lawyer Djibrilou Saley, relating to his lack of quality to appear, and defend the interests of the Defendant before the Court.

33. Hence, while adopting the preceding grounds, the Court is of the opinion that there is no need adjudicating on the quality of Lawyer Djibrilou Saley to appear before it, nor on the setting aside of the earlier writs filed by that Lawyer, on behalf of the Republic of Niger.

As to the right to effective appeal of the heirs of SIDI AMAR and of OUSMANE SIDI ALI before the competent national courts of Niger

34. The heirs of SIDI AMAR and of OUSMANE SIDI ALI accuse the Republic of Niger for violating their right to effective appeal before competent national courts of Niger, by failing, to search for, and try the authors, co-authors or accomplices of the tragic events, which occurred on 9th December, 2007, in the Agadez Region and during which their benefactors died.

35. The Republic of Niger accuses Plaintiffs of their own negligence, to seek redress, pursuant to the provisions of Article 80 of the Code of Penal Procedure of Niger, following the putting away of the file of the preliminary investigation on the afore-mentioned events, by the State Prosecutor of the Agadez Region.

36. Indeed, Article 80 of the Code of Penal Procedure, which is relied upon provides that:

> ***"Any person who feels that his rights have been infringed upon, by a crime, or an act, shall bring a complaint before the trial judge, by constituting a civil party".***

On the basis of this Text, the State of Niger opines that after there was no feedback on the report of the preliminary investigation on the events that led to the death of their benefactors, Plaintiffs should have brought a case before a trial judge, by constituting, a civil party.

37. Defendant avers that the Applicants who abstain from taking advantage of this Text are ill founded in accusing her of failing to take necessary measures, which would enable them exercise their right to effective appeal before the competent courts in the Republic of Niger.

38. The State of Niger seems to deduce that, by the existence of Article 80 of the Code of Penal Procedure, as cited above, it has conformed itself to the respect for Applicants' right to effective appeal before competent national courts, as this right is enshrined in Articles 7 and 8 of the African Charter on Human and Peoples' Rights, and the Universal Declaration of Human Rights, which respectively provide that:

> ***"Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force"*** and ***"Every individual shall have the right to an effective appeal to national competent courts against acts violating his fundamental rights as recognised by the Constitution or by the Law."***

39. However, the Court notes that Article 80 of the Code of Penal Procedure of Niger Republic relates to ordinary common law, and that it does not concern situations which are related to the armed forces, as the tragic events, which led to the death of their benefactors. To this effect, the Court is of the opinion that Article 32(2) and 41(2) of the Code of Military Justice are more explicit on the jurisdiction of the Military Court, for the facts exposed in the Application of the heirs of SIDI AMAR and of

OUSMANE SIDI ALI. These Articles provide that:

> ***"the Military Tribunal has jurisdiction over crimes of whatever nature, which are committed by the Military Personnel, in active service (...)" " In times of war, or any exceptional period, the jurisdiction of the Military Tribunal covers any act whose author, one of the co-authors or accomplices* is *a military personnel."***

Indeed, SIDI AMAR and OUSMANE SIDI ALI met their death during an exchange of fire by the Niger Military, on an ordered mission. The Court notes that these events, during which the Plaintiffs met their death call for the application of the Code of Military Justice, because it involved soldiers who were obeying their superiors' orders; and this is the import of the putting away of the report of the preliminary investigation decided upon by the State Prosecutor, while he made it a duty to duly inform both the Minister of Defence and the Plaintiffs.

40. The Court also notes that the Plaintiffs who had earlier brought a complaint against X on 27th December, 2007, before the Minister of Defence, informed the same Minister on 10th December, 2008, on the decision of putting away of the report of the preliminary investigation by the State Prosecutor, and they expressed their resolve to see that justice is done to their request.

41. The Court equally observes that the facts which Applicants relate in their Application bother on fundamental human rights, which are guaranteed in the Niger Laws and the pertinent international instruments.

42. The Court also notes that the military tribunal is exclusively empowered to consider the facts of the case, and that Applicants are not aware of bringing such a case before the military tribunal, and that Articles 46 and 47 of the Code of Military Justice, which provide that:

> ***"the Judicial Military Police is placed under the authority of the Minister of Defence"***, and ***" The Minister of Defence shall either take, or have necessary measures taken, which are geared towards searching for, and trial of offences over which the military tribunal has jurisdiction"***
>
> are unequivocal, and exclude any other court from having jurisdiction over these acts, except the military tribunal.

43. The Court also notes that the Minister of Defence and the military authorities are exclusively empowered to receive such complaint, and that the only initiative open to Applicants was to bring the matter to the knowledge of the competent judicial authorities, who in turn, shall forward the same matter to the military authorities; this was exactly what Plaintiffs did on two occasions on 27th December 2007, and 10th December, 2008.

44. The Court observes that in spite of this request which was reiterated several times by Plaintiffs, the authorities in Niger Republic, who are competent to bring this case to the knowledge of the Niger Military Justice, in order that justice could be done, as requested by the heirs of SIDI ALI AMAR and OUSMANE SIDI ALI, abstained from acting, and initiating any court action.

45. Thus, the Court is of the opinion that this abstention of the authorities of the Republic of Niger is tantamount to a violation of the right of Plaintiffs to effective appeal before the competent national courts in Niger Republic, as guaranteed in Articles 7 of the African Charter on Human and Peoples' Rights and 8 of the Universal Declaration of Human Rights.

    The Court recalls that the Republic of Niger which signed and ratified both the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights has an obligation to conform itself to them; that having failed to do so, Plaintiffs are right to claim that Defendant has violated their right to effective appeal before the competent national courts of the Niger Republic.

    On the request seeking to order the Republic of Niger to search for, and try the authors, co-authors or accomplices of the incidents that led to the death of the benefactors of Applicants.

46. Plaintiffs solicit that the Court should order the Republic of Niger to search for, and try the authors, co-authors or accomplices of the incidents of 9th December, 2007, in the Agadez Region that led to the death of SIDI AMAR and OUSMANE SIDI ALI.

47. The Republic of Niger opposes this request by claiming the Amnesty Law resulting from Order No. 2009-19 of 23rd December, 2009.

48. The Court notes that this Amnesty Law, which provides in its Articles 1, 2 and 3 respectively:

"This Amnesty covers, both in their effects and consequences, all acts and facts, which are likely to be qualified criminal in nature, committed during the armed insurrection from the year 2005 to the date of signing the present Order";

"Included in this Amnesty, as defined in Article 1 above:

"the authors, co-authors or accomplices of the crimes and offences committed during the said period; Members of the National Defence and Security Forces, or any other persons who helped them;
-Members of the various groups of the armed insurrection"..."The provisions of Articles 1 and 2 of the present Law are applicable to the persons who are tried, sentenced, sought or who are likely to be sought after, for the offences covered under the present Order";

covers all criminal offences related to the rebellion that the Republic of Niger witnessed, as well as their authors, co -authors and accomplices.

49. The Court equally observes that the tragic events during which the benefactors of Plaintiffs met their death occurred during the rebellion, which took place in the Republic of Niger.

50. The Court then deduces that, in principle, those acts and their authors and accomplices fall under the application of the Amnesty Law invoked by the Republic of Niger, whose consequences are among others, the voiding of the offences resulting from the said acts, the impossibility of initiating any search for the authors, on the basis of these acts, as well as the end of any trial already initiated relating to these acts.

51. However, the Court must recall that the doctrine and international jurisprudence in this matter, exceptionally admit that, for serious and large scale violation of fundamental human rights, as guaranteed in international customs, and pertinent human rights instruments, invoking the Amnesty Law shall amount to denying the right to effective appeal before competent courts **(Judgment of 14th March, 2004 of the Appeal Chamber of the UN Special Court on Sierra -Leone, in the case between Kallon**

&Kamara: SCLS-04-15-060-1SCLS-04-15-PT-060-II) 14th March, 2004 Case of Barious Altos -Inter -American Court on human Rights: Judgment of 30th November, 2002 (Series C No. 87 cases of BARIOUS vs PERU)

52. To this effect, the Court notes that, in the instant case, although the facts constitute serious human rights violations, they are far from being committed on a large scale, and therefore, they do not meet the conditions specified by the doctrine and international jurisprudence; thus, the Court believes that the Amnesty Law invoked by the Republic of Niger, is of nature to be applicable to the facts in the instant case, and consequently, the Court decides to reject Plaintiffs' request that an order should be made for the Republic of Niger to search for, and try the authors, co - authors and accomplices of the offences during which SIDI AMAR and OUSMANE SIDI ALI died on 9th December, 2007 in the Agadez Region.

As to the plea for the award of costs for the prejudice.

53. Without stating the quantum of amount, plaintiffs requested the award of costs, for the reparation of the prejudice they suffered, due to the death of their benefactors.

54. The Court notes that the Republic of Niger does not oppose to this request for the reparation of prejudice; it notes that the prejudice whose reparation is sought by Plaintiffs is true and is sequel to the death of SIDI AMAR and OUSMANE SIDI ALI, their benefactors.

55. The Court also observes that the acts, during which SIDI AMAR and OUSMANE SIDI ALI died, involved the soldiers of the Niger republic's Armed Forces, who were carrying out official directives under the command of their superior officers. The Court thereafter notes that, having failed to set the court action in motion, as requested by Plaintiffs, the competent officials of the Republic of Niger are no longer in a position to do so, because of the Amnesty Law enacted by the Republic of Niger, following the Order No. 2009-19 of 23rd December, 2009, to obtain reparation for the prejudice in a national court in Niger.

56. To this effect, the provisions of Article 1 of this Amnesty Law which provides thus:

> ***"This Amnesty covers, both in their effects and consequences, all acts and facts, which are likely to be qualified criminal in nature, committed during the armed insurrection from the year 2005 to the date of signing the present Order."***

are so explicit that they do not give room for any doubt.

57. As the principal of the soldiers that are involved in the acts that led to the death of SIDI AMAR and OUSMANE SIDI ALI on 9th December, 2007, the Republic of Niger has to carry out its civil responsibility towards the heirs of the two victims, thus the Court shall favorably admit their request for reparation.

58. As the Plaintiffs did not state the quantum of their prejudice, the Court decides to adjourn the case to a future date, in order to adjudicate on damages.

FOR THESE REASONS

The Court, adjudicating in a public sitting, after hearing both parties, in a case of human rights, and in a preliminary ruling, after deliberating in accordance with the law;

As to the form

59. **Declares** admissible the Application filed by the heirs of SIDI AMAR and OUSMANE SIDI ALI.

60. **Declares** that there is no need adjudicating on the quality of Lawyer Djibrilou Saley to appear before it, nor on the setting aside of the earlier writs filed by that Lawyer, on behalf of the Republic of Niger.

61. **As to merit.**

- **Declares** that the Republic of Niger has violated the right of Plaintiffs to effective appeal before the competent courts in Niger republic.

- **Declares** however that there is no need to order the Republic of Niger to search for, arrest, and try the authors, co-authors and accomplices of the acts during which SIDI AMAR and OUSMANE SIDI ALI died on 9th December, 2007 in the Agadez Region.

- **Declares** that the Republic of Niger carries a civil responsibility in the death of SIDI AMAR and OUSMANE SIDI ALI.

- **Adjourns** the case and order the parties to appear before it on 10th March, 2011, to adjudicate on reparation of prejudice.

- **Reserves** the right to award costs.

Thus made, adjudged and pronounced in a public hearing at Abuja, by the Court of Justice of the Economic Community of West African States, on the day, month and year stated above.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

HON. JUSTICE AWA NANA DABOYA - *PRESIDING JUDGE*
HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*
HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON *(ESQ.)* - *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 9TH DAY OF FEBRUARY, 2011

SUIT NO: ECW/CCJ/APP/13/08
JUDGMENT NO: ECW/CCJ/JUD/01/11

BETWEEN
EL-HADJI TIDJANI ABOUBACAR - ***PLAINTIFF***

V.

1. BANQUE CENTRALE DES ETATS DE L'AFRIQUE DE L'OUEST
2. REPUBLIC OF NIGER } ***DEFENDANTS***

COMPOSITION OF THE COURT:
1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ) - REGISTRAR

REPRESENTATION TO THE PARTIES:
1. **MAITRE SEYE OUSMANE AND MAITRE BAKOH KOSSI** - *FOR THE PLAINTIFF*
2. **MAITRE MAME ADAMA GUEYE & ASSOCIATES** - *FOR THE 1ST DEFENDANT*
3. **MAITRE MOSSI BOUBACAR** - *FOR THE 2ND DEFENDANT*

-Right to property -Human rights -Jurisdiction of the Court -Application of the provisions of BCEAO Law and the legal instruments adopted by the Council of Ministers of UEMOA -Discontinuance of proceedings against one of the Defendants -Recognized exclusive jurisdiction of another Regional Court

SUMMARY OF FACTS

By Application dated 6th November 2009, Mr. Tidjani Aboubacar brought his case before the Court, alleging that the Republic of Niger refused to exchange the demonetised 1992 denomination of CFA Franc currency notes he had in his possession, whose total sum amounted to One Billion Two Hundred and Fifty Million CFA Francs (CFAF 1,250,000,000), and thereby violated his human rights as provided for in Article 17(2) of the Universal Declaration of Human Rights, Articles 14 and 21 of the African Charter on Human and Peoples' Rights, and in the Constitution of Niger.

In exchange for the demonetised currency notes still in his possession, the Applicant requested that the Court ask both BCEAO and the Republic of Niger to pay jointly to him the sums of One Billion Two Hundred and Fifty Million CFA Francs (CFA F 1,250,000,000) and Ten Billion CFA Francs (CFA F 10,000,000,000) for moral damages and losses incurred, owing to the decline in his business activities, since the amount of demonetised currency notes in his possession was not legal tender.

In its Defence, the Republic of Niger averred that the decision to withdraw the 1992 denomination of the CFA currency notes from circulation was adopted by the Council of Ministers of UEMOA and implemented by the Central Bank of UEMOA, namely BCEAO. The Republic of Niger thus concluded that the competent bodies to sit on the case are the organs of UEMOA.

The Republic of Niger maintained that there is no human right violation in the instant case, within the meaning of the articles cited by the Applicant, and submitted that the demonetisation exercise was conducted publicly and sustained by appropriate communication channels so as to ensure that everyone was informed; and that since the Applicant did not exchange

his currency notes within the prescribed time-limit, he is ill founded in suing the Republic of Niger before the Court on grounds of violation of his right to property.

In conclusion, the Republic of Niger contended that the Court has no jurisdiction to adjudicate on the case; that the Application is inadmissible; and on alternative grounds, asked the Court to dismiss the requests brought by the Applicants as ill founded.

Relying on Article 6 of the Headquarters Agreement it concluded with the Republic of Senegal, BCEAO averred on its part, that the Court has no jurisdiction to sit on the case.

On 5 February 2010, the Applicant discontinued the proceedings against BCEAO and asked the Court to clear BCEAO of all the previous charges it had made against BCEAO.

LEGAL ISSUES

1. Whether or not BCEAO can be held for the allegations against it.

2. Whether or not this Court has jurisdiction to hear this matter.

DECISION OF THE COURT

The Court granted the Applicant's request to drop all the previous allegations it had made against BCEAO; and the Court held that the defence put up by the Republic of Niger to the effect that it was not jointly sued with BCEAO was ill founded.

The Court noted that it suffices to bring a case on human rights violation before it for the Court to assert its rationae materae competence over the matter, by virtue of Article 9(4) of the Supplementary Protocol. The Court however declined its jurisdiction over matter brought before it by Mr. Tidjani Aboubacar, in the light of the exclusive jurisdiction accorded to the Court of Justice of UEMOA.

JUDGMENT OF THE COURT

1. By Application dated 6th November, 2009, Mr. Tidjani Aboubacar whose Counsels are Maitre Ousmane Seye, Lawyer registered with the Bar Association of Senegal, and Maitre Bakoh Kossi of SCP Aquereburu & Partners, Lawyer registered with the Togolese Bar, brought his case before the Court, contending that, for having refused to change the 1992 denominations of the CFA currency notes demonetised and detained by the Republic of Niger, in the sum of CFA 1,250,000,000, the Republic of Niger has violated his human rights, as provided for under the Article 17 paragraph 2 of the Universal Declaration of Human Rights, Articles 14 and 21 of the African Charter on Human and Peoples' Rights, and under the Constitution of the Republic of Niger.

2. The Applicant asks, in exchange for the demonetised currency notes he is holding, that charges be preferred jointly against Banque Centrale des Etats de l'Afrique de l'Ouest (BCEAO) and the Republic of Niger, so that he shall be paid the sum of CFA 1,250,000,000.

3. In the terms of further pleadings, Mr. Tidjani Aboubacar equally asks for damages to be paid to him to the tune of CFA 10,000,000,000 for moral harm and for the deficit to be restored as a result of the downturn of activities related to the unavailability of the demonetised currency notes, which could not be changed, and which formed a substantial part of the sums of money meant for promoting his business.

THE FACTS

THE FACTS AS PLEADED BY THE APPLICANT

4. In support of his Application, Mr. Tidjani Aboubacar pleaded that on 20th December, 2003, the Council of Ministers of UEMOA (West African Economic and Monetary Union) decided to withdraw from circulation the currency notes of, the 1992 denomination; that in implementing that decision, BCEAO fixed a first period running from 15th September, 2004 to 31st December, 2004, for exchange of the demonetised currency notes against new ones in the 8 Member States of the sub-regional financial

institution; that subsequently, this time-period was extended further, covering the period from 17th January, 2005 to 18th February, 2005 for **"social reasons"**, in the very words of the Governor of BCEAO, who observed that a high amount of the demonetised currency notes had still not been changed, and comprised small denominations being held by low-income earners living in rural areas.

5. The Applicant considered that the extension of the time for changing the demonetised currency notes demonstrates that the time-frame for carrying out the demonetisation operation is not legally rigid.

6. The Applicant pleaded further that in application of Article 8 of the Statutes, which makes it binding to supply in the State in which the demonetised currencies were issued, the value in exchange for the monetary notes withdrawn from circulation, BCEAO transferred into the account of the Public Treasury of the Republic of Niger, the value of the demonetised currency notes issued to Niger and not presented for exchange, representing an amount of CFA.

7. The Applicant affirmed that, instead of using the said sum to continue the exchange of the demonetised currency notes still held by Niger citizens, including the Applicant himself, the Republic of Niger preferred to put the money to other uses; that this is a case of misappropriation of movable assets, amounting to human rights violation.

THE FACTS AS PLEADED BY THE DEFENDANT

8. The 1st Defendant, BCEAO, whose Counsel is Maitre Mame Adama Gueye and Partners, did not make an address on the facts.

9. The 2nd Defendant, the Republic of Niger, whose Counsel is Maitre Mossi Boubacar of the Niamey Bar and Partners, expantiated on the facts relating to the demonetisation of the CFA currency notes of the 1992 denomination, as derived from the Application of Mr. Tidjani Aboubacar. The Republic of Niger indicated moreover that at the closure of the operations of exchange of the demonetised currency notes with new notes, the monetary Authorities declared the results as satisfactory and the Council of Ministers

of UEMOA approved on 9th October, 2006 the final result of the operation. The 2nd Defendant added that it was then that Tidjani Aboubacar, on 21st November, 2006, dragged BCEAO before the *Tribunal Regional de Dakar,* asking for payment of the sum of CFA 1,250,000,000 representing the exchange value of the 1992 denomination of currency notes in his possession. The Republic of Niger further contended that the Republic was brought to court in that cause by Mr. Tidjani Aboubacar; that it was therefore in regard to the Republic and to BCEAO that the *Tribunal Regional de Dakar* declared that it had no jurisdiction to adjudicate on the case. The Republic of Niger added that it was after this judicial disappointment that the Applicant brought his case before the Honourable Court.

10. The Republic of Niger contested first of all, the human rights violation alleged by Mr. Tidjani Aboubacar and deduced thereby that his Application was inadmissible. Furthermore, he contested the jurisdiction of the Court and finally asked, in alternative terms, that the requests of the Applicant be dismissed for being ill-founded.

PLEAS INLAW OF THE PARTIES

PLEAS IN LAW OF THE APPLICANT

11. The Applicant invoked in support of his action, Article 17 paragraph 2 of the Universal Declaration of Human Rights, Articles 14 and 21 of the African Charter on Human and Peoples' Rights, as well as the Constitution of the Republic of Niger.

    In subsequent pleadings, the Applicant equally invoked Article 4 of the Revised Treaty of ECOWAS and the International Covenant on Civil and Political Rights of 16th December, 1966, as well as the ECOWAS Protocol on Democracy and Good Governance.

12. The Applicant noted that all the cited instruments protect the right to property; that they have been ratified by the Republic of Niger which has integrated it into its domestic judicial order, at the Constitutional level, where Article 21 provides that: **"every individual has a right to**

property; that none shall be deprived of his property except for public necessity, subject to a just prior compensation, and Article 32 provides that the State shall protect the legitimate rights and interests of the citizens of Niger abroad". The Applicant considered that by refusing to carry out the exchange of the demonetised currency notes held by him, the Republic of Niger, which had received the exchange value by a 14th December, 2006 Decision of BCEAO, violated his right to property, an essential element of the economic rights recognised for every human being.

Mr. Tidjani Aboubacar affirmed that the Republic of Niger is under obligation to protect his rights, and cannot despoil his movable assets by refusing to change the demonetised currency notes in his possession.

PLEAS-IN-LAW OF THE DEFENDANTS

A. Pleas-in-Law of BCEAO

13. BCEAO, pleading through Maitre Mame Adama Gueye and Partners, raised an objection regarding lack of jurisdiction of the Court, by virtue of Article 6 of the Headquarters Agreement signed on 21st March, 2006 between the Republic of Senegal and BCEAO.

14. Mr. Tidjani Aboubacar, asked, in the terms of the pleadings dated 15th February, 2010, that he be allowed to withdraw the requests he made in regard to BCEAO; and BCEAO required the Court to give effect to it and declare therefore that BCEAO had no case to answer.

B. Pleas-in-Law of the Republic of Niger

15. The Republic of Niger, the 2nd Defendant, raised an objection regarding inadmissibility of the Application, on the grounds that the violation alleged by the Applicant Mr. Tidjani Aboubacar is not established; that the facts in the instant case are very simple, and cannot be interpreted as constituting any human rights violation within the meaning of Article 17 of the, Universal Declaration of Human Rights, nor Articles 14 and 21 of the African Charter on Human and Peoples' Rights.

16. The 2nd Defendant argued that the right to property, whose violation is invoked by the Applicant, still remains inviolate since there has neither been legal .or material dispossession of the demonetized currency notes of Mr. Tidjani Aboubacar, that he himself admitted that he was still in possession of those currency notes; that the demonetization of the notes was a sovereign measure of the West African monetary institution, which concerned more than 80,000,000 persons; that it was implemented publicly with appropriate means of communication to enable the entire population to be informed; that since he did not change his currency notes due to his own fault, by virtue of the maxim *nemo auditur propriam turpidiniem allegans,* the Applicant is ill-founded to claim that his right to property has been violated.

17. The 2nd Defendant, invoking Article 15 paragraph 5 of Regulation No. 01/96/CM on Rules of Procedure of the Court of Justice of UEMOA, which provides that' ***"only the Court of Justice is competent to make a declaration on a non-contractual responsibility which constitutes a commitment, and ask the Union for relief for damage caused, either by concrete acts or by the customary actions of organs of the Union or by officers of the Union while exercising their functions"***. He maintained that since the instant case arose from a decision of withdrawal of the 1992 denominations of the CFA currency notes adopted by the Council of Ministers of UEMOA and the implementation of this decision by the Central Bank of the Union, the competent organs are solely those of UEMOA, and concluded formally that the Honourable Court is therefore not competent to adjudicate on the case brought before it by Mr. Tidjani Aboubacar.

18. In alternative terms, and on the merits, the Republic of Niger indicated that it had no responsibility in the occurrence of the harm alleged by the Applicant, and argued that since it did not have the power to continue changing the demonetised currency notes after the closure of the operation, the complaints filed by Mr. Tidjani Aboubacar against the Republic of Niger are inoperative; that whatever the case may be, Article 8 of the Statutes of BCEAO, cited by the Applicant, does not specify that the sums remitted to the Republic of Niger at the end of the demonetisation operation must serve the purpose of continuation of the operation of changing the 1992 denomination of CFA currency notes .

19. At the hearing of cross-examination, the Republic of Niger averred that it had lodged the equivalent value of the demonetised currency notes in its credit, in accordance with Article 8 of the BCEAO Statutes, out of the necessity of avoiding in the country, a deficit of monetary circulation in case the currency notes which had been lodged there do not totally return into the country after the demonetisation operation.

Consequent to the foregoing, the Republic of Niger sought an order to dismiss all the requests made by Mr. Tidjani Aboubacar.

LEGAL ARGUMENTS

The points of law arising from the facts in the cause are specific to each Defendant, and it is therefore worthwhile to examine them in that regards

AS TO THE ABANDONMENT OF PROCEEDINGS AND THE OBJECTION REGARDING INCOMPETENCE OF BCEAO

20. BCEAO raised an objection regarding incompetence, by virtue of Article 6 of the Headquarters Agreement concluded between BCEAO and the Government of Senegal. BCEAO equally pleaded abandonment of proceedings as contained in the pleadings of the Applicant dated 15th February, 2010.

21. Indeed, the Court finds that in the terms of the pleadings cited above, Mr. Tidjani Aboubacar declared that he was limiting his Application exclusively to the Republic of Niger and asked to be allowed to discontinue the proceedings brought against BCEAO, on the grounds that the said institution had conformed to Article 8 of the statutes.

22. The Court equally finds that the discontinuation of the proceedings as declared by the Applicant, was fully accepted by the 1st Defendant, and that the opposition of the Republic of Niger, 2nd Defendant. As to the 1st Defendant having been cleared by the 1st Defendant, is irrelevant. This is because, on one hand, the interests of the two Defendants are not holistic in nature, and they were not jointly sued before court, in the terms of the Application filed by Tidjani Aboubacar; and on the other hand, it is a

question of the right to appear in court, which is a right reserved for the Applicant, but also a personal right whose only limits lie in the responsibility of the one who exercises it in case of abuse, or in the refusal of the sued Defendant to acquiesce to request to discontinue the proceedings filed by the Applicant to obtain a decision. That since BCEAO, the Defendant concerned, did not adopt this position, it follows that the Court is of the opinion that the exoneration of the 1st Defendant is imperative, in as much as the Republic of Niger has not filed an application for intervention. That consequently, there are grounds to allow to stand Mr. Tidjani Aboubacar's declaration of discontinuance of the proceedings, and to clear BCEAO.

23. The Court finds, in regard to the clearance of the 1st Defendant, that there are no grounds to make any pronouncement on the issue of competence in relation to this same Defendant.

AS TO THE OBJECTIONS RAISED BY THE REPUBLIC OF NIGER

24. The 2nd Defendant, the Republic of Niger, firstly raised the issue of inadmissibility of the Application and incompetence of the Court; and secondly, the Republic of Niger considered that not being a monetary authority of the UEMOA zone, it cannot be linked to any decision on demonetisation of the 1992 CFA currency notes and the implementation of any such decision; such that according to the statements of the Republic of Niger, the requests filed against it by Mr. Tidjani Aboubacar are groundless.

25. The Court finds that for an application to be admissible, in matters of human rights, the mere citing of the facts connected with such description suffices to confer competence on it. That this view is consistent with its case law; that Mr. Tidjani Aboubacar, in accusing the Republic of Niger of having violated his rights, in violation of Articles 17 and 14 respectively of Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, enshrined as right to property and economic and social rights, comes under the jurisdiction of the Court. That is to say that since the Application was not anonymous and has not been filed before another competent International Court, as prescribed by Article 10(d) of the 2005 Supplementary Protocol, but is intended to address

issues presumed to have come about in the Republic of Niger, an ECOWAS Member State, in accordance with Article 9 paragraph 4 of the Supplementary Protocol cited above, the Court considers that, contrary to the stance of the Republic of Niger, that the said Application is admissible.

26. Besides, the Court finds that the right to property, as mentioned by the Applicant, is an important element of the economic rights reserved for the human person; that this right, within the meaning of international instruments. Notably Articles 17 and 14 respectively of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, which provide: ***"No one shall be arbitrarily deprived of his property. The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws;*** is a human right, which is not contested, in any case, by the Republic of Niger.

27. As at now, the Court must determine whether this human right equally recognized by the Constitution of the Republic of Niger in its Article 21 was violated by the Defendant as claimed by Mr. Tidjani Aboubacar. In the instant case, the Court considers that, for it to admit violation of that right, the Court must find that the 2nd Defendant was under obligation to carry out the change of the demonetised currency notes issued on its territory, whose value was credited to the Republic of Niger, pursuant to Article 8 of the statutes of the; Central Bank. It shall also be worthwhile to find out whether this Article provides that:

> **"whenever one or two categories of currency 'notes or monies are withdrawn from circulation, the currency notes or monies which may not have been changed at the Central Bank during the fixed time-limit will cease to be legal tender.**

28. The exchange value of the monetary notes identified by the State or issuing agency shall be remitted to the State in which they were issued, that of the unidentified notes are assigned by decision of the Council of Ministers"

may be understood as bringing the Republic of Niger under the real obligation of the change of demonetised currency notes issued on its territory.

29. At this stage of the argumentation, the Court is compelled to acknowledge that its *rationae materiae* jurisdiction does not confer on it exclusive competence in regard to the legal order of UEMOA, as raised by the Republic of Niger.

It is equally worthwhile to state that formally, it is demonstrated that the Court is competent to adjudicate upon the case.

AS TO THE MERITS

30. The Republic of Niger argued, and this is trite, that the decision of demonetisation of the 1992 denomination of currency notes was taken by the UEMOA Council of Ministers and implemented by the UEMOA financial institution, BCEAO. It is equally trite that UEMOA has, among other institutions, a Court of Justice for applying its Community law. In that regard, Article 15 paragraph 5 of Regulation 01/96/CM on Rules of Procedure of the Court of Justice of UEMOA, invoked by the Republic of Niger, provides that:

> **"only the Court of Justice is competent to declare engaged a non-contractual commitment and charge the Union to remedy any harm caused, either by concrete acts or by regulatory acts of organs of the Union or its officers in the exercise of their functions".**

31. The Court finds further that this provision attributes exclusive competence to the Court of Justice of UEMOA, when its institutions or officers are in issue as regards the exercise of their functions; that since the facts in the case are essentially constituted by Decisions and Acts made by the monetary authorities of UEMOA, in the exercise of their functions, Article 15 paragraph 4 of the Rules of Procedure of the Court of Justice of UEMOA are binding; that if the Honourable Court does not decline its avowed *rationae materiae* jurisdiction, it will inevitably be led to assume a right it is depositary of and whose implementation is conferred expressly and unequivocally on another Regional Court.

32. The Court is also of the opinion that although its *rationae materiae* jurisdiction is relevant, it is incumbent upon it to decline that jurisdiction in view of the exclusive jurisdiction of the Court of Justice of UEMOA over the facts of the instant case.

For having declined its jurisdiction, the Court consequently finds that it cannot adjudicate any further on the instant case.

FOR THESE REASONS

33. The Court, adjudicating in a public sitting, after hearing both parties, in a matter of human rights, in last resort, after deliberating in accordance with the law;

34. IN TERMS OF FORMAL PRESENTATION

- **Confirms** that Mr. Tidjani Aboubacar has abandoned the proceedings instituted against BCEAO; and consequently orders that the latter has a case to answer;

35. ON THE MERITS

- **The Court declines** its *rationae materiae* jurisdiction;
- **Adjudges** that there are no grounds to adjudicate further;
- **Asks** each party to bear its costs.

THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*
HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*
HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON *(ESQ.)* - *REGISTRAR*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT PORTO-NOVO, BENIN REPUBLIC

ON FRIDAY, THE 7TH DAY OF OCTOBER, 2011

SUIT NO: ECW/CCJ/APP/03/09
JUDGMENT NO: ECW/CCJ/JUD/01/11

BETWEEN
Mrs. AMEGANVI Isabelle Manavi
Messrs. FABRE Jean-Pierre:
LAWSON-BANKU Boevi Patriek:
OURO-AKPO Tchagnaon Nafiou;
ATAKPAMEY Kodjo Thomas;
NANTI Kwarni:
ATTIKPA Akakpo;
KETOGLO Yao Victor and
APENYA, Bruce Ahli } ***PLAINTIFFS***

V.

THE REPUBLIC OF TOGO - ***DEFENDANT***

COMPOSITION OF THE COURT:

1. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **AJAVON ATA MEGAN ZEUS (ESQ.),** – *FOR THE PLAINTIFFS*
   SCP MARTIAL AKAKPO (ESQ.) AND
2. **EDAH ABBY N'DJELLE (ESQ.)** – *FOR THE DEFENDANT*

Lack of jurisdiction -Bringing a case under expedited procedure - Right to be heard -Human rights.

SUMMARY OF FACTS

The Applicants, Madam Isabelle Manavi Ameganvi and Others, lodged an Application at the Court Registry against the Republic of Togo, for human rights violation. By a separate Application, the Applicants asked that their case be heard under expedited procedure in accordance with Article 5(c) of the Rules of Procedure of the Court.

They contended that they were elected as parliamentarians on the ticket of the party named Union des Forces du Changement or UFC (Union of the Forces of Change) and sat in the National Assembly as Members of Parliament (MPs).

That following internal dissension, there was a division within the UFC and a new political party was formed with the name Alliance Nationale pour le Changement (National Alliance for Change).

That in response, the Management Board of the UFC appointed a new Chairman and a Vice-Chairman for the UFC Parliamentary Group. The Applicants further claimed that they were surprised to notice that a letter from the President of the National Assembly addressed to the Constitutional Court noted that the new Chairman of the UFC Parliamentary Group had transmitted letters of resignation to him, supposedly emanating from them, the Applicants.

That it was on the basis of those falsified letters that the Constitutional Court erroneously certified that the seats of the Parliamentarians concerned had become vacant, and therefore ordered that they be replaced.

The Applicants concluded that their human rights were violated, and cited provisions of the ECOWAS Protocol on Democracy and Good Governance, the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the Constitution of Togo.

THEY SOUGHT THE FOLLOWING ORDERS FROM THE COURT:

- ***A declaration*** *that their removal from the National Assembly was effected in violation of the instruments cited above;*

- ***An order*** *to the Republic of Togo to reinstate them back to their seats as Parliamentarians of the National Assembly;*

- ***An order*** *to the Republic of Togo to repair the damage done against them.*

The Republic of Togo contended that the Applicants voluntarily resigned from their functions as Parliamentarians, through their own personal statements. That in line with Article 6 of the Rules of Procedure, the President of the National Assembly informed the plenary session of that development and subsequently brought the matter to the notice of the Constitutional Court, and the Constitutional Court carried out the replacement of the resigning Parliamentarians by applying Article 192 of the Electoral Code.

The Republic of Togo refuted the allegations of human rights violations brought by the Applicants, and asked that it may please the Court to find:

- *That the Applicants resigned on their own free will;*
- *That the decision made by the Constitutional Court, ordering a replacement of the resigning Parliamentarians, followed due legal process.*

LEGAL ISSUES

- *Does the Court have jurisdiction to examine the case?*

- *Can the case be brought under expedited procedure as provided for under Article 59 of the Rules of Procedure of the Court?*

- *Did the Republic of Togo respect the Applicants' right to be heard?*

DECISION OF THE COURT

The Court dismissed the objection of the Republic of Togo, that the Court lacked jurisdiction over the matter brought by the Applicants, and also dismissed the Applicants' request for expedited procedure.

In terms of the merits of the case, the Court found that the Republic of Togo violated the Applicants' fundamental right to be heard, as provided for in Article 10 of the Universal Declaration of Human Rights and Article 7 of the African Charter on Human and Peoples' Rights, and ordered the Republic of Togo to repair the said violation of the Applicants' human rights by paying to each of them the sum of Three Million CFA Francs (CFA F 3,000,000).

JUDGMENT OF THE COURT

PROCEDURE

1. By application filed at the Registry on the 30th day of November, 2010, Mrs. AMEGANVI Isabelle Manavi; Messrs. FABRE Jean-Pierre; LAWSON-BANKU Boevi Patrick; OURO AKPO Tchaunaou Nafiou; ATAKPAMEY Kodjo Thomas; NANTI Kwarni: ATTIKPA Akakpo; KETOGLO Yao Victor and Bruce Ahli APENYA having as Counsel AJAVON Ata Messan Zeus (Esq.), Lawyer registered with the Court of Appeal in Lome.113, Rue LOGOSSAME-Hanoukope, BP 1202, Lorne, E-mail: atamzajavon brought a case against THE REPUBLIC OF TOGO, before the Community Court of Justice, ECOWAS, and plead with the Court to:

   - **Adjudge and declare** that the withdrawal of the Applicants from the National Assembly of Togo occurred in violation of human rights, notably in violation of Article 1(a) paragraph 2 and Article 33 of Protocol A/SP1/12/01 on Democracy and Good Governance and Article 7(1), 7(l)-c and Article 10 paragraph 2 of the African Charter on Human and Peoples' Rights;

   - **Order** the Republic of Togo to recall the Applicants to occupy their seats at the National Assembly of Togo:

   - **Order** the Republic of Togo to pay to each of them, such sums as the Court may adjudge sufficient as damages.

2. In another Application dated the same day and filed at the Registry of the Court on 30th November 2010, Applicants requested the Court to hear their Application under expedited procedure, pursuant to Article 59 of the Rules of procedure of the Court.

3. On 23rd March, 2011, they equally submitted a reply to the defence writs of 14th February, 2011, and another rejoinder dated 5th May, 2011, to an earlier one sent in by the defence, and finally, a note to the Court, informing it that they no longer have observations, regarding the last writ filed by the defence; Applicants attached to their last note, copy of the ***Inter***

Parliamentary Decisions adopted by the Human Rights Committee of the Inter-Parliamentary Union, at its 133th Session in Panama, 15 to 19 April, 2011.

4. The Republic of Togo, represented by the Minister of Justice, and Minister in charge of Cooperation with State Institutions filed its first defence writ on 28th February, 2011. On 18th April, 2011, the Republic of Togo, represented this time by a group of Lawyers, Martial Akakpo (Esq.) and Edah Abby N'djelle (Esq.) in the SCP Akakpo Martial Law Firm filed a second Memorial in defence at the Registry of the Court.

FACTS

The facts as related by Applicants

5. Applicants aver that they were all parliamentarians of the National Assembly of Togo till 22nd November, 2010:

That they were all active members of the political party known as "UFC" (Union des Forces du Changement) from which some of them resigned on 12th August, 2010, and others, on 12th October, 2010:

6. Applicants claim that before the October 2007 Legislative Elections, the candidates that won nomination to vie for the of posts of MPs under the banner of the party were presented with three pre-typed documents which they signed during an official endorsement ceremony by the party: that the documents were labelled: (i) "UFC contract of trust: Agreement to subscribe to the values of UFC", (ii) "UFC contract of trust; The candidate's commitment" and (iii) "a model of a typed letter of resignation, having no name or date, with the recipient addressed as the President of the National Assembly, and bearing the inscription: 'Member of Parliament (MP) at the National Assembly': that all these documents were collected and kept by the national chairman of the party, Mr. Gilchrist Olympio.

7. Applicants aver that following the October 2007 Legislative Elections. UFC won 27 seats and its candidates formed a Parliamentary Group, within the Parliament, with MP FABRE, Jean-Pierre as President, and MP LAWSON, Latevi Georges as Vice -President.

8. Applicants however claim that following a disappointment occasioned by Mr. Gilchrist Olympio, the National Chairman of the party, there was a break-up within the party, which led to the resignation, from the party, of 20 MPs, out of the 27 that UFC had at the National Assembly, on 5th and 8th October, 2010, and that on 24th October, 2010, these break away MPs equally resigned from the UFC Parliamentary Group.

9. They point out that, prior to these resignations, UFC had excluded, from within its ranks, MPs FABRE, Jean-Pierre, LAWSON, Latevi Georges, AMEGANVI Isabelle Manavi. Mrs. SOKPLOLI Mana nee AGBOKU and Mr. DUPUY who was the National Communications Secretary to the party, on 12th August, 2010.

10. Applicants claim that after their resignation from UFC they created a new political party known as "Alliance National pour le Changement" (National Alliance for Change), and that they formed a Parliamentary Group for the new party, with MP FABRE, Jean-Pierre as President, and MP LAWSON, Latevi Georges as Vice-President.

11. Applicants further claim that, following their departure from UFC, the National Bureau of UFC announced, through a declaration on 8th November, 2010, that they have nominated MPs AHOLOU Kokou and AKAKPO, Alexandre as President and Vice-President respectively for the UFC Parliamentary Group within the National Assembly.

12. Plaintiffs aver that, the President of the Togo National Assembly wrote to the Constitutional Court of Togo, that on 10th November, 2010, the new President of the UFC Parliamentary Group within the National Assembly, MP AHOLOU Kokou forwarded to him (the President of Assembly) resignation letters purportedly written by them and Mr. Lawson Latevi, who was not ejected during the October 2007 Legislative Elections.

13. According to Plaintiffs, the said resignation letters, which were typed and read thus: ***"I have the honour to inform you that, effective this day, and for political exigencies, I am resigning, from my position, as a Member of Parliament"*** which were not dated, but bear the handwritten name of the purported writer, were actually written by a third party.

14. That the purported letters of resignation which were forwarded by the President of the National Assembly to the President of the Togo Constitutional Court do not constitute an order expressly given by the MPs cited as their signatories, to the fact that they resigned their positions.

15. Also, that the MPs cited in such letters, having left the UFC, and having created a new party (ANC), the new President of the UFC Parliamentary Group within the National Assembly can no longer act on their behalf, and moreover, as a reminder, the President of the Togo National Assembly was duly informed on their quitting the UFC.

16. Plaintiffs recall that a resignation letter is a personal and voluntary correspondence, which is written, dated and signed by the individual who takes such a decision, and which is submitted to the recipient by the person resigning, him/herself; that in the instant case, none of the Plaintiffs gave mandate to MP AHOLOU Kokou, to forward on their behalf, any purported letter of resignation whatsoever.

17. That the inclusion of a letter of resignation purportedly written by Mr. Lawson Latevi, who was not elected during the October 2007 Legislative Elections, among the letters purportedly written by the supposedly resigning MPs shows that those letters had actually been signed by **candidates**, and not **MPs**.

18. That at best, the President of the Togo National Assembly was officially informed on the exclusion of these MPs, by the UFC on 12th August, 2010.

19. They thus submit that there is no doubt that MP AHOLOU Kokou's intention is to infringe upon their rights and that this violates Article 52 of the Togo Constitution which provides that:

"Each MP is the Representative of the whole Nation; (therefore) any forced mandate is null and void"

20. From the foregoing therefore, Plaintiffs submit that it should be understood that, once elected, an MP is legally not accountable or responsible neither to the electorate, nor the party on whose platform he was elected,

consequently, he is not legally bound by the commitments he might have earlier made, or the manifestation of some wishes during his mandate.

21. Also, that by forced mandate, it is meant to be an act that legally binds both an MP and people from his constituency (in this case, the electorate and political party), in such a way that the MP would be fully accountable to his constituency; that this view would mean the revocation of the mandate, either by the party or the electorate, (the electoral constituency) from an MP who would not fulfill his commitments made, prior to the election.

22. Applicants aver that the provisions of Article 6 of the Rules of procedure of the Togo National Assembly were violated and that they did not sign any letter of resignation, from their position as Members of Parliament.

23. Plaintiffs conclude by averring that the purported letters of resignation that were imputed to them are falsified documents, on which a third party just wrote their names by hand.

24. They therefore argue that the Togo Constitutional Court should have authenticated the validity of the purported letters that were forwarded to it, in violation of Article 52 of the Togo Constitution, and Article 6 of the Rules of procedure of the Togo National Assembly, instead of acknowledging same, as it did, and erroneously ascertain the vacancy of their seats in the Parliament and ordered for their replacement.

The facts as related by the Defendant

25. In its defence writs of 28th February, 2011, the State of Togo observes that the facts of the case border on the conditions for the replacement for the resigning MPs, and that the Constitutional Court of Togo, once informed by the President of the Togo National Assembly on the matter, with the resignation letters of the MPs as proof, ordered their replacement, pursuant to the relevant legislative and constitutional provisions.

26. In another defence writs dated 13th April, 2011, Defendant avers that since Mr. Gilchrist Olympio, the National Chairman of the UFC political party

was barred from contesting the presidential elections of 4th March, 2010, it was the National Secretary of the party, Mr. FABRE, Jean-Pierre who was designated to contest the elections on the platform of UFC; it claims that after the said presidential elections, there was a dispute within that party, which led to the party being split into two entities, and the creation of another political party known as ***"Alliance National pour le Changement"*** (National Alliance for Change), by the dissidents, with Mr. FABRE, Jean-Pierre as its President.

27. Defendant further claims that, following this development, the Applicants who are all ex-dissidents of UFC, having voluntarily resigned from their position as MPs, by individual letters, the President of the Togo National Assembly informed the House at its Plenary Session, pursuant to the provisions of Article 6 of the Rules of procedure of the Togo National Assembly, and thereafter wrote to the Constitutional Court of Togo, which ordered the replacement of the resigning MPs, pursuant to the provisions of Article 192 of the Electoral Laws.

The pleas-in-law by the parties

The pleas-in-law as invoked by Applicants

28. Applicants rely on Articles 9.4 and 10 of the Supplementary Protocol on the ECOWAS Court of Justice, which provide respectively that: ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"***, ***"Access to the Court is open to...individuals on application for relief for violation of their human rights..."***

29. As to the merit of the case, they claim that since human rights are inherent in the human person, these rights are inalienable, imprescriptibly sacred, and should not suffer any limitation; they further argue that their rights as violated are recognized, on the one hand by Articles 1 and I (a) paragraphs 2 and 33 of the protocol on Democracy and Good Governance, and the other hand, by Articles 7 (1), 7 (1) (c) and 10 paragraph 2 of the African Charter on Human and Peoples' Rights; that the President of the Togo National Assembly, by forwarding purported, doubtful and unsigned letters

of resignation (partly typed, and partly handwritten by a third party), and which were not submitted by the concerned MPs in person, has failed to contribute to the respect for the principle of valorizing and reinforcement of Parliaments, and thus, has violated the provisions of Article 1 of the afore-mentioned Protocol; they equally point out that, by accepting such purported letters of resignation from MP AHOLOU, who is openly opposed to them, yet who claims that he presented such letters on their behalf the President of the Togo National Assembly voluntarily contravenes the provisions of Article 6 of the Rules of procedure of the Togo National Assembly.

30. Plaintiffs claim that, by declaring legal the purported letters of resignation imputed to them, whereas it knew that the said letters were forwarded by a third party, who is openly opposed to them, within the UFC political family, and whereas they publicly objected to the validity of the same letters, the Constitutional Court of Togo voluntarily contravenes Articles 32 and 33 of its own Rules of procedure, and thus violates the principle of valorizing and reinforcement of Parliaments, as provided under Articles 1 (a) paragraph 2, 33 paragraphs 1 and 2 of Protocol A/SP1/12/01 on Democracy and Good Governance.

31. Plaintiffs furthermore invoke the violation of Articles 7 and 10 of the African Charter on Human and Peoples' Rights.

32. They equally claim that the Constitutional Court of Togo did not ensure the respect for the provisions of the same Article 7, by failing to hear them, or by refusing them to enjoy the services of a Counsel.

33. Plaintiffs equally accuse the President of the Togo National Assembly of violating Articles 7 and 10 of the African Charter on Human and Peoples' Rights, by forwarding to the Constitutional Court of Togo, purported letters of resignation imputed to the MPs, who he knew do no longer belong to their former political party, but to a new one, the ANC, while at the same time refusing to hear them on the matter; they further aver that, by acting in such a manner, the President of the Togo National Assembly demonstrates a shallow knowledge of the provisions of Article 52 of the Togo Constitution, which empowered the President of the same Assembly

to allow an MP, during the swearing-in ceremony of the 1995-2000 Parliamentary period, to still continue in his capacity as MP, despite the latter leaving the political party under whose banner he was first elected into Parliament.

34. In another rejoinder dated 5th May, 2011, Applicants aver that in the 'French' constitutional law, a dateless resignation letter constitutes a 'blank resignation' (a written guarantee given by a candidate to his electorate prior to election), and that a letter of resignation, given by an elected MP to a third party is of no consequence, when such a letter is presented to the President of the concerned Parliament and that all this relates legally to the forced mandate that is prohibited under Article 52 of the Togo Constitution; in the same writs Applicants declare that they abandon the plea that they invoke under the Protocol A/SP.1/12/01 on Democracy and Good Governance, and plead that the Court should take note; they submit that they are limiting their pleas to Articles 10 of the Universal Declaration of Human Rights of 10th December 1948, and 7(1), 7 (1)(c) and 10 paragraph 2 of the African Charter on Human and Peoples' Rights, and conclude that their fundamental human rights recognized by these instruments are violated by the Republic of Togo.

The pleas as invoked by the Defendant

35. In a Memorial dated 13th April, 2011, filed at the Registry of the Court on 18th April, 2011, the Republic of Togo raises an objection as to the incompetence of the Court to hear the case, and submits that there is no human rights violation, because the Constitutional Court of Togo only respected the provisions of Articles 191 and 192 of the Togo Constitution. Defendant relies on the jurisprudence of this Court, by citing an earlier judgment of 22nd March, 2007, in the case ECW/CCJ/APP/05/06, and concludes that the Application is inadmissible.

36. In its writs of 14th February, 2011, Defendant submits that it is incontrovertible that Applicant voluntarily resigned from their positions as MPs, through individual letters; it claims that it is equally true that, once the said resignation letters got to the President of the Togo National Assembly the concerned MPs were no longer Members of the Assembly, and that even the repentant moves embarked upon thereafter cannot revive a mandate that they have already relinquished.

37. To this effect, Defendant invokes Article 6 of the Rules of procedure of the Togo National Assembly, which provides thus:

> ***Any Member of Parliament who is lawfully elected may resign from his position. Letters of resignation shall be submitted to the President of the Assembly, who, in turn shall inform the House, during the very next sitting, and shall notify the Constitutional Court of Togo accordingly.***

38. The Republic of Togo submits that, in the instant case, it is reported in the minutes of the third sitting of the Second Ordinary Session of the year 2010 that the President of the Togo National Assembly informed the Plenary that nine MPs submitted individual letters of resignation to him, and that since the notification of the incident was made to the Togo Constitutional Court, legal provisions were strictly respected.

29. Defendant claims that in these circumstances, the process of replacing the concerned MPs as done in total respect for the laid down rules, and has not infringed on any legal instrument that could give jurisdiction to the ECOWAS Court of Justice; that moreover, this lack of jurisdiction of this Honourable Court is pursuant to the provisions of Article 106 of the Constitution thus: ***"The Decisions of the Togo Constitutional Court cannot be appealed. They are binding on State Institutions, military and judicial authorities"***. In the same vein, Defendant cites a jurisprudence of this Court, when it refers to the Judgment in the case ECW/CCJ/APP/02/05, wherein the Court holds that it lacks jurisdiction to enter Applications seeking to appeal the decisions made by the Courts in Member States.

40. In its rejoinder dated 13th April, 2011, Defendant also claims that the violation of Protocol on Democracy and Good Governance that Applicants allude to is ill founded, because once the resigning MPs have chosen another political party, the only honourable thing left to them was to relinquish the mandate of the political party on whose platform they were elected in the first instance, in accordance with their earlier commitments made to UFC, during the investiture of candidates of that political party.

41. Furthermore, regarding the Applicants' earlier commitments made to UFC, to: ***"invest their energy for the cause of UFC, respect its Rules and***

Regulations, its political orientation and to resign from their positions in case of disobedience to this commitment", Defendant submits that, since it was for a purpose that they signed these commitment, it was equally for the purpose that they had signed these letters that they are now contesting; moreover, Defendant notes that these letters of resignation are neither anonymous, because Applicants are the authors; likewise, they not signatures to a blank documents, because they had been written before signatures, and that the dates on which they were written are of no consequence, since their effect was projected into the future.

42. While invoking Article 52 of the Togo Constitution, Defendant points out that the resignation came from the manifestation of the MPs' wishes in this regard, and that this is what the MPs have done in the instant case; they further submit that once each of the MPs' wish to resign is recognized, the identity of the person who forwarded their letters of resignation is of less importance, and that is why the President of the Togo National Assembly informed the Constitutional Court, pursuant to the provisions of Article 6 of the Rules of procedure of the Togo National Assembly.

43. As to the violation of Article 33 of the Protocol on Democracy and Good Governance that Applicants invoked, Defendant argues that the confirmation of the authenticity of the letters of resignation fall within the discretionary powers of the Togo Constitutional Court. It further argues that the same thing goes for whether or not to hear the resigning MPs, by the same Court.

44. Defendant contests the alleged violation of Articles 7 (1) and 7 (1) (c) of the African Charter on Human and Peoples Rights invoked by Applicants, and submits that these instruments which provide that every person has the right to be heard; that every person has the right to defence, including the right to be assisted by a Counsel of his choice; are applicable to Courts of law before which cases are brought, during a trial, and not applicable to a National Assembly of a country, as in the instant case, which cannot be taken as a law court, talk less of its President, and finally deduces that there could not have been violation of these instruments with regard to an Institution.

45. The State of Togo avers that its Constitutional Court neither violates Articles 7 (1) and 7 (1) (c) of the African Charter on Human and Peoples' Rights, and defends its position with argument that, the fact that Applicants' resignation letters were forwarded to that Court does not constitute a trial.

46. Defendant equally contests the alleged violation of Article 10 of the African Charter on Human and Peoples' Rights, and argues that it is pursuant to the freedom of association that this text provides for, that led Applicants to freely join UFC, such that they freely signed the letters of resignation which are now incriminated, and concludes that, in these conditions, and pursuant to the principle of *"nemo auditor"*, they cannot prevail against their depraved act.

47. Consequent upon all the foregoing, the State of Togo solicits that may it please the Honourable Court to:

- Note the resignation that each of the MPs freely made, from their position, sequel to political nomadism;
- Note the regularity with which the Togo Constitution Court has noted the resignation of each of the Applicants from their position as MPs, and their subsequent replacement within the Togo National Assembly, pursuant to legal provisions;
- Strike out all claims of Applicants and order them to bear the cost.

The Court Analysis

48. The consideration of the case by the Court shall be in relation to the admissibility of the Application and its subsequent submission to an expedited procedure, on the jurisdiction of the Court and eventually on the merit of the case.

As to admissibility of the case

49. In their Application, Mrs. Ameganvi, Manavi Isabelle and her Co-Applicants invoke human rights violation that took place in the Republic

of Togo, an ECOWAS Member State. This invocation which is premised on Articles 9 (4) and 10 of the Supplementary Protocol A/SP.1/01/05 on the Court is amply sufficient to declare admissible this Application, as filed by these individuals, who claim that they are victims of human rights violation committed on the territory of a Community Member State.

50. Consequently, the Court declares admissible, the Application filed by Mrs. Ameganvi Manavi Isabelle and her 8 Co-Applicants.

Regarding the submission of the Application to expedite procedure

51. By another Application filed at the Registry of the Court the same day with the main Application, Applicants solicits for the benefit of the expedited procedure. pursuant to Article 59 of the Rules of procedure of the Court; the Court notes that Applicants respected the form of submission as provided under Article 59, however, the Court views that the particular urgency contained in the said Article 59 is not established, because the mere reference to the next election date to renew the mandate of the MPs, which is slated for September 2012, is not pertinent, since nothing debars Applicants to still present themselves at the next election, either as private candidates or within the framework of their new political party; thus the Court is of the opinion that it behoves it to reject the request to submit the Application to an expedited procedure.

As to the jurisdiction of the Court

52. The legal issues brought for the consideration of the Court, namely the transmission by the President of the Togo National Assembly, of letters of resignation imputed to Applicants, and contested by them, and **Decision No. E018/10 of 22nd November, 2010** of the Togo Constitutional Court made following the said transmission of letters, whether the Court has jurisdiction to consider them, as likely to constitute human rights violation of Applicants, as they claim.

53. The Court notes that of primary importance is the simple reference to the international instruments, as cited above, and which constitute the essential part of the Community Judicial order in matters relating to human rights

violation. This therefore makes it binding on the Court to declare its jurisdiction, as provided under Articles 9 (4) as it relates to subject-matter, and 10 (d) as it relates to access to the Court; that since its jurisprudence is constant in this regard, the Court must declare its jurisdiction, and consider the case on its merit.

As to the merit of the case

54. The Court must determine whether the transmission by the President of the Togo National Assembly, of letters of resignation imputed to Applicants, and contested by them, and Decision No.E018/10 of 22 November 2010 of the Togo Constitutional Court made following the said transmission of the said letters, whether the Court has jurisdiction to consider them, as likely to constitute human rights violation of Applicants, as they claim.

55. Although it was an initiative by the President of the Togo National Assembly, followed by a Decision of the Togo Constitutional Court, the procedure which led to the deprivation of Applicants' seats in Parliament should be analysed, in its entirety as an act that must engage the responsibility of the Republic of Togo in relation to its international engagements, as they relate to human rights.

56. Therefore, the Court is of the strong opinion that if alleged human rights violations that must be heard in a case, only a consideration of the procedure in its entirety can enable the Court to find whether or not there was respect for this right.

57. In the instant case, the procedure which led to the loss of Applicants' seats in Parliament was initiated by the President of the Togo National Assembly, who decided to transmit to the Togo Constitutional Court, letters of resignation imputed to certain MPs, which he received from the UFC Parliamentary Group, to which these MPs (Applicants) belonged.

58. It is established that Article 6 of the Togo National Assembly provides that:

(1) "Any Member of Parliament who is lawfully elected may resign from his position;

(2) "Letters of resignation shall be submitted to the President of the Assembly, who, in turn shall inform the House, during the very next sitting, and shall notify the Constitutional Court of Togo accordingly".

59. From the above Article, it could be deduced that nothing bars an MP legally elected, to take the initiative to submit, by way of writing, a letter of resignation, addressed to the President of the Togo National Assembly. However, the concerned MPs deny taking the initiative of renouncing their mandate as Members of Parliament, neither have they submitted a resignation letter to the President of the Togo National Assembly.

60. From the consideration of the facts of the case, the Court can conclude that no letter of resignation was submitted personally by Applicants, to the President of the Togo National Assembly, in this case.

61. It can only be deduced that the President of the Togo National Assembly received from the new leader of the UFC Parliamentary Group, MP AHOLOU, documents that were signed by Plaintiffs, when they were only ordinary candidates to the post of MPs. The said documents are thus labelled: ***"I have the honour to inform you that, effective this day, and for political exigencies, I am resigning, from my position, as a Member of Parliament"***.

62. However, these documents cannot be considered as being letters of resignation, in the spirit of Article 6 of the Rules of procedure of the Togo National Assembly. Indeed, according to this Article, a letter of resignation must be signed by an MP who was duly elected, a legal status that the signatories were yet to attain, when they appended their signatures on the said letters; even the Defendant did not contest this fact.

63. On the other hand, it can be deduced from the facts of the case that Plaintiffs have never expressed their wish to resign, either by submitting personally, or transmitting a letter to the President of the Togo National Assembly; on the contrary, they refuted, during the Plenary Session of the Assembly ever having the intention to resign, a fact that is buttressed by the creation of a new Parliamentary Group.

64. Yet, if the concerned MPs did not take any initiative to resign, this means that the conditions as stated under Article 6 of the Rules of procedure of the Togo National Assembly were not respected, this is the more reason why the said letters should not have been forwarded to the Togo Constitutional Court, in the first instance, without prior hearing from Plaintiffs.

65. This explains the immediate reaction of the President of the Togo Constitutional Court, who, upon receiving the letters of resignation, had to send them back to the President of the Togo National Assembly, via letter dated 17th November, 2010, denouncing some irregularities in the procedure followed, and requesting that the provisions of Article 6 of the Rules of the Togo National Assembly be respected.

66. The non-regularisation of this procedure by the President of the Togo National Assembly led the Constitutional Court to adjudicate, as it did, thereby depriving Plaintiffs of their mandate, and, in the same breadth, violating the pertinent provisions of the Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights.

67. Indeed, Article 10 of the Universal Declaration of Human Rights provides that: **"Everyone is entitled, in full equality, to a fair and public hearing, by an independent and impartial Tribunal, in the determination of his rights and obligations, and any criminal charge against him".** And Article 7 of the African Charter on Human and Peoples' Rights provides that: **"Every individual shall have the right to have his cause heard"**. This right comprises **"the right to an appeal to competent national organs, for violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force"**.

Article 1 (h) of the ECOWAS Protocol on Democracy and Good Government provides that:

> **"The rights set up in the African Charter on Human and Peoples' Rights and international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organization shall be free to have recourse to**

the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on human rights, to ensure the protection of his/her rights.

In case the absence of a Court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving necessary powers to common or civil judicial bodies".

68. The Court therefore concludes that the Republic of Togo violates Plaintiffs' rights to be heard during the procedure that led to their losing their mandate.

69. Plaintiffs equally allege the violation of their right to association, as provided under Article 10(2) of the African Charter on Human and Peoples' Rights. But since the facts supporting this violation were not proven by Applicants, the Court rejects this plea.

70. Applicants solicit that the Court should order the Republic of Togo to pay them, such a sum that the Court may consider sufficient, as damages for the prejudice that they suffered.

71. Even when Applicants did neither expose the facts that constitute, nor the nature of the prejudice, they however request the Court the evaluation of such prejudice. The Court holds that Plaintiffs are deprived of a fundamental human right. There is therefore ground for the reparation of the prejudice suffered by Plaintiffs, by awarding a lump sum for each of them.

72. **FOR THESE REASONS**

The Court, sitting in a public hearing at Porto-Novo, and after hearing both parties on issues of human rights violation in last resort:

As to the form:

- **Rejects** the preliminary objection raised by the Republic of Togo;

- **Declares** admissible the Application filed by Mrs. AMEGANVI Isabelle Manavi and eight (8) of her Co-Applicants;

- **Declares** that it has jurisdiction to examine the allegations of Applicants' human rights by the Republic of Togo;

- **Adjudges** that the request to submit the Application for an expedited procedure is rejected, because Plaintiffs did not justify any legitimate ground for this;

As to merit:

- **Declares** that there is violation of Plaintiffs' fundamental human rights to be heard, as provided under Articles 10 of the Universal Declaration of Human Rights and 7 of the African Charter on Human and Peoples' Rights;

Consequently

- **Orders** the Republic of Togo to repair the violation of Plaintiffs' rights, and to pay to each of them, the sum of three million (3,000,000 CFA Francs);

- **Orders** that the Republic of Togo bears the cost.

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

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

HON. JUSTICE BENFEITO MOSSO RAMOS - *PRESIDING*

HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
ATHANASE ATANNON *(ESQ.)* - *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 THURSDAY, THE 17TH DAY OF MARCH, 2011

SUIT NO: ECW/CCJ/APP/09/09
JUDGMENT NO: ECW/CCJ/JUD/03/11

BETWEEN
BAKARY SARRE AND 28 OTHERS - ***PLAINTIFFS***
V.
THE REPUBLIC OF MALI - ***DEFENDANT***

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY
ATHANASE ATANNON (Esq.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
NONE – *FOR THE APPLICANTS*;
AGENT: HIS EXCELLENCY, MR. BOUBACAR KARAMOKO COULIBALY, ***AMBASSADOR OF MALI TO NIGERIA;***
COUNSEL: MR. MOUSSA KENNEYE KODIO, *JUDGE, DEPUTY-DIRECTOR OF LAND AND ADMINISTRATIVE MATTERS, LEGAL DEPARTMENT OF THE MINISTRY OF FINANCE AND ECONOMIC MATTERS OF MALI. - FOR THE DEFENDANT*

Lack of jurisdiction to adjudicate on judgments delivered by another court -Human rights violation -Defect in representation -Lack of locus standi -Inadmissibility

SUMMARY OF FACTS

Bakary Sarre, a Malian national, and 28 others were appointed as judges on 29th January 2007 by a decree. A retroactive provision contained in the said decree backdated the effective date to 1st January 2006. Relying on that provision, the Republic of Mali awarded the Applicants, as back payment, all the financial benefits they should have received during the period from January 2006 to February 2007, but it refused to pay them court sitting and responsibility allowance, arguing that the judges had not yet been posted during the period under consideration. An attempt to settle the case amicably did not yield any fruit and the Applicants took the case before the Supreme Court of Mali. The Supreme Court of Mali dismissed their application. The Applicants filed an action for revision of the judgment, and after the Supreme Court confirmed that their case must be thrown out, they brought the matter before this Court.

LEGAL ISSUES

- *Whether a judgment delivered by another Court be submitted before the Court for review?*
- *Whether an Application which does not observe the conditions provided in Article 13 of the 19th January, 2005 Protocol on the Court, and those in Articles 28(3) and 32(1) of the Rules of Procedure of the Court, be declared admissible?*

DECISION OF THE COURT

The Court declared that it has no jurisdiction to adjudicate on the Application for revision of judgments delivered by the Supreme Court of Mali.

- *That it has jurisdiction to examine violations of human rights.*
- *That Bakary Sarre has no locus standi to act on behalf of the judges, before the Court; that the criteria for representation before the Court were not respected.*
- *The Court declared Bakary Sarre's application inadmissible.*

JUDGMENT OF THE COURT

FACTS AND PROCEDURE

1. An Application was filed against the Republic of Mali by Mr. Bakary Sarre and 28 others before the Court, on 21st July, 2009, and it was registered at the Registry of the Court on 11th August, 2009.

2. The Applicants were appointed *auditeurs de justice* by Decree No. 04-OOS/MJ-SG of 9th January, 2004. They went through a two-year training at the National Institute of Judicial Training after which they were appointed as judges, by Decree No. 07-030/P-RM of 29th January, 2007, then posted, by Decree No. 07-0S3/P-RM and Decree No. 07-054/P-RM of 21st February, 2007.

3. The Decree appointing them comprises a retroactive provision backdating the effective date of appointment to 1st January, 2006. By relying on that provision, the Republic of Mali granted them, on the basis of a reminder, housing allowances and basic salaries which they should have received during the period from January 2006 to February 2007. The Republic of Mali did not however pay them the corresponding judges' sitting and responsibility allowances on the grounds that the judges had not yet been assigned their duties during that period.

4. Dissatisfied with this treatment, the Applicants, as from April 2007, approached their administrative authorities, for an amicable settlement of payment of judges' sitting and responsibility allowances, which they claimed as due them. They did not win their case.

5. They therefore brought their case, on 5th May, 2008, before the Administrative Section of the Supreme Court of Mali seeking that the Republic of Mali be made to pay the sitting and responsibility allowances, With the interest accruing thereof. By a Judgment delivered on 16th October, 2008, the Supreme Court dismissed their application as ill founded, on the grounds that Article 37 of Decree No 142/PRM of 14 August 1975 stipulating the modalities for granting allowances to civil servants and State officials provide that:

> ***"Allowances shall be attached to a function, irrespective of the status of the officer occupying that post. The allowance shall be paid in***

respect of the appointing legislation of the beneficiary and shall take effect from the first day of the month which follows the actual assumption of duty"

and that Mr. Bakary Sarre and the 28 others had not assumed duty during the period between 2004 and 2006. The Supreme Court found that the allowances claimed by the Applicants should only have been due them after actually assuming duty in the courts and principal departments of the Ministry of Justice, except at the National Institute for Judicial Training, in the light of the nominating instruments and certifications of assumption of duty signed by the president or head of the court, tribunal or department; that just as in the processing of their appointments, the allowances are not due them except upon their effective assumption of duty. The Court also indicated that the factual circumstances of the case, in the light of the applicable rules of law, notably in terms of the texts relating to the statutory and monetary benefits of public servants, it shall be risky to describe the period between 1st January, 2006 and 28th February, 2007 as prejudicial for the Applicants; that this period rather corresponds to **"a period of expectation"** or /la pro-maturation and posting period" of the concerned persons. And that as a result, in the light of the legal provisions in force, the Applicants are in bad standing to lay claim to the sitting and responsibility allowances for the period under consideration.

6. On 29th October, 2008, they filed before the same Court, an application for the revision of Judgment No 188 of 16th October, 2008. By Decree No 116 of 26th June, 2009 the Supreme Court confirmed the previous ruling.

7. The Applicants therefore brought their case before the Court of Justice of ECOWAS because, according to them, Judgment No 188 of the Supreme Court of Mali confirmed by Judgment No 116, constitutes a human rights violation, notably a violation of Articles 5 and 10 of the Universal Declaration of Human Rights.

   In accordance with Article 34 of the Rules of Procedure, the said application was served on the Republic of Mali on 17th August, 2009, and the Republic of Mali filed its defence on 18th January, 2010.

8. The Applicants did not appear in court during the hearings of 18th and 20th June, 2010. The Court therefore addressed preparatory measures to the

Parties on 27th July, 2010, in line with Article 51 of the Rules of Procedure, and requested their responses, at the latest, by 30th September, 2010. The Court notably asked the Applicants to produce evidence to the effect that the 1999-2001 year-group, in the same manner as the 2004-2006 batch, benefited from sitting and responsibility allowances; that they delegate their peers or else a duly constituted Counsel to represent them at the hearing of 28th October, 2010. The Court also asked the Republic of Mali to furnish all information which will throw light on the treatment reserved for the judges of year-group 1999-2001, in respect of the said allowances, and to file for the purposes of the instant proceedings, Judgment No 116 of 26th June, 2009 as rendered by the Supreme Court of Mali. The Court equally indicated that it intended to hear the Parties on the admissibility of the Application and on the jurisdiction of the Court to adjudicate on the case.

9. On 27th September, 2010, the Republic of Mali communicated to the Registry of the Court, its response to the preparatory measures. Mr. Bakary Sarre did likewise on 29th September, 2010. The said responses were communicated to the Parties on 28th October, 2010.

10. The Court summoned the Parties to a hearing, held on 18th January, 2011, at which the Applicants failed to appear before the Court and did not enter any appearance.

CLAIMS AND ARGUMENTS OF THE PARTIES

A. THE APPLICANTS

11. The Applicants made complaints before the Court against Judgments No 188 and No 116 of the Supreme Court of Mali, on the grounds that the said judgments allegedly violated ***"human rights, namely: the principle of equality of citizens before the law, the principle of equity and fairness before the courts of law and the right not be subjected to a degrading treatment"***. The Applicants consequently asked the Court to receive their Application, declare that it is well founded, and adjudicate afresh and ask the Republic of Mali and the Ministry of Justice to pay to Mr. Bakary Sarre and the others the sum of CFA F 145,000,000 as damages and also order the relaxation of the constraints imposed by the Supreme Court of Mali in regard

to contentious proceedings on administrative matters. To back up their request, they invoked as pleas-in-law, the non-application of the law and the false application or interpretation of the law.

12. To buttress their point on non-application of the law, they alleged that a previous year-group judges, the 1999-2001 batch, who were appointed by virtue of a Decree in 2001, had benefited, before any posting, from the allowances that were being denied them; that the payment of the said allowances to the judges of batch 2009-2001 was never questioned by the State nor formally denied by the State Legal Department in its Reply which was lodged in the course of its presentation and observations before the Supreme Court. They contended further that Judgment No 188, which was meant to be substituted at the State Legal Department, to conceal its incapacity to provide evidence to the contrary, simply contented itself with maintaining that the pay slip annexed to the pleadings of the case does not provide any precise indication on the payment of the sitting allowance in the section reserved for bonuses and allowances, without adding any formal denial of the payment of those benefits; that it was as a result of the impossibility of producing evidence to the contrary on the said payment that the State Legal Department refused to respond to this particular point of law; that by granting the rights claimed by the Applicants, which are rights due to judges of another year-group under the same legal provisions and national regulations, on one hand, and by denying them those rights, on the other hand, the Republic of Mali has infringed upon Article 10 of the Universal Declaration of Human Rights as well as other general principles of law; besides, they argued out that the judgment complained of never made a declaration on the question of default in State responsibility, and much less, did it consider the gravity of that default or did it attempt to proffer charges; they deduced thereby that the Court had adjudicated beyond the issues brought for determination. They concluded that by transforming a case of reparation of harm into one of mere requests for payment of allowances on the basis of the provisions of the afore-said Article 37 of Decree No 142/PRM, and by refusing to consider State responsibility so as to make a pronouncement on the reparation of harm done against them, Judgments No 188 and No 116 of the Supreme Court of Mali have defaulted by refusing to apply the provisions of Article 40 of the General Rules of the Judicature, as well as the principle of equality of treatment of civil servants of the same corps.

13. In support of the plea-in-law drawn from the false application or interpretation of the law, they contended that, so as to dismiss the application for reparation of harm, Judgments No 188 and No 116 referred to the provisions of Article 37 of Decree No 142/PRM of 14th August, 1975 which stipulates the conditions and modalities for granting allowances to civil servants and State officials; they argued that in their capacity as judges, their situation is specifically governed by the provisions of the law on Statute of the Judicature, and by Decree No 00-322/PRM of 7th July, 2000 on sitting allowances of judges, and not by the General Statute on Civilians and by Decree No 142/PRM as referred to by the faulted judgments; that no particular text governing the judges and invoked by them was referred to by the faulted judgments to buttress the grounds of their argument; that by relying on Decree No 142/PRM of 14th August, 1975 in a matter which goes beyond the scope of application of that decree, the said judgments erroneously applied or interpreted the law, and as such the judgments ought to be withdrawn. They considered that the partiality of the Supreme Court is glaring and has caused them incalculable harm. They affirmed that in the terms of Article 5 of the Universal Declaration of Human Rights, the judges of year-group 2004-2006 were treated in a degrading manner by the Republic of Mali, the latter having denied them lawful allowances due them by virtue of the texts previously cited, thus exposing them to ***"unacceptable living conditions in relation to the society, their milieu and the professional body"*** they belong to.

14. In response to the preparatory measures, the Applicants maintained that the Court is competent to sit because the dispute they have brought before it concerns human rights as enshrined in Articles 3, 5 and 26 of the African Charter on Human and Peoples' Rights. They however did not make any observations on the admissibility of the Application. However, they reiterated that the judges of the year-group 1999-2000 received the benefits that the Republic of Mali is refusing to accord them whereas members of the said batch were not assigned to their duties till 2003.They pleaded that Mr. Moussa Kenneye Kodio, Deputy Director at the State Legal Department - who is incidentally Counsel for the Republic of Mali - and Mr. Amadou Samba Koita, Special Adviser at the Ministry of Justice, who belong to the batch in question, can confirm the situation. They further asked the Court to arrange and hold a court hearing in Bamako as was the case of the Niger national, Miss Hadijatou Mani Koraou, due to the precarious financial situation of the said year-group.

B. THE DEFENDANT

15. In its Memorial in Defence, the Republic of Mali raised a Preliminary Objection in respect of lack of jurisdiction of the Court, and inadmissibility of the Application for lack of locus standi on the part of the Applicant. It reiterated the same observations in regard to the preparatory measures of the Court. Besides, the Republic of Mali maintained that the allegations of violation as raised in the Application were ill founded.

16. As to the incompetence of the Court, the Defendant contended that the Applicant, in misunderstanding the provisions of the Protocol on the Court, intends to have "re-judged" the Judgments of the Supreme Court of Mali; that in the **case concerning Moussa Leo Keita v. Mali, Judgment Nº. ECW/CCJ/03/07 of 22nd March, 2007 (paragraph 26)**, the Court has already posed the principle of its incompetence to entertain such applications, when it declared that in that respect, the Community Court of Justice lacks the jurisdiction to make pronouncements on judgments of the domestic courts. Within the meaning of the Article 10 cited above, the Community Court can only intervene when such national, courts or the parties in dispute before the court of law expressly ask the Court to do so within the context of the interpretation of the Community law; that there cannot be human rights violation in a case where the supreme national court before which the case was brought declared that the claims made were ill founded.

17. On inadmissibility of the Application, the Republic of Mali claimed to be the representative of the 28 persons whereas the object of the power of attorney as granted it by the latter, which it adduced before the Court, is limited to actions to be pleaded before the Administrative Section of the Supreme Court of Mali; that the said powers expressly accorded the prerogative of representation to cover four persons, namely Messrs. Hamidou Dao, Bakary Sarre, Hady Macky Sall and Mamadou Sangho, whereas the Application was signed by Mr. Bakary Sarre only. The Republic of Mali therefore concluded that the Applicant lacks the locus standi to act on behalf of the year-group in question, considering that Mr. Bakary Sarre acts solely on his own behalf since the other three persons granting the power of attorney, and who are supposed to represent the colleagues on whose behalf he was acting, did not sign the Application.

18. As to the facts, the Republic of Mali affirmed that the Administration does not acknowledge having paid that sum regularly, neither to the year-group at stake nor any other year-group, before assumption of duty; besides, neither the batch .in question nor the various batches that came after benefited from this allowance, and that this situation never became a subject of argumentation or much less, of judicial proceedings and that if by any extraordinary means, certain staff benefited from this allowance, then it must be an illegal incident which cannot constitute a case-law or a source for the creation of law and that the Administration reserves the right of correction by virtue of its prerogatives.

19. The Republic of Mali therefore asked the Court to dismiss the claims made by the Applicants as ill-founded and to adjudge that there is no human rights violation. In reaction against the claims made by the Applicants, the Republic of Mali maintained that no legal basis may justify the granting of responsibility, representation and sitting allowances; that indeed, it shall be contrary to Decree No 98-191/P-RM of 1st June, 1998 on Payment of Housing Allowance, Decree No 92-176/P-CTS of 5th June, 1992 on Payment of Responsibility and Representation Allowance and Decree No 00-322/P-RM of 7th July, 2000 on Payment of Judges' Sitting Allowance; that it appeared therefore that the payment of these allowances is linked to the exercise of a well-defined function; that in the instant case, the Applicants were appointed judges by Decree N°. 07-030/P-RM of 29th January, 2007 and were posted to various specific functions at the courts by Decrees N°. 07-053/P-053/P-RM and N°. 07-054/P-RM of 21st February, 2007; that it is when one has effectively assumed duty that the allowances being sought after may be granted; - that within the time-period which elapsed, between their appointment as judges in accordance with Decree N°. 07-030/P-RM of 29th January, 2007 (which takes effect from 1st January, 2006) - and their posting, they had not been assigned to any of the Departments listed out by the texts granting the allowances they were claiming.

20. At the court hearing of 18th February, 2010, the Agent of Mali, H.E. Mr. Boubacar Karamoko, Ambassador of Mali to Nigeria, contended that from 2006 to 2007, the Judges were expected to take up their positions in due course but that the Decree appointing them as judges indicated that the appointment dates back to 1st January, 2006; that by so doing, their length of

service was maintained. He reiterated that the judges' sitting allowance and responsibility allowance were not due and he declared that the Republic of Mali cannot be asked to pay an allowance which has no legal basis, on the ground that there may have been human rights violation.

21. In response to a question by the Court, as to whether special circumstances prevented the appointment of *auditeurs de justice* at the end of their first training and if, after their training, there is a time frame within which an appointment to a function must be effected, the Agent of the Republic of Mali replied that in that regard, the Applicants sound confused. He affirmed that the latter were appointed judges upon graduating from the Judges' School but that they were awaiting appointment to a function; that there is no text that compels the State to appoint an officer to a function after his training; and that no other text equally compels the State to appoint a judge to a function at the end of such a year or upon graduation; that the civil service has its procedures; that with the case in point, Articles 28 and 29 of the Law on the Judicature provides for the appointment and posting of judges after investigating their moral standing and after the issuing of a Presidential decree in a session with the Higher Council of the Judicature; that an appointment to occupy a function can only be done following a procedure laid down by the text. He indicated therefore that the period awaiting the appointment is the intervening period during which the administration conducts inquiries and the Council meets.

22. Equally, he affirmed before the Court that the allegation by the Applicants according to which a previous year-group, notably the 1999-2001 batch, under the same conditions as the 2004-2006 batch, may have received the judges' sitting allowance and responsibility allowance, is erroneous; and he emphasized that the Applicants do not provide any evidence to support their affirmation. He all the same maintained that at any rate, an error cannot be a source of law.

ANALYSIS OF THE COURT

A. COMPETENCE

23. In the instant case, the Court is seized with an Application in which the Applicants partly seek to obtain a reversal of Judgments N°. 188 and 116 of

the Administrative Section of the Supreme Court of Mali, and partly allege violation of Articles 5 and 10 of the Universal Declaration of Human Rights. They equally invoke violation of the principle of equality before the law, and without any particular indications, violation of other general principles of law. They found the competence of the Court on violation of Articles 3, 5 and 26 of the African Charter on Human and Peoples' Rights.

24. On the other hand, the Republic of Mali maintains that the Court has no jurisdiction to adjudicate on judgments delivered by the domestic courts, and cites, to support its position, the consistently held case law of the Court, notably the case concerning **Moussa Leo Keita v. Mali**. Moreover, for Mali, the Application is at any rate inadmissible; that there is no human rights violation and that the requests of the Applicants are ill founded.

(1) As to the incompetence of the Court as raised by the Republic of Mali

25. The competence of the Court to adjudicate in a given case depends not only on its texts but also on the substance of the initiating application. The Court accords every attention to claims made by applicants, the pleas-in-law invoked, and in an instance where human rights violation is alleged, the Court equally carefully considers how the parties present such allegations. The Court therefore looks to find out whether the human rights violation as observed constitutes the main subject-matter of the application and whether the pleas-In-law and evidence produced essentially go to establish such violation.

26. In the instant case, the Court finds that the Applicants seek that the Court sit afresh, by examining in particular, Judgments No. 188 and No 116 of the Supreme Court of Mali; and in event of making a declaration in favour of the Applicants, order a reversal of the pronouncement made by the said Supreme Court in connection with the administrative proceedings. They equally ask for an order of injunction seeking to compel the Republic of Mali to pay, principally, requested allowances and damages. Hence, they have based their application on pleas-in-law seeking to quash judgments made through the non-application of the law and false application or interpretation of the law, and they thus bring a complaint against the said judgments from which the violations alleged by them may have originated. That is why in arguing out their pleas-in-law, they ask the Honourable Court to adjudge and declare that

the Supreme court of Mali, in its Judgment N°. 188 adjudicated in excess of the matters brought before it and that Judgments N°. 188 and 116 ought to be withdrawn.

27. Thus, the Court finds that in the logic of argumentation, human rights violations are invoked here as arguments for buttressing these two pleas-in-law seeking annulment of the judgment. Therefore, violation of Article 5 of the Universal Declaration of Human Rights, in the terms of which **"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"**, is presented as a consequence of the false application or interpretation of the law, the judgments of the Supreme Court of Mali; according to the Applicants, the Judgments of the Supreme Court resulted in maintaining the decisions of the Malian administrative authorities, which, in depriving them of legal allowances due them by virtue of the texts, exposed them to unacceptable conditions of life with regard to the society, their milieu and the professional body they belong to. Moreover, violation of Article 10 of the Universal Declaration of Human Rights which states that: **"Every individual is entitled in 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 charges against him"**, is presented as a strong argument in favour of the non-application of the law.

28. The Court equally notes that even if subsequently, they intended to found the competence of the Court on violations of Articles 3, 5 and 26 of the Charter; the Applicants did not, either in the initiating application or in the responses to the preparatory measures, present the said violations as constituting the heart of their application, that is to say, as grievances forming the rationale behind their cause and underpinning the visible structure of their argumentation and also constituting the basis of their requests. They do not provide evidence to support the facts they bring forth, or to buttress the discrimination they claim to have been victims of, or in support of the degrading treatments and unacceptable conditions of life allegedly imposed on them by the Republic of Mali.

29. Now, in its **Judgment N°. ECW/CCJ/JUD/03/05 of 7th October, 2005 (paragraph 32)**, relating to **Suit N°. ECW/CCJ/APP/02/05, Jerry Ugokwe v. Nigeria and Christian Okeke,** the Court stated that cases made against

decisions of national courts of Member States do not form part of its jurisdiction, the specific nature of the Community legal order of ECOWAS being that it sanctions a judicial monism without necessarily endorsing the primacy of the Community law; if the obligation to enforce the decisions of the Community Court of Justice is binding on the domestic courts of the Member States, that obligation does not imply a hierarchy in the judicial order between the Community and Member States, but requires an integrated Community legal order. The Court of Justice of ECOWAS is not an appellate court or a court of cassation over the national courts.

30. Similarly, in **Judgment N°. ECW/CCJ/JUD/03/07 of 22nd March, 2007 (paragraph 26)** relating to **Suit N°. ECW/CCJ/APP/05/06, Moussa Leo Keita v. Mali**, the Community Court of Justice pointed out that in reality, the Application of Moussa Leo Keita did not make reference to any Community text. That he complained of being a victim of a case of injustice committed by his country of origin. In that regard, the Community Court of Justice has stated that it has no jurisdiction to make any declaration on the judgments of national courts and that the Court can only intervene when such courts or the parties in dispute before the national courts of law expressly ask the Community Court to do so within the strict context of interpretation of the Community law.

31. The Court concludes that it can be deduced from the Application filed by Mr. Bakary Sarre and 28 Others against the Republic of Mali, that the said Application substantially seeks to obtain from the Court of Justice of ECOWAS, a reversal of Judgments N°. 188 and N°. 116 as delivered by the Supreme Court of Mali and it seeks to project the Court of Justice of ECOWAS as a court of cassation over the Supreme Court of Mali. Viewed from that angle, the Honourable Court declares that it has no jurisdiction to adjudicate on the matter.

(2) As to the jurisdiction of the Court in matters of human rights violation

32. The Court notes in strictly alternative terms, that the Application alleges human rights violation, notably violation of Articles 5 and 10 of the Universal Declaration of Human Rights, Articles 3, 5 and 26 of the African Charter on Human and Peoples' Rights and the principles of equality before the law.

33. The Court recalls that to establish its competence in matters on human rights, the invocation of facts which fall in line with that subject-matter is sufficient on its own **(***cf.* **Judgment Nº. ECW/CCJ/JUD/01/11 of 8th February, 2011, paragraph 3, relating to Suit Nº. ECW/CCJ/APP/13/08, El Hadji Tidjani Aboubacar v. BCEAO and Niger)**. Similarly, the Court has also indicated that the mere invocation of violation of human rights as falling within the sphere of competence of the Court, is sufficient to establish the jurisdiction of the Court **(***cf.* **Judgment Nº. ECW/CCJ/JUD/05/10 of 8th November, 2010, paragraph 18(1b), Suit Nº. ECW/CCJ/APP/05/09, Mamadou Tandja v. Niger)**.

34. The Court equally reaffirms that in accordance with its consistently held case law, once human rights violations constituting international or Community obligations of a Member State are brought against any Member State, the Court declares its jurisdiction to examine such violations **(***cf.* **Judgment Nº. ECW/CCJ/JUD/02/10 of 14th May, 2010, paragraphs 53, 58 and 59**, on the Preliminary Objections in **Suit Nº. ECW/CCJ/APP/07/08, Hissein Habre v. Senegal).**

35. In the instant case, the Court finds that the Republic of Mali is signatory to the African Charter on Human and Peoples' Rights, which it ratified on 21st December, 1981, and whose Article 3 sanctions equality of all before the law; that as a member of the United Nations, it is binding on Mali to give effect to resolution 217 A (III) of 10th December, 1948, through which the General Assembly, adopted the Universal Declaration of Human Rights; moreover, the violations are alleged against Mali, a Member State of the Community. Thereby, the Court has jurisdiction to examine the said violations, even if invoked on strictly alternative grounds. The Court recalls, that one of the fundamental principles of the Community featuring in Article 4 of the Revised Treaty of 24th July, 1993 is the **"recognition, promotion and protection of human and peoples' rights in accordance, with the provisions of the African Charter on Human and Peoples' Rights"**;

    - that the Protocol on Democracy and Good Governance of 21st December, 2001, which was the forerunner of the expansion in the powers of the Court to cover human rights violations, was adopted by the Member States, which, according to its preamble, is **"mindful of**

the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of the Member States ...";

- that the guarantee in each of the Member States, of the rights contained in the African Charter on Human and Peoples' Rights and other international instruments, were 'set out in Article 1 of this instrument under the domain of constitutional convergence. Human rights protection thus constitutes a cardinal and fundamental value for the Community. Therefore, the Court, in the exercise of this function of protection, may not by virtue of excessive formalism arising from the quality of the Application, decline to exercise that jurisdiction. The Court is therefore competent to examine the violations alleged and recalled in paragraph 32 above.

B. ADMISSIBILITY

36. Paragraph (d) of new Article 10 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol provides**:**

> **"Access to the Court is open to (...) Individuals on application for violation of their human rights; the submission of application for which shall: (i) not be anonymous; nor (ii) to be made whilst the same matter has been instituted before another International Court for adjudication."**

37. It follows from this provision, that the admissibility of an application is linked, among other criteria, to the status of the victim. This condition necessarily entails that the applicant, acting on personal grounds as a result of a legally protected injured interest, reserves the right to come before a judge to have his claims examined; alternatively, an Applicant, authorised to act by virtue of a power of attorney on behalf of another person or for a group of people whose legally protected interests have been harmed, shall exercise the power of representation in the action, so as to ensure that the claims brought by another person or a group of persons succeeds. Bringing an action before a court of law is a vested power, and it is up to the holder of that prerogative either to execute it himself or entrust that power to a third party within the limit permitted by the national laws.

38. In the instant case, the Application is lodged on behalf of a group of peoples, the judges of the year- group 2004-2006. But the court notes that Mr. Bakary Sarre who claims to act for and on behalf of the said year-group adduced powers of attorney whose terms unambiguously indicate that the power of representation to the action is accorded to himself and to Messrs. Hamidou Dao, Hady Macky Sall and Mamadou Sangho and that it is limited to actions before the Administrative section of the supreme court of Mali. Thus, the said power of attorney which accords joint powers of representation does not confer on Mr. Bakary Sarre any legal title to act before the Court of justice of ECOWAS on behalf of the said year-group. As a result, there are grounds for concluding that Mr. Bakary Sarre does not have the locus standi for lodging the instant case in the name of the judges of his year-group.

39. Supposing that he thus pleaded on his own behalf, the court considers that the application must conform to the conditions fixed by the provisions of new Article 13 of the Protocol on the community court of justice (former Article 12 of the 1991 Protocol) as amended by the supplementary protocol of 19th January, 2005, and by Articles 28 (3) and 32 (1) of the Rules of Procedure of the Court, which prescribed respectively:

New Article 13: **"Each party to a dispute shall be represented before the Court by one or more agents nominated by the party concerned for this purpose. The agents may, where necessary, request the assistance of one or more Advocates or Counsels who are recognized by the Laws and regulations of the Member states as being empowered to appear in Court in their area of jurisdiction."**

Article 28(3): **"The lawyer acting for a party must lodge at the Registry a certificate that he is authorized to practice before a Court of a member State or of another State, which is a party to the Treaty."**

Article 32(1): **"The original of every pleading must be signed by the party's agent or lawyer (...)"**

40. Now, in the instant case, the Court notes that Mr. Bakary Sarre did not nominate a duly constituted agent or lawyer. Moreover, the initiating application is neither signed by his agent or lawyer. Consequently, his Application does not follow the due process, in terms of formal presentation; the Application is therefore inadmissible.

DECISION

For these reasons, and needless therefore to adjudicate on the other requests,

41. The Court, adjudicating in a public hearing, after listening to the two Parties, and after deliberating:

- **Adjudges** that it has jurisdiction to adjudicate on aspects of the Application seeking a reversal: of the judgments delivered by the Supreme Court of Mali;

- **Adjudges** that it has jurisdiction to examine the alleged human rights violations;

- **Adjudges** that Mr. Bakary Sarre does not have the locus standi for bringing a case before the Court in the name of judges of the 2004-2006 year-group;

- **Adjudges** that the criteria for representation before the Court were not respected by Mr. Bakary Sarre, since he was neither represented by an agent nor a lawyer;

- **Consequently**, the application filed by Mr. Bakary Sarre and others against the Republic of Mali is inadmissible.

COSTS

42. **Adjudges** that each Party shall bear its costs, in line with the new Article 25 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol.

43. **AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:**

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*
HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*
HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON *(ESQ.)* - *REGISTRAR*

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

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, THE 18TH DAY OF MARCH, 2011

SUIT NO: ECW/CCJ/APP/17/10
JUDGMENT NO: ECW/CCJ/JUD/01/11

BETWEEN
GODSWILL MRAKPOR AND 5 ORS - ***PLAINTIFFS***
V.
AUTHORITY OF HEADS OF STATE AND GOVERNMENT, ECOWAS & ANOR - ***DEFENDANTS***

COMPOSITION OF THE COURT:

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:

MESSRS FRANK TIETIE, UWANGUE OSARETIN, CLIVE AKPOTAIRE, ADAMU DOUGLAS, OMORUSI THERESA - *FOR THE PLAINTIFFS*

OBII ONUOHA - *FOR THE DEFENDANTS*

Competence of the Court -Locus standi -Order of provisionary measures -Legality of a Decision of the Authority of Heads of State and Government.

SUMMARY OF FACTS

On the 24th December, 2010, the association known as La foundation Ivoirienne pour l'observation et la surveillance des droite de l'homme et de la vie politique (FIDHOP), the Actions pour la protection de droite de I'homme (APDH) and fideles a la democratie et a la nation de cote d'ivoire (FIDENACI) filed an Application urging the Court to examine the decision made by the Authority of Heads of States and Government of ECOWAS, on the 7th December, 2010.

By another Application filed on 31st December, 2010, Godswill Mrakpor a human rights activist and a Nigerian national filed an Application urging the Community Court of Justice, ECOWAS to declare the threat of resort to the use of military force to resolve the election dispute by the Authority illegal.

On 31st January, 2011 the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo an Ivorian national filed an Application also urging the Court to examine the Decisions of the Authority of Heads of State and Government made on the 7th and 24th December, 2010.

Subsequently, the Applicants filed an Application for interim measures urging the Court to grant an order restraining the Authority of Heads of State and Government from resorting to military action in the crisis situation in Cote d'Ivoire where it is equally observed that human rights violations have occurred and for an order suspending the said Decision of the Authority of Heads of State.

In response, the Defendants Counsel filed a preliminary objection challenging the jurisdiction of the Court and the admissibility of the Plaintiff's application for lack of locus standi and for not disclosing a cause of action.

The three Applications were consolidated since they had the same subject matter.

LEGAL ISSUES

1. *Whether or not the 1st Applicant had locus standi to come before the Court.*

2. *Whether or not the Court can grant the interim measures asked for.*

DECISION OF THE COURT

In its Decision the Court held:

1. *That it has jurisdiction to entertain the case filed by the Applicants based on the provision of Article 9 (1) (c) of the Protocol of the Court as amended by the Supplementary Protocol which vests on it the competence to determine the Legality of the Regulations, Directives, Decisions and other subsidiary Legal instruments adopted by ECOWAS.*

2. *That the Applicant Godswill Mrakpor lacks locus standi to come before the Court as the Decision of the Authority does not affect him directly or indirectly. It also added that the applicants status of a community citizen and a human right activist do not qualify him to file an Application on the basis of Article 10 (c) of the Protocol as amended by the Supplementary Protocol of the Court.*

3. *In respect of the Application for interim measures filed by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo the Court held that it is competent prima facie to examine the initiating Application filed by the Applicants and that the initiating Application of the Applicant is prima facie admissible and there is urgency to order the provisional measures.*

4. *That the Member States and Institutions of the Community should comply strictly with the provisions of new Article 23 of the Protocol on the Court as amended by the Supplementary Protocol.*

INTERIM JUDGMENT OF THE COURT

FACTS AND PROCEDURE

1. By Application dated 24th December 2010, received the same date at the Registry of the Court, *La Fondation Ivoirienne pour l'Observation et la Surveillance des Droits de l'Homme et de la Vie Politique* (FIDHOP) and the non-governmental organisations: *Actions pour la Protection des Droits de l'Homme* (APDH) and *Fideles a la Democratic et a la Nation de Cote d'Ivoire* (FIDENACI), all being legally recognised Ivorian associations, assisted by their Counsels, Maitre Claude Mentenon and Maitre Mohamed Lamine Faye, both lawyers registered with the Court of Appeal of Abidjan in the Republic of Cote d'Ivoire, brought their case before the Court of Justice of ECOWAS, for the purposes of asking the Court to examine closely the 7th December, 2010 Decision of the Authority of Heads of State and Government of ECOWAS (hereinafter called **"the Authority"**), upon the basis of paragraphs 1(a) and 1(c) of new Article 9 of the Protocol on the Court as amended by the Supplementary Protocol of 19th January, 2005.

2. By another Application filed on 31st December, 2010, Godswill Mrakpor Esq., a human rights activist and Nigerian national domiciled at Abuja, filed a case before the Honourable Court against the Authority of Heads of State and Government of ECOWAS and the United Nations Operations in Cote d'Ivoire (UNOCI), for purposes of asking the Court to declare that the threat of resort to the use of military action, as decided upon by the Authority, within the context of resolving the **"election dispute"** in Cote d'Ivoire, was illegal. He invoked, in support of his claims: Articles 4(g), 15, and 56 of the Revised Treaty of ECOWAS; paragraphs 1(a), 1(c) and 4 of new Article 9 and paragraph (d) of new Article 10 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol; Articles 1, 2, 3(2), 4, 18(4), 23, 27, 29(2) and (8) of the African Charter on Human and Peoples' Rights.

3. By Application dated 31st January 2011, the Court was equally seised with an application by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo, an Ivorian national, with the assistance of Maitre Claude Mentenon

and Maitre Mohamed Lamine Faye, for the purposes of asking the Court to take a close look at the Decisions made on 7th and 24th December, 2010, at Abuja, in the Republic of Nigeria, by the Authority of Heads of State and Government of ECOWAS, upon the same basis as that of the said Associations.

4. By filing different pleadings respectively on 31st December, 2010 and 28th February 2011, Mr. Godswill Mrakpor as well as the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo asked the Court for interim measures, firstly for the purposes of restraining the Authority from resorting to military action in the crisis situation in Cote d'Ivoire, where it is equally observed that human rights violations have occurred, and secondly, to seek suspension of the Decisions complained of.

5. On 28th February 2011, the Authority of Heads of State and Government, through Madam Obi Onuoha, Legal Adviser to the Legal Department of the ECOWAS Commission, filed in a separate pleading, on the basis of Articles 88 and 87 of the Rules of the Court, Preliminary Objections asserting lack of jurisdiction of the Court and inadmissibility of the Application filed by Mr. Godswill Mrakpor for lack of locus standi for bringing an action and for disclosing no cause of action.

6. The Court observed at its hearings of 14th February, 2011 and 10th March 2011, the non-representation of the Authority in the cases filed by the Ivorian Associations and by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo, in spite of the pleadings having been duly served on the Authority.

7. At its court sitting of 10th March 2011, and after hearing the Parties, the Court consolidated the three cases on the grounds that substantively, they all had the same subject-matter, i.e. they all asked for a close examination of the 7th and 24th December, 2010 Decisions of the Authority of Heads of State and Government. The Court also heard the Parties on their submissions regarding application for interim measures.

8. The Court however noted that in the instant case, FIDHOP, APDH and FIDENACI did not ask for any interim measures, and no Preliminary Objection was raised against their initiating application.

ANALYSIS OF THE COURT ON THE APPLICATIONS FOR INTERIM MEASURES

9. When a preliminary objection is raised by one of the Parties in a dispute, the Court may not make an order of interim measures without first taking a close look at its jurisdiction and the admissibility of the initiating applications filed before it. In the instant case, the Defendant has raised a Preliminary Objection as to lack of jurisdiction of the Court and as to inadmissibility of the initiating application filed by Mr. Godswill Mrakpor, and the Court first of all intends to make a pronouncement on these two assertions.

I. In respect of the Preliminary Objections raised against the initiating application of Mr. Godswill Mrakpor

A. As regards lack of jurisdiction of the Court

10. The Defendant maintained that the Honourable Court has no jurisdiction to adjudicate on the instant case, which deals with an electoral issue. The Defendant considered that no provision in the texts governing the Court gives it the power to sit on electoral matters in Member States of the ECOWAS Community; that electoral disputes come under the purview of national courts. The Defendant further asserted that only on two occasions did the Applicant make reference to human rights violations and that his entire argumentation is related to elections and the consequences thereof on Cote d'Ivoire.

11. In reply, Mr. Godswill Mrakpor affirmed that the Court has jurisdiction to entertain the suit, in that the matters brought before the Court concern human rights, and made reference to the conflict situation in Cote d'Ivoire. He alleged that the 7th December, 2010 Decision of the Authority of Heads of State and Government is illegal and has a direct link to the security situation in Cote d'Ivoire, in the sense that it brought about the said violations.

12. The Court finds that Mr. Godswill Mrakpor makes a request to examine the legality of the 7th December, 2010 Decision of the Authority and that

he invokes, in support of his claims, several provisions including new Article 9(1) of the 2005 Supplementary Protocol, which states:

> ***"The Court has competence to adjudicate on any dispute relating to the following: ...the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS."***

In compliance with this provision, the Court considers that decisions of the Authority of Heads of State and Government of ECOWAS fall into the category of acts that may be examined by the Court. Consequently, it is ripe and appropriate for the Court to insist on its competence in regard to this plea.

B. As regards the *locus standi* of Mr. Godswill Mrakpor

13. The ECOWAS Commission, representing the Authority, raised the issue of lack of locus standi of Mr. Godswill Mrakpor to bring an action, on the ground that he is not a citizen of the Republic of Cote d'Ivoire; that being a national of the Federal Republic of Nigeria, the Authority decision complained of does not cause him any injury; and that as things stand, Mr. Godswill Mrakpor does not manifest any interest at stake in the instant proceedings. The ECOWAS Commission therefore prays the Court to dismiss the action brought by Mr. Godswill Mrakpor.

14. The Applicant affirms, on his part, that he has locus standi, and that his locus standi is linked to his status as a citizen of the Community of which Cote d'Ivoire is a Member State; that on that score, he is grounded to ask for the annulment of the said decision. He further considers that as a human rights activist, he feels compelled to prevent the violations of human rights in Cote d'Ivoire, which are as a result of the Decision complained of.

15. On this point, the Court considers that locus standi, on the basis of the new Article 10(c) of the Protocol on the Court as amended by the Supplementary Protocol of 19th January 2005, assumes that Mr. Godswill Mrakpor must have been personally targeted by the Decision complained of and must have been directly harmed by it. Indeed, the said Article

provides: ***"Access to the 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."***

In the instant case, the Decision complained of is directed at Cote d'Ivoire and Mr. Laurent Gbagbo; it does not target Mr. Godswill Mrakpor as an individual, either directly or indirectly. Moreover, the status of a Community citizen and that of a human rights activist are not sufficient in themselves to confer the status of an applicant who is qualified to seek annulment of the contentious Decision. Consequently, the Court adjudges that Mr. Godswill Mrakpor neither has the required status or a cause at stake, and that this plea in his Application must fail.

16. From the foregoing, it can be concluded that on the whole, the substantive application filed by Mr. Godswill Mrakpor is inadmissible. Hence, the Court concludes that it shall therefore be inappropriate to examine his application for interim measures.

II. In respect of the application for interim measures filed by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo

17. According to new Article 21 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol, ***"The Court, each time a case is brought before it, may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable."*** In the exercise of its powers for the indication of provisional measures, the Court takes account of the provisions of Article 79 of its Rules of Procedure, which provides: ***"An application under Article 20 (new Article 21) of the Protocol (relating to the Court as amended by the Supplementary Protocol of 19th January, 2005) shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied Or"*** Article 82 states that ***"The decision on the application shall take the form of a reasoned order. The order shall be served on the parties forthwith.*** It can be deduced from the combined reading of these provisions that the Court would not

be in a position to order the interim (or provisional) measures asked for except upon the fulfillment of three conditions:

1. If it is competent prima facie to adjudicate on the substantive case or if it is not manifestly incompetent to adjudicate on the substantive applications filed;

2. If the substantive application is prima facie admissible or if it is not manifestly inadmissible; and

3. If there is urgency in regard to the circumstances of fact and law invoked in support of the application for interim measures.

A. Condition concerning prima facie competence of the Court

18. The Republic of Cote d'Ivoire and Mr. Laurent Gbagbo invoke as basis for the competence of the application for examining the legality of the 7 and 24th December, 2010 Decisions of the Authority of Heads of State and Government, paragraph 1(c) of new Article 9 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol on the Court and paragraphs (a), (b) and (c) of new Article 10 of the said Protocol, which provide, respectively as follows:

New Article 9(1): ***"The Court has competence to adjudicate on any dispute relating to the following: ... the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS."***

New Article 10: ***"Access to the Court is open to the following: (a) Member States, and unless otherwise provided in a Protocol, the Executive Secretary (the President of the Commission), where action is brought for failure by a Member State to fulfill an obligation; (b) Member States, the Council of Ministers and the Executive Secretary (the President of the Commission) in proceeding for the determination of the legality of an action in relation to any Community text; (c) individuals and corporate bodies in proceedings for the determination of an act or of a community official which violates the rights of the individuals or corporate bodies."***

19. The Court finds that examining the legality of the 7th and 24th December, 2010 Decisions falls within the scope of its competence as provided for under Article 9(1)-c of its Protocol. Hence, it is competent prima facie to adjudicate on the dispute brought before it by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo.

B. Condition concerning the admissibility of actions brought

- ***In relation to the Republic of Cote d'Ivoire***
  In application of paragraph (b) of new Article 10 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol, any action brought by a Member State on the basis of Article 9(1)-c is admissible. It follows that the Republic of Cote d'Ivoire, as a Member State of the ECOWAS Community, has the prima facie status for bringing an action before the Court.

- ***In relation to Mr. Laurent Gbagbo***
  Counsels for Mr. Laurent Gbagbo maintained in the substantive application that the acts complained of are injurious to the legitimate rights of Mr. Laurent Gbagbo. They alleged that he is personally affected by the threatening injunctions, prohibitions or restrictions, and even threats against his person, and that this is in violation of the principles inherent in his liberty and in the freedom of movement of his natural person, all of which are rules enshrined in the legal instruments which establish and govern the ECOWAS Community.

22. The Court finds that Mr. Laurent Gbagbo alleges and brings forth a personal complaint, and as a result, the Court adjudges that the Application fulfills the criterion for admissibility as provided for under paragraph (c) of new Article 10 of the above-cited Supplementary Protocol on the Court. The resultant effect is that the action brought by Mr. Laurent Gbagbo, a natural person, is prima facie admissible.

C. As regards provisional measures per se

23. The Applicants ask that it may please the Court to order provisional measures, notably they ask that the Court may order suspension of a resort to the use of force, pending the determination of the case by the Court.

24. The Court observes indeed that the 24th December, 2010 Declaration of the Heads of State and Government contains in itself the threat of resorting to the use of force; the legality of this decision is being contested before the Court, and the new Article 23 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Court provides that:

> ***"When a dispute is brought before the Court, Member States and Institutions of the Community shall refrain from any action likely to aggravate or militate against its settlement."***

25. **FOR THESE REASONS**

26. The Court,

Adjudicating publicly in an Interim Judgment, after hearing the Parties, on the Preliminary Objections raised by the Authority of Heads of State and Government against the initiating application of Mr. Godswill Mrakpor; and by default, on the application for interim measures made by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo;

27. **In terms of the Preliminary Objections,**

- **Adjudges** that it is competent to adjudicate on the Application of Mr. Godswill Mrakpor;
- **Declares** the said Application inadmissible for lack of locus standi and lack of cause of action;
- **Adjudges** consequently that there is no ground for adjudicating on the interim measures requested by Mr. Godswill Mrakpor.

28. **In terms of the interim measures requested by the Republic of Cote d'Ivoire and Mr. Laurent Gbagbo:**

- **Adjudges** that it is competent prima facie to examine the initiating application filed by Cote d'Ivoire and Mr. Laurent Gbagbo;
- **Declares** that the initiating application of Cote d'Ivoire and Mr. Laurent Gbagbo is prima facie admissible;
- **Observes** that there is urgency to order the provisional measures;

CONSEQUENTLY,

29. **Orders** the Member States and Institutions of the Community to comply strictly with the provisions of new Article 23 of the Protocol on the Court as amended by the Supplementary Protocol of 19th January, 2005;

30. **Adjourns** the proceedings until 9th May, 2011, for examination on the merits of the case;

31. **Reserves** costs.

THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*

HON. JUSTICE M. 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 *(ESQ.)* - *REGISTRAR*

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

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, THE 18TH DAY OF MARCH, 2011

SUIT NO: ECW/CCJ/APP/08/08
JUDGMENT NO: ECW/CCJ/JUD/04/11

BETWEEN
PETROSTAR (NIGERIA) LIMITED - PLAINTIFF
V.
1. BLACKBERRY NIGERIA LIMITED - DEFENDANTS
2. IFEANYI PADDY- EKE

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
ATANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
CHIEF EMEFO ETUDO - *FOR THE APPLICANT*
EDOKA DOX ONYEKE - *FOR THE DEFENDANTS*

Burden of proof, -Binding effect of an agreement,
-Uncontroverted evidence,
-Breach of contract, -General damages,

SUMMARY OF FACTS

The Plaintiff and the first Defendant are both companies incorporated under the Laws of the Federal Republic of Nigeria. The 2nd Defendant is the Managing Director of the 1st Defendant. The Plaintiff avers that it delivered Automotive Gas Oil (AGO) to SHELL on credit upon the instruction of the 1st Defendant for a consideration of 485 million naira to be paid by the 1st Defendant. The 1st Defendant paid part of the money owed to the Plaintiff and subsequently failed despite an agreement to pay the outstanding sum of 255 million naira. The Plaintiff then instituted this action against the Defendants jointly and severally.

The Defendant raised a preliminary objection which was dismissed. In their Defence, the Defendant stated that the agreement relied upon by Plaintiff was entered into under duress and that the Plaintiffs counsels' action worked against their financial standing to liquidate the debt.

LEGAL ISSUES:

- *Whether or not the Plaintiff adduced sufficient evidence establishing that the Defendants owe it the sum of 255 million naira?*

- *Whether the Defendants has established that the Plaintiffs action impinged on Defendants ability to pay the amount owed*

- *Whether in the circumstances of this case the Plaintiff is entitled to interest and general damages.*

DECISION OF THE COURT

The Court held:

- *That Defendant having failed to controvert the evidence of the Plaintiff witnesses, same are accepted in proof of the authenticity of*

the bills submitted in evidence and the court finds Defendants indebted to the Plaintiff in the sum of 255 million Naira.

- *That the Defendants having pleaded frustration as a defence bore the burden of proof to establish that the Plaintiff frustrated their efforts in settling their indebtedness to them and have failed to discharge this burden by production of evidence.*

- *That the Plaintiff shall recover from the Defendants the sum of 255 million naira being the balance of the AGO supplied to SHELL on their behalf with interest at the rate of 25% on the said sum up to the date of judgment, as well as Accountants' fees of 12.75 million naira, and solicitor's fees of 25.5 million naira.*

- *Plaintiff is entitled to cost for travelling expenses of Plaintiffs witness.*

JUDGMENT OF THE COURT

PARTIES

1. The Plaintiff and the first Defendant are both companies incorporated under the laws of the Federal Republic of Nigeria. They have their principal places of business in either Lagos or Abuja. The second Defendant is the Managing Director of the first Defendant and is a citizen of the Federal Republic of Nigeria. The Plaintiff was represented by Barrister Chief Emefo Etudo, whilst the Defendants were represented by Barrister Edoka Dox Onyeke who was debriefed and substituted with Barrister Enyinnaya Uwaezuoke.

PLAINTIFF'S CASE

2. The Plaintiff avers that it delivered five million litres of Automotive Gas Oil (AGO) to SHELL on credit upon the instruction of the first Defendant for a consideration of 485 Million Naira. The first Defendant undertook to pay the Plaintiff the contract sum from the proceeds received from Shell. However, upon receiving the payment from Shell, the first Defendant failed to fulfill its contractual obligation to the Plaintiff.

   After subsequent negotiations, the total debt of the first Defendant to the Plaintiff was reduced to 255 Million Naira. Cheques issued by the first Defendant for the 255 Million Naira were not honoured.

3. Plaintiff states further that it then gave a three month grace period to the first Defendant to make good the outstanding payment in order to resolve the issue. Plaintiff entered into an agreement with the first Defendant for the liquidation of the indebtedness by April 9, 2008. The first Defendant then issued a postdated cheque for the entire outstanding amount. Under the said agreement, the second Defendant guaranteed the repayment of the amount owed by the first Defendant. The said agreement provided that any dispute shall be settled by the Community Court of Justice, ECOWAS.

4. The averments continue that about two weeks to the scheduled date for the first Defendant to liquidate its indebtedness to the Plaintiff, the second Defendant contacted the solicitor to the Plaintiff who is also the Plaintiff's solicitor in the present proceedings and appealed to him to receive a bribe of 5 Million Naira in order to prevail upon the Plaintiff not to pursue the recovery of the 255 Million Naira because the Defendants would not be able to settle their indebtedness on the agreed date.

5. According to the Plaintiff the second Defendant subsequently paid one (1) Million Naira to its solicitor as part of the bribe promised. Thereafter Plaintiff's solicitor reported the bribery case to the police. Plaintiff waited until the maturity date of the cheque issued to them by the second Defendant and presented the cheque but it was not honoured because he did not have sufficient funds in the account.

6. Plaintiff then wrote to the second Defendant demanding the payment of the outstanding debt in seven days. Defendants failed to make payment. Plaintiff alleges that the Defendants have defrauded them and as a result suffered immense harm. As a result the Plaintiff brought the instant action, claiming jointly and severally against the Defendants the following reliefs and orders:

   a. **A declaration** that the agreement between the Plaintiff and first Defendant dated the 8th August, 2008 is valid;

   b. **A declaration** that the guarantee of the second Defendant as contained in the agreement of 08/08/2008 is valid;

   c. **An order** of the Court attaching the properties of the Defendants for the satisfaction of the judgment sum; and

   d. **An order** for the payment of damages jointly and severally against the Defendants and their agents.

THE DEFENDANTS' CASE

7. Defendants filed a preliminary objection to the suit pursuant to Articles 87 (1) and (2) and 88 (1) of the Rules of this Court asking the Court to strike out or dismiss this suit in its entirety on the ground that this Honourable

Court lacks the jurisdiction to hear and determine same. In a ruling dated 27th October 2009 the Court dismissed the preliminary objection and held that it has the jurisdiction to hear and determine the present suit.

8. In the Defendants' statement of defence, they put in a general traverse denying every allegation of fact made by the Plaintiff in their statement of claim except where such was expressly admitted by them and put Plaintiff to strict proof of the allegations thereof. The Defendants stated that they had not refused to settle their indebtedness to Plaintiff but Plaintiff's conduct had frustrated all efforts made by them to settle their indebtedness. Defendants continued that in line with first Defendant's business practice it was committed to settling its debts to the Plaintiff, and paid 230 Million Naira to the Plaintiff, prior to the institution of this suit. Defendants further stated that it entered into negotiations with Plaintiff to pay the outstanding sum of 255 Million Naira by installments.

9. Defendants stated that the agreement dated 9/4/08 on which Plaintiff relies heavily was entered into under undue influence, duress and without the benefit of having their solicitors peruse and advice on same before execution. According to Defendants, they had to enter into that agreement when Plaintiff and its solicitor Mr. Emefo Etudo threatened to use the officers of the Nigerian Police and the Economic and Financial Crimes Commission to arrest the 2nd Defendant. Therefore, Defendants contest the voluntariness of the said agreement and the issuance of a cheque in the sum of 255 Million Naira in favour of Plaintiff as it was done to prevent the unlawful arrest and detention of second Defendant.

10. Defendants pleaded emphatically that at no time did they by themselves or through anyone acting for, through or in trust for them offer to bribe Plaintiff's solicitor to compromise the recovery of the 255 Million Naira they owed Plaintiff. Instead, Defendants contend that being desirous of an amicable-solution of the issue between the parties, they informed Plaintiff's solicitor that the first Defendant needed more time to settle the debt it owed the Plaintiff because first Defendant was expecting some funds from a housing contract it had undertaken, as well as other ventures it had embarked upon which were on the verge of yielding funds. Defendants continue that Plaintiff's solicitor by some overt acts pressurized

and extorted a total sum of 1.1 Million Naira from Defendants in order to prevail upon Plaintiff to end the time given to the Defendants to settle their indebtedness to Plaintiff.

11. Defendants' averments continued that it was in a bid to conceal his dishonest action that Plaintiff's solicitor connived with police officers to prepare a non-existent case file alleging bribery against the second Defendant; and that Defendants were not contacted by any police officer to make statements admitting or denying the said charge. No statements were made by any officers of the Plaintiff. Defendants also denied the allegations of fraud in its entirety.

12. The Defendants concluded their defence by stating that they have not been able to liquidate the debt they owe the Plaintiff as a result of the actions taken by Plaintiff's solicitors which have culminated in the closure of Defendants' business. These acts include writing false petitions to the Economic and Financial Crimes Commission which has resulted in a criminal charge being filed against the Defendants and subsequently the incarceration of the second Defendant, intimidating the business partners of first Defendant to stop carrying on business with them, the cancellation of pending contracts of the first Defendant among others.

ORAL PROCEDURE

13. During the hearing of the case Plaintiff called four witnesses. The first Plaintiff witness (PW1), Captain Toyin Ayilara is a Marine Navigator and presently working with the Plaintiff as operations officer in charge of shipping. He stated that he knew the second Defendant in this suit, Mr. Ifeanyi Paddy Eke, Managing Director of the first Defendant. He continued that sometime in early 2007, the second Defendant came to the Plaintiff's premises in the company of one Mr. Ogonta, a friend of the Plaintiff. PW1 stated further that second Defendant came with an LPO from Shell Petroleum Nigeria Ltd for the supply of five million litres of Automotive Gas Oil (AGO).

14. PW1's evidence continued that after the necessary conditions stated by the Plaintiff were met by the second Defendant, an agreement was

reached. A vessel was subsequently hired to convey the five million litres of AGO to Shell Company in Warri, the location scheduled in the agreement. Upon arrival of the representatives of Shell and those Blackberry, together within dependent surveyors boarded the vessel and confirmed the volume of AGO supplied. Shell subsequently acknowledged receipt of the AGO and the quantity thereof.

15. He continued his testimony by stating that Mr. lfeanyi Paddy Eke, the representative of Blackberry Nigeria Ltd later came to Lagos for reconciliation of account. The amount due to Petrostar Nigeria Ltd was Four Hundred and Eighty-Five Million Naira for the five million litres AGO supplied. Shell paid Blackberry but they refused to pay Petrostar. Eventually, only 230 Million Naira was paid by Blackberry to Petrostar, leaving a balance of 255 Million Naira. Mr. Paddy Eke issued a lot of cheques but they were all dishonored; he then pleaded for an extension of time for him to settle the debt. Mr. Paddy Eke, acting on behalf of Blackberry entered into an agreement with Petrostar to pay the outstanding amount within 90 days from the date of the agreement.

16. PW1 went further to say that on the strength of the agreement made between Petrostar and Blackberry acting through Mr. Paddy Eke, a postdated cheque for the outstanding amount was issued to Petrostar. On the maturity date of the cheque, it was presented for payment but it was dishonoured due to lack of funds in the account. A letter was written to Mr. Paddy Eke to inform him of the dishonoured cheque.

17. PW1 also intimated to the Court that he was a signatory to the agreement that was entered into between Petrostar and Blackberry and that it was not made under duress but freely written by Mr. Paddy Eke himself. He identified copies of the agreement and the cheque that was issued for the outstanding sum of Two Hundred and Fifty-Five Million Naira and they were tendered in evidence by learned counsel to the Plaintiff, Exhibits Al and A2 respectively.

18. Plaintiff's second witness (PW2), Mr. Ndubisi Ekem Mbaanugo is a Chartered Accountant with thirty-four years' experience. He stated that he prepared a report on the interest accruing on the amount of indebtedness of 255 Million Naira from August 2007 to December 2010 at the request

of his client, the Plaintiff herein. He continued that he received the request by letter from Plaintiffs solicitor sometime in May 2008 and identified the letter through its content. The letter was tendered and admitted in evidence without objection by the counsel to the Defendants and was marked as Exhibit A3. He went on to identify the computation he made through his signature and stamp and same was tendered in evidence without any objection and marked as Exhibit A4. The computation amounted to 366 Million Naira. Finally, he stated that he forwarded his bill to the Plaintiff in the sum of 12.75 Million Naira.

19. The third Plaintiff witness, Godwin Nwekoro is a legal practitioner in the law firm of Etudo & Co. He stated that sometime in May 2008 he was directed by his principal to draft three letters addressed to the Managing Director of Petrostar Nigeria Ltd, Nkem Mbanifor & Co and Mr. Ifeanyi Eke of Blackberry Nigeria Ltd respectively. He stated that the letter addressed to the Managing Director of Petrostar Nigeria Ltd was a bill of charges in respect of the subject matter of this case in the sum of 25.5 Million Naira whilst that addressed to Mr. Ifeanyi Eke was a letter of reminder.

20. PW3 continued by saying that he dispatched two documents by DHL to Petrostar and Mr. Ifeanyi Eke respectively after they were signed by his principal. He stated that he went to DHL and collected the proof of service and attached same to the documents. He concluded his testimony by identifying the documents, and same were tendered in evidence without any objection, and were marked as Exhibits A5 and A6 respectively. PW3 concluded his testimony by identifying the two documents, the bill of charges and the letter of reminder.

21. The 4th Plaintiff witness (PW4), Mr. Emmanuel Onyekachi is a civil servant working with the Department of Petroleum Resources. He testified that sometime in 2007 the Managing Director of Blackberry Nigeria Ltd Mr. Ifeanyi Paddy Eke (second Defendant) approached him with an LPO from Shell. PW4 continued that the second Defendant intimated to him that he wanted those who had the product for supply so he introduced him to the Plaintiff in this case. He stated that the parties entered into a contract though he did not know the details of same.

22. PW4's testimony continued that he was contacted when the payment of the contract sum became a problem; subsequently he found out that Shell had paid the second Defendant. He averred that with some pressure the second Defendant paid about 200 Million Naira out of a total of 500 Million Naira. Subsequent cheques issued by the second Defendant were dishonored. Eventually an agreement was entered into between the parties for the payment of the outstanding sum. PW4 went on to say that he was there when the agreement was signed by the parties and identified a copy thereof (Exhibit Al). He concluded his evidence by saying that the Plaintiff instituted this action when second Defendant could not pay the outstanding sum as per the agreement (Exhibit A1) the parties entered into.

23. It is noteworthy that learned counsel to the Defendant was not in Court when PWI gave his testimony despite the fact that Defendants had been duly served with the hearing notice. Mr. Patrice Akwara holding brief for counsel to the Defendants, Mr. E. D. Onyeke was in Court when the other three Plaintiff witnesses, PW2, PW3 and PW4 testified. When learned counsel to the Defendants was asked to cross examine the witnesses, he intimated the Court that he was not in the position to do so.

24. The Defendants changed their counsel, Mr. Enyinnaya Uwaezuoke replacing Mr. E.D. Onyeke. Mr. Uwaezuoke appeared in Court on the 27th of September, 2010 and asked for an adjournment to enable him put his house in order and to cross examine Plaintiff's witnesses. Learned Counsel to the Plaintiff objected to this request for adjournment stating the various adjournments that had been given at the instance of the Defendants. The Court obliged the defence counsel's request for adjournment, ruling that it was the final adjournment in this suit and that Plaintiff should make available its witnesses for cross examination at the expense of Defendants. Plaintiff made available its witnesses for cross-examination at its own expense despite the Court's ruling to the effect that the Defendants should bear such expense. However, Defendants failed to appear in Court on the adjourned date without any excuse communicated to the Court. In the circumstances, the Court had no option but to bring proceedings to a close and set a date for judgment as defendant had clearly exhibited an intention not to proceed with the matter.

PLAINTIFF'S WRITTEN ADDRESS

25. Plaintiff stated that sometime in April/May 2007 the defendants entered into an agreement to supply 5 million litres of AGO to Shell Petroleum Development Company(SPDC). Defendants however did not have the AGO so they approached plaintiff who supplied the AGO to Shell on the agreement that Defendants would pay plaintiff when they are paid by Shell. The agreed sum to be paid to the plaintiff was 485 Million Naira.

26. However, when Defendants were paid by Shell, they refused to pay the plaintiff. After repeated demands, defendants only paid 230 Million Naira leaving an outstanding balance of 255 Million Naira. The parties subsequently met in April 2008 and executed an agreement (Exhibit A1) by which defendants had three months to settle their indebtedness to plaintiff and issued a postdated cheque for the entire amount. However, upon presentation of the cheque (Exhibit A2) it was dishonoured as Defendants did not have enough money in their account. A letter was then written to second Defendant to inform him of the dishonored cheque and for him to make good his guarantee to pay the sum if first Defendant failed to pay. About three months later, plaintiff instituted this suit.

27. Plaintiff continues that it established its case by calling four witnesses who substantiated the allegations it made in its pleadings and therefore judgment should be entered in its favour. Plaintiff further stated that it is entitled to the principal and the interest pleaded and particularized in its amended statement of claim. Plaintiff says it is entitled to the principal amount of 255 Million Naira as indicated by Exhibits A1 and A2 as well as interest at 25% on the principal as computed by PW2 as of 31/07/2010 which amounts to 278.531.325.32 Million Naira.

28. Further, plaintiff says it is entitled to Solicitor's and Accountant's fee as the parties expressly agreed in their agreement (Exhibit A1) that the cost incurred by the creditors (plaintiff herein) would be borne by the defendants. Plaintiff further stated that by Exhibit A3 and the testimony of PW2, the bill for the Accountant is 12.75 Million Naira whilst Exhibit A5 shows that the bill for the Solicitor is 25.5 Million Naira; both bills were pleaded. Plaintiff concluded that the special damages pleaded and

proved amount to 571,781,321.32 Million Naira, being the principal and interest on same as well as Solicitor's and Accountant's fees. Plaintiff urged the Court to award the special damages pleaded and proved in addition to general damages of 300 Million Naira against Defendants for flagrant breach of contract.

29. Plaintiff's arguments continued that the Defendants demonstrated throughout the trial that they had no defence to this action. They failed to cross examine Plaintiff's witnesses though they were recalled at Plaintiff's expense for such cross examination. Defendants also failed to call witnesses of their own to controvert the evidence of Plaintiff's witnesses. Plaintiff concluded its address by urging the Court to enter judgment in its favour as per the reliefs claimed.

CONSIDERATION BY THE COURT

30. The issue for consideration in this suit is whether Defendants owe Plaintiff an amount of 255 Million Naira and if so, whether Plaintiff is entitled to interest on the said sum, Solicitor's and Accountant fees as well as general damages.

31. Plaintiff pleaded that Defendants owe it an amount of 255 Million Naira and called two witnesses, PW1 and PW4 to testify in support thereof. The evidence of PW1 essentially is that the first Defendant paid 230 Million Naira out of a total debt of 485 Million Naira it owed to the Plaintiff for the supply of 5 million litres of AGO to Shell Petroleum Development Corporation (SPDC) on behalf of first Defendant. PW1 continued that after failed attempts by the first Defendant to settle the outstanding sum owed to the Plaintiff, the parties voluntarily entered into an agreement (Exhibit Al) whereby second Defendant undertook to pay the debt of the first Defendant if it failed to. A cheque (Exhibit A2) issued for the outstanding sum of 255 Million Naira was dishonored when it was presented because Defendants did not have sufficient funds in their bank account.

32. The testimony of PW4 is to the effect that he introduced second Defendant to Plaintiff whereupon the parties entered into a contract for the supply of AGO to SPDC. He said he was contacted when the second Defendant

failed to pay the contract sum to the Plaintiff. He further stated that part of the contract sum, about 200 Million Naira was paid to the Plaintiff. He continued by saying that a contract (Exhibit Al) was subsequently entered into by the parties by which the outstanding balance was to be paid but the cheque issued to Plaintiff for the outstanding sum was returned unpaid. The Plaintiff then instituted this action.

33. Defendants in their statement of defence did not deny that they owed the Plaintiff. Defendants' contention is that Plaintiffs by their conduct have frustrated their efforts in settling their indebtedness to them. The Defendants pleaded frustration as a defence and therefore bore the burden of proof in establishing that Plaintiff frustrated their efforts in settling their indebtedness to them. After all, it is a cardinal principle of law that he who alleges must prove. The Defendants failed to discharge this burden as they failed to produce any evidence to substantiate that claim.

34. Further, Defendants contended that they entered into the agreement (Exhibit Al) on which this suit is grounded under threat and undue influence. Defendants further contended that they did not have the benefit of having their solicitor perusing the agreement before it was signed. Having made allegations of threat and undue influence, the Defendants bore the burden of proof which they ought to discharge by adducing evidence to support same. However, Defendants failed to adduce evidence to prove that they entered into the contract (Exhibit Al) under threat and undue influence. A voluntary agreement entered into by a person of full capacity is binding whether he consults with his solicitor or not. Therefore, the fact that Defendants did not have the benefit of their solicitor when they entered into the agreement (Exhibit Al) with the Plaintiff is of no legal value or consequence.

35. The evidence of PW1 and PW4 stood uncontroverted despite the fact that Defendants' counsel was given every reasonable opportunity to cross examine the witnesses. The Plaintiff made reasonable effort to enable Defendants cross examine its witnesses. In so doing the Plaintiff produced its witnesses at its own expense for Defendants to cross examine them even though the Court had ruled that the expenses in their recall should be borne by Defendants. Even then Defendants still refused to appear in Court, let alone cross examine these witnesses.

36. The evidence given by PW1 and PW4 was credible and uncontroverted. Exhibits Al and A2 also buttress the authenticity of their testimonies. In **CHIEF EBRIMAH MANNEH v. REPUBLIC OF THE GAMBIA** (2009) CCJELR (Pt. 2) 116, this Court stated that uncontroverted evidence would be accepted. Again, in **MORROW v. MORROW** (1914) 2 I.R. 183, it was held that in a civil case evidence that is not impeached should be acted upon. Therefore, the Court accepts the testimonies of PW1 and PW4 and accordingly finds that the Defendants are indebted to the Plaintiff in the sum of 255 Million Naira.

37. Having established that the Defendants owe Plaintiff the sum of 255 Million Naira, we now turn our attention to whether Plaintiff is entitled to the other sums claimed namely, interest on the principal sum, Solicitor's and Accountant's fees as well as general damages.

38. Plaintiff claimed Solicitor's fee of 25.5 Million Naira as well as Accountant's fee of 12.75 Million Naira from Defendants stating that the payment of such fees was in the contemplation of Defendants because it was provided for in the agreement (Exhibit Al) entered into by the parties. Paragraph 4 of Exhibit Al clearly evidences an intention on the part of the debtor to pay the costs incurred by the creditor towards the recovery of the debt. Paragraph 4 of Exhibit Al reads in part thus ***"... any expenses or cost incurred by the creditors towards the recovery of the N 255 Million at a Court shall be for the account of the debtor (the Defendants) ... the parties shall not be competent to challenge or contest said bill."***

39. Exhibit Al is an agreement freely entered into by the parties and therefore they ought to be bound by the express terms thereof. Exhibit A3 shows the engagement of an Accountant and the evidence of PW2 showed that the bill for the Accountant is 12.75 Million Naira. Exhibit A5 indicates that the Solicitor's bill is 25.5 Million Naira. The evidence produced by Plaintiff was uncontroverted so we accept it. Since both of these bills were pleaded and uncontroverted evidence was adduced by the Plaintiff, the Court accepts the evidence and holds that the Plaintiff is entitled to recover them based on the agreement entered into by the parties (Exhibit A1).

40. Plaintiff also claimed that it is entitled to interest of 25% on the principal sum of 255 Million Naira based on the agreement that was entered into by the parties (Exhibit Al). Plaintiff stated that the right to compute interest at 25% is in paragraph 4 of Exhibit Al. Plaintiff stated that the computation of its Accountant as per Exhibit A4, the interest on the 255 Million Naira as at 31/07/2010 amounts to 278,531,325.32 Million Naira. Clearly, Exhibit Al entitled Plaintiff to interest of 25% on the principal sum of 255 Million Naira as Defendants agreed to the payment of the said interest if they defaulted in the payment of the principal sum. Since the computation by PW2 was not challenged, it has to be accepted. Plaintiff is therefore entitled to the interest pleaded and proved.

41. Plaintiff also claimed general damages of 300 Million Naira for Defendant's flagrant breach of contract. General damages are such as the law implies to have accrued from the act of a wrongful party and are compensatory in nature. General damages are usually awarded for pain and suffering, future problems and crippling effect of an injury, loss of ability to perform various acts, shortening of life span, mental anguish, loss of companionship, loss of reputation, loss of anticipated business and many more. It is always awarded at the discretion of the court having regard to the peculiar circumstances of each case.

42. The Court is not satisfied that any good reason has been proffered to justify the award of general damages in addition to the interest agreed upon which we consider to be an adequate recompense for any loss arising out of the failure to pay the principal sum. The Plaintiff, as per Exhibit Al, is entitled to 25% interest on the principal sum to be calculated from 1st August, 2010 to the date of this judgment, besides what the court has already said it is entitled to for the period ending 31st July, 2010.

DECISION

43. Whereas the Plaintiffs have led sufficient evidence to establish their claims, and whereas the Defendants failed to lead any contrary evidence notwithstanding all the opportunities given them, the Court decides that the Plaintiff shall recover from the Defendants the sum of 255 Million Naira being the balance of the AGO supplied to Shell on their behalf,

interest at the rate of 25% on the said sum up to date of judgment, Accountant's fees of 12.75 Million Naira, and Solicitor's fees of 25.5 Million Naira.

COSTS

44. The Plaintiff is entitled to costs in this action. We take note of the fact that the Defendants even failed to pay the travelling expenses of the Plaintiff's witnesses who were re-called at their instance. The Chief Registrar is to take this into account in assessing the costs due the Plaintiff applying the provisions of Articles 66 - 69 of the Court's Rules of Procedure.

45. This decision has been given in open court in Abuja this 18th day of March 2011, in the presence of:

HON. JUSTICE H.N. DONLI - *PRESIDING JUDGE*

HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
ATANASE 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 FRIDAY, THE 9TH DAY OF MAY, 2011

SUIT NO: ECW/CCJ/APP/07/09
JUDGMENT NO: ECW/CCJ/JUD/05/11

BETWEEN

1. **CENTER FOR DEMOCRACY AND DEVELOPMENT**
2. **CENTER FOR DEFENCE OF HUMAN RIGHTS AND DEMOCRACY** - ***PLAINTIFFS***

V.

1. **MAMADOU TANDJA**
2. **REPUBLIC OF NIGER DEFENDANTS** - ***DEFENDANTS***

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

MAITRE ATANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MR. SAMUEL OGALA;**
   MR. OLUSOLA EGBEYINKA - *FOR THE PLAINTIFF*
2. **MAITRE SALE DJIBRILOU** - *FOR THE DEFENDANTS*

Violation of human rights -Inadmissibility -Jurisdiction of the Court, -Contestation as to facts and Pleas-in-law -Public policy

SUMMARY OF FACTS

The Centre for Democracy and Development (CDD) and the Centre for Defence of Human Rights and Democracy (CDDHDA) sued Mamadou Tandja and the Republic of Niger before the ECOWAS Court of Justice for violation of human rights of the people of Niger.

According to the Applicants, President Mamadou Tandja, in violation of the Constitution of the Republic of Niger, put himself out as a candidate for a third term in political office at the end of his second term. That the matter was brought before the Constitutional Court by a group of Parliamentarians and the Constitutional Court declared, in a legal opinion, that maintaining Mamadou Tandja in power as President beyond the second term, would be unconstitutional.

The Applicant alleged that on 26th of May 2009, President Mamadou Tandja dissolved the National Assembly, but four opposition parties brought the issue of the dissolution of the National Assembly before the Constitutional Court, and the latter annulled it. In reaction, Mamadou Tandja terminated the functions of the Members of the Constitutional Court and appointed new Members. That it was under the composition of its new Members that the Constitutional Court declared on 14th August, 2009, the adoption of a Draft Constitution enabling Mamadou Tandja to seek power for a third term.

The Defendants contested the facts and pleas in law invoked by the Applicants, and they averred that the Application was inadmissible, that the Court has no jurisdiction to adjudicate on the case on the grounds that the Applicants have no locus standi, and that the Court has no powers to examine the legality or otherwise of a nationwide referendum.

LEGAL ISSUES

- *Was there an occurrence of human rights violation?*

- *Is the Application admissible, given that it was filed by two NGOs (corporate bodies) whose locus standi to plead on behalf of the people of Niger seems contestable?*

- *In the light of Article 9 of the Protocol on the Court, is the Court invested with powers to examine the legality or otherwise of a nationwide referendum?*

- *As a natural person, can Mamadou Tandja be brought before the Honourable Court for human rights violation?*

DECISION OF THE COURT

The Court declared that it had no jurisdiction to examine the constitutionality or legality of acts which come under the domestic norms and laws of the authorities of Member States (vis-a-vis violation of provisions of the African Charter on Human and Peoples' Rights as raised by the Applicants), and that the Applicants had no locus standi to bring the case before the ECOWAS Court of Justice.

The Court also declared the Application filed against Mamadou Tandja, a natural person, as inadmissible, and the claims brought by the Applicants, as frivolous.

JUDGMENT OF THE COURT

FACTS AND PROCEDURE

1. By Application dated 14th July 2009, lodged at the Registry of the Court on 27th July 2009, the Centre for Democracy and Development (CDD) and the Centre for the Defence of Human Rights and Democracy in Africa (CDHRDA), through their lawyers, Mr. Olusola Egbeyinka and Mr. Samuel Ogala, filed their case before the Community Court of Justice, ECOWAS, against Mr. Mamadou Tandja, then President of the Republic of Niger, and the Republic of Niger, for ***"violation of the human rights of the people of Niger to participate freely in the management of the affairs of their country by electing a new President in December 2009"***.

2. The Applicants pleaded that Mr. Mamadou Tandja, elected President of the Republic of Niger in December 1999 for a five-year term of office, was re-elected in December 2004 for a second term which ends in December 2009, and that he could no longer ask for another tenure, according to the provisions of the 9th August, 1999 Constitution.

3. Before the end of his tenure, a movement named **"Tazartche"** was born during the laying of the foundation stone for the construction of the Zinder oil refinery in October 2008, and it called for extension of the tenure of Mr. Mamadou Tandja and his maintenance in power beyond that second five-year term. This idea agitated the Niger society and generated both supporters and opposers.

4. On 25th May 2009, twenty-three parliamentarians brought a matter before the Constitutional Court of Niger and the latter rendered an opinion concerning the interpretation of Articles 1, 5, 6, 36, 37, 39, 49 and 136 of the Constitution of Niger and Article 29 of Law No 2000-11 of 14th August, 2000 as amended, determining the organization, functioning and procedure to be followed before the Constitutional Court. In the terms of that opinion, the Constitutional Court of Niger declared, inter alia, that maintaining the President of the Republic in office beyond the end of his tenure is contrary to the Constitution and that the President of the Republic ***"cannot embark on or undertake an amendment of the Constitution without violating his oath of office."***

In reaction against the said opinion, on 26th May 2009, by Decree No 2009-150/PRN and by application of Article 48 of the Constitution, Mr. Mamadou Tandja dissolved the National Assembly, and on 5th June 2009, he issued Decree No 2009-178-PRN/MI/SP/D by summoning the electoral body for a referendum on the Constitution of the Sixth Republic, on the basis of Article 49 of the Constitution of 9th August, 1999 and Article 5 of Law No 2002-046 of 16th June, 2004 which determine the conditions for having recourse to a referendum.

On 12th June 2009, four political parties, namely *Alliance Nigérienne pour la Démocratie et le Progrès (ANDP-Zaman Lahia), le Parti Nigérien pour I'Autogestion (PNA-AI'Oumma'T), le Parti Nigérien pour la Démocratie et le Socialisme (PNDS-Tarayya),* and *I'Union des Socialistes Nigériens (UDSN/Talaka le bâtisseur),* filed a case before the Constitutional Court of Niger seeking annulment of the Decree which dissolved the National Assembly; the Constitutional Court granted the request of this application in Judgment No 04/CC/ME of 12th June 2009. Mr. Mamadou Tandja then went before the Constitutional Court on 23rd June 2009 with an application to quash the said judgment.

After declaring, through Decision No. 001/PRN of 26 June 2009, and by application of Article 53 of the Constitution, the existence of "exceptional circumstances", the President of the Republic of Niger, by Decision No. 003/PRN of 29 June 2009, repealed Decree No. 2004-297/PRN/M of 30 September 2004, Decree No. 2006-295/PRN/MJ/MCRI of 5th October, 2006 and Decree No. 2008-346/PRN/MJ of 2nd October, 2008 on appointment of members of the Constitutional Court, and appointed new members of the said Constitutional Court.

5. On 14th July 2009, the Applicants brought their case before the Honourable Court, which was served, on 28th July 2009, on Mr. Mamadou Tandja and on the Republic of Niger (a Member State of ECOWAS).

6. On 4th August 2009, the people of Niger participated in a referendum for the adoption of the new Constitution. By Judgment No. 07/09/CC/ME, the Constitutional Court, as newly composed, adjudicating on an electoral matter, in its public hearing of 14th August 2009, declared having adopted the Draft Constitution, which had received 92.5% of the votes cast.

7. Counsel for the Defendants lodged on 29th September 2009, at the Registry, a Memorial in Defence in which, on one hand, they raised inadmissibility of the Application and incompetence of the Court, and contested, on the other hand, the facts as related by the Applicants.

8. On 19th February 2010, the said Memorial in Defence was served on the Applicants. In its hearing of 23rd September 2010, the Court gave lawyers of the Applicants a time-limit of one week, i.e. up to 1st October 2010, to respond in writing to the Preliminary Objections.

9. The Applicants lodged their Reply to the said Preliminary Objections at the Court on 13th October, 2010 and requested the Court to accept it, while acknowledging that it was lodged outside the time-limit, arguing on the ground that the officer who had to prepare the document was on leave.

10. At the hearing of 21st October 2010, the Republic of Niger contended that the Reply to the Preliminary Objections was lodged outside the time-limit as prescribed by the Court, and that on top of that, the Republic of Niger was notified that very morning; and moreover, the Reply was not translated into French. The Republic of Niger asked that the document be set aside during the proceedings or else it should be served with a copy after the translation is done.

11. These observations warranted arguments from either Party, which led the Court to indicate that the decision regarding extension of time, in the terms of paragraph 2 of Article 35 of the Rules of the Court, comes solely under the discretionary power of the President and that the application for extension of such time-limit must be filed prior to the hearing; but that for an effective administration of justice, and in exceptional circumstances, the Court grants requests made by applicants for extension of time-limits where such applicants should have lodged their observations on preliminary objections. The Court therefore adjourned proceedings to 1st December, 2010 so that the Republic of Niger may be served with the translated document by that time.

12. On 3rd December 2010, the Court held a court session during which Niger maintained that the Application had lost its essence and it asked the Court to bring proceedings to an end. The Court also heard the Parties on the Preliminary Objections.

CLAIMS AND ARGUMENTS BY THE PARTIES

A. AS REGARDS THE APPLICANTS

13. In their Initiating Application, the Applicants asked the Court:

(i) To declare that the decision of Mr. Mamadou Tandja to remain in power and to organize a constitutional referendum is illegal, null and of no effect, because it constitutes a violation of Articles 36 and 136 of the Constitution of Niger and Article 13 of the African Charter on Human and Peoples' Rights;

(ii) To declare that the violent quelling of protest marches and other demonstrations is illegal because it violates the Niger people's rights to freedom of expression, assembly, and association with other persons , as guaranteed by Article 9, 10, and 11 of the African Charter on Human and Peoples ' Rights;

(iii) To issue an order of injunction restraining Mr. Mamadou Tandja from:

- Organizing a referendum in whatever manner it may be, around the 4th of August 2009;
- Remaining in power in whatsoever manner as President of the 2nd Defendant, beyond December 2009;
- Dispersing protest marches and other gatherings organized by the people of Niger in protest against his plan of seeking a third term of office.

14. In support of their claims, the Applicants maintained that Mr. Mamadou Tandja decided to organize a referendum on 4th August, 2009 in order to tamper with the Constitution and to enable him stand for a third term of office;

(1) That in countering the 12th June, 2009 Decision by the Constitutional Court, he dissolved the Parliament and governed Niger by Orders, contrary to the constitutional order of the country;

(2) That he instructed the Independent National Electoral Commission (CENI) to act likewise;

(3) That the authorities of Niger persist, in violation of the Constitution of their country, in organizing the said referendum.

15. The Applicants affirmed at any rate that Mr. Mamadou Tandja's decision to impose himself on the people of Niger beyond December 2009, the period marking the end of his tenure, and to organize a referendum after inserting a new clause in the Constitution, aimed at eliminating every form of limitation to the presidential term of office, is arbitrary, and constitutes a violation of Articles 36 and 136 of the Constitution of Niger as well as Article 13(1) of the African Charter on Human and Peoples' Rights, in that the said decision aims at depriving the Niger citizens of their individual rights to participate freely in the management of the affairs of their country ***(See* Modise v. Botswana (2000) AHRLE 25*)***; that the instructions given by Mr. Mamadou Tandja to the Army, to patrol the principal areas of the big cities of Niger and to attack unarmed demonstrators, is contrary to Articles 9, 10 and 11 of the African Charter on Human and Peoples' Rights, and may amount to a violation of the demonstrators' right to life as guaranteed by Article 4 of the African Charter on Human and Peoples' Rights.

16. They concluded that the decision by the Niger authorities to tamper with the Constitution of Niger constitutes a human rights violation and a violation of the rights of the people of Niger to democratic governance as stated in Article 13(1) of the African Charter on Human and Peoples' Rights.

B. AS REGARDS THE DEFENDANTS

17. In their Defence, the Defendants filed a Memorial in which they raised inadmissibility of the Application and incompetence of the Court, on one hand, and contested, on the other hand, the facts as related by the Applicants as well as the pleas-in-law invoked.

As to inadmissibility

18. They maintained that the Application is inadmissible on the grounds that the Applicants are not qualified to act on behalf of the people of Niger; They contended further that having the status to act in a matter is an entitlement or a qualification which is, in certain legal actions, inseparable from the right to engage in legal action, without which one's application is deemed inadmissible. That such status is derived from a requirement of the law, or else, in an action open to an interested party, it is founded upon a justification of an interest at stake. They argued that in regard to the Supplementary Protocol A/SP.1/01/05 amending Protocol A/P.1/7/91 on the Community Court of Justice, ECOWAS, the Community lawmaker, under the new Article 10, determined the persons qualified to come before the Court, by placing limits on the qualification of such persons, and that the persons are **"(...) individuals on application for relief for violation of their human rights"**. They considered that, it can be deduced from this provision that non-governmental organizations (NGOs) in general, and the Centre for Democracy and Development as well as the Centre for the Defence of Human Rights and Democracy in Africa, in particular, do not have the status which should qualify them to gain access to the Community Court of Justice, to ask the Court to adjudicate on an alleged violation of human rights of the people of Niger to participate freely in the management of the affairs of their country by electing a new President in December 2009. That indeed according to Articles 5 and 6 of the Niger Constitutions of 9th August, 1999 and 18th August 2000, **"National sovereignty belongs to the people; No Faction of the people or an individual may take up the exercise of such sovereignty (...); and that "The people shall exercise their sovereignty through elected representatives and by referendum (...)";** That in the instant case, the Centre for Democracy and Development and the Centre for the Defence of Human Rights and Democracy in Africa do not provide any justification that they have received a mandate from the people of Niger - who are portrayed here as victims - to empower them to engage in such an action on their behalf, nor a legitimate interest at stake for the success of the claims being made by them on behalf of the people of Niger.

As to incompetence

19. The Defendants invoke incompetence of the Court to consider *in abstracto* the laws of Member States of the Community, for the purposes of determining whether there is a human rights violation or not. Referring **to Judgment No ECW/CCJ/JUD/06/08 of 27th October 2008**, in Case Concerning **Hadijatou Mani Koraou v The Republic of Niger**, they argued that the Applicants did not submit for the consideration of the Court of Justice, concrete cases of human rights violation committed by the Republic of Niger but vaguely mentioned that the People of Niger would fall victim to such violation, in the sense that the moves made by the President of the Republic are likely to prevent the People of Niger from exercising their right to participate freely in the management of the affairs of their country, through the election of a new President in December 2009.

20. They further contended that the Court has no jurisdiction to consider the legality of popular votes and maintained that the Applicants' pleadings seeking an order for declaring Mr. Mamadou Tandja's decisions as illegal, and asking the Court for an order to prevent the referendum from being organized and to restrain Mr. Mamadou Tandja from remaining in power, are totally inadmissible, in so far as they tend to urge the Court to consider the legality of a popular vote which deals with the municipal law of a Member State of the Community; that such competence does not in any way come under new Article 10 of the Protocol on Court as amended by Supplementary Protocol A/SP.1/01/05 of 19th January, 2005.

21. They contested the facts adduced by the Applicants and maintained that there has been no violation of Articles 36 and 136 of the Constitution of Niger, Articles 4, 9, 10, 11 and 13 of the African Charter on Human and Peoples' Rights, and Article 4 of the Revised Treaty.

ANALYSIS OF THE COURT

A. AS TO THE PRELIMINARY OBJECTIONS

22. The Applicants did not invoke at any point in time, either in the orders sought by them in writing or in their oral submissions, the basis of the

competence of the Court upon which they relied for asking that the Court should consider violation of the alleged human rights, the illegality of the acts engaged in by Mr. Mamadou Tandja and the banning of the said referendum. The Court recalls, under such conditions, that it is not its duty to assume the place of the Parties by stating in any given case the basis of its competence.

23. However, given that Niger has admitted, through the logic of its argumentation, that the Application is related to the exercise of the Court's jurisdiction on matters of human rights, the Court intends to examine, in accordance with Article 87 of its Rules of Procedure, the Preliminary Objections raised by the Republic of Niger in regard to lack of jurisdiction of the Court and inadmissibility of the Application. In that regard, the Court shall apply paragraph 1, Article 88 of its Rules of Procedure and shall automatically take note of the causes of incompetence or inadmissibility, which it will on its own be compelled to find. The said article provides in effect, that:

> ***"Where it is clear that the Court has no jurisdiction to take cognizance of an action 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."***

1. In terms of the jurisdiction of the Court

24. The Court finds that the summoning of the electoral body, for the purposes of organizing a referendum on the Sixth Republican Constitution, is related to the exercise of the due power of a sovereign Member State. Now, the powers conferred on the Court as concretely spelt out in the new Article 9 of the Protocol relating to the Court as amended by the Supplementary Protocol A/SP.1/01/05 of 19th January, 2005, shall not be interpreted as implying the exercise of control over the constitutionality or legality of the instruments adopted by the national authorities of the Member States, in the application of their domestic law. Indeed, such powers have not been conferred on the Court, neither by the ECOWAS Treaty nor by the 10th December, 1999 Protocol on Mechanism for the Prevention, Management and Resolution of Conflicts, Maintenance of Peace and Security, much less by the 21st December, 2001 Protocol on Democracy and Good

Governance, all of which are instruments invoked by the Applicants. Consequently, the Court is of the view that it has no jurisdiction to make a declaration on the legality or constitutionality of the acts complained of or to forbid acts of that nature from being taken. Hence, the Court is incompetent to make a declaration as to whether the decisions taken by Mr. Mamadou Tandja are illegal, arbitrary, and null and of no effect. The Court is equally incompetent to forbid Mr. Mamadou Tandja or the agents of the Republic of Niger from organizing the said referendum, for the purposes of holding on to power, or from dispersing the protest marches against the organization of the referendum.

25. Conversely, guided by its consistently held case-law, the Court adjudges that it has jurisdiction to sit on a case once human rights violation is alleged in a dispute submitted before it. Now, in the instant case, the Applicant alleged violation of Articles 4, 9, 10, 11 and 13 of the African Charter on Human and Peoples' Rights, which provide on the inviolability of the human person, the right to information and the right to freedom of expression, assembly, and association with other persons, and the right to participate in the public affairs of one's country. The Court therefore considers that it is competent to examine such complaints.

2. In terms of the admissibility of the Application

26. The Republic of Niger claimed the inadmissibility of the Application on the grounds that the Applicants are not qualified to act on behalf of the people of Niger, as recalled herein above in paragraph 18. Counsel for the Applicants opposed this plea during the hearing without developing the argument further.

27. In the exercise of its jurisdiction on human rights protection, the Court shall ensure that all the conditions for bringing the case before it are fulfilled. In such circumstance, the Court shall entertain cases filed by "individuals on application for relief for violation of their human rights", as stipulated in paragraph (d) of the new Article 10 of the Protocol on the Community Court of Justice as amended by Protocol A/SP.1/01/05 of 19th January 2005, which provides that ***"Access to the Court is open to ...Individuals on application for relief for violation of their human rights."***

Pursuant to this article, cases shall be brought before the Court by natural or legal persons endowed, within the framework of their national laws, with the required legal capacity, and who, in addition, shall justify their condition of being victim."

28. In the opinion of the Court, it can be deduced from the points of the case, that the Applicants are legal persons incorporated under the laws of the Federal Republic of Nigeria and of the Republic of Benin, as regards, respectively, the Centre for Democracy and Development and the Centre for the Defence of Human Rights and Democracy in Africa. Now, in the circumstances of the case, even if one should suppose that the said association possess the legal status in their respective countries, they have not evinced their status as victims nor justified that they are qualified to act on behalf of the victims whose mandate they must have received.

29. The Court further finds that the request of the Applicant Associations seeks a declaration to the effect that the decision by Mr. Mamadou Tandja to call a constitutional referendum is illegal and arbitrary and violates the human rights of the people of Niger to democratic governance. The Court finds that the decisions taken by Mr. Mamadou Tandja have effect on only the nationals of Niger and possibly on residents of the said Country. But, the Applicants are not Associations formed from the laws of Niger and do not have any justification either as constituting a part of the Republic of Niger. The said decisions cannot therefore be against them and does not concern them either intimately or remotely; they cannot therefore constitute victims of the consequences of such decisions. Ultimately, they cannot be identified as victims.

30. Besides, the Court considers that the human rights invoked by the Applicants are not rights for corporate bodies as constituted by them; that as such, they do not have any specific interest at stake. Consequently, and for all the reasons spelt out, the Court declares that the Application is manifestly inadmissible.

31. Furthermore, the Court recalls that when an application on human rights violation is brought before it, it is so done necessarily by a person who is a victim of the said violation against one or several Member States of the

Community, and not against individuals, natural or legal persons **(cf. Judgment Nº. ECW/CCJ/APP/07/10 of 10th December, 2010** relating to **Suit Nº. ECW/CCJ/RUL/08/09, SERAP v. Nigeria & Others, §71**, as well **as Judgment Nº. ECW/CCJ/RUL/03/10 of 11 June, 2010** relating to **Suit Nº. ECW/CCJ/APP/04/09, Peter David v. Ambassador Raph Uwechue, §41, 42, 46, 47**. From the foregoing, the Court declares that the action brought against Mr. Mamadou Tandja is inadmissible.

32. At this juncture, in the instant case, the Court intends to apply paragraph 2, Article 88 which provides:

> ***"The Court may at any time on its own motion, (...) consider, (...) after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it (...)."***

B. AN ACTION HAVING BECOME DEVOID OF PURPOSE

33. At the hearing of 3rd December 2010, the lawyer for the Republic of Niger asked the Court to terminate the proceedings, for, according to him, the Application had become devoid of purpose, considering the developments in the political situation in Niger, which had surpassed those stages. He thus maintained that the claims of the Applicants can no more be granted. Indeed, he contended that the referendum the Applicants wanted debarred had been conducted and that the Constitution had been adopted and promulgated; that subsequently, a *coup d'etat* had occurred; that the authorities of Niger's transition have drawn up a programme for restoring democracy, after adopting and promulgating a new Constitution.

34. As for the Applicants, they declared that they wanted their applications to be maintained, on the grounds that the decision of the Court will contribute towards dissuading other leaders who may have the intention of tampering with the constitutions of their country, so as to perpetuate themselves in power.

35. The Court notes that on 18th February 2010, a *coup detat* occurred in Niger following which a Supreme Council for the Restoration of Democracy (CSRD) and institutions for transition were put in place for a

return to legal constitutional rule in Niger. The said Council established a programme in three dimensions. For the implementation of the programmes under the first dimension, an independent National Electoral Commission proposed an Elections Calendar, according to which elections leading to the return to civil rule would be organized.

By the said calendar, elections shall take place from 31st October, 2010 to 6th April, 2011. These shall include a Constitutional Referendum, local, legislative and presidential elections. As for programmes under the second dimension, a Commission for Good Governance, and the Fight against Financial Crimes was created in May 2010. Finally, for the programmes under the third dimension, a Council for Reconciliation and Consolidation of Democracy was equally created.

36. The Court notes that, with regard to the implementation of the programme of restoration of democracy, local elections were organized on 8th January 2011; legislative elections followed on 31st January 2011, while Mr. Mahamadou Issifou of the *le Parti Nigérien pour la Démocratie et le Socialisme* (PNDS) was elected President of the Republic of Niger, following a-two-round Presidential election held on 31st January, 2011 and 12th March, 2011. He was sworn-in on 7th April, 2011.

37. With regard to these latter events which occurred, and as exposed above, the Court concludes that the Applicants' claims seeking various orders of injunction to restrain Mr. Mamadou Tandja from organizing the criticized referendum, modifying the Constitution and quelling protestation marches have become devoid of purpose, pursuant to Article 88 (2) of its Rules cited above.

DECISION

FOR THESE REASONS

38. The Court, adjudicating in a public sitting, after hearing both parties, in last resort, after deliberating in accordance with the law;

As to the preliminary objections,

- **Declares** its lack of jurisdiction to make a declaration on the legality or constitutionality of the acts made by the authorities of Member States, pursuant to the provisions of their domestic law;
- **Declares** that it has jurisdiction over the violation of the African Charter on Human and Peoples' Rights, as alleged;
- **Declares** that the allegation on the violation of the African Charter on Human and Peoples' Rights is inadmissible, for the lack of locus standi, by Applicants;
- **Declares** inadmissible the claim of violation of human rights against Mr. Mamadou Tandja, as an individual;

As to the other requests

- **Adjudges** that the Applicants' claims seeking various orders of injunction to restrain Mr. Mamadou Tandja from organizing the criticized referendum and its subsequent effects have become devoid of purpose.

COSTS

39. Costs shall be borne by the Applicants.

Thus made, adjudged and pronounced in a public hearing at Abuja, by the Court of Justice of the Economic Community of West African States, on the day, month and year stated above.

40. AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*
HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*
HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON *(ESQ.)* - *REGISTRAR*

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

HOLDEN AT ABUJA, NIGERIA

ON THE 1ST DAY OF JUNE, 2011

SUIT NO.: ECW/CCJ/APP/03/09
RULING NO: ECW/CCJ/RUL/05/11

BETWEEN
PRIVATE ALIMU AKEEM - PLAINTIFF
V
FEDERAL REPUBLIC OF NIGERIA - DEFENDANT

COMPOSITION OF THE COURT:

HON. JUSTICE HANSINE N. DONLI - *PRESIDING*

HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*

HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MR. SAMUEL OGALA,** AND **OLUSOLA EGBEYINKA** - *FOR THE PLAINTIFF*
2. **G. F. ZI** ***(ESQ.)*** - *FOR THE DEFENDANT*
3. **MOHAMMED IBRAHIM SANNI** ***(ESQ.)*** *-FOR THE NIGERIAN ARMY*

Human rights violation -Defendants in the suit -Intervention -Joinder as interested party -Indivisible nature of the international legal status of a State -State representation in the suit -Time-limit of procedure -Discretionary power of the Court

SUMMARY OF FACTS

On 6th February 2009, Private Alimu Akeem, a soldier in the Nigerian Army, filed a case before the Court against the Federal Republic of Nigeria, for violation of Articles 5 and 6 of the African Charter on Human and Peoples' Rights.

On 2nd October 2009, the Army of the Federal Republic of Nigeria applied to be joined to the proceedings as an interested party, and further to that application, filed a Memorial in Defence in which it contended that the Court has no jurisdiction to adjudicate on the case.

On 10th November 2009, after Plaintiff Counsel had lodged an Application for judgment by default, the Federal Republic of Nigeria lodged a defence thereto and asked the Court to accept its aforementioned Memorial in Defence, which it had filed outside the required time-limit.

LEGAL ISSUES

- *Is the application brought by the Army of the Federal Republic of Nigeria, seeking to be joined to the procedure as an interested party, admissible?*

- *Is the application for extension of time to lodge the Memorial in Defence, as lodged by the Federal Republic of Nigeria and filed upon expiration of the previously fixed time-limit, admissible?*

DECISION OF THE COURT

The Court held that:

Applications for human rights violations are brought by persons who are victims, against one or several Member States of the Community. A third party can only be admitted to the procedure as an intervener. In the instant

case, since the international legal status of the State is indivisible, the State cannot, in the same suit, be represented by two different State organs concurrently claiming to be parties to the same suit. Consequently, the Army cannot be joined to the proceedings as an intervener in the case. Hence, the written pleadings and requests of the Army are inadmissible.

The time-limit within which pleadings are required to be lodged shall be respected. The extension of such time-limit may be granted by the authorizing body that fixed or accorded it, upon a justified request duly filed by the requesting party before the expiration of the previously fixed time period. In the instant case, the reasons advanced by the Federal Republic of Nigeria in its application requesting for further time, which was filed 9 months after the expiration of the previously fixed time-limit, are specious and ill founded. Nevertheless, for the purposes of efficient administration of justice, and to ensure that both parties are heard in course of the procedure, the Court admitted the Memorial in Defence which was filed outside the laid down period of time. The Court thus ordered proceedings on the case to continue.

RULING OF THE COURT

PARTIES

Mr. Olusola Egbeyinka, appeared as Counsel for the Plaintiff from the Falana and Falana's Chambers;

Mr. Zi appeared as Counsel for the Federal Republic of Nigeria;

Mr. Muhamed Ibrahim Sanni, appeared as Counsel to the Army of the Federal Republic of Nigeria;

FACTS

1. Mr. Alimu Akeem, whose Counsel is Mr. Olusola Egbeyinka, a lawyer from the Falana and Falana's Chambers, came before the Court on the 6th of February 2009 with an application for violation of Articles 5 and 6 of the African Charter on Human and Peoples' Right, against the Federal Republic of Nigeria.

2. The Plaintiff claimed that while he was a soldier in the Army of the Federal Republic of Nigeria, of the 72 para Battalion based in Makurdi, Benue State of Nigeria, he was attached to General Victor Malu (Rtd.) as security detail as at the time of the facts.

3. He averred that on the 13th of November 2006, he was arrested along with four (4) other persons on the allegation that a rifle was missing in General Malu's house at Gboko, in Benue State and that since this date, he was ***"detained and manhandled in a military custody at the army barracks in Makurdi"***, even though ***"the investigation conducted by the Nigerian Army and police did not implicate him"***. He further averred that he was detained without trial for over two years on the ground that he was indicted by a native doctor.

4. He sought these reliefs from the Court:

   a) A declaration that his detention since 13th November, 2006 is illegal and does not conform to the Constitution of Nigeria as it violates the fundamental rights to human dignity and personal liberty of the Plaintiff

as guaranteed under Section 35 of the aforementioned Constitution and Article 6 of the African Charter on Human and Peoples' Rights;

b) A declaration that the physical torture inflicted on the Plaintiff while in military custody at 72 para Battalion of the Army in Markudi by the agents of the Government of Nigeria is illegal and unconstitutional, as it violates the Plaintiff's fundamental right to personal liberty guaranteed under section 34 of the Constitution of Nigeria and Article 5 of the African Charter on Human and Peoples' Rights;

c) An order that the Government of the Federal Republic of Nigeria shall pay Ten Million (10,000,000.00) Naira as compensation for violation of the Plaintiffs human rights to the dignity of his person and personal liberty.

5. The initial application was served on the Federal Republic of Nigeria, on the 11th of February 2009, at the Office of the Attorney General and Minister of Justice, Abuja.

6. The Federal Republic of Nigeria did not appear for hearing on the 23rd of September, 2009 and failed to lodge a defence till date. The Plaintiff's counsel then urged the Court to grant the requests contained in the orders sought and a period of time to formalize the application in accordance with the provisions of Article 90(1) of the Rules of the Court.

7. On the 24th of September 2009, upon the request or Mr. Muhamed Ibrahim Sanni, Counsel to the Army of the Federal Republic of Nigeria, the Registry of the Court served the Army with the initial application by the Plaintiff.

8. On the 28th of September 2009, Mr. Samuel Ogala, a Counsel in Falana and Falana's Chambers, on behalf of the Applicant, lodged at the registry of the Court, an application dated the same day, asking that he be granted the requests made in the orders sought, and this application was served on Counsel to the Nigerian Army on 29th September, 2009.

9. On the 2nd of October 2009, Counsel to the Nigerian Army lodged at the Registry of the Court, their response on the same date comprising of the following documents:

   (i) An application seeking for the Nigerian Army to *be joined to the procedure* as an *interested party;* that additional time should be granted to enable him produce a brief of defence on the ground that he only received the initial application on the 24th of September 2009; that an order should be made that the defence brief attached to the file was properly lodged in the form required and that it is admissible, as well as any other necessary order;

   (ii) An affidavit attesting to the circumstances and motive by which he was acting on behalf of the Army of the Federal Republic of Nigeria as well as facts to justify the application which were given and believed upon in respect of the case;

   (iii) A defence brief with evidence annexed in which he conceded that the Court is incompetent to hear the case and rejection of the initial application as baseless.

10. On the 2nd and 5th of October 2009, the Registry of the Court served the application of the Army as well as its brief of defence respectively on Nigeria through the Federal Ministry of Justice and on the counsel to the Applicant. On the 8th of October 2009, the said Ministry was equally served with the application seeking for implementation of the orders sought by the Applicant on 28th September, 2009.

11. On the 10th of November 2009, the Ministry of Justice filed a defence and an application in which it conceded that the brief was filed out of time but stated reasons for such a default in filing. The said Ministry equally raised the issue of lack of jurisdiction of the Court and pleaded, like the Army, that the initial application be dismissed as lacking in substance.

12. On the 11th of November 2009, the Court held a hearing on the case. Mr. Olusola Egbeyinka, lawyer of Falana and Falana's Chambers, appeared for the Applicant, while Mr. G. F. Zi and Muhamed Sanni appeared respectively for Nigeria and the Nigerian Army of Nigeria.

13. The latter who applied for their pleadings filed on the 2nd and 10th September 2009 to be granted respectively moved the court to grant same. This resulted in Mr. Sola Egbeyinka withdrawing his application concerning the orders sought dated 28th September 2009 for default judgment. The court enjoined counsel to the Plaintiff to file the reply to the defence of the Federal Army of Nigeria in writing by 10th December 2009, having initially filed an application to respond to the said defence by the Army.

14. In his reply counsel to the Plaintiff challenged the facts narrated in the defence and maintained that the Army of Nigeria did not provide any evidence in support of its allegations. In the same vein, he argued against the issue of the lack of jurisdiction of the Court, as raised by the Army of the Federal Republic of Nigeria.

15. On the 2nd of March 2010, the Plaintiff's counsel filed at the Registry of the Court, an application for extension of time to reply to the defence by the 1st Defendant that he came to know that the Applicant, Aliyu Akeem had been released.

16. During the hearing of 12th May 2010, the Plaintiff's counsel asked the Court for permission to file an application to enable his client appear in court; then on the 16th of September 2009, he submitted an application asking for an order enjoining the Defendants to enable Aliyu Akeem, who was still in detention, to appear in court, as witness, and to guarantee his security at the time of appearance in court. Further, he affirmed that he had discovered that the Applicant was detained at the 82nd Mechanised Division in Enugu State of Nigeria, where he was confined.

17. On the 20th of September 2010, Counsel for the Army raised a Preliminary Objection, through separate pleadings, on lack of jurisdiction of the Court, relying on Articles 87 and 88 of the Rules of the Court.

18. During the hearing of 29th September 2009, the Court, by the application of Article 87(3) of the Rules of Court, and by virtue of an oral application made by Counsel to the Plaintiff, granted a time limit of two weeks to the said Counsel, i.e. till 13th October 2009, to enable him submit his written observations on the Preliminary Objection raised by the Army of the Federal Republic of Nigeria.

19. On the 21st of October 2010, Counsel for the Applicant further lodged at the Registry of the Court, an application for extension of time for the submission of his written observations on the Preliminary Objection, on the ground that the instruction to draft and submit those observations, came late to him, only on the 18th of October 2010. In the said observations, which were filed together with the said application, he maintained that the Court has jurisdiction to adjudicate on the case, and urged the Court to dismiss the said Preliminary Objection.

20. On the 9th of November 2010, Counsel for the Army of Nigeria, Mr. Mohammed A. Sanni, lodged at the Registry of the Court, further information relating to the trial which the Applicant was made to undergo, as well as the indictment and trial by the General Court Martial.

21. On the 12th of November 2010, Counsel to the Plaintiff, Mr. Paul Otchai, filed at the Registry of the Court, further affidavits in reply to the written observations adduced by the Army on 9th November 2010, where he equally indicated to the Court that the name of the Applicant is in fact Alimu Akeem and not Aliyu Akeem.

22. Pursuant to Article 87(4) of its Rules, the Court heard the Parties on the 1st of December 2010 in respect of the Preliminary Objection.

ARGUMENTS OF THE PARTIES

23. In support of his claim regarding the Preliminary Objection, on the issue of lack of jurisdiction of the Court, Counsel to the Federal Army of Nigeria first argued that the required conditions for the exhaustion of local remedies were not observed by the Applicant before he filed the case. Secondly, he contended that the Applicant was detained following an order made by a military tribunal and that he had committed an abuse of that process since the issue raised by him was still pending before the said tribunal. He further submitted that the action was statute barred in accordance with Article 2(a) of the laws of Nigeria on the protection of civil servants (CAP P41 LNF 2004) since the application can be considered as an action brought against a decision made by another body of the military hierarchy of Nigeria.

24. The Federal Republic of Nigeria's counsel equally maintained its stance on the issue of incompetence of the Court, based on the ground of non-exhaustion of local remedies, and the fact that the Applicant is subject to the laws applicable to civil servants and non-compliance with the provision of laws of Nigeria concerning the 2nd Defendant.

25. In response to the pleas-in-law relating to exhaustion of local remedies, Counsel for the Applicant argued that pursuant to the provisions of paragraph (d) of new Article 10 of the Protocol on the Court, as amended by 2005 Supplementary Protocol A/SP.1/01/05, the jurisdiction of the Court to hear cases of human rights violations is not tied to the exhaustion of local remedies, as already adjudged by the Court in the case of **HADIJATOU MANI KORAOU v. REPUBLIC OF NIGER**; that besides, the Application conforms to the conditions stipulated in sub-sections (i) and (ii) of the said paragraph (d), since the Application is not anonymous and the case was not filed before another equally competent International Court. He maintained, however, in response to the second objection by submitting that his action was not statute barred, in that the Applicant was arrested on the 13th of November 2006 and his application lodged in this court on the 6th of February 2009, in compliance with paragraph 3 of the new Article 9 of the Protocol on the Court as amended by the Supplementary Protocol. He submitted that the action was brought within the time limit of three years provided for by the said paragraph. He further made it known that the Federal Army did not provide any evidence on the plea-in-law regarding abuse of process and no evidence that the Federal Army did provide any proof that the Applicant lodged a similar case before an International court and that the claim was pending therein.

ANALYSIS OF THE COURT

AS TO PRELIMINARY EXCEPTIONS

26. In the instant case, the Court is seised with an Application filed by Aliyu Akeem now commonly agreed to be Alimu Akeem, an Army personnel of Nigeria, against the Federal Government of Nigeria, for violation of Articles 5 and 6 of the African Charter on Human and Peoples' Rights, The Federal Republic of Nigeria was served on 11th February, 2009, and failed to file its Memorial of Defence until 10th December, 2009. Meanwhile, on 28th September, 2009, Counsel for the Applicant filed an application before the

Court seeking relief in the form of orders sought, and for a judgment to be delivered by default, in accordance with Article 90 of the Rules of the Court. Subsequently, on 2nd October, 2009, the Federal Army filed a document before the Court containing an application seeking to be joined to the proceedings, and a Memorial in Defence on 24th September, 2010, by a separate pleading, which raised a Preliminary Objection in respect of incompetence of the Court.

27. The Court considered the under listed processes and subsidiary applications in reaching its conclusion on those points:

(i) the application by the Nigerian Army dated 2nd October, 2009 seeking for an order to he joined to the proceedings, and asserting its right to file written pleadings and to be heard in the instant case;

(ii) the application by the Federal Republic of Nigeria seeking acceptance of the deposit of its Memorial in Defence as done on 10th November, 2009;

as issues in preliminary procedure, which the Court must first of all settle, by applying paragraph 1 of Article 88 of its Rules of Procedure, which provides: ***"Where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, the Court may by reasoned order, after hearing the parties and without taking further steps in the proceedings, give decision."***

THE APPLICATION SEEKING FOR THE FEDERAL ARMY TO BE JOINED IN THE PROCEEDINGS

28. When the Court is seised with an application for human rights violation, on the basis of paragraph 4 of new Article 9 and paragraph (d) of new Article 10 of the Protocol on the Court, as amended by the Supplementary Protocol of 19th January 2005, which respectively provide that:

i) New Article 9(4): ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State";***

ii) New Article 10(d): ***"Access to the Court is open to: (...) individuals on application for relief for violation of their human rights ..."***

The application shall necessarily be filed by a person who is a victim of the said violations and the application shall be against one or several Member States of the Community and fortified by the jurisprudence of this court in these decisions - **Judgment No ECW/CCJ/APP/07/10** of 10th December, 2010 relating to **Suit No ECW/CCJ/RUL/08/09**, **SERAP v. NIGERIA & OTHERS**, paragraph 71, as well as **Judgment No ECW/CCJ/RUL/03/10** of 11th June, 2010 relating to **Suit No ECW/CCJ/APP/04/09, PETER DAVID v. AMBASSADOR RAPH UWECHUE**, paragraphs 41, 42, 46 and 47).

The jurisdiction of the Court cannot be in doubt once the facts adduced are related to human rights, as indicated by its own case law of **Judgment No. ECW/CCJ/RUL/02/10** of 14th May, 2010 on the Preliminary Objections of **Suit No. ECW/CCJ/APP/07/08**, **HISSEIN HABRE v. SENEGAL**, paragraphs 53, 58 and 59; **Judgment No. ECW/CCJ/JUD/05/10** of 8th November, 2010 in the case **ECW/CCJ/APP/05/09** of **MAMADOU TANDJA v. NIGER**, paragraph 18(1) (b).

29. It is therefore the rule that dispute, whose subject matter is human rights violation, is between an Applicant and a Member State, and a third party may not be admitted to the proceedings except if that third party is admitted as Intervener on the basis of interest in the matter by the application of new Article 22 of the Protocol on the Court as amended by the Supplementary Protocol of 19th January, 2005 and Article 89(1) of the Rules of the Court, which provide respectively, that:

i) New Article 22 (original Article 21 of the Protocol of 6th July 1991 on the Community Court of Justice) albeit, **"Should a Member State consider that it has an interest that may be affected by the subject matter of a dispute before the Court, it may submit by way of a written application a request to be permitted to intervene."**

ii) Article 89.1: **"An application to intervene must be made within six weeks of the application of the notice referred to in Article 13(6) of these Rules."**

As regards the interpretation it has made of new Article 22 of the Protocol on the Court as amended by the 19th January, 2005 Supplementary Protocol,

in agreement with the considerable change in perspective brought about the adoption of the said Supplementary Protocol, the Court has already had the occasion to indicate in its **Ruling No. ECW/CCJ/APP/11/09** of 17th November, 2009, paragraph 24 *in fine* and paragraph 25, on application for intervention in the case of **HISSEIN HABRE v SENEGAL**, supra, that:

> ***"whenever a legal or natural person considers that the solution to a dispute brought before the Court is likely to harm his interests, he may, upon application, intervene in the dispute"*** and that ***"for an application for intervention to be taken into consideration, it must fulfill the conditions of time-limit and formal presentation, as provided for in Article 89(1) of its Rules of Procedure."***

30. Apart from the word *"intervention"* as used in the Rules, the Protocols and the Rules of the Court do not provide for other mechanisms by which third parties may be joined as parties to a dispute, given that the right to file written briefs and plead before the Court is necessarily linked to the status of being a party to the proceedings.

31. Article 21 of 6th July, 1991 Protocol on the Court of Justice of ECOWAS and Article 89 of its Rules of Procedure establish that an *"intervention"* is a procedure which enables a third party to be admitted to an action, as an "*intervener"*, when that third party demonstrates that it has an interest which may be affected by the subject matter of the dispute.

At any rate, it is this meaning that is indicated in the **Black's Law Dictionary, *9th Edition, 2009,* page 897,** which defines 'intervention' as ***"the entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome"*** **or** ***"as the legal procedure by which such a third party is allowed to become a party to the litigation."***

In terms of the act of joining, or a state of things that are joined (joinder), as provided for by Article 38 of the Rules of the Court, the same reference *(Black's Law Dictionary)* considers that it is the same as a joinder of suits (consolidation).

Indeed, **on page 913**, the initial expression *"joinder"* is understood- as *"**the uniting of parties or claims in a single lawsuit"**;* **on page 357**, the second expression is defined as ***"the act or process of uniting; the state of being united"***. It is indicated there, in the acceptation of the term "consolidation", which has to do with a procedure before civil courts, that it is ***"the court-ordered unification of two or more actions involving the same parties and issues, into a single action resulting in a single judgment or, sometimes, in separate judgments."***

32. In the case of *'intervention'*, a third-party becomes a party to the proceedings, whereas in the case of *'joinder'* or *'consolidation'*, various actions involving the same parties or dealing with the same subject-matter are joined to form a single suit, which prevents a multiplicity of cases, and as a necessary consequence, a multiplicity of judgments. Unlike intervention, there is no third party to the single lawsuit which results from the joinder of several proceedings instituted before the court. Obviously, in procedural law, and in practice, '*intervention'* is distinct from *'joinder of suits'* (consolidation); these acts indeed obey different rules of logic and do not turn to have the same result.

33. In the instant case, the Application was filed against the Federal Republic of Nigeria; the Federal Army of Nigeria, in its own terms, asks, without invoking any basis derived from the Protocol on the Court or the Rules of Procedure of the Court, to be joined to the proceedings as an interested party. However, as recalled above, for a joinder to be possible, there must be the prior existence of several actions before the Honourable Court and these actions must be dealing with the same subject-matter or must involve the same parties. The Application of the Federal Army cannot, in any manner whatsoever, be considered as act initiating another action before the Court, different from the only one case the Court is seised with, namely ***Private Alimu Akeem v. Federal Republic of Nigeria;*** it is indeed a matter of an act engaged in during the normal course of a singular lawsuit. In such circumstances, the Court deduces very much logically, and by relying on the content of the Application by the Federal Army, that in spite of the use of the expression **"to be joined as interested party"**, the Federal Army is in fact asking to intervene in the dispute.

Hence, the Court shall consequently examine whether the condition precedent for intervention, as indicated in the ***Case Concerning*** **Hissein Habre v. Senegal** recalled above, are met, such as to enable the Army to be admitted as intervener.

34. It is incontrovertible, for the Court, that in the pleadings lodged in the case-file, the Army cites an interest and states the grounds upon which it intends to act. However, the Court, which applies international law when examining cases brought before it, recalls once again that in actions brought for human rights violation, the application shall be made against States, irrespective of the organ of State against which the case is brought. In the instant case, the Federal Army is an organ of the Federal Republic of Nigeria, and whatever the case may be, it would be contrary to the principles recalled above (paragraphs 28 and 29), to admit the Federal Army of Nigeria as a party to an action instituted against .the Federal Republic of Nigeria, since the said principles indicate that actions brought for human rights violation shall be instituted against the State.

35. The standing of a State, for the purposes of coming before an international or community court, is linked to its international legal status, which is what a State stands for, not its constituent parts or organs. In practical terms, it is the duty of the competent body to commit and represent the State at the international level, by virtue of its Sovereignty and constitutional rights to exercise such legal position on behalf of the States and its constituents. Even if it is agreed that in regard to the typical rules of the structural organisation of a State, an organ other than the Government may be qualified to represent the State; One must not end up with a situation where several bodies of the same State claim to exercise or are joined in actions which hitherto should be handled by the State.

36. It is a well-known legal, position that legal status of the State is indivisible. Hence, to maintain the Federal Army as a party to the proceedings would inevitably have the consequence of the Nigeria being represented by two different bodies from the same State, which would mean, filing *separate* written briefs and pleadings. This situation would be contrary to the practice of representation of States before international courts, as provided in the new Article 1.3 of the Protocol on the Court as amended by the 19 January

2005 Protocol. The said Article 13 of the 2005 Protocol provides:

> ***'Each party to a dispute shall be represented before the Court by one or more agents nominated by the party concerned for this purpose. The agents may, where necessary, request the assistance of one or more Advocates or Counsels who are recognised by the laws and regulations of the Member States as being empowered to appear in Court in their area of jurisdiction.'***

The same rule is provided for in Article 42 of the Statute of the International Court of Justice, which provides:

> ***"The parties shall be represented by agents. They may have the assistance of counsel or advocates before the Court"***

37. It can be deduced from the new Article 13 that the Court cannot admit third parties to file pleadings or to plead their case in a matter brought before the Court, if such third parties do not possess and cannot acquire the status of a party, which is necessarily to be understood, as recalled in paragraph 29 above, as: an applicant, a Defendant or an intervener.

38. Whether there exists a need or not to examine further the interest cited and the grounds advanced, the Court is of the view that there is no legal ground which may enable the Court to grant the request of the Army seeking to be joined to the proceedings, or at any rate, to be constituted as an intervener in the instant case. Hence, the application *by* the Nigerian Army and the pleadings filed by it, are inadmissible. Consequently, the Court cannot proceed to examine preliminary objections raised by a person that is a non-party to the proceedings; and it is essential that the Federal Republic of Nigeria complies.

39. The Court recalls that for every case brought before it, representation of the parties must be in conformity with the provisions of the new Article 13 cited above; the Court cannot therefore admit that several bodies of one and the same State shall represent a single State in proceedings brought before it. For a State to be represented in any dispute which concerns it, it shall be sufficient for the State that is sued before the Court to designate and communicate to the Court, its agents as well as its lawyers and counsels, after receiving the first notification.

APPPLICATION BROUGHT BEFORE THE COURT FOR EXTENTION OF TIME TO FILE PROCESS IN COURT OUT OF TIME

40. The Court finds that this application was filed nine months after the service of the Initiating Application, and after the Applicant had asked for relief in the form of orders sought and for a judgment by default. The Federal Ministry of Justice cites as ground for the lateness, that upon receipt, the Initiating Application was allegedly not posted to the competent Department of the Federal Ministry for it to be processed, and that this could not have been as a result of a deliberate act.

41. On the time-limits of the procedure, Article 77 of the Rules of the Court provides:

"1. Any time-limit prescribed pursuant to these Rules may be extended by whoever prescribed it.

2. The President may delegate to the Vice President power of signature for the purpose of fixing time limits which, pursuant to these Rules, it falls to them to prescribe or of extending such time-limits."

In terms of depositing essential documents connected with the proceedings, such as a memorial in defence, a reply or a rejoinder, Articles 35 and 36(2) of the Rules of Procedure provide respectively, that:

Article 35:

"1. Within one month after service on him of the application, the Defendant shall lodge a defence (...);

2. The time limit laid down in paragraph 1 of this Article may be extended by the President on a reasoned application by the Defendant."

Article 36(2):

"The time limits laid down in paragraph 1 of this Article may be extended by the President."

42. It can be deduced from the letter and spirit of these provisions, taken as a whole, that two alternative situations may be envisaged:

    1. The limits of the proceedings may be extended by the authority that fixed them (Article 77);

    2. The extension of the time limit may be granted upon a reasoned application of the requesting party (Articles 35, 36(2) and 77).

43. Consequently, in as much as the authority that fixed the time limit did not extend the originally fixed time, the party concerned is bound to comply with the time limit fixed by the texts, notably by Article 35 of the Rules of Court, or by the competent authority. It follows that any application for extension of time limit must fulfill two cumulative conditions: firstly, it must be reasoned, and secondly, it must be filed before the end of the originally fixed time limit. Whatever the case may be, the acceptance or refusal to extend a time limit comes under the discretionary power of the competent authority before which the application was duly seized, in conformity with the cumulative conditions enumerated above.

44. It is trite that however discretionary the power to examine the relevance of a ground for the purposes of justifying an extension of time may be, such ground must all the same be compelling, such that when being considered, the judge confronted with the delicate necessity of breaking the regular and normal course of the procedure may find it indispensable to grant that request for the sake of an efficient administration of justice and for the observance of a reasonable time-limit.

45. In the instant case, it holds that the ground advanced to justify the lateness, namely, a misdirection of the application within the administrative system, arises, in all probability, from a malfunction of the public service *system*, and is inadmissible. Moreover, the period within which the application was filed, that is nine months after notification, is well beyond the time-limit within which it should have been filed, *i.e.* within one month. Consequently, the Court declares inadmissible the application for extension of time for the lodgment of a memorial in defence by the Federal Ministry of Justice, in that the required time-limit was not observed. The Court therefore declares the said application ill founded.

46. However, the Court noted that the Plaintiff intended to bring an action against Nigeria and at the hearing of 11th November, 2009 Counsel to the Plaintiff withdrew the application in which he asked for relief in the form of orders sought and for institution of proceedings by default. Besides, the subsequent attitude of Nigeria demonstrates that it intend to appear before the Court. It is therefore possible to maintain the conduct of the instant proceedings, as engaged in by the two opposing parties. Consequently, the Court grant the withdrawal of application seeking relief in the form of orders sought and institution of proceedings by default, and accept the filling of Nigeria's memorial in defence on exceptional grounds and for the sake of efficient administration of justice, so as to able both parties to be heard.

47. At this stage of the proceedings, the Applicant has not yet responded to the Memorial in Defence filed by the Federal Ministry of Justice of Nigeria. It is therefore ripe and appropriate to grant the Applicant a time-limit to do so.

REASONING OF THE COURT

48. **Whereas** Mr. Alimu Akeem filed an Application against the Federal Republic of Nigeria, citing violation of Articles 5 and 6 of the African Charter on Human and People's Rights;

49. **Whereas** the Federal Army of Nigeria filed an Application to be joined as an interested party, and submitted Preliminary Objections in a separate pleading; whereas upon being examined, and in spite if the terms used, the Army had filed an Application for intervention;

50. **Whereas** the possibility of arguing one's case before a court and filing written pleadings before that court is related to one's status as a party, which is necessarily understood as an applicant, Defendant or intervener;

51. **Whereas** actions for human rights violation shall be brought against States, and whereas several organs of the same State may not claim to represent that State and act on its behalf, within the context of such actions;

52. **Whereas** it is incumbent upon the State to designate its agents, lawyers and counsels, after being served with the initial pleadings;

53. **Whereas** the Federal Republic of Nigeria asked for extension of time in order to lodge its defence;

54. **Whereas** this application was made outside the time-limit;

55. **Whereas** the Applicant withdrew his application asking that he be granted the requests contained in the orders sought;

56. **Whereas** for the purposes of an efficient administration of justice, it shall be appropriate to maintain the hearing of both parties, as required by procedure;

57. **Whereas** there are grounds to pursue further, the filing of written pleadings by both Parties;

58. **Whereas** no order has as yet been sought and submitted to the Court, in regard to costs related to the instant proceedings;

DECISION

59. The Court, Adjudicating publicly, after hearing both parties, in a preliminary ruling on the Preliminary Objection filed by the same Army of Nigeria:

- **Declares** inadmissible the application filed by the Army of Nigeria seeking to be joined to the instant proceedings;

- **Consequently** adjudges that there are no grounds for examining the Preliminary Objection raised by Counsel for the Army of Nigeria;

- **Adjudges** that the case must be cited as*:* "**PRIVATE ALIMU AKEEM V. NIGERIA**"*;*

- **Orders** that the appropriate rectifications must be made in the register of the Registry and that the Parties must do the same in their written briefs and pleadings as from date of this ruling;

- **Asks** the Federal Republic of Nigeria to abide by the new Article 13 of the Protocol on the Community Court of Justice as amended by the 19th January, 2005 Supplementary Protocol, in regard to the designation of its agents, lawyers and counsels;

- **Adjudges** that the ground invoked in support of the application for extension of time is flimsy and ill founded;

- **Grants** all the same, on exceptional grounds, and for efficient administration of justice, additional time-limit for the Parties to lodge their pleadings;

- **Fixes** 1st July, 2011 (one month from the day this order is made) as the date for lodgment of the Reply to Nigeria's Memorial in Defence;

- **Fixes** 1st August, 2011 (1 month from the day the notification of the Reply is made) as the date for lodgment of Nigeria's Rejoinder.

COSTS

60. The Court asks each Party to bear its own costs, in accordance with paragraph 11, Article 66 of the Rules of the Court,

THIS DECISION IS READ IN PUBLIC AS REQUIRED BY THE RULES OF PROCEDURE ON THE 1st OF JUNE, 2011.

HON. JUSTICE HANSINE N. DONLI - *PRESIDING JUDGE*

HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*

HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON - *REGISTRAR*

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

HOLDEN AT ABUJA, NIGERIA

ON THE 8TH DAY OF JULY, 2011

SUIT NO. ECW/CCJ/APP/05/08
JUDGMENT NO: ECW/CCJ/JUD/07/11

BETWEEN
OCEAN KING NIGERIA LIMITED - ***PLAINTIFF***
V
REPUBLIC OF SENEGAL - ***DEFENDANT***

COMPOSITION OF THE COURT:
HON. JUSTICE HANSINE N. DONLI - *PRESIDING*
HON. AWA NANA DABOYA - *MEMBER*
HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
C. I. IGBINEDION - *FOR THE PLANTIFF*
MAFALL FALL - *FOR THE DEFENDANT*

- Exhaustion of local remedies, Article 10 (d)
-Applicability to Individuals and corporate bodies
- Inherent jurisdiction of Court -Fair hearing.

SUMMARY OF FACTS

The Plaintiff is a corporate entity registered under the laws of the Federal Republic of Nigeria and the Defendant is a Member State of ECOWAS. The Plaintiff alleged in his initiating application that he purchased a vessel from the United States of America which developed mechanical fault on the high seas en route Nigeria. When the crew went ashore to seek help the vessel was discovered and towed to the port of Dakar, Senegal by a Spanish registered vessel MN Maxi Corta. The Plaintiff paid storage charges to the Senegalese authorities but refused to pay 40 million CFA fees to the owners of MN Corta which they considered high. Euskalduna, owners of MN Corta, then brought the matter before a court in Senegal which awarded the vessel to them in lieu of the towing fees. Upon the application by the Plaintiffs' lawyer, that decision was vacated. The Plaintiffs efforts to get the Defendant to release the vessel to it failed. Subsequently, the vessel was awarded to the owners of MN Corta when the Plaintiff failed to pay the deposit ordered by the Court for the release of the vessel to it.

The Plaintiff then brought this Application alleging a violation by the Defendant of its right to fair hearing and to own property under the African charter by divesting it of the ownership of its vessel without its knowledge. The Defendant denied any involvement in the sale of Plaintiffs' vessel and stated that it was the court that awarded same to Euskalduna. They also raised a preliminary objection for failure to exhaust local remedies and incompetence of the Plaintiff to come under article 10(d) of the Protocol.

LEGAL ISSUES

- *Whether or not the exhaustion of local remedy is a condition precedent for coming before this court.*

- *Whether or not the provision of Article 10(d) of the Protocol of the Court is applicable to corporate bodies?*

- *Whether or not the Defendant is liable for the award of Plaintiff's vessel to owners of MN Corta?*

DECISION OF THE COURT

The Court held dismissing the Application:

- *That the exhaustion of local remedies is not a condition precedent for initiating actions before it pursuant to Article 10(d) of the Supplementary Protocol.*

- *That the Plaintiff is a corporate body and cannot therefore rely on the provisions of Article 10 (d) as that provision is applicable to human beings who are victims of human rights abuses and no more.*

- *That the Right to fair hearing is not dependent on human rights and the Defendant owes an obligation to every ECOWAS citizen or entity to ensure fair hearing within its territory, failing which this Court will have the right to entertain an application by an aggrieved party, even if it is based on the Court's inherent jurisdiction.*

- *That the Defendant was under no legal obligation to resolve a matter decided by a Court of competent jurisdiction and the Plaintiff having failed to provide evidence in proof of the allegation that it was the Defendant that sold its vessel, Defendant was found not liable for the loss of the vessel.*

JUDGMENT OF THE COURT

PARTIES AND REPRESENTATION

1. The Plaintiff is a corporate entity registered under the laws of the Federal Republic of Nigeria whilst the Defendant is a Member State of the Economic Community of West African States (ECOWAS). The Plaintiff was represented by C. I. Igbinedion, a Nigerian lawyer, whilst the Defendant was represented by Mafall Fall, a State Judicial Agent in Senegal.

FACTS OF THE CASE

2. By an application filed on the 14th of July, 2008, the Plaintiff claimed to have purchased a vessel from the USA. Whilst on the high seas en route to Nigeria, the vessel developed a mechanical fault off the coast of Cape Verde. The crew left the vessel and went ashore to look for parts, leaving nobody on board. It was in that state that a Spanish registered vessel M/V Maxti Corta found the Plaintiff's vessel and towed it to the port of Dakar, Senegal.

3. The Plaintiff negotiated with the Senegalese authorities who agreed to release the vessel upon their pay vent of port storage charges. However, after paying the charges, the Defendant did not release the vessel to the Plaintiff, claiming that Euskalduna de Pesca, owners of M/V Maxti Corta, were demanding towing fees before the vessel would be released. The Plaintiff considered the amount of 40 million CFA being charged as towing fees to be on the high side. On the suggestion of the Dakar Port Commandant, the Plaintiff agreed to negotiate a reduction with a representative of Euskalduna de Pesca. Consequently, the Plaintiff purchased a ticket for Euskalduna's representative who travelled from Spain to Dakar. However, the ensuing meeting failed to break the deadlock.

3. Subsequently, Euskalduna approached a court in Senegal which awarded the vessel to them in lieu of the towing fees that Plaintiff had failed to pay. That decision was vacated upon application by the Plaintiff's lawyer. The Plaintiff explored all possible avenues to secure the release of the vessel

but to no avail, including a case they made to the tribunal of the Marine Merchant and diplomatic pressures. The Plaintiff stated they found the Defendant was determined to award the vessel to Euskalduna illegally and this has cost them a lot of loss.

5. The Plaintiff accordingly sought the following reliefs against the Defendant:

(i) A declaration that the seizure on the high seas by the owners of the Maxti Corta, detention at Dakar Port and subsequent sale of the Plaintiff's vessel, Ocean King 1 by the Defendant is illegal and in contravention of internationally accepted standard of maritime intercourse, particularly the provisions of the Revised Treaty of the Economic Community of West African States (ECOWAS) and the African Charter on Human and Peoples' Rights.

(ii) A declaration that the activities of the Defendant as they relate to the Ocean King I amount to piracy and acts of brigandage on the high seas and acts of hostility against a Community citizen.

(iii) An order of mandatory injunction compelling the Defendant to forthwith pay the Plaintiff the sum of US $ 5,804,000.00 representing the cost of the vessel and the loss suffered by the Plaintiff as a result of the illegal seizure aforesaid and the interest at the rate of 21% per annum starting from 1993 until the entire sum is liquidated.

(iv) The sum of US $ 30,000,000.00 in general and punitive damages against the Defendant.

6. In their statement of defence, the Defendant denied selling the vessel and they referred to the various judicial proceedings that took place in her territory between the Plaintiff and Euskalduna over the Plaintiff's refusal to pay the towing charges. They stated the fact that eventually the court awarded the vessel to Euskalduna and that the Defendant was never a party to those proceedings. The only role they played was to protect the vessel whilst the parties battled it out in the courts. The courts were accessible to the parties and they were given a fair hearing in accordance with the law. The Defendant's officials did not take part in any of those proceedings.

Preliminary Procedure

7. After filing the defence, the Defendant raised a preliminary objection to the suit on a number of grounds which were argued before the court. The Plaintiff opposed the application and set down their grounds which their counsel argued. Arguing the grounds for the preliminary objection, the defence counsel stated that the Plaintiff had failed to exhaust local remedies and as such this Court should not entertain this suit. Defendant contended that Plaintiff has counsel who litigated this matter on its behalf in the Senegalese Court but did not exhaust all the avenues open to it before bringing the same matter to this Court. Defendant concluded this leg of her arguments by positing that in international courts like this one, local remedies, judicial or not, ought to be exhausted before the court could assume jurisdiction and cited the European Court of Human Rights as an example.

8. The Defendant also argued that the Plaintiff was incompetent to come under the provisions of Article 4 of the Supplementary Protocol (A/SP.1/01/05) amending the provisions of Article 10 of the Protocol on the Court of Justice (A/P.1/7/91). The contention of the Defendant here is that the Plaintiff relied on Article 10 (d) of the Protocol as amended whereas that provision is available for the benefit of individuals in actions for the enforcement of their human rights, and not corporate bodies like Plaintiff herein. Defendant stated that Article 10 (c) of the Protocol as amended avails itself to both individuals and corporate bodies wherein it is stated thus "Individuals and Corporate bodies in proceedings..." whilst Article 10 (d) limited itself to only Individuals.

9. Finally, Defendant argued that it did not know how a corporate body like the Plaintiff herein could be a victim of human rights violation. In any case, the issue at hand is not one of a violation of human rights but a pure civil matter.

10. In reply, learned counsel to the Plaintiff stated that the exhaustion of local remedies is not a prerequisite for the institution of an action before this Honourable Court and that the Plaintiff was properly before the Court and ought to be heard.

11. In respect of the allegation that the Plaintiff has no locus standi before this Court in human rights violations, counsel to the Plaintiff argued that under Article 9 of the 1991 Protocol as amended by Article 3 of the 2005 Supplementary Protocol, this Court has jurisdiction over any matter relating to the interpretation of the ECOWAS Revised Treaty, Protocols, Conventions and subsidiary legislation of ECOWAS. Further, counsel contended that Article 10(c) of the 1991Protocol as amended provided right of access to individuals and corporate bodies to approach this Court in proceedings for the determination of an act or inaction of a Community Official which violates the rights of the individual or corporate bodies. The Court also has jurisdiction over human rights violations that occur in Member States.

12. Learned counsel to the Plaintiff also stated that contrary to Defendant's allegations, the matter in issue is clearly one of a violation of the human and property rights of a Community Citizen and therefore one that squarely falls within the ambit of human rights. Counsel posited further that Plaintiff's fundamental rights to fair hearing, right to own property and its freedom of movement and right of passage at sea, all guaranteed under the African Charter on Human and Peoples' Rights have been infringed by the Defendant.

13. After careful consideration of the arguments of the parties, this Court in a Ruling dated the 27th of April, 2010 concluded that the issues in the preliminary objection are interwoven with the substantive issues and therefore made it inappropriate to resolve them without determining the substantive case. Thus, in line with Article 87(5) of its Rules of Procedure, the Court reserved its decision in the preliminary procedure until the final determination of the merits of the substantive application.

Oral phase

14. The Chief Executive Officer of the Plaintiff, Mr. Olakunle Kuteyi, the sole witness in the case gave evidence in support of their case. He stated that he is the legal representative of the Plaintiff by virtue of a power of attorney deposed to and executed by the Directors of the Plaintiff. He testified to the facts pleaded and was extensively cross-examined. The court will refer to the relevant parts of his testimony and cross-examination in the course of this decision.

Plaintiff's address

15. Learned counsel to the Plaintiff started his final address with a recount of the legal basis of the application and the reliefs sought therein.

    He went on to state that the Plaintiff is seeking over US$ 5.8 Million for the loss it has suffered, being the value of its vessel, lost earnings, travelling expenses etc. and categorized the expenses thereof. Plaintiff also stated that it seeks the sum of US$ 30 Million as general and punitive damages against the Defendant.

16. Learned counsel continued by stating that whilst the Plaintiff called Mr. Olakunle Kuteyi as its sole witness and led evidence to prove the averments contained in its pleadings, the Defendant did not and thus effectively abandoned all the averments contained in its statement of defence. Counsel argued that it is trite law that a Court of law can only act on evidence placed before it and that averments in pleadings are no evidence. Counsel further submitted that the defence consists of mere technical objections, which objections this Honourable Court decided in its Ruling of 27th April, 2010 that it would be considered together with the substantive case.

17. Learned counsel went on to recount extensively the evidence of Plaintiff s witness and concluded that upon the consideration of the entire evidence before the Court, the Plaintiff is entitled to the reliefs sought. Counsel to the Plaintiff went on to state that the decision of the Tribunal Hors Classe which allegedly divested the Plaintiff of the ownership of its vessel without the Plaintiffs knowledge was a flagrant violation of the Plaintiff's right to fair hearing and the right to own moveable property as guaranteed under the African Charter of Human and Peoples' Rights. Learned counsel drew this conclusion by arguing that in line with the cardinal principle of law *"audi alterim patem"* rule, which literally means *"hear both sides"* the Tribunal erred by not giving the Plaintiff the opportunity to be heard before arriving at its decision.

18. Counsel stated that it is the uncontroverted evidence of the Plaintiff that it was not informed of the proceedings leading up to the decision that divested it of the ownership of the vessel. According to counsel, Plaintiff was not

served with any court processes with respect to that trial. Counsel concluded that any legal proceedings conducted in breach of the *"audi alterim partem"* rule are a nullity and the aggrieved party is entitled *"ex debito justiciae"* to have that judgment or decision set aside.

19. Finally, learned counsel submitted that the deprivation of the Plaintiff of its vessel in the way and manner disclosed by the evidence before the Court is a violation of its right to own property and to traverse freely within the ECOWAS sub-region as enshrined in the ECOWAS Treaty and the African Charter on Human and Peoples' Rights.

Defendant's address

20. Learned counsel to the Defendant divided his written address into two parts, arguments intended to disprove Plaintiff's arguments and those to buttress its own in these proceedings.

21. With respect to arguments seeking to disprove Plaintiff's allegations, learned counsel started by saying that Plaintiff's pleadings and conclusions are not based on case law or on Community legislation. He continued that even the principles of law articulated by Plaintiff are without reference to specific articles of the legislations it sought to rely on.

22. Learned counsel argued that in Plaintiff's introduction, it relied on everything except on human rights violation, the foundation of this suit. Further, learned counsel stated that from the Plaintiff's own case, the dispute is exclusively one between three private companies, Ocean King, Sogemar and Euskalduna de Pesca and had nothing to do with the Defendant.

23. Further, learned counsel disputed Plaintiff's assertion that it was not informed of the proceedings which eventually led to the award of its vessel to some other entity and therefore amounted to a flagrant violation of its right to property as guaranteed under the African Charter on Human and Peoples' Right.

24. Learned counsel contends that the order made by Tribunal Regional Hors Class de Dakar which divested Plaintiff of the ownership of its vessel contained the expression **"in the presence of parties involved"** and therefore indicates that the Plaintiff and its lawyer Mr. Sall participated in the hearing which they are now challenging. Further, learned counsel contends that if the order was made in default, Plaintiff had the option of approaching the court in order to present its case.

25. Again, learned counsel argued that Plaintiff's ownership of the vessel, the subject matter of this suit is in dispute. He posited that Plaintiff failed to explain to the Court how the name of the vessel was changed from "Elizabeth Rose" to "Ocean King". Further, counsel noted that Plaintiff failed to satisfactorily explain the discrepancy between the date of purchase and that on which the name was changed, alleging that Nigerian Law allows it without pinpointing any specific legislation within Nigeria that permits that.

26. Again, the deed of sale presented by the Plaintiff is made in the name of one Mohammed Jibril but this person was not invited by Plaintiff to testify on its behalf. The deed of sale also lacked important characteristics such as name and home port, major dimension, place and date of construction, numbers of crew and passenger capacity, nature, type and brand of propulsive devices among others.

27. Counsel also submitted that after evaluating all the evidence before the Court, the Plaintiff's application ought to fail as it has not established the violation of any human right which is based on any specific human rights text. He continued that Plaintiff vaguely made reference to the African Charter, Revised Treaty of ECOWAS and the Protocols relating thereto without stating the relevant provisions that are breached in these legislations. Also, the Tribunal Regional Hors Class de Dakar that made the decision divesting Plaintiff of the ownership of the vessel in dispute was properly seised of the case and made its decision after hearing the parties involved. The Certificate on Non Appeal (Annexure A) attached to Defendant's defence and issued by the Tribunal Regional Hors Class clearly indicated that the Plaintiff was a party to the proceedings. The decision is therefore valid.

28. With respect to the arguments in support of the Defendant's case, learned counsel stated that the Plaintiff's application ought to fail on technical grounds based on this Court's own jurisprudence. Learned counsel to the Defendant stated that it is only individuals who can directly come to the Court on matters of human rights. Counsel continued that this Court, after making reference to Articles 9 (4) and 10 (d) of the Protocol as amended, affirmed in the cases of **Chief Ebrimah Manneh v. Republic of The Gambia (Suit No. ECW/CCJ/APP/04/07,** judgment delivered on 5th June 2008) and **Hadijatou Mani Koraou v. Republic of Niger (Suit. No. ECW/APP/08/08**, judgment delivered on 27th October, 2008) that it is only individuals who can approach this Court in matters of human rights.

Corporate entities like the Plaintiff herein are therefore excluded. Learned Counsel stated that in the **Hadijatou Mani Koraou *Case* (supra)**, this Court stated thus:

> ***"it should be pointed out that human rights are inherent rights of the human person".***

29. Learned counsel continued that the position of this Court on the subject of human rights is supported by the doctrine of human rights in international law. Counsel quoted extensively from various international legal instruments which has defined human rights as rights belonging to individual human beings. For example, the ***"Dictionaire de droit international public",*** published in 2001 (under the direction of Professor Jean Salmon), Brussels, Bruyant stated that **"human rights"** *are* ***"all rights and fundamental freedoms of the human person and concern all human beings"***. Similarly, the ***"Dictionnaire des Communautes europeenes",*** published in 1993, Paris noted that **"fundamental rights"** *are* ***"a core of essential and inalienable rights of the human person, valid in all circumstances, no possibility of derogation…."***

30. Further, counsel contends that the African Charter on Human and Peoples' Rights on which Plaintiffs claim is based, is available for the benefit of only individuals. Counsel noted that even by definition, the Charter provisions inure to the benefit of only individuals. Again, the preamble speaks of the "attributes of the human person" whilst various articles including Articles 2, 4, 6, 7 and 13 all make reference to words and phrases

such as "the inviolability of the human person, any individual, citizens, right to dignity, freedom of assembly and movement etc." which all denote that the provisions thereof are exercisable by human beings and not artificial persons including corporate bodies. Counsel concludes that the Plaintiff, not being a human being, cannot benefit from the human right provisions enshrined in the African Charter on Human and Peoples' Rights.

31. Moreover, counsel contends that the Plaintiff has failed to establish the violation of any fundamental right and therefore its application ought to be dismissed. In **Moussa Leo Keita v. Republic of Mali** (**Suit No. ECW/CCJ/APP/05/06**, **judgment delivered. on 22nd March, 2007)**, this Court rejected the application and stated thus:

> ***"the Applicant's counsel has not indicated any proof of a characteristic violation of a fundamental Human Right; and in the absence of any such violation, the Application must be declared inadmissible".***

Counsel contends that Plaintiff alleges the violation of the "spirit and principle" of the African Charter as well as the Revised Treaty and the Protocols of ECOWAS without citing a single text which has been violated. Based on the decision in the **Moussa Leo Keita *Case* (supra)**, the Court ought to dismiss this application.

32. Counsel also argued that this Court cannot operate as an appellate court to the courts of Member States or rule on their decisions. Counsel argued that in the **Moussa Leo Keita *Case* (supra)**, this Court stated inter alia that ***"in this context, the Court of Justice of the Community is incompetent, it cannot rule on the decisions of national courts"***. Further, counsel stated that in the case of **Alhaji Hammani Tidjani v. Federal Republic of Nigeria and Ors. (Suit No. ECW/CCJ/APP/01/06,** judgment delivered on 28th June, 2007) this Court stressed that the Plaintiff ***"had the opportunity to defend himself in accordance with Nigerian Laws. Admitting this application will mean interfering with the jurisdiction of Nigerian courts in criminal matters without justification".*** According to counsel, Plaintiff had every opportunity to defend the action instituted against it by Enskalduna de Pesca in accordance with Senegalese laws and was ably represented by MalickSall,

a lawyer of Plaintiff's own choice. Counsel therefore urged the Court to refrain from admitting this application as it may lead to reviewing the decisions of the Senegalese courts.

33. Moreover, counsel urged the Court to dismiss Plaintiff's application because it is full of inconsistencies and fraught with the production of false documents. First, Counsel stated that in Annexure A15, the Plaintiff claimed that it addressed a letter to Ambassador Saliou Cisse in Lagos in 2007. However, the Ambassador was not at that post in 2007. Besides, the Embassy of Senegal had already moved from Lagos to Abuja in 2007. Again, Annexure 17 contradicts Annexure 15 in the sense that it was addressed to the Defendant's Embassy in Abuja in 2005 whilst Annexure 15 was addressed to Defendant's Embassy in Lagos in 2007. Interestingly, the Embassy of Senegal in 2005 was still at Lagos.

34. Finally, counsel urged the Court to declare the application filed by Plaintiff inadmissible or hold that it lacks the jurisdiction to entertain same pursuant to Article 87 of the Court's Rules and its own jurisprudence. Further, counsel urged the Court to also hold that Plaintiff's application fails on the merits. Counsel also urged the Court to order Plaintiff to bear the costs incurred in these proceedings, including travel expenses of Defendant's delegation since 2008 and asked for One Hundred Million CFA Francs (100,000,000 FCFA) pursuant to Article 66 of the Court's Rules.

Issues

35. Relying on Article 87(5) of its Rules, the court reserved its decision in the preliminary application for the final judgment. The court will accordingly decide the preliminary issues first and then decide on the merits of the only issues raised by the application, those of denial of a right to fair hearing before the courts of Senegal and Defendant's alleged sale or role in the sale of the vessel.

Analysis by the court

36. The Defendant argued that the Court should not entertain the Plaintiff's application because it had not exhausted the local remedies available to it before approaching it. Plaintiff responded by saying that under the laws

setting up this Court and its Rules, the exhaustion of local remedies is not a condition precedent for initiating actions before it and therefore the application was properly filed.

37. The court thinks a brief historical perspective into the issue of the exhaustion of local remedies will help in setting the record straight once and for all. The original Protocol on the Court of Justice (A/P1/7/91) did not grant individuals direct access to this Court. However, the Protocol on Democracy and Good Governance (A/SP1/12/01) by its Article 39 indicated that the Protocol on the Court of Justice (A/P1/7/91) would be amended to give the Court jurisdiction over human rights violations claims after exhaustion of local remedies. Article 39 of the Protocol on Democracy and Good Governance states thus:

> **Protocol A/P1/7/91 adopted in Abuja on 6th 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 settle the matter at the national level have failed.**

38. The Protocol on the Court was amended by the Supplementary Protocol (A/SP.1/01/05) whereby the Court was granted human rights jurisdiction by Article 9(4). And Article 10(d) of the 1991 Protocol as amended by the Supplementary Protocol of 2005, granted access to individuals, subject to certain conditions. Another provision in the 1991 Protocol, as amended, which grants access to the court to individuals, is Article 10(e). It granted direct access to the court to individuals and corporate bodies against the Community in certain specific matters. All these provisions do not require, directly or even indirectly, the exhaustion of local remedies before an action could be brought before this court. So what is the basis of this submission that a Plaintiff should exhaust local remedies before recourse to this court?

39. The rule on exhaustion of local remedies is derived from customary international law which requires the exhaustion of local remedies before a claim may be brought before an international tribunal. However, it is not an inflexible rule. For instance, the International Court of Justice held in the case titled **Electronica Sicula Sp.4, (ELSI Case), (Second Phase),**

ICJ Rep. 1989, that exhaustion of local remedies may be waived by express provision in a treaty. Thus by Article XI(1) of the Convention on International Liability for Damage caused by Space Objects, 1972, the requirement of the exhaustion of local remedies was dispensed with.

40. Under Article 10 of the Supplementary Protocol of 2005, any provision of a prior Protocol which is inconsistent with the provisions of the 2005 Supplementary Protocol is to the extent of the inconsistency null and void. Thus, Article 39 of the Protocol on Democracy and Good Governance, which is clearly in conflict with the provisions of Article 4(d) of the Supplementary Protocol of 2005 with respect to the exhaustion of local remedies as a condition precedent to the institution of an action in human rights is null and void to that extent. The 1991 Protocol, as amended by the Supplementary Protocol, forms an integral part of the Treaty and thus the exclusion of exhaustion of local remedies under the Protocol is perfectly valid in international law.

41. That being the position of the law, this Court has decided in a plethora of cases including **Prof. Etim Moses Essien v. Republic of The Gambia &Anor. (Suit No. ECW/CCJ/APP/05/05**, judgment delivered on 29th October, 2007), **Musa Saidykhan v. Republic of The Gambia (Suit No. ECW/CCJ/APP/11/07,** judgment delivered on 16th December, 2010) and **Hadijatou Mani Koraou v. Republic of Niger (supra)** that the exhaustion of local remedies is not a condition precedent for the institution of an action for the relief of violation of human rights before it. Therefore, a Plaintiff is not obliged to exhaust local remedies in order to have access to this Court.

42. Finally, Defendant argued that Plaintiff cannot come to this Court for the relief of human rights violations under Article 10 (d) of the 1991 Protocol as amended by the 2005 Supplementary Protocol since the provisions thereof inure to the benefit of individuals only, to the exclusion of corporate bodies like the Plaintiff. Defendant continued that it is Article 10(c) which avails itself to both individuals and corporate bodies but that is only in proceedings against Community Officials for the determination of an act or inaction which violates the rights of the individuals or corporate bodies concerned.

43. In response, the Plaintiff argued that under Article 9 of the 1991 Protocol as amended, this Court has jurisdiction over any matter relating to the interpretation of the ECOWAS Revised Treaty, Protocols, Conventions and subsidiary legislation of ECOWAS. Further, counsel contended that Article 10(c) of the 1991 Protocol as amended provided right of access to individuals and corporate bodies to approach this Court in proceedings for the determination of an act or inaction of a Community Official which violates the rights of the individual or corporate bodies. The Court also has jurisdiction over human rights violations that occur in Member States.

44. It is trite learning that jurisdiction is conferred by statute. This Court was created by the Revised Treaty of ECOWAS. The jurisdiction of this Court and its competence in various spheres are clearly spelt out in the Protocols on this Court. Article 9 deals with the jurisdiction of the Court. Under Article 9(4) the Court has jurisdiction to determine cases of human rights abuse that occur in any Member State. Article 10 governs the right of access to the Court. It prescribes clearly who can access the Court and the relevant causes that they can prosecute before it. A careful reading of Article 10 reveals that access to the Court is open to the following:

1. **Member States**
2. **The Executive Secretary (now President of the ECOWAS Commission)**
3. **The Council of Ministers**
4. **Community Institutions**
5. **Individuals**
6. **Corporate Bodies**
7. **Staff of any Community Institution**
8. **National Courts of ECOWAS Member States**

45. Though these distinct legal personalities have access to the Court, the issues that they can present to the Court for adjudication are laid down by Article 10 of the Protocol, as amended. Thus, an applicant will lack the

requisite standing to bring a claim to the Court for determination if the issue raised does not fall within those over which they have been granted the right of access.

46. The Plaintiff herein is a corporate body. It is only under Articles 9 (6) and 10 (c) of the Protocol as amended by the Supplementary Protocol that corporate bodies have direct access to the Court.

> Article 9 (6) provides that:
> **The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.**
>
> Article 10 reads in part that:
> **Access to the Court is open to the following:**
> **(c) Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;**

47. From the above provisions, corporate bodies such as the Plaintiff herein can access the Court only where there is a prior agreement between the parties to a particular transaction that disputes arising out of that transaction shall be settled by the Court, or alternatively, in proceedings for the determination of an act or omission of a Community official which violates their rights and no more. In the instant case, Plaintiff is trying to access the Court for the determination of an alleged breach of fundamental human rights. This is not an action against any Community official. The Defendant is a member state, and officials and agents working for her are not Community officials within the meaning of Article 10(c) of the amended Protocol. For the same reason, the Defendant could not be brought under Article 10(c) in respect of the allegation that the actions of the Defendant's agents, including the Port Commandant, led to the loss of the vessel.

48. Article 10 (d) of the Protocol on the Court specifically governs the right of access to the Court in human right violation applications.

Article 10 (d) reads in part thus:

Access to the Court is open to the following:

(d) individuals on application for relief for violation of their human rights;

It is noteworthy that whilst Article 10 (c) gave a right of access to individuals and corporate bodies, Article 10 (d) gave the right of access in human rights violation causes to only individuals.

49. That leads the Court to find out the meaning of individuals within the context of Article 10 of the Protocol. The court thinks 'individuals' within the context of Article 10 of the Protocol refers to only human beings and no more. This is so because Article 10 (c) mentioned individuals and corporate bodies. What that means is that the legislation sought to distinguish between human beings and other legal entities.

50. Thus, by expressly giving access to only individuals, the Supplementary Protocol sought to give that right exclusively to individual human beings who are victims of human rights abuse to the exclusion of all others. The fact that human rights, by its very nomenclature, is human centred, finds expression from the Preamble to the 1948 Universal Declaration of Human Rights as well as **Black's Law Dictionary, 9th Edition at page 809**. The defence counsel's submissions on this point set out in paragraphs 28, 29 and 30 above, are apt and germane and are accordingly upheld by the court. The Plaintiff is a body corporate and cannot therefore rely on the provisions of Article 10(d).

51. The Court must place it on record that even a cursory reading of the application would indicate that the Plaintiff was complaining, inter alia, of a denial of the right to fair hearing which is a fundamental right, open to any party who is affected by a tribunal's decision. That right is not dependent on human rights, and for that reason a party who has such a complaint of denial of fair hearing should not be thrown out of a court without first being heard. That was sufficient justification for this Court to embark upon hearing this application in the first place. Being a Member State of

the Community, the Defendant owes an obligation to every ECOWAS citizen or entity to ensure fair hearing within its territory, failing which this Court will have the right to entertain an application by an aggrieved party, even if it is based on the Court's inherent jurisdiction.

52. The court, having determined that the Plaintiff has no locus in human rights and, having decided that the Defendant could not be brought before this court for acts of her officials under Article 10(c) of the amended Protocol, the only issues remaining to be determined on merit are whether the Plaintiff was denied the right to hearing or fair hearing in the Defendant's territory; and whether the Defendant sold the vessel or played any role in its sale.

53. The court considers it expedient to rule on the issue of ownership of the vessel in dispute before moving on to the analysis of the merits of the application before us. Learned counsel to the Defendant in his cross-examination of the Plaintiff's witness as well as in his final address to the Court sought to dispute Plaintiffs ownership of the vessel, the subject matter of the present proceedings. However, Plaintiff's ownership of the vessel has never been in dispute right from the outset of the events leading up to this suit. Defendant's agents admitted that Plaintiff is the legitimate owner of the vessel and dealt with Plaintiff as such in all proceedings that took place in Defendant's territory. Indeed, the record of proceedings clearly shows that Defendant's agent, the Port Commandant asked Plaintiff to pay the Port charges and then his vessel would be released to him. There has been no adverse claim to this vessel. The Court therefore finds as a fact that the Plaintiff was the true owner of the vessel MV Ocean King.

54. The court considers a brief recount of the facts leading to this action as necessary. It is not in dispute that Plaintiffs vessel was towed to Defendant's port by a vessel named MV Maxti Cotra belonging to Euskalduna de Pesca of Spain. After Plaintiff had concluded negotiations with the Defendant for the release of the vessel, Euskalduna de Pesca asked the Plaintiff to pay it for the costs it incurred in bringing Plaintiffs vessel to Defendant's port. Plaintiff agreed in principle to pay Euskalduna de Pesca for the rescue service but the parties were unable to settle on

the quantum of money to be paid, ensuing in a legal battle between them. Finally, Plaintiffs vessel was awarded to Euscalduna de Pesca upon the orders of a court of Senegal, Defendant herein.

55. A critical appraisal of the pleadings and evidence before this Court reveals that the main issue in this matter is whether Defendant is liable for the sale or award of Plaintiff's vessel to some entity other than the Plaintiff. The answer to this issue could be ascertained by carefully assessing the various judicial processes that took place and eventually led to a decision which divested Plaintiff of the ownership of the vessel, and the role played by the Defendant in determining whether Defendant is culpable or not.

56. The evidence before the Court indicates that there have been three judicial proceedings in the Defendant's country in respect of the subject matter of the present case. The first judicial proceedings arose when Euskalduna de Pesca commenced an action before a Senegalese court asking for Plaintiff's vessel to be awarded to it as compensation for the amount it spent on towing the vessel to Defendant's port. The court obliged and awarded Plaintiff's vessel to Euskalduna de Pesca.

57. However, upon an application by the Plaintiff, that decision was reversed. Upon the advice of the Nigerian Ambassador to Senegal, Plaintiff approached the Tribunal of the Marine Merchant, culminating in the second judicial proceedings. This Tribunal decided that the Plaintiff should deposit CFA 30.5 Million to secure the release of its vessel. Plaintiff refused to pay the CFA 30.5 million unless given an undertaking by the Director of Marine Merchant that the vessel would be released to it after the payment. The Director of the Marine Merchant refused to give any such undertaking and referred the Plaintiff to the Port Commandant, who also refused to give the undertaking Plaintiff was requesting for. Plaintiff refused to pay the amount and decided to explore diplomatic channels in resolving the dispute.

58. The third and final judicial proceeding is the one that divested Plaintiff of its ownership of the vessel. Plaintiff says it was not approached by the court to enable it defend its interest before judgment was given divesting it of its ownership of the vessel and did not know anything about the

proceedings until the defence filed by Defendant herein in this action revealed that a court revisited the earlier decision of the Marine Merchant and awarded same to some other entity.

59. It is important to carefully appraise the role of the Defendant in the judicial proceedings that took place in order to determine whether she is liable to the Plaintiff for its vessel or not. It is not in dispute that Defendant assured Plaintiff that she would release its vessel to it after paying the CFA 2.5 Million port charges that had accrued from Plaintiff's vessel docking at her port. When Plaintiff made the said payment, Defendant informed it of the fact that Euskalduna de Pesca that towed the vessel to her port had requested to be paid for the costs it incurred in towing Plaintiffs vessel. It is noteworthy that Plaintiff agreed to pay Euskalduna de Pesca for its services and paid the airfare of its representative, Mr. Moriyo to travel to Dakar from Spain for negotiation after Plaintiff had been billed CFA 40 Million by Euskalduna de Pesca. Thus, Plaintiff acknowledged in 'principle that it owed Euskalduna de Pesca, the only issue was the quantum.

60. The parties, Euskalduna de Pesca and the Plaintiff, could not agree on the amount of money to be paid to the former. Plaintiff's sole witness in the proceedings admitted in cross examination that the Defendant was not responsible for the parties' inability to arrive at a compromise on the quantum. Plaintiff therefore did not make the payment and subsequently left Dakar. Euskalduna then approached a Senegalese court and asked that the vessel be awarded to it in order to enable it defray the costs it incurred in towing the vessel to Defendant's port. The court obliged and awarded the vessel to Euskalduna. However, upon an appeal by the Plaintiff that decision was reversed. Plaintiff invoked the jurisdiction of the Tribunal of the Marine Merchant, wherein Plaintiff was asked to pay CFA 30.5 Million in order to secure the release of its vessel.

61. Had Defendant committed or omitted to do anything in order to make it liable to the Plaintiff at this stage? Our answer to this question is no. Plaintiff had successfully procured counsel of its own choice and had been given every opportunity to prosecute its case. It had been offered the legal right to appeal and had successfully appealed against the earlier decision given against it. For all intents and purposes, Plaintiff had been

offered a fair trial by Defendant's domestic courts. It is significant to note that Plaintiff had no complaints against the Defendant at this stage.

62. The Plaintiff, however, refused to respect the judgment that had been delivered by the court that he had voluntarily approached by asking for an undertaking before paying the sum of money that it had been directed to pay. Plaintiff by so doing was seeking a modification to the judgment that had been rendered by the court before it would comply with it. A judgment delivered by a court of competent jurisdiction ought to be fully respected and implemented without any conditions. Thus when the Tribunal refused to modify its decision, the Plaintiff was bound in law to comply with it. Therefore, the rejection of Plaintiffs demand for an undertaking by the Defendant's authorities did not make Defendant liable in any way to the Plaintiff.

63. The court will now consider the third judicial process that took place within Defendant's jurisdiction and assess if that makes Defendant liable to the Plaintiff for the loss of its vessel. Whilst Plaintiff contends that, it was not informed of this proceeding, Defendant avers that Plaintiff was a party to it. Whilst Plaintiff offered no evidence in support of its position, the Defendant provided "the Certificate of Non Appeal" issued by the Tribunal Regional Hors Class which explicitly stated that the Plaintiff was the Defendant in that proceeding. The Chief Registrar of the Tribunal stated thus in the Certificate of Non Appeal:

> ***"Aware of the Ruling No. 735/96 of 5th August, 1996 given by The Regional Tribunal "Hors class" of Dakar given in public and after hearing both parties, Considering the Application filed by Messrs Doudou & Yerim THIAM (Esq.), Counsels to Euskaiduna De Pesca in the "Euskalduna De Pesca v. Ocean King"***
>
> ***Considering the verification done on the Judgment Register, according to Article 107 and following of Code of Civil Procedure:***
>
> ***Certify and attest that no mention was made in the said Register, of any Appeal against the aforementioned Ruling No. 735/96."***

64. This document was attached to Defendant's statement of defence and duly served on the Plaintiff. During the cross-examination of Plaintiffs witness, this document issue carne up and the witness said it was in this court he became aware of it for the first time. He did not challenge its authenticity. It is an official record and is thus presumed to be regular and authentic until the contrary is established. It thus behoved on the Plaintiff to adduce evidence in order to contest the authenticity of this document. The document speaks for itself. Thus in the absence of contrary evidence, the Court accepts that Plaintiff was indeed heard in those proceeding which divested it of its ownership of the vessel.

65. On this same issue, the Plaintiff stated they did not know that the vessel had been divested until the Defendant herein filed their defence. This again was false.

The very first relief sought by the Plaintiff accused the Defendant of having sold their vessel. Indeed the Plaintiff pleaded that they got the information the Defendant had sold the vessel on 23rd July, 2007. The reliefs and pleadings were formulated and filed before the defence was filed, so it is plainly false for the Plaintiff's witness to say on oath that the first time they became aware of the sale of the vessel was when the defence was filed. The Plaintiff was aware they had been divested of the ownership of the vessel on the order of a Senegalese court in civil proceedings yet they chose not to contest it. The issue of the ownership of the vessel was conclusively determined by the Senegalese courts as far back as 1996, in an action between the appropriate parties and this court must respect it. The Defendant was not a party to that action and was not a beneficiary of the award made by the court.

66. Be that as it may, granted that the Plaintiff was not notified of the process that led to its vessel being awarded to some other entity, the courts in Senegal were available for Plaintiff to seek redress. Learned counsel to the Plaintiff rightly stated in his final address that Plaintiff is entitled to have the judgment set aside *"ex debito justiciae"*. However, it is trite learning that when a court of competent jurisdiction makes a decision or an order, it is that court or an appellate court that can be approached to set it aside. This Court, not being an appellate court to the Senegalese court that made the order cannot be approached to set it aside.

67. This court, in appropriate cases, may reach a different conclusion from that arrived at by a domestic court, but it must be over a subject-matter where it has cognate jurisdiction with the domestic court. However, the subject-matter before the Senegalese courts was purely civil between two private companies, one of whom is not before this court. It is thus not an appropriate case where this court can give a decision that has the effect of vacating the order made by the Senegalese court.

68. Further, the judicial processes that took place in Defendant's territory were between two private parties as admitted by Plaintiffs witness in cross examination who added that the Defendant was never a party to the dispute. Plaintiff's sole witness stated under cross examination that the Defendant became a party to the dispute because Plaintiff had never had the opportunity of dealing directly with Euskalduna de Pesca right from the outset and was only dealing with agents of the Defendant such as the Port Authority, the Marine Merchant and the Judiciary.

69. However, Plaintiff witness admitted that he paid the air ticket of Mr. Moriyo, an agent of Euskalduna to travel to Dakar from Spain and also held a meeting with him upon the advice of the Port Commandant. This evidence provided by Plaintiff's witness is contradictory in terms. On the one hand he stated that he had not had any opportunity to deal directly with Euskalduna but on the other hand he admitted paying the airfare of Euskalduna's agent as well as having a meeting with him in order to negotiate the bill sent to Plaintiff by Euskalduna. If Plaintiff claims that the Defendant became a party because it had no opportunity to deal directly with Euskalduna but with Defendant's agents, that assertion is unsupported by the evidence before this Court and therefore unacceptable. Be that as it may, Defendant could not become a party to a private litigation between two private companies only because the subject matter of the dispute was situated within its territory and had to facilitate the resolution of the conflict through its agents.

70. Plaintiff also sought to establish that Defendant's refusal to heed to various diplomatic overtures made Defendant liable as it exhibited the intention of the Defendant to collaborate with Euskalduna and award the vessel to same. With respect, that position is untenable at law. The Defendant was

not under any legal obligation to try and resolve a matter that had been decided by a court of competent jurisdiction, through diplomatic channels. In any case, the dispute at hand was one between Plaintiff and Euskalduna and not between Plaintiff and the Defendant.

71. The Plaintiff pleaded that it was the Defendant who sold their vessel, but Defendant denied it. Thus the Plaintiff assumed the burden of producing evidence since they asserted the affirmative of the issue. However, there was no evidence adduced at the hearing that the Defendant sold the vessel. The fact that a court in Defendant's territory awarded the vessel to Euskalduna did not per se make the Defendant culpable. It was an order made in proceedings regularly conducted between two private companies to which the Defendant was not a party before a court of competent jurisdiction.

DECISION

72. On the preliminary procedure, the Court concludes that it is not a requirement of its texts to exhaust local remedies before an application could be filed before it in human rights cases. The court also decides that the acts of officials of the Defendant are not subject to Article 10(c) of the amended Protocol. The court further decides that Article 10(d) of the 1991 Protocol, as amended, is not open to corporate bodies as victims of human rights abuse; that is open to only human beings.

73. In respect of the substantive issues:

- **Whereas** the Court has found that the Plaintiff and Euskalduna de Pesca were the parties that contested all the proceedings before the Senegalese courts;

- **Whereas** the vessel was not awarded to the Defendant herein;

- **Whereas** it was the Plaintiff's failure to respect the decision of the Marine Merchant that eventually led to the final decision depriving them of the ownership of the vessel;

- **Whereas** the Plaintiff was heard in the last proceedings;

- **Whereas** the Plaintiff, even if they were not heard in the last proceedings, upon becoming aware of this final decision could have taken steps to set it aside;

- And **Whereas** the Plaintiff failed to do so;

- And **Whereas** there is no evidence to decide that the Defendant sold the vessel;

- And **Whereas** there is no evidence of any adverse role played by the Defendant's agents in the loss of the vessel to the Plaintiff;

The Court decides that the Defendant bears no liability for the loss of the vessel.

CONCLUSION

74. In view of foregoing reasons, the Plaintiff's action has not been sustained and it is accordingly dismissed.

COSTS

75. The parties are to bear their own costs.

THIS DECISION HAS BEEN RENDERED IN PUBLIC SITTING OF THE COMMUNITY COURT OF JUSTICE, ECOWAS.

BEFORE:

HON. JUSTICE HANSINE DONLI - *PRESIDING*

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 FRIDAY, THE 8TH DAY OF JULY, 2011

SUIT NO: ECW/CCJ/APP/01/08
JUDGMENT NO: ECW/CCJ/JUD/06/11

BETWEEN
STARCREST INVESTMENT LIMITED - ***PLAINTIFF***

V.

1. **PRESIDENT, ECOWAS COMMISSION**
2. **FEDERAL REPUBLIC OF NIGERIA**
3. **STARCREST NIGERIA ENERGY LIMITED**
4. **EMEKA OFOR**

} ***DEFENDANTS***

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 - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
CHIEF EMEFO ETUDO - *FOR THE PLAINTIFF*
MR. DANIEL LAGO - *FOR THE 1ST DEFENDANT*
MRS. PAMELA OHABOR - *FOR THE 2ND DEFENDANT*
MR. U. N. UDECHUKWU, SAN. -*FOR THE 3RD & 4TH DEFENDANTS*

Access to Court -Article 10 (d) of the Supplementary Protocol -Member States responsibility under Article 38 of the Protocol on Democracy and Good Governance -Exercise of the statutory functions of the President of the ECOWAS Commission.

SUMMARY OF FACTS

The Plaintiff filed an Application alleging that the 2nd Defendant colluded with some persons representing foreign companies to deprive them of their legitimate interest in oil block number OPL 291 for which they had put in a bid in response to an International tender advertised by the 2nd Defendant.

They alleged that officials of the 2nd Defendant took bribe of $35 million and awarded the tender to some companies including Starcrest Nigeria Energy Limited which did not qualify in 1st terms of the tender invitation. The Plaintiff consequently addressed a petition to the Defendant (the President of the ECOWAS Commission) requesting it to table same before the Authority of Heads of States and Government which the 1st Defendant refused or failed to do. Plaintiff then brought this action and claims that the action is a breach of the 1st Defendants' duties under Article 19 (1) (2) (3) (e) and (3) (1) of the ECOWAS Revised Treaty and contrary to the provisions of Articles 7, 55, 21 (2) and 21(5) of the African Charter.

The Defendants while denying the allegation aver that bribery is a criminal offence over which only domestic Courts have jurisdiction and that the 1st Defendant owes no obligation to Plaintiff to submit the petition to the Authority of Heads of State.

LEGAL ISSUES

1. *Whether the Plaintiff has a right of access to this Court for human rights violation.*

2. *Whether the 1st Defendant owed the Plaintiff any duty or obligation to place its petition before the Authority.*

3. Whether this Court is competent to delve into an allegation of crime.

DECISION

The Court in dismissing the application held:

1. That the 1st Defendant has no duty or obligation to table the Plaintiff's petition before the Authority since he does not set the agenda for meetings of the Authority, and even if he could influence the setting of the agenda, he has discretion over what matter to ask Council to place before the Authority.

2. That the issue of bribery is criminal and therefore belongs strictly to the domestic Jurisdiction of the 2nd Defendant, thus the 1st Defendant could not be faulted for refusing to advance the petition beyond his office desk.

3. The Plaintiff being a corporate body cannot bring an action before the Court as a victim of alleged human rights abuse.

4. The 2nd Defendant committed no breach of Article 38 of the Protocol on Democracy and Good Governance.

JUDGMENT OF THE COURT

Parties and representation

1. The Plaintiff is a Company registered under the laws of the Federal Republic of Nigeria. The first Defendant is the head of the ECOWAS Commission, one of the institutions of the Economic Community of West African States (ECOWAS), indeed he operates as the chief executive officer of the institutions. The second Defendant is a Member State of the Community. The third Defendant is also a company registered under the laws of the Federal Republic of Nigeria. The fourth Defendant is the Chairman of the third Defendant's Company. The Plaintiff was represented by their counsel Chief Emefo Etudo. The first Defendant was represented by a Legal Officer of the Commission, Mr. Daniel Lago. The second Defendant was represented by a State Counsel Mrs. Pamela Ohabor. The third and fourth Defendants were represented by their Lawyer Mr. U. N. Udechukwu, SAN.

Facts

2. The initial application brought by the Plaintiff did not include the third and fourth Defendants; the latter were joined at their own instance. A number of the pleadings were withdrawn and struck out, leaving virtually no claim against the second, third and fourth Defendants, yet they remain parties to the end. It is thus necessary to state what remains of the suit before the court and against which Defendant/s.

3. The principal claim as set forth in the application filed in this court on 6th February, 2008, but was later amended, was against the first Defendant for his failure and/or refusal to place the Plaintiffs petition dated 13th March, 2007 before the Authority of Heads of State and Government of ECOWAS, hereinafter called the Authority. The entire case centres on this. The Plaintiff contends that officials of the Federal Republic of Nigeria, second Defendant herein, colluded with some persons representing foreign companies to deprive them of their legitimate interest in oil block number OPL 291, for which they had put in a bid in response to an international tender advertised by the second Defendant. The Plaintiff

claimed the Nigerian officials took a bribe of $35 million in order to award the tender to some other named companies including Starcrest Nigeria Energy Ltd, which in their view did not qualify in terms of the tender invitation.

4. Being dissatisfied with this state of affairs in the Federal Republic of Nigeria, the Plaintiff addressed a petition to the first Defendant on 13th March, 2007, requesting him to place same before the Authority. However, the first Defendant refused or failed to accede to the Plaintiff's request; hence this application. The reasons alleged against the first Defendant may be found in paragraph 5.8 of the originating application, as amended, and is set out here as follows. The first Defendant has failed to harmonise, promote and coordinate community development programmes so as to eliminate bad policies in erring member states, has failed to promote transparent policies especially when he failed to react to the Plaintiff's letter dated 13/03/07. In the meeting of the Authority dated 15/06/07 he also failed to table the subject matter or anything relating to Nigeria. The Plaintiff further averred that the first Defendant has also failed to implement the policies of ECOWAS, decisions of the Authority and regulations of the council relating to the protection of the Plaintiff, corporate governance and popular participation in development in the Community. The Plaintiff stated further that these failures are returning the Community including Nigeria to the bad old days as reported in so many media as no individual state can unilaterally survive the vices of globalization and corrupting of local officials, which vices are defeating the vision and goals of ECOWAS and causing huge financial hardship and losses to the corporate bodies including the Plaintiff.

5. The Plaintiff averred also that the first Defendant has a duty to promote policies that could have eradicated the corrupt hijack of the oil block, which duty he failed to exercise. The first Defendant also failed to implement policies and programmes that would ensure their right to carry on business without discrimination and under equal opportunity, resulting in damages to the Plaintiff.

Reliefs sought

6. The Plaintiff accordingly sought the following reliefs:

   i) A declaration that the Plaintiff can validly claim damages against the 1st Defendant for failure/refusal to table her petition before the ECOWAS Authority which failure is an unlawful breach of the Defendant's duties under Article 19(1), (2) (3e) and (3i) of the ECOWAS Revised Treaty and also amounts to an unlawful violation of the Plaintiff's right to petition the Authority under Articles 7, 55, 21(2) and 21(5) of the African Charter on Human and Peoples' Rights (ACHPR), adopted by ECOWAS under Article 4(h) of the Revised Treaty.

   ii) General damages of US$5,000 (five thousand US Dollars) against the 1st Defendant for injury to the rights of the Plaintiff by his subject matter *'failure to act'*.

   iii) An order compelling the 1st Defendant to table the subject matter petition on corruption and non-transparent policies in Nigeria before the Authority and other relevant institutions of the community.

   iv) An order removing Addax/Starcrest Nigeria Energy Ltd. from OPL 291 pending the decision of the Authority. There was an alternative to this last relief which is not material to recount here since it was seeking interim measure which was not taken.

7. From the reliefs sought, it is clear that the first three are all against the 1st Defendant. The 2nd Defendant has an interest in the third relief in so far as allegations of corruption and non-transparency are made against the country in the petition. The 3rd and 4th Defendants are interested in the fourth relief.

Defence

8. All the Defendants entered defence to the claims by the Plaintiff. They all challenged the claims by the Plaintiff. The second Defendant denied any corrupt practice in the bid process. They also denied that the Plaintiff

was even qualified to take part in the OPL 291 bid which was reserved for operators in the deep offshore, which Plaintiff was not. These issues involve oil law in Nigeria. And the allegation that there was a $35 million dollar bribe clearly belongs to the realm of Criminal Law, which only the domestic courts have jurisdiction over. These are not matters the court will be called upon to delve into in these proceedings, which principally are the failure and/or refusal of the 1st Defendant to place the Plaintiff's petition before the Authority.

Issues

9. Consequently, the Court will confine itself to the core issue which is the petition of 13th March, 2007 and decide whether the Plaintiff was entitled to the request made therein, whether the 1st Defendant owed the Plaintiff any duty or obligation, and, if so whether the Plaintiff committed any error or breach of his duty by failing and/or refusing to table the petition before the Authority.

Consideration of the issues

10. First, concerning the alleged obligation or duty owed the Plaintiff by the 1st Defendant. The Plaintiff claims it has a right under some specified paragraphs of Article 19, cited above, of the Revised Treaty to bring her petition before the Authority. She also claims that the said failure by the 1st Defendant to present her petition before the Authority was in violation of specified provisions of the ACHPR. In his final address filed on 15th March, 2011, Counsel for the Plaintiff stated inter alia, that ***"it is the duty of the 1st Defendant to prepare the meetings of the Authority*** *(see Article 19(3) of the Revised ECOWAS Treaty)* ***and convene the meetings of the Council and table his findings for further decisions and regulations of the Authority and Council (Article 19(3e) of the Revised ECOWAS Treaty; it is his duty to submit reports to the Authority and Council".***

11. These provisions which the Plaintiff's counsel relied upon have since 2006 been repealed by Supplementary Protocol A/SP.1/06/06 amending the Revised Treaty. Indeed the entire Article 19 of the Revised Treaty was

repealed. Article 33(1) (c) of the Court's Rules of Procedure enjoins a Plaintiff to provide a summary of the pleas in law on which the application is based. It follows that where the application does not state the plea in law, or where the application is founded on a non-existing law, the entire application is flawed as being without a legal justification. Where a party has chosen to rely on some portions of an enactment, the Court cannot decide the case on other portions of that enactment; in this Court the party will succeed or fall having regard to the plea in law he has chosen.

12. The new Article 19(1), (2) and (3) of the Revised Treaty have nothing to do with the 1st Defendant's duty to organize any meeting of the Authority or Council. The provisions cited by the Plaintiff in the repealed Article 19(3) whereby the then Executive Secretary of ECOWAS was responsible for preparing the agenda for the meetings of the Authority have not been repealed in the new Article 19. The practice in ECOWAS since this amendment is that it is the Council of Ministers, as constituted by this same amending Protocol, which sets the agenda for the meetings of the Authority; the ECOWAS Commission only facilitates the organization of such meetings. This practice has since crystalized into a rule in 2010. Rule 17(2) of the Rules of Procedure of the Authority provides that:

> **"The provisional Agenda of an ordinary session shall be drawn up by the Council of Ministers' session preceding the session of the Authority".**

The President of the Commission is thus not obliged and indeed does not have the duty under the Revised Treaty, as amended, to prepare the agenda for meetings of the Authority, and consequently has no right to place any matter before the Authority without the mandate of the Council of Ministers. The role the Commission has been playing and is still mandated to play is to transmit the draft provisional agenda drawn up by Council to Member States of the Community, see Rule 16(5) of the Rules of Procedure of the Authority. Thus in so far as the 1st Defendant is not mandated to set the agenda for meetings of the Authority, he could not be compelled by any third party to place any matter before the Authority.

13. Let us for a moment agree that the 1st Defendant has the duty to set the agenda for the meetings of the Authority; even there he is not obliged to

place every issue before it; he has discretion to choose which matters should be placed before the Authority given the limited duration of such meetings, except those matters which are obligatory by law.

14. An essential element in the exercise of power or a statutory function is that it should be exercised by the authority upon whom it is conferred, and by no one else. The 1st Defendant therefore cannot replace Council in drawing up agenda for any meeting of the Authority. Interestingly, the duty to set agenda for even Council meetings has been entrusted to the Chairman of Council, and it is exercised through the Administration and Finance Committee, with the 1st Defendant playing a facilitator's role. Be that as it may, the entire provisions of the Revised Treaty on which this application is based were non-existent as at the time the action was commenced.

15. Next, concerning Plaintiff's claim in human rights, the Plaintiff also relied on the provisions of Articles 7, 21(2), 21(5), and 55 of the ACHPR in submitting that they have a right to petition the Authority which has a duty to consider her petition. The ACHPR, is applicable in this Court by virtue of Article 4(g) of the Revised Treaty, and not Article 4(h) as pleaded by the Plaintiff. However, Article 10(d) of Protocol A/P1/7/91 as amended by Article 4 of Supplementary Protocol A/SP.1/01/05 grants access to this Court in human rights cases to only individuals, meaning human beings as distinct from corporate bodies and other legal entities. This provision contrasts sharply with the immediate preceding one namely Article 10(c) of the 1991 Protocol (supra) as amended, which grants access to individuals and corporate bodies in certain actions before this Court.

    The maxim *'expressio unius est exclusion alterius'* is clearly applicable here. By granting access to both individuals and corporate bodies in Article 10(c), and failing to mention both in the succeeding paragraph (d), the ECOWAS authorities clearly intended to exclude corporate bodies from the purview of human rights causes.

16. The Preamble to the 1948 Universal Declaration of Human Rights gives a clear indication that human rights are human centred. It provides that the ***'recognition of the inherent dignity and the equal and inalienable***

rights of the human family is the foundation of freedom, justice and peace in the world. 'Equally instructive is the definition of Human Rights provided in **Black's Law Dictionary, *9th Edition at page 809*** as ***"the freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live."***

17. This court thus held in the case of **The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President of the Federal Republic of Nigeria and 8 Ors. Suit No. ECW/CCJ/APP/08/09**, delivered on 10th December 2010, unreported, that no action could lie against a corporate body in human rights cases before this court. By parity of reasoning, the converse of the decision just cited is equally true and that is, no corporate body can bring a human rights case before this court as a Plaintiff as an alleged victim of human rights abuse. Thus the provisions of the ACHPR do not avail the Plaintiff in this court in so far as they complain about human rights abuse against them as a company.

18. Finally, the alleged violation by the second Defendant of the Protocol on Democracy and good governance. The Plaintiff also cited some provisions of Protocol A/SP1/12/01, On Democracy and Good Governance in their pleas in law. But as to how relevant they are to their case, the only reference made in the pleadings that specifically addresses that issue is to be found in paragraph 5.8.2.2(1) of the Amended Statement of Claim wherein they refer to Article 38 of the Protocol as imposing an obligation on the 2nd Defendant to tackle corruption. The Plaintiff's case is that in order that the 2nd Defendant might fulfil the obligation imposed on them by Article 38 of this Protocol, the Authority could apply diplomatic pressure by virtue of Article 77(1) of the Revised Treaty. The said Article 38 provides that:

    1. **Member States undertake to fight corruption and manage their national resources in a transparent manner, ensuring that they are equitably distributed.**

    2. **In this regard, Member States and the Executive Secretariat undertake to establish appropriate mechanisms to address issues of corruption within the Member States and at the Community level.**

19. Article 38 paragraph 2 quoted above recognizes corruption at two levels, namely at the national level and at the level of the Community. In the context of this case, it is clear that it is where a Member State fails to set up appropriate mechanisms to fight corruption within its territory that it is in breach of these provisions. It is not the Plaintiff's case that the 2nd Defendant has failed to establish institutions or mechanisms to fight cases of corruption in Nigeria. An isolated case of an allegation of corruption does not suffice to set in motion application of sanctions against a Member State. Consequently the 2nd Defendant could not be said to be in breach of Article 38 of this Protocol.

Decision

20. The Court concludes that the 1st Defendant has no duty or obligation to table the Plaintiff's petition before the Authority since he does not set the agenda for meetings of the Authority. And even if he could influence the setting of the agenda, he has discretion over what matter to ask Council to place before the Authority. And in the circumstances of this case where the core underlying issue of bribery is criminal and therefore belongs strictly to the domestic jurisdiction of the 2nd Defendant, the 1st Defendant could not he faulted for refusing to advance the petition beyond his office desk. Besides, the Plaintiff, being a corporate body, cannot bring an action before the Court as a victim of alleged human rights abuse. Finally, the 2nd Defendant committed no breach of Article 38 of the Protocol on Democracy and Good Governance.

Conclusion

21. In the light of the foregoing reasons:

    (i) The principal case which is against the 1st Defendant has not been sustained and as a result the Court dismisses it in its entirety.

    (ii) It follows that there is nothing against the 2nd 3rd and 4th Defendants too, so the case made against them is also dismissed.

Costs

22. Parties shall bear their own costs.

THIS DECISION HAS BEEN RENDERED IN PUBLIC SITTING AT THE COMMUNITY COURT OF JUSTICE, ECOWAS, AT ABUJA

THIS FRIDAY THE 8TH DAY OF JULY, 2011.

BEFORE:

HON. JUSTICE H. N. DONLI - *PRESIDING*
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 THURSDAY, THE 7TH DAY OF JULY, 2011

SUIT NO: ECW/CCJ/APP/02/11
RULING NO: ECW/CCJ/RUL/03/11

MOUKHTAR IBRAHIM AMINU - ***PLAINTIFF***

V

1. **GOVERNMENT OF JIGAWA STATE**
2. **JIGAWA STATE JUDICIARY OF JIGAWA STATE OF NIGERIA**
3. **INSPECTOR GENERAL OF POLICE OF THE FEDERAL REPUBLIC OF NIGERIA**

} ***DEFENDANTS***

4. **ATTORNEY GENERAL OF THE FEDERATION**

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE DONLI** - *PRESIDING JUDGE*
2. **HON. JUSTICE ANTHONY BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

NUREINI JIMOH *(ESQ.)* - *FOR THE PLAINTIFF*
ALH. HUSSIANI *(ESQ.)* - *FOR THE 1ST AND 2ND DEFENDANTS*

- Non Exhaustion of local remedies
- Non domestication of the Revised Treaty and Protocols of the Court-effect.

SUMMARY OF FACTS

The Plaintiff/ Respondent filed an applicant for the-violation of his fundamental human rights by the 1st Defendant which was sustained by the 2nd, 3rd and 4th Defendants. In response, the Defendants/Applicants filed a preliminary objection brought pursuant to Articles 87 and 88 of the Rules for an Order dismissing the Application on grounds of non-exhaustion of local remedies by the Plaintiff and the non-domestication of the Revised Treaty and Protocol of the Court as prescribed by Article 12 of the Constitution of the Federal Republic of Nigeria.

LEGAL ISSUES

1. *Whether by virtue of Section 12(1) of the Constitution of the Federal Republic of Nigeria the domestication of the Revised Treaty and the Protocols of the Court is a condition precedent to their application to issues arising in the Federal Republic Nigeria by this Court.*

2. *Whether the non-exhaustion of local remedies by the Plaintiff renders the case incompetent for consideration and determination by this Court.*

DECISION OF THE COURT

The Court held dismissing the application that:

1. *Upon its ratification, Nigeria became neck deep in the execution of the Revised Treaty and the intendment of the Federal Republic of Nigeria was to make Articles 4(g) of the Revised Treaty and its contents as well as that of the African Charter applicable to it on the reasoning that the condition stated in Article 4 (g) of the Revised Treaty was actualized by the domestication of the African Charter on Human and Peoples Rights.*

2. *The question of domestication is entirely a local duty and the non-domestication of the Revised Treaty does not affect the main application which was lodged under the provisions of the Revised Treaty and the African Charter on Human and people's Rights and the Protocols of the Court since under international law a country cannot be allowed to escape its obligation under a treaty by virtue of its domestic legislation.*

3. *That Article 10 (d) of the protocol of this Court as amended by the supplementary protocol is lex Specialis to the general rule. In this regard the question of exhaustion of domestic/local remedies was put to rest by the Court regarding any plight of an individual who complained of alleged violation of human rights that occur in any Member State of the community.*

4. *200,000 naira as cost is awarded to the Plaintiff against the 1st and 2nd Defendants.*

RULING OF THE COURT

1. The Applicant, **MOUKHTAR IBRAHIM AMINU** is the Plaintiff instituting this action for himself and all members of his family based in Nigeria and resides at No YA Block 9, Flat 4/5 Gidan Dubu, Dutse, Jigawa State of Nigeria.

2. The 1st Defendant is the Government of Jigawa State with an address at Government House, Jigawa State of Nigeria.

3. The 2nd Defendant is the Judiciary of Jigawa State of Nigeria with an address for service at the office of the Chief Registrar, Jigawa State Judiciary of Nigeria.

4. The 3rd Defendant is the Inspector General of Police of the Federal Republic of Nigeria with an address at Nigeria Police Headquarters, 3 Arms Zone, Abuja Federal Capital Territory, Nigeria.

5. The 4th Defendant is the Attorney General of the Federation with an address for service at the Federal Ministry of Justice, Federal Secretariat, Abuja - Nigeria.

FACTS OF THE PRELIMINARY OBJECTION

6. That the Applicant filed an Application for the violation of his Human Rights by the 1st Defendant and sustained same through the operation of the 2nd, 3rd and 4th Defendants which are various organs of the Federal Republic of Nigeria.

7. In view of the Application the Applicant herein filed a preliminary objection brought pursuant to Articles 87 and 88 of the Rules of the Community Court of Justice, ECOWAS seeking for the following, orders:

   (a) **An Order dismissing** the main Application filed by the Plaintiff for violation of his Human Rights on the grounds that this Court has no jurisdiction to entertain the action on the grounds of non-exhaustion of local remedy.

(b) **An Order that the suit is incompetent** on the grounds that the Protocol of the Court of Justice which gave it the power to hear and determine issues of violation of Human Right by individuals has not been domesticated in Nigeria as provided for under Article 12 of the Constitution of the Federal Republic of Nigeria and that where the Protocol is not domesticated, it will not apply to the Defendant.

8. The Plaintiff in his reply to the preliminary objection stated that the Court has jurisdiction to entertain the main Application by virtue of Articles 87 and 88 of the Rules of Procedure of the Community Court of Justice and Article 9 sub-paragraph 4 of Protocol A/P1/7/91 as amended by the Supplementary Protocol of the Court which endowed the Court with the competence to hear and determine cases of violation of Human Rights that occur in any Member State by individuals.

ISSUES RAISED FOR DETERMINATION BY 1ST AND 2ND DEFENDANTS

9. The 1st and 2nd Defendants have distilled the following issues for determination viz:

a. **Whether** the Applicant ought to have brought this Application for enforcement of his fundamental right as contained under chapter IV of the 1999 Constitution before this Court.

b. **Whether** this Court has jurisdiction to hear and determine the Applicants Application in respect to the above mentioned subject matter.

c. **Whether** the Applicant's originating motion is competent to enable the Court exercise its jurisdiction to determine the merit of this suit.

ISSUES RAISED FOR DETERMINATION BY APPLICANT

9. a) **Whether** this Court does not have jurisdiction to entertain actions bordering on violation of Human Rights of the Plaintiff or put plainly;

b) **Whether** the Plaintiff has a right of direct access to this Court to litigate his rights, when there exists a local law in the Federal Republic of Nigeria to file the case;

THE NATURE OF THE ARGUMENTS BY COUNSELS

10. The Learned Counsel of the 1st and 2nd Defendants submitted that the issue of Fundamental Human Rights as contained in the African Charter on Human and Peoples' Rights and Universal Declaration of Human Rights are contained under chapter IV of the Constitution of the Federal Republic of Nigeria 1999, which is the supreme law of the land. Section 46(3) of the 1999 Constitution empowered the Chief Justice of the Federation to make Rules for the enforcement of such rights where it was breached, likely to be breached or about to be infringed.

11. The Learned Counsel further stated that **ORDER II Rule 1** of the **FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES 2009** provides as follows:

> ***"Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled has been is being or likely to be infringed, may apply to the court in the State where the infringement occurs or likely to occur, for redress. Provided that where the infringement occurs in a state which has no Division of the Federal High Court, the Division of the Federal High Court administratively responsible for the state shall have jurisdiction…"***

12. He also submitted that the provision of law is clear concerning **ORDER II Rule 1** of the **FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES 2009.** The word ***'shall'*** in the Rules imposes a duty on the applicant to file the application for enforcement of his Fundamental Rights in the Federal High Court or State High Court, and since the State High Court is one of the disputed parties coupled with the fact that the agencies of the Federal Government are involved in the dispute, the Federal High Court Dutse Judicial Division is the proper and competent court to hear and determine this application.

13. The Learned Counsel pointed out that the Constitution of the Federal Republic of Nigeria is clear and vests jurisdiction of adjudication of this matter on the Federal High Court Jigawa, and the position of law is also clear that neither a state nor an individual can contract out of the provisions of the Constitution and the reason is that a contract to do a thing which cannot be done without a violation of the law is void. He referred the Court to the Supreme Court authority in the case of **AG BENDEL STATE v A G FEDERATION & ORS (1981) NSCC 314.**

14. The Learned Counsel also pointed out that **Order 1 Rule 2 of the Fundamental Rights (enforcement procedure) Rule 2009** provide for application and interpretation particularly clause 5 which interprets "Court" to mean Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory Abuja. He said that since this dispute involved Federal Government agencies, the position of law is very clear in this respect. He referred the Court to the case of **JACK v UNAM (2004) 4 NWLR pt. 865 page 208** where the Supreme Court observed that;

> **"section 230(1) of the 1979 Constitution (section 251(1) of the 1999 Constitution) is a general provision which confers exclusive jurisdiction on the Federal High Court in civil causes arising from any action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies"** ***at pg. 213 para 2.***

15. The Learned Counsel to the 1st and 2nd Defendants thus submitted that the Federal High Court Dutse Judicial Division Jigawa State is the competent court to hear and determine this suit and urged the Court to so hold and strike out this action for want of jurisdiction. He stated that section 12(1) of the 1999 Constitution provides for requirement or condition for application of international treaty or convention in Nigeria.

16. By virtue of the section 12(1) of the 1999 constitution no treaty between the Federation and any Country has the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly, thus, an international treaty entered into by the government of

Nigeria does not become binding until enacted into law by the National Assembly. In the instant case the **Supplementary Protocol (AS/SP1/01/05)** amending **Protocol (A/P1/7/91)** relating to the Community Court of Justice has not been domesticated in Nigeria by enactment of the National Assembly, therefore it cannot be applied in Nigeria with particular reference to this matter.

17. He urged the Court to so hold and referred to the authority of the Supreme Court of Nigeria in respect to the following cases.

- **ADISA v OYINWOLA (2000) 10 NWLR pt. 674 page 116.**
- **MUSA v INEC (2002) 11 NWLR pt. 777 pg. 223 at 314 to 315.**
- **ABACHA v FAWEHINMI (2002) 6 NWLR pt. 660 pg. 228.**
- **RTNACHPN v MHWUN (2008) 2 NWLR pt. 1072 pg. 575 at 623.**
- **DOW v AG BOTSWANA (1992) LCR (CONS) 623.**

18. He submitted that there are 2 types of legal constitutional regimes i.e. monist and dualist. The former incorporates treaties into their municipal legal system automatically by ratifying the said treaty e.g. the Cape Verde Constitution, and the latter does not have such automatic application. There are certain laid down procedure to be followed before domesticating the said treaty or convention for example section 12(1) of the Constitution of the Federal Republic of Nigeria 1999. Without such domestication based on the supreme law of the land he submits that the action filed by the Applicant before this Court is incompetent and this Court lacks jurisdiction to hear and determine it. He urged the Court to so hold and strike out this Application for want of jurisdiction with substantial cost against the Plaintiff/Applicant.

19. The Counsel to the Applicant/Plaintiff responded that the 1st and 2nd Defendants raised, *in limine litis*, the inadmissibility of this case on ground of lack of jurisdiction on one hand, and on the other hand, upon the ground that the case brought before this Court ought to have been filed appropriately before the State High Court in Jigawa State of Nigeria.

20. He contested the Defendants' position that the protection of Human Rights by international mechanism is subsidiary in nature by the principles of exhaustion of local remedies. He therefore submitted that Human Rights is inherent to the human person, and are inalienable, irrevocable and sacred, and cannot suffer any limitation whatsoever.

21. Secondly, he submitted that jurisdiction is a creation of statute and can be:

    (i) With reference to the territory i.e. Member States of the Economic Community of West African States (ECOWAS);

    (ii) With reference to the subject matter i.e. violation of Human Rights or interpretation of treaty, the subsidiary legislation;

    (iii) With reference to parties i.e. Member States or individuals.

22. The Counsel submitted that this action is founded on the Treaty and it is equally maintainable in a domestic court, the option is available to the Plaintiff to elect the procedure and the court to approach by the doctrine of election of remedies. ***See*** **Mohammed v Husseini (1998)** ***12.***

23. He maintained that the action is founded and maintainable on the Treaty of ECOWAS to which Nigeria is a signatory. He referred to Article 4(g) of the Revised Treaty which affirmed:

> **"recognition, promotion and protection of Human and Peoples' Rights in accordance with the provision of the African Charter on Human and Peoples' Rights".**

24. He stated that the draftsman intended that the African Charter on Human and Peoples' Rights are subsumed under the Revised Treaty and therefore applicable directly before the Court of Justice of ECOWAS, and did not affirm that the local laws of Member States will prevail or sink the volume of international legislations stated in the African Charter on Human and Peoples' Rights or the Revised Treaty. Thus, the European Court on Human Rights in **DeWilde, Verspy v. Belgium, 18 June, 1971** found that;

> ***"In accordance with the evolution of international practice, states may well renounce the benefits of the rule of exhaustion of local remedies".***

25. He submitted that the African Charter sets out;

    (a) Fundamental principles of the Charter (part 1)

    (b) Modalities of implementing such rights (part 2) which includes;

    - Its composition - Articles 31 - 41
    - Its function - Articles 42 - 45
    - And procedure before the Commission - Articles 46 - 59

26. He maintained that this is inclusive of the other mechanism prescribed in the Revised Treaty for the court to implement these fundamental principles. He referred to the decision of this Court in **Hadijatou Mani Koraou v. The Republic of Niger (Judgment No. ECW/CCJ/JUD/06/08) dated 27th October, 2008.**

27. He argued that the Court possesses an inherent jurisdiction to take such an action as may be required in ensuring that the exercise of its jurisdiction on the merits of a case is not frustrated, and to ensure that any local laws which are not prescribed within the Treaty does not suffocate international law and practice. He therefore urged the Court to decide the case *ex aequo bono* i.e. on the basis of justice and equity untrammeled by technical legal rules through laws made locally by the Federal Republic of Nigeria.

28. He further submitted that the canon of interpretation prescribed that statute should be given their plain and ordinary meaning and relied on **Parke, J.,** in **R vs Banbury (inhabitants) 1834 1A. & E 136 at 142.** The rule of construction is ***"to intend the Legislature to have meant what they actually expressed".***

29. Learned Counsel referred to Lord Green M. R' s comment on the rule of construction, on the principle of interpretation, the duty of the court known as *jus dicere non jus dare* and the duty of the Court is to read the statute in its simple, plain, ordinary and grammatical meaning in support of his argument.

30. In this connection, he referred to Articles 9 and 10 of the Protocol of the Court as amended and he further relied on the authorities of **Basinco**

Motors Ltd. supra, **Hadijatou Mani Koraou. The Republic of Niger supra and Oshevire v British Caledonia Airways Ltd (supra)** and urged the Court not to consider the reference to Fundamental Rights (enforcement procedure) applicable locally in Nigeria because same are irrelevant and cannot override or deprive the Court of its jurisdiction to entertain this matter.

31. On domestication of International Treaty, he relied on **ABACHA v FAWEHINMI (supra)** and the quotations therein in connection with section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended. Also Articles 1, 4, 5, 6, 7 and 26, of the African Charter on Human and Peoples' Rights together with the authorities of **MOSES ESSIEN v THE REPUBLIC OF GAMBIA 2009 CCJLR (PT.2) 1, MUSA SAIDYKHAN v REPUBLIC OF THE GAMBIA (SUIT NO. ECW/CCJ/APP/11/07) UNREPORTED AND DECIDED ON 16TH DECEMBER, 2010** and he urged the Court to dismiss the preliminary objection with N500,000.00 cost.

ANALYSIS BY THE COURT

32. The arguments of both Learned Counsels have been considered and the issues raised also are vital for the resolution of the preliminary procedure in accordance with Articles 87 and 88 of the Rules of Procedure of the Court.

33. The crux of the matter lies as shown before this court within the perimeters of these questions stated hereunder and to be considered and determined seriatim.

    1) **Whether** the non-domestication of the Revised Treaty of ECOWAS and the Protocols on the Court annexed thereto in accordance with section 12(1) of the Constitution of the Federal Republic of Nigeria makes it mandatory for domestication before the application of same by a judicial organ of the Community.

    2) **Whether** such lack of domestication rendered the instant case incompetent for adjudication before this Court.

3) **Whether** the lack of non-exhaustion of local remedies renders this case incompetent for consideration and determination by this Court.

34. On the question of whether the non-domestication of the Revised Treaty renders this case incompetent, the material provision of the Constitution of the Federal Republic of Nigeria requires consideration.
Section 12(1) of the said Constitution provides inter alia thus:

> ***"No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly…"***

35. This provision as explicit as it is, makes it necessary for treaties signed by the Federal Republic of Nigeria to be enacted into law for same to be applicable in the domestic courts of the land. Hence the Learned Counsel to the Defendant's reliance on internal instruments such as order 1 Rule 2 of the Fundamental Rights (Enforcement Procedure) Rule 2009 which provides for application and interpretation particularly clause 5 and its interpretation of "Court" to mean, Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory Abuja.

36. He submitted that since this dispute involves the Federal Government and its agencies, the position of law is very clear in this respect as to where or which Court should hear such matters of fundamental Human rights violations in Nigeria. He referred the Court to the case of **JACK v UNAM (2004) 4 NWLR pt. 865 page 208** where the Supreme Court made its comment regarding the said provision of the Federal law.

37. However the argument of the Plaintiff's counsel was of the effect that even if the Treaty and the Protocols are not domesticated, the fact that the provisions of the Treaty in question is domesticated to wit the African Charter on Human and Peoples' Rights makes the objection as to the non-domestication irrelevant in cases before the ECOWAS Court of Justice and the fact also that reliance is placed upon the African Charter.

38. It is trite that the question of domestication is entirely a local duty of the State to comply with its domestic laws including its constitution. However, where the action of the State is indicative of the fact that it intends to

abide by the contents of the Treaty and proceeded to enact into law the provision of the African Charter on Human and Peoples Rights contained in Article 4(g) of the Revised Treaty makes the objection of the 1st and 2nd Defendants a non-issue and immaterial. As always, a State cannot approbate and reprobate in respect of domestication of Treaties, that it derives benefits from its application.

39. It is common knowledge that the Revised Treaty was ratified by the Federal Republic of Nigeria, on 1st July, 1994. With such ratification, the Revised Treaty as far as the Community Law is concerned, became applicable in the institutions of the community, ECOWAS including this Court. The Protocols of the Court which are annexed to the Revised Treaty form an integral part thereof.

40. Article 4(g) of the Revised Treaty provides under Fundamental Principles as follows:

> ***"The high contracting Parties, in pursuit of the objectives stated in Article 4 of this Treaty, solemnly affirm and declare their adherence to the following principles:***
>
> ***"g) recognition, promotion and protection of Human and Peoples' Rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".***

41. It is not in doubt that the African Charter on Human and Peoples' Rights is domesticated as required by section 12(1) of the Constitution of the Federal Republic of Nigeria. This was referred to in the case of **ABACHA v FAWEHINMI (2002) 6 NWLR pt. 660 pg. 228.** The Revised Treaty and **Protocol A/P1/7/91** as amended by the **Supplementary Protocol A/SPA/01/05** have the State of Nigeria as signatories to them and the latter has a provisionary clause that same shall become effective immediately provisionally in Member States upon signatures by Member States. It is significant to emphasize as stated above that the Revised Treaty in question was ratified since the 1st of July 1994 and made applicable.

42. In any case, the main Application which the 1st and 2nd Defendants are challenging contained the statement of the alleged violation of human rights pursuant to Article 4(g) of the Revised Treaty and **Articles 1, 4, 5, 6, 7, and 26, of the African Charter on Human and Peoples' Rights** - the domesticated Charter by the Federal Republic of Nigeria. Despite the said objection, it is apparently clear that the intendment of the Federal Republic Nigeria was to make **Article 4(g) of the Revised Treaty** and its content and that of the said Charter applicable to it on the reasoning that the condition stated therein in Article 4 (g) of the Revised Treaty was actualized into domestication of the said Charter on Human and Peoples Rights.

43. The rules of interpretation of treaties as provided by Article 31 of the **Vienna Convention on interpretation**, shows that treaties are not like other provisions of statutes and in interpreting treaties the court is required to take into consideration all the documents connected to the treaty, actions of the parties and give meaning to them in line with the intention of the High contracting parties, which are the States in good faith. **See Competence of the General Assembly for the Admission of a State to the United Nations case ICJ Reports, 1950 pp, 4, and 8,** where the ICJ held that:

> ***"the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur."***

See **Afolabi v FRN supra** where this Court applied the said method of interpretation to defuse any confusion that was raised regarding the meaning of Article 9 (3) of the Protocol of the Court before same was amended. It is therefore a well-established principle of international law of practice that there are three basic approaches to treaty interpretation.

44. The first, centers on the actual text of the agreement and the analysis of the words used as held in the cases of **German External Debts Arbitration, 19 ILM pp 1357, 1377**, and Judge Ajibola's Separate Opinion in **Libya/Chad case, ICJ Reports, 1994, pp6 and 71**, that in applying **Article 31(1)** of the Vienna Convention the judges opined that 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 object and purpose. The second, looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach. The third approach adopts a wider perspective than the other two and emphasizes the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured as expressed on **page 656 of the book International Law by Malcom N. Shaw on the subject- the Law of Treaties.** These authorities fortify the view expressed above namely;

1) **Afolabi v the Federal Republic of Nigeria Reported in *2004-2009 CCJELR Page 1*;**

2) **The Executive Secretary of ECOWAS 2010 CCJELR (Pt 3) Page 185.**

45. Also, the effect of the subsequent practice of the parties as stated on **page 424** of **the Laws of Treaties by Mcnair** indicates that in interpreting a treaty, the subsequent practice of the parties, and the conduct or action of the parties thereto cannot be ignored.

46. In applying the statement in **Mcnair** as stated above to the instant case, all actions taken by Nigeria in respect of ECOWAS and the ECOWAS Treaty and Protocols are those that are in consonance with the enforcement of the Revised Treaty with the annexed Protocols that the 1stand 2nd Defendants are trying to denounce or question their applicability which is evident from the various actions taken by Nigeria, a Member State of ECOWAS. It would be curious not to hold that the intention that can be inferred from the operation of Nigeria regarding the Revised Treaty is that of acceptance of its validity and enforcement.

47. As much as possible, the intention of parties, which is to be ascertained from the contexts of the Revised Treaty and the domestication of part of it albeit the African Charter on Human and Peoples' Rights, the positions being held by Nigeria and the finances that are being expended or utilized towards the running costs of its activities, like other Member States are

doing, and its Protocols including the one in question **(Protocol A/SP.1/01/05 Supplementary Protocol)** buttressed the fact that upon its ratification, Nigeria became neck deep in the execution of the said Revised Treaty and intended the contents to bind it. Furthermore, Nigeria is hosting all the three key institutions of ECOWAS and currently is the Chairman of the Community. In international law a country cannot be allowed to escape its obligations under a treaty by virtue of its domestic legislations.

48. The Court holds a more dynamic approach on the issue of interpretation after considering the submissions made particularly in respect of the application of internal legislations rather than the Community texts that where it is evidently clear that the context of the said Revised Treaty is already made operational by Nigeria, any objection to it should be carefully considered and if found as in this case that the intention was to apply it, any objection to it should be jettisoned. The 1st and 2nd Defendants being components of Nigeria are bound by the action/reaction/omission of Nigeria pertaining to the implementation of the said Revised Treaty. In this regard, the court affirms the argument of the Plaintiff's counsel that the main application being connected with an alleged violation of human rights, pursuance of the provisions of the Community law, same should be admissible and all National Courts should give way to the adjudication of this matter through the Community judicial organ in accordance with the Revised Treaty and the Protocols of the Court annexed thereto.

49. On the next issue regarding the exhaustion of local remedies, Article 10(d) of **Protocol A/P.1/7/91** as amended by the Supplementary Protocol depicts no other meaning than that expressed in a number of decisions of this Court regarding exhaustion of local remedies as follows:

> **Professor Etim Moses Essien v. The Republic of The Gambia and University of the Gambia** ***Suit No ECW/CCJ/APP/05/05 reported in 2004 - 2009 CCJELR page 95 at 107*****; Hadijatou Mani Koraou v the Republic of Niger** ***2004 - 2009 CCJELR 217 at 226-9***, where the Court held that:
>
> ***"Access to the Court is open to… individuals on application for relief of 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; Falana v The Republic of Benin 2010 CCJELR pt. 3 page 130, stated that international law is general, and the provision as contained in the Supplementary Protocol in this case is *lex specialis* because what it advocates derogates from the general law.

50. Article 10(d) of the Protocol of this Court as amended by the Supplementary Protocol is *lex specialis* to the general rule. In this regard the question of exhaustion of domestic/local remedies was put to rest by the Court regarding any plight of an individual who complained of alleged violation of human rights that occur in any member state of the Community as provided in Article 9(4) and Article 10(d) of the 1991 Protocol as amended by the Supplementary Protocol of 2005. On this note, the Court finds the preliminary objection that emphasized the need to access the National Courts to wit the High Court of Justice Jigawa State, before accessing this Court as misconceived and should not be allowed to stand or prevail.

51. As this Court stated in numerous pronouncements on the prone questions of exhaustion of local remedies before accessing this Court that the individual is at liberty to choose wherever he elects to file his case once the Community text is the reference point. In the circumstance, the objection on grounds of non-exhaustion of local remedies shall fail and the main application by the Plaintiff is adjudged admissible.

DECISION

52. The Court after considering all the circumstances of this preliminary procedure and the arguments advanced therein by both learned Counsel finds as follows;

a) **Whereas** the preliminary procedure raised objection as to the admissibility of the case which was based on the Revised Treaty and the Protocols on the Court of ECOWAS that was not domesticated by the Federal Republic of Nigeria;

b) **Whereas** the said Revised Treaty was ratified by the Federal Government of Nigeria on 1st July 1994;

c) **Whereas** the Federal Government of Nigeria has domesticated the African Charter on Human and Peoples' Rights and the said Charter is part and parcel of the Revised Treaty together with the Protocols of the Court;

d) **Whereas** by all yardsticks of interpretation of treaties, and the behavior of the various organs within the component of the Federal Government of Nigeria regarding the implementation of the said Revised Treaty and the fact that the action of the Federal Government of Nigeria by domesticating the African Charter on Human and Peoples Rights is indicative of an acceptance of the said Revised Treaty and its binding effect;

e) **Whereas** the Court is of the opinion that all circumstances show that the non-domestication of the said Revised Treaty does not affect the main Application which was lodged under the provisions of the Revised Treaty and the African Charter on Human and Peoples' Rights and the Protocols on the Court annexed thereto;

f. **Whereas** by the overact of the Federal Republic of Nigeria in implementing the Revised Treaty and the Protocols on the Court annexed thereto in that Nigeria is hosting three institutions of ECOWAS, contributing funds for the sustenance of the operations of ECOWAS like other Member States of ECOWAS;

g. **Whereas** the question of non-exhaustion of local remedies raised in the preliminary procedure did not fall within the provision of the Protocol as decided by a plethora of decisions of this Court applying Article 10(d) of Protocol as amended by the Supplementary Protocol that individuals need not access their National Courts before accessing this court in respect of violations of human rights that occur in any Member State of ECOWAS;

h) **Whereas** the grounds of the objection failed to show that this Court is incompetent to hear and determine the substantive case of an alleged violation of human rights that occurred in Member State in accordance with Article 9(4) of the Protocol of the Court as amended.

53. In the circumstance, the Court adjudges that the preliminary procedure brought pursuant to Articles 87 and 88 of the Rules of Procedure, lacks merit and is overruled.

54. C O S T

Cost is hereby awarded in the sum of N200,000.00 for the Plaintiff against the 1st and 2nd Defendants accordingly.

THIS DECISION IS DELIVERED THIS 7TH DAY OF JULY, 2011.

IN THE OPEN COURT AND IN THE PRESENCE OF THE PARTIES/ COUNSEL OF THE PARTIES, IN ACCORDANCE WITH THE RULES OF THIS COURT.

HON. JUSTICE HANSINE DONLI - *PRESIDING JUDGE*
HON. JUSTICE ANTHONY BENIN - *MEMBER*
HON. JUSTICE ELIAM M. 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 WEDNESDAY, THE 13TH DAY OF JULY, 2011

SUIT NO: ECW/CCJ/APP/03/11
RULING NO: ECW/CCJ/RUL/08/11

THE INCORPORATED TRUSTEES OF
MIYETTI ALLAH KAUTAL HORE
SOCIO CULTURAL ASSOCIATION - ***PLAINTIFF***
V
THE FEDERAL REPUBLIC OF NIGERIA - ***DEFENDANT***

PLATEAU STATE GOVERNMENT - ***APPLICANT***
INTERVENER

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY ALFRED BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
M.M. NURUDDEEN, ESQ. - *FOR THE PLAINTIFF*
AKAA E.T. ESQ. - *FOR THE DEFENDANT*
CALEB MUFTWANG ESQ. - *FOR THE INTERVENER*

Right to intervene - Locus standi
- Inherent Jurisdiction of the Court - Sufficient interest.

SUMMARY OF FACTS

The Plaintiff/Respondent filed an Application against the Federal Republic of Nigeria alleging that series of ethnic violence occurred between February 2010 and February 2011 in Plateau State during which several Fulani people were killed and their properties destroyed.

The Applicant intervener filed an Application for leave to intervene and be joined as a party to the suit on the ground that the main application is based on a crisis that took place in its jurisdiction and that the victims were also within its jurisdiction.

The Plaintiff in opposing the Application averred that the action is not against the applicant but rather directed at the Defendant for failure to protect its citizens and that right to intervene is open only to Member States.

LEGAL ISSUES

1. *Whether or not the Applicant/Intervener not being a member State, can intervene in proceedings before this Court in view of the provision of Article 22 of the Supplementary Protocol*

2. *Whether in its inherent jurisdiction this Court can apply the principle under Article 38 of the Statute of the International Court of justice to allow a non-Member State to intervene under Article 22 of the Rules.*

3. *Whether the Applicant has established such interest in the present action to warrant being joined pursuant to the inherent jurisdiction of the Court.*

DECISION OF THE COURT

The Court held refusing the Application that:

a. It is the clear intendment of the drafters of the Protocol that only Member States should intervene under Article 22 of Protocol A/P.1/ 7/91.

b. Even though the said Article 22 of the Protocol denies the applicant the right of intervention not being a Member State, the principles of Law under Article 38 (1) (c) of the Statute of the International Court of justice is applicable by this court to allow intervention if the intervener shows a compelling interest that may be affected by the subject matter of the dispute.

c. There is no cogent ground to show that Applicants' interests will be affected by the subject matter of the substantive case as to warrant the grant of this application.

RULING OF THE COURT

1. The Plaintiff/Respondent, is the incorporated Trustees of Miyetti Allah Kautal Hare Socio-Cultural Association, a Fulani Socio-Cultural Organisation registered under Nigerian Laws, represented by N. M.Nuruddeen ESQ. with Mathias Ikyav, and Ikenna Akubue and Tina Edobor as their Lawyers.

2. The Defendant is the Federal Republic of Nigeria with an address at the office of the Honourable Attorney General. Ministry of Justice. Abuja, Nigeria and represented by Akaa E. T. ESQ.

3. The Intervener is the Plateau State Government and represented by Caleb Muftwang ESQ., P. A. Daffi and lfeanyi Tim Anago for the Intervener.

4. The main application by the Plaintiffs/Applicants summarized the facts of their case as follows;

   a) That in the series of ethnic violence that have engulfed Plateau State in the past few years, many lives and property valued at several millions of Naira have been lost and destroyed by tribal hordes.

   b) That Fulani people of Plateau State were greatly affected by these unending crises in the State.

   c) That the crises occurred between February 2010 to February 2011 and the Fulani people lost over 175 men, women and children who died in various areas stated below;

      i) Jos South LEA- III Fulani men, Women, and children killed:

      ii) Riyom LGA-146 Fulani men, women and Children were killed;

      iii) Barikin Ladi LGA- 117 Fulani men, Women and Children were killed;

   d) That the Fulani people lost a lot of property which include livestock. Houses and other household items as follows: livestock killed or stolen, 17,479 cows, 4,280 sheep, and 222 houses.

   e) That the said crisis/violence is still persisting, unabated and several lives and property are being lost on daily basis, and the Plaintiffs/

Applicants claim compensation in the sum of Nine Billion. Nine hundred and Twenty Two Million, Nineteen Thousand, Nine Hundred and Twenty One Naira for loss of 384 men, women and children killed in Plateau State as well as Special damages for the destruction of 222 houses and theft or killing of 17,479 cows and 4280 sheep by tribal hordes in Plateau State.

That the Plaintiffs/Applicants claims pursuant to Articles 2,4 and 14 of the African Charter on Human and Peoples Rights'.

5. The Defendant is yet to file a defence.

6. The applicant/Intervener filed an application for leave to intervene brought pursuant to Articles 89, 32, and 33 of the Rules of Court. Articles 10(c) of Supplementary Protocol A/SP.1/01/05 amending Protocol A/P1/7/01 relating to the Court, Articles 12 and 21 of Protocol A/P1/7/91 on the Court, Inherent Powers of the Court and the rudimentary principles of natural justice and fair play and consequential directives that the Court may deem fit to make.

7. The Applicant/Intervener supported his application with sworn statement of the circumstances establishing the right to intervene by restating the parties in the main case and that the intervener is a constituent of the Defendant.

8. The Applicant/Intervener sought to be joined as an interested party on the grounds that the main application filed by the Plaintiffs is manifestly referring to the crisis from February 2010 - February 2011 that happened in the jurisdiction of the Intervener and the men, women and children, livestock and property were within its jurisdiction

9. That the Applicant/Intervener stated that the case filed by the Plaintiffs, by implication depicts it as derelict/negligent in the performance of its statutory duties as enshrined in the Constitution of the Federal Republic of Nigeria 1999.

10. That the case so filed by imputation cast aspersions on the integrity, dignity and capacity for consistent good governance of the Intervener.

11. That the phrases used in the Plaintiff's case such as ethnic cleansing campaigns are vulgar and potentially inciting such as to affect the integrity of the intervener and would speedily destroy the extant peace within the interveners' jurisdiction.

12. That it will be in the interest of justice to allow this application for intervention to succeed.

LEGAL ARGUMENTS OF BOTH LEARNED COUNSELS

13. The Interveners Counsel submitted that the application is grounded or supported by sworn statement of the circumstances establishing the right to intervene in pursuance of Article 89 of the Rules of this Court, wherein the decision will directly affect the interest of intervener or intending intervener.

14. Learned Counsel submitted that the claim will embarrass the intervener as to the assertions by the Plaintiffs that there was evident malfunctioning, negligence and unconcern attitude by the intervener.

15. He submitted that the Court should grant them the right to be heard as it has a stake/interest in the case filed by the Plaintiff and that the claim stated that the intervener was negligent in the protection of the lives of the citizens within the jurisdiction of the intervener.

16. He also contended that the Court has inherent powers to grant the application as interveners in this case so that all the rights of the parties may be decided.

17. Learned Counsel to the Defendant did not oppose the grant of the application and urged the Court to grant it in the interest of justice in that for them to defend the case diligently, the Federal Government would have to rely on the evidence given to them by Plateau State where the alleged incident occurred.

18. However, the Plaintiff on their part opposed the application on points of law by the reason that they were served a day before the hearing of this application.

19. He submitted that the claim was not against the intervener but the Defendants-Federal Republic of Nigeria for the failure to protect lives and property of citizens as provided under Article 4(g) of the African Charter on Human and Peoples Rights as well as the Protocols of ECOWAS and that no paragraph of the claim states a relief against the interveners.

20. He submitted further that the interveners are meddlesome interlopers with no business in this case, and that the words used were against the Defendants and not the interveners and that unless one is accused there is no right to defend.

21. He referred to Article 21 of Protocol A/P1/7/91 to submit that the right to intervene is only opened to Member States and not individuals and contended that Article 89 (5) (b) and (c) of the Rules was not complied with regarding their contents therein and urged the Court to dismiss the application for intervention.

22. The interveners' Counsel replied with the consent of the Court regarding Article 21 now 22 of Protocol A/PI/7/91 as amended by the Supplementary Protocol on the Court that a contextual reading of Article 21 and the Supplementary Protocol that allowed individuals access to the Court should also allow individuals to intervene when their interests are affected in the same case. H**e** also relied on the case of Jigawa State mentioned in the Court where this Court adjudged that Jigawa State is a component of Nigeria.

23. He submitted that the Interveners have met the requirements of Article 89(5) of the Rules which the Plaintiffs' Counsel raised. He urged the Court to grant the application.

ANALYSIS OF THE COURT REGARDING THE APPLICATION FOR INTERVENTION AND THE LEARNED COUNSELS SUBMISSIONS THEREON.

24. After considering the submissions of Learned Counsel to the Applicant and the reply on points of law by Learned Counsel to the Plaintiffs the following **issues** for determination were discernible from the above arguments thus:

    a) Whether the applicant /intervener has locus standi to file this application in view of Article 22 of Protocol A/P1/7/91 which specified only Member States and not individuals or corporate bodies;

    b) Whether the effect of the inherent jurisdiction of the Court is within the ambit of Article 38 of the Statute of International Court of Justice which this Court is enjoined to apply under Article 19 (**1)** of Protocol A/P1/7/91 on the Court;

    c) Whether the conditions for granting an application for intervention have been met by the Applicant/Intervener in this case;

25. On the first issue as itemized above, the question of Article 22 of the Protocol and the propriety of the intervener applying to intervene is crucial as issues have been joined by the parties in that regard touching on their locus standi'. The question of Article 22 of the said Protocol calls for interpretation and its propriety in respect of an individual intervening in this action.

26. In order to appreciate the said provision. Article 21 now 22 as amended by the Protocol requires some consideration as follows:

    Article 21: Application for Intervention should be by a Member State where their interest is affected.

27. The above Protocol was made in 1991 and amended in 2005. In order to understand it and its effect Article 21 of Protocol A/P1/7/91, states thus:

    "Should a Member State consider that it has an interest that may be affected by the subject matter of a dispute before the Court it may submit by a way of a written application request to be permitted to intervene"

28. The Supplementary Protocol, Article 5 states: **"Renumbering former Articles 10 to 22. The former articles 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, are hereby renumbered to read 11, 12, 13, 14, 15, 16, 17.18, 19, 20, 21, 22, and 23 respectively."** By the above stated. Article 21 became Article 22. It is apparent that the contents are not in dispute except that the intervener's Counsel submitted that Article 21 should not be read in isolation from the provision of the Supplementary Protocol which gave access to individuals hitherto its coming to effect, wherein, only Member States are given access.

29. The Court holds, the same view that on one hand, access was only opened to Member States and on the other, access was allowed to others including Individuals. Even though it appears logical to so hold that under Article 22 individuals were not allowed to intervene, logic cannot he brought to bear in consideration of Article 22 as amended by the Supplementary Protocol. It is the clear intendment of the said provision that only Member States should intervene under Article 22 of Protocol A/P.1/7/91.

30. Having held that only Member States can access the Court under Article 22 of the Protocol, the Intervener's locus standi by that is drastically deflated as to its application in respect of individuals. As it is well established principle of law that the term locus standi denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like standing or title to sue. It has also been defined as the right of a party to appear and be heard on question before any Court or Tribunal. This Court however in its earlier numerous decisions imbibed the ardent opinion that even though same was opened only/ to Member States, the question of right to be heard is fundamental and same cannot be ignored. These cases adumbrated the submissions regarding Article 22 of the Protocol to wit, In **Hissein Habre vs Senegal Suit No. ECW/CCJ/APP/01/08** Unreported, the Court stated that the Defendant in that case who was in the process of filing its defence and a preliminary objection yet to be heard, was served with an application for intervention for reason of the violation of human rights of the victims suffered from torture under the Plaintiffs' Regime. They further submitted in that case that the interveners, on behalf of the victims, were directly connected with the proceedings before the Court. The Respondent therein opposed the application and the Court also held the view that the facts as stated in the application for intervention appeared that the interest of the interveners was criminal in

nature and to allow an intervention with two distinct characteristics in the same case would amount to injustice; in that instead of doing justice to the parties the converse may be the case.

31. Article 21 of the Protocol was observed and not diagnosed in this context because the central focus was on Article 89 (f) and the establishment of the right to intervene by drawing inspiration from domestic cases and international ones as to know what interest the applicants have identified that amounted to personal interest of such magnitude requiring them to intervene.

32. The issue of interest in the instant case would be examined in consideration with the third issue as set above. In interpretation process, the option that prevails is that where the meaning of the provision is not in doubt same is actualized by the Court. The provision of a Protocol is deemed to be valid until such is repealed or nullified or amended. Where that is not done, the actions, rights, interests, and detriments under such Protocol must be valid unless the need to resort to other interpretative yardsticks are consulted as in the case of **Moukhtar Ibrahim Aminu vs Government of Jigawa State and 3ors Suit No: ECW/CCJ/APP/02/11** decided by this Court on 7th July, 2011, that in applying Article 31(1) of the Vienna Convention, the judges opined.

> ***"that 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 object and purpose. The second, looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach. The third approach adapts a wider perspective than the other two and emphasizes the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured as expressed on page 656 of the book International law by Malcom N Shaw on the subject - the law of Treaties.*** *Also see* ***Afolabi v the federal Republic of Nigeria Reported in 2004-2009 CCJELR Page 1; The Executive Secretary of ECOWAS 2009 CCJELR (Pt 3) page 185."***

33. It follows that Article 22 is clear and unambiguous and this Court holds that only Member States can apply in pursuance of it as stated above and the submission of the Plaintiffs' Counsel therefore is worthy of acceptance and the Court endorses same.

34. The second issue in respect of inherent jurisdiction and whether same is applicable under Article 19 (1) of the Protocol of the Court in combination of Article 38 of the Statute of International Court of Justice, requires special focus as to their true import *vis-a-vis* the application in the instant case. The domestic jurisdiction used the word 'inherent' in the Constitution of Nigeria and other jurisdictions which means that the Court can act judiciously in the interest of justice where there is no law or rules of procedure regarding a particular step in the proceedings to be taken by the Applicant/Plaintiff or in this particular case by the intervener. Article 6 (6) (a) of the Constitution of the Federal Republic of Nigeria provides;

> **"The judicial powers vested in accordance with the foregoing provisions of this section shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;"**

35. Inherent power or incidental power as explained at page 1288 of Black's Law Dictionary, 9th Edition highlighted the meaning of inherent and incidental power to mean a power that although not expressly granted, must exist because it is necessary to the accomplishment of an express purpose and necessarily derives its efficacy from an office or status.

36. Article 19 (I) of the Protocol (A/PI/7/91) on the Community Court of Justice (ECOWAS) provides:

> **"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."**

37. Article 38 of the Statute of the International Court of Justice provides:

> **1. 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:**
>
> **a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;**
>
> **b. international custom, as evidence of a general practice accepted as law;**
>
> **c, the general principles of law recognized by civilized nations;**
>
> **d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.**
>
> **2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the Parties agree thereto.**

38. In a Regional Court like this Court, it is guided by the provisions referred above namely, Articles 19 (I) of the Protocol and Article 38(1) of the Statute of International Court of Justice stating amongst other things, the general principles of Law which is intended to apply to any situation that is not covered by law but where the court needs to do justice; which is described as "the fundamental justice thus indicating to the judges the lines which they must fallow, and compelling them to conform to the dictates of the legal conscience of civilized nations."

39. There is no strict definition of the general principles mentioned in Article 38 (I) (C of the said Statute). The consensual view of legal minds dictates that they are the unwritten legal norms of wide-ranging character, recognized in municipal laws of States and transposable at the International Level. In this regard the following cases on the application of Article 38(l) (c) are relevant; In the case of the **Right of Passage over Indian**

Territory (Portugal v India) ICJ Reports 1960, p.6 at p.43; South West Africa (Liberia v South Africa) Second Phrase, Judgment, Reports 1986, p6, at p.47: Factory at Chorzow. Merits Judgment No. 13 1928, P.C.I.J. Series A, No.1, at page 29, the Court observes that it is a principle of international law .and even a general conception of law that any breach of engagement, involves an obligation to make reparation. This allows the court to do justice in those cases.

40. Having been persuaded by the precise opinion of the International Court of Justice on the application of the said principles, and the request being made by the intervener in the instant case regarding its position to be given hearing in that same will affect them adversely if the right is not granted the Court tends to view it in the light of interest of justice. It must be mentioned that the right to hearing is a fundamental right enshrined in Article 7 of the African Charter on Human and Peoples Rights; that every individual shall have his cause to be heard in a court of law: the Court finds that even though the said Article 22 of the Protocol deprives the intervener of applying as an intervener being not a Member State, the said principles of law under Article 38(1) (c) of the Statute of the International Court of Justice is applicable if the intervener shows a compelling interest and that their interest may be affected by the subject matter of the dispute as filed by the Plaintiff.

41 The next issue is that relating to the personal interest of the intervener as connected to the originating application by the Plaintiff and/or whether the Plaintiff has a claim against the intervener. **In Hissien Habre v Senegal supra**, unreported and decided on 17th November, 2008 where the Court considered the circumstances establishing the right of intervention and the facts relied upon by the Intervener which showed multiple features that if put together will produce such rights or none .In that case no sufficient interest was shown and the Court refused the application. It is obvious; that such rights are not granted for the mere asking but upon some cogent reasons linking the intervener and the case or vice versa.

42. However this right is not unfettered but upon sufficient facts of interests same may be granted. The restriction is that there must be a connection between the claim and the intervener. On the face of the claim marked

No. 3 by the Registry of the Court, there was no mention of the intervener or any claim made against it/them. Furthermore the statement and grounds to justify the right of intervention should be borne out of the application by the intervener and the facts so stated in the instant case show the following:

a) that the Applicant/Intervener by implication is imputed to be derelict/ negligent in the performance of its statutory duties as enshrined in the Constitution of the Federal Republic of Nigeria 1999;

b) that the imputation has cast aspersions on the integrity, dignity and capacity for consistent good governance of the Intervener;

c) that the phrases used in the Plaintiffs' claim such as ethnic cleansing campaigns are vulgar and potentially inciting as to affect the integrity of the intervener and that same would speedily destroy the extant peace within the intervener's jurisdiction;

d) that it will be in the interest of justice to allow this intervention.

43. Upon examination of the above facts and grounds that the intervener relied on to justify their interests and their connection with the case, the Court finds no cogent ground to show that their interests may be affected by the subject matter of the substantive case as filed by the Plaintiffs and their claim as to warrant the grant of the application. The mere fact that the incident was alleged to have occurred in Plateau State cannot be sufficient link to the claim. Those phrases and imputations as to the intervener made out in this application did not flow from the originating application marked C. in this case.

44. Apart from the above opinion, it must be restated that Article 9(4) of the Protocol on the Court makes it clear that violation of human rights that occur in any Member state may be brought before the Court and it follows that Member states are primarily responsible to protect human rights of all persons within their territories. Therefore an applicant can elect to sue a Member state without joining any party.

DECISION ON THE APPLICATION FOR INTERVENTION

45. Having considered the application and all its essentials as to the justification for the grant of the application, the Court holds that the Intervener has failed to justify sufficient interests to warrant the grant of the application. In the circumstance, the application fails in its entirety as follows:

    a) **Whereas** the Applicant/Intervener has no locus standi to file this application under Article 22 of Protocol A/P1/7/91 as amended which specified only Member States and not individuals or corporate bodies;

    b) **Whereas** the intervener relied on the inherent jurisdiction which was considered under Article 19 (1) of Protocol A/PI/7/91 on the Court and applied Article 38 (1) (C) of the statute of International Court of Justice as principles of law to allow the intervener to justify its/their interest in the case:

    c) **Whereas** the Intervener has failed to justify the facts in support of the application by not showing cogent interests in the claim by the Plaintiffs;

    d) **Whereas** the Plaintiffs have the right to elect to sue a Member state as provided in Article 9(4) of the Protocol as amended;

46. The Court hereby decides that the application for intervention fails and is struck out in accordance with Article 89 of the Rules of procedure of the Court accordingly.

COSTS

47. Whereas the parties made no specific application for cost in the application for intervention and whereas the award of cost is made in the final judgment or in the order of the Court which closes the proceedings, with the unsuccessful party ordering to pay costs if applied for; In the circumstance no order as to cost made herein.

THIS RULING IS READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT DATED JULY 13TH, 2011.

CORAM:

HON. JUSTICE HANSINE DONLI - *PRESIDING*

HON. JUSTICE ANTHONY 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 PORTO NOVO, REPUBLIC OF BENIN
ON THE 7TH DAY OF OCTOBER, 2011

SUIT NO: ECW/CCJ/APP/11/08
JUDGMENT NO: ECW/CCJ/JUD/08/11

CHEICK ABDOULAYE MBENGUE - ***PLAINTIFF***

V.

REPUBLIC OF MALI - ***DEFENDANT***

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

NIANG PAPA KHALY AND
MOUSSEBAYE PADONOU - *FOR THE PLAINTIFF*

IBRAHIM TOUNKARA AND
MAMADOU SANGARA - *FOR THE DEFENDANT*

- Admissibility of the application - Lack of jurisdiction -Bringing a case under expedited procedure -Abuse of court process -Right to defence -Damages -Reasonable time limit

SUMMARY OF FACTS

The Applicant claims that he filed a case before Trial Chamber 2 of the Court of First Instance of Commune IV of Bamako, partly complaining for forgery, use of forged documents and breach of trust against his partner Mr. Bruno Akboute Ahadji, but that the proceedings instituted on the case was dismissed by a Court order, as a non-suit, and once it had become final, the situation was exploited by the said partner when he lodged a case against him before the same judge, for false accusation.

That in due course, new facts were discovered in respect of the proceedings instituted against Mr. Bruno Akboute Ahadji, and the Public Prosecutor ordered resumption of the procedure upon new charges. But, the investigating judge continued with the case filed against him by Mr. Bruno Akboute Ahadji, for false accusation, and he issued an order for his arrest. That it was under such circumstances that he lodged his case before the State Prosecutor at the Court of Appeal of Bamako and before the President of the Criminal Chamber of that same Court, for a withdrawal of the arrest warrant made against him; but that these two authorities did not grant his request and preferred to keep completely mute over the matter.

It was as a result of the facts related above that the Applicant seised the honourable Court with his case, for violation of his rights by the Republic of Mali. He also requested that his Application be brought under expedited procedure.

The Republic of Mali contends that the two criminal proceedings which the Malian Judiciary has had to conduct between the Applicant and his partner Mr. Bruno Akboute Ahadji, are concerned with an internal wrangling related to the business of the two persons involved in the case. That the complaint for false accusation brought against the Applicant gave rise to the issuing of an arrest warrant against him because apart from postponing his appearance before the investigating judge on three

occasions, upon the request of his Counsel, he never put in an appearance. That in reaction to the arrest warrant issued against him, the Applicant filed his case before the State Prosecutor and the President of the Criminal Chamber, seeking to take the investigating judge away from the case and to withdraw the arrest warrant made against him. That in response to the application, the State Prosecutor asked that the procedure take its normal course, and issued a statement of indictment in that connection before the Criminal Chamber.

The Republic of Mali contends that the State Judiciary carried out its functions correctly and violated no human rights.

LEGAL ISSUES

- *Admissibility of the application filed by Cheick Abdoulaye Mbengue.*

- *Is an expedited procedure justified in the instant case?*

- *Did the Republic of Mali commit any human rights violation against Cheick Abdoulaye Mbengue?*

- *Is there an abuse of court process by the Applicant?*

DECISION OF THE COURT

1. *On the basis of Article 9(4) of its Supplementary Protocol, the Court declared that the application for human rights violation filed by Cheick Abdoulaye Mbengue is admissible.*

2. *The Court rejected the application for expedited procedure.*

3. *Concerning the various human rights violations alleged by the Applicant, the Court declared that:*

   (a) *There was no human rights violation in terms of the arrest warrant issued by the Malian Judiciary against the Applicant, because, the circumstances under which it was issued do not*

provide any ground for challenging the competence, independence and impartiality of the court that made the arrest warrant;

(b) There was no violation of the right to defence since the Applicant constituted Counsel for his defence throughout the procedure;

(c) It did not find any human rights violation in respect of the applications seeking to withdraw the arrest warrant against the Applicant and also take the investigating judge away from the case, since the Judiciary of Mali granted the requests made by the Applicant within reasonable time-limits.

4. As regards the request concerning resumption of proceedings and annulment of the arrest warrant issued against the Applicant, the Court declares that, in conformity with its consistently held case law, it has no jurisdiction to examine matters brought against decisions of the domestic courts of ECOWAS Member States.

5. The Court declared that Cheick Abdoulaye Mbengue did not commit any abuse of court process by filing his application for human rights violation against the Republic of Mali.

JUDGMENT OF THE COURT

FACTS AND PROCEDURE

1. By Application dated 8th October, 2010 and received at the Registry of the ECOWAS Court of Justice on 28th October 2010, Mr. Cheick Abdoulaye Mbengue, a Senegalese citizen, living in Dakar, Parcelles Assainies, Unité 22, No. 473, but resident in France, Troyes, 25, rue Voltaire 10 000, made a case against the Republic of Mali before the ECOWAS Court, through his Counsel, Maître Malick Mbengue, Barrister at Law, whose address is at 90 rue Abdou Karim Bourgi, Immeuble Serigne Ibrahima Fall, 4e Etage, No. 22, Dakar, Senegal. In the Application lodged, he requested the Court to order: a resumption of the judicial inquiry re-opened and conducted against Mr. Bruno Kaboute Ahadji; an annulment of the arrest warrant issued against him, the Applicant, by the judiciary of the Republic of Mali; and reparation of the damage caused by the Republic of Mali resulting from violation of his human rights pursuant to Articles 2(3), 12 and 14 of the International Covenant on Civil and Political Rights, and Articles 7 and 12 of the African Charter on Human and Peoples' Rights.

2. By another Application dated 13th October 2010, lodged at the Registry of the Court on 28th October 2010, Mr. Cheick Abdoulaye Mbengue requested that his original Application be brought under expedited procedure in line with the provisions of the Rules of Procedure of the Court.

The facts of the case as narrated by the Applicant

3. The Applicant claimed that on 16th June 2008, he brought a case before the Judge of Trial Chamber 2 of the Court of First Instance in Commune IV at Bamako, the capital of the Republic of Mali, for forgery, use of forged documents and breach of trust, against Mr. Bruno Kaboute Ahadji, a French citizen and his business partner, in a limited liability company called Abe Link Mali, specialized in the supply of computer software.

4. That on 14th July 2009, the Judge of Trial Chamber 2 closed the trial opened against Mr. Bruno Kaboute Ahadji, by an order dismissing the case as a non-suit, and declared the charges of forgery, use of forged documents and breach of trust, as made against Mr. Bruno Kaboute Ahadji, as not sufficiently established.

5. He further averred that Mr. Bruno Kaboute Ahadji relied on the fact that the judgment had become final, because it was not appealed, and lodged a complaint against him before the same judge, for false accusation.

6. That in due course, new facts were discovered in respect of the judicial inquiry instituted against Mr. Bruno Kaboute Ahadji, and the Public Prosecutor ordered a resumption of the procedure, upon new charges, in accordance with Articles 194 and 195 of the Criminal Code of Procedure of Mali, following a summing-up for prosecution dated 26th July, 2010 and transmitted to the Trial Judge on 5th August, 2010.

7. That the Trial Judge set aside the said brief of 26th July, 2010 and continued further with the trial on the matter concerning the complaint on false accusation as brought by Mr. Bruno Kaboute Ahadji against him, and issued an arrest warrant against him, Mr. Cheick Abdoulaye Mbengue.

8. That it was in such circumstances that he filed a case before the State Prosecutor at the Court of Appeal of Bamako and before the President of the Criminal Chamber of that same court, for recusal of the Trial Judge and withdrawal of the arrest warrant made against him; but that these two judicial authorities did not grant his requests and preferred to keep completely mute over the matter.

The facts of the case as narrated by the Defendant

9. The Republic of Mali contested the version of facts as related by the Applicant, and contended that in 2006, the Applicant and Mr. Bruno Kaboute Ahadji created in Mali a new business company named Abe link Mali SARL, which unfortunately failed to get off the starting blocks, and thus led to his business partner, Mr. Bruno Kaboute Ahadji, terminating the lease agreement covering the premises of the company, after which he laid off the entire supporting staff, and created a new company called ABELINK Services.

10. That on 18th June 2010, the Applicant, through his lawyer Maître Ousmane Aldiuma Touré, brought a complaint before the Judge of Trial Chamber 2 of the Court of First Instance in Commune IV, Bamako District, and constituted *partie civile* (a civil party seeking damages in a criminal proceeding) against Mr. Bruno Kaboute Ahadji, for breach of trust, forgery and use of forged documents, on the grounds that he folded up the activities of their joint company and diverted the staff for personal gains in his newly formed company.

11. The Republic of Mali affirmed that the trial was conducted to its final conclusion upon an order by the Trial Judge dated 14th July, 2009 dismissing the case as a non-suit; that the case was not appealed even though it was served on all the parties. The Defendant further pleaded that it was at that stage that Mr. Bruno Kaboute Ahadji came before the Trial Judge of the same Chamber and instituted a proceeding for false accusation against the Applicant via Complaint No. 021/09/AS of 11th November, 2009.

12. That, summoned before the Trial Judge on 18th March 2010, the Applicant never appeared in court, whereas he had taken all the trouble to have the proceedings adjourned three times through the services of his Counsel; that it was under such circumstances that the arrest warrant complained of was issued against him, in accordance with Article 118 (1) of the Criminal Code of Mali.

13. The Republic of Mali further contended that in reaction to the arrest warrant issued against him, the Applicant filed his case before the State Prosecutor and the President of the Criminal Chamber of the Court of Appeal of Bamako, seeking the recusal of the investigating judge in the case and the withdrawal of the arrest warrant made against him. That in reply, the State Prosecutor required that the procedure should take its normal course, and thereby ordered a summing-up for prosecution before the Criminal Chamber of the Court of Appeal of Bamako.

THE PARTIES' PLEAS IN LAW

The Applicant's pleas in law

14. The Applicant maintains that the refusal by the judicial authorities of the Republic of Mali to adjudicate on the case constitutes a violation of Articles 2(3), 12 and 14 of the International Covenant on Civil and Political Rights and Articles 7 and 12 of the African Charter on Human and Peoples' Rights, which provide that:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

- **Every individual shall have the right to have his cause heard. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.**

- **Every individual shall have the right to have his cause heard … the right to be tried within a reasonable time by court or tribunal."**

15. The Applicant affirms that following the re-opening of the inquiry, on the ground of new facts, in accordance with Articles 194 and 195 of the Code of Civil Procedure of Mali, the Trial Judge did not respond in any way whatsoever whereas he had a time-frame of 5 days to do so, in the terms of Article 91 of the same Code of Civil Procedure; that such an attitude violates the international instruments cited above.

16. He equally maintains that the inaction of the Malian judiciary as a response to his applications for recusal of the Trial Judge and withdrawal of the arrest warrant made against him constitute a violation of the provisions of both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights as cited in the paragraph above.

17. The Applicant further affirms that the arrest warrant made against him, preventing him from leaving Senegal, his country of origin where he was on holiday, to join his family in France, his country of residence, where he has an employment, and where his elder son is hospitalized and his wife is expecting to give birth to a child through caesarean operation, contributed to the violation of Articles 12 and 13 of the International Covenant on Civil and Political Rights and of the African Charter on Human and Peoples' Rights, which provide, respectively, as follows:

> ***"Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; Everyone shall be free to leave any country, including his own; Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law; Every individual shall have the right to leave any country including his own, and to return to his country; This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."***

18. The Applicant argues that the arrest warrant was dispatched to France by Mr. Bruno Ahadji himself, a complainant and party to the case, and was delivered to his home in the form of a direct summons, which is contrary to the transmission procedures of arrest warrants under the 1974 Co-operation Agreement on Justice Between France and Mali, which

provides in its Article 1 and related provisions that: ***"Judicial and extrajudicial acts in civil, commercial, criminal and administrative matters to be served on persons resident on the territory of either of the Contracting States shall be dispatched between the Ministries of Justice of the two States."***

19. The Applicant affirms that under such circumstances, the Trial Judge had no power to compel him to appear before him, and pleads further that the warrant itself was vitiated by forgery because it was antedated, so as to shift the Public Prosecutor's summing-up for prosecution to an earlier date; that his assertion is clearly corroborated by the differing dates borne by the trial proceedings: 15 July 2010, and by the Office of the Public Prosecutor: 25 August, 2010.

20. Finally, the Applicant contends that the arrest warrant issued against him was made *after* the Public Prosecutor had ordered a resumption of the judicial inquiry; and according to him, this signifies that he had already constituted himself as a *partie civile*, to wit a civil party seeking damages in a criminal procedure, and that since that status was subsisting, there was no issue of false accusation at that stage.

The Defendant's pleas in law

21. The Republic of Mali, the Defendant, affirms that violation of Articles 2(3) and 14 of the International Covenant on Civil and Political Rights and of Article 7 of the African Charter on Human and Political Rights, as invoked by the Applicant, is not proven, and avers that Article 91 of the Code of Criminal Procedure, on which the Applicant relies, is thus worded:

> ***"In his introductory summing-up for prosecution and at any other stage of the judicial inquiry where an alternative brief for summing-up for prosecution may be made, the Public Prosecutor may ask the trial judge to furnish him with all pleadings and processes that may be required for establishing the truth. For such purpose, he may request the case file to be communicated to him, under obligation to return it within 24 hours. Where the trial judge considers that he is unable to carry out the required instructions, he shall make a reasoned order within 5 days following the briefs for prosecution prepared by the Public Prosecutor."***

The Republic of Mali therefore contends that this legal provision was erroneously invoked by the Applicant because it is irrelevant to the re-opening of judicial inquiries on grounds of new charges.

22. The Defendant contests the absence of a follow-up to the requests for recusal of the trial judge and withdrawal of the arrest warrant, and produces as supporting document, a slip dated 29th September, 2010 originating from the Prosecutor General's Department, requesting for the case-file, and another one dated 7th October, 2010 originating from the State Prosecutor in charge of the actual trial. Both requests were followed up on 11th October, 2010 by the actual submission of the case-file on the application for recusal of the judge and withdrawal of the arrest warrant, as well as the summing-up brief referring the case before the Criminal Chamber, equally dated 11th October, 2010. The Defendant further asserts that it was at that stage, when the Criminal Chamber was getting set to adjudicate on the case, that the Applicant brought the matter before this Honourable Court, and concludes that whatever the case may be, no blame may be apportioned to the judicial authorities regarding the processing of the case, much less could the judicial authorities be considered to have violated Article 7 of the African Charter on Human and Peoples' Rights.

23. The Defendant maintains that it is erroneous for the Applicant to invoke Article 12(1), (2) of the International Covenant on Civil and Political Rights and Article 2 of the African Charter on Human and Peoples' Rights. It contends that these texts enshrined the principle of freedom of movement and that in that regard, the Applicant's freedom of movement was never tampered with by the judicial authorities of Mali. That he was simply asked to appear before the investigating judge to answer charges made against him, but he refused to comply with the order on several occasions: on 18th March, 2010, on 17th May, 2010 and on 30th May, 2010, asking the court on each occasion, through his Counsel, that the hearing be adjourned to a later date. The Defendant concludes that it was his refusal to put in an appearance which justifies the issuing, in due form, of the arrest warrant complained of.

24. The Republic of Mali deduces from the foregoing that all the allegations concerning human rights violation submitted by the Applicant before the Court are ill founded and must be dismissed, and consequently, together with the related application asking for damages. Finally, while claiming that the procedure initiated against it by the Applicant is an abuse of court process, and that it seriously discredits the State of Mali and tarnishes its image, the Defendant pleads that it had to incur costs in putting up its defence to the action brought by the Applicant, and as such, asks for the sum of CFAF 10,000,000 (Ten Million CFA Francs) in reparation for all the harms caused the Republic of Mali.

ARGUMENTATION

25. The Court is duty-bound to make a pronouncement on the admissibility of the Application, whether or not the Application is to be brought under expedited procedure as provided for under Article 59 of its Rules of Procedure, and finally, make a declaration on the allegations of human rights violation made by the Applicant.

As to the admissibility of the Application

26. In his Application, Mr. Cheick Abdoulaye Mbengue makes mention of human rights violations allegedly committed against him on the territory of a Member State of ECOWAS, namely the Republic of Mali.

27. Based on that observation, the Court states that since Article 9(4) of the Supplementary Protocol confers jurisdiction on the Court in matters concerning Human Rights and in instances of human rights violation in every Member State of ECOWAS, that power must be applied. The Court deduces thereby that the Application filed by Mr. Cheick Abdoulaye Mbengue on 28th October, 2010 is admissible.

Whether or not the Application is to be brought under expedited procedure as provided for under Article 59 of the Court's Rules of Procedure

28. The Court states that such request must satisfy formally determined conditions laid down in Article 59 of the Rules of Procedure of the Court.

The Court notes however, that the arguments raised by the Applicant to justify the particular urgency of his personal situation or that of his family, and the facts submitted for the consideration of the Court, are irrelevant for granting the request he made.

The Court therefore dismisses the application for expedited procedure as requested by the Applicant, pursuant to Article 59 of the Rules of Procedure of the Court.

As to the allegations of human rights violation made by the Applicant

29. Mr. Cheick Abdoulaye Mbengue maintains that the malfunction of the judiciary of the Republic of Mali and the refusal by certain State judicial authorities of Mali to adjudicate on applications he submitted to them contributed to the violation of his human rights under Articles 2(3) and 14 of the International Covenant on Civil and Political Rights and Article 7 of the African Charter on Human and Peoples' Rights, in whose terms:

"Each State Party to the present Covenant undertakes:

(d) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(e) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(f) To ensure that the competent authorities shall enforce such remedies when granted.

- **Every individual shall have the right to have his cause heard. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.**

- **Every individual shall have the right to have his cause heard … the right to be tried within a reasonable time by court or tribunal."**

30. The Applicant equally affirms that owing to the malfunction of the judiciary of Mali, his human rights arising from Article 12 of the International Covenant on Human and Peoples' Rights were violated. The said Article 12 provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; Everyone shall be free to leave any country, including his own; Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law; Every individual shall have the right to leave any country including his own, and to return to his country."

31. The Applicant finally alleges violation of his human rights on the basis of the provisions of Article 14 of the International Covenant on Civil and Political Rights as referred to above, and upon Articles 5 and 12 of the African Charter on Human and Peoples' Rights, again as a result of the malfunction of the judiciary of Mali, which, in his estimation, had breached the principle of equality of all before the law courts and tribunals and also violated his human dignity and freedom of movement and choice of residence.

32. The Court notes that a close look at the complaints made in support of the allegations of human rights violations brought by Mr. Cheick Abdoulaye Mbengue reveals that none of them is relevant Indeed.

33. The arrest warrant issued against the Applicant is equally the only channel for resolving the impasse in a trial proceeding where the indicted person does not comply with the summons to appear before the judge, as obtained in the Applicant's case. Merely because the summons was transmitted through a channel that is certainly unusual or unauthorized, cannot solely, on its own, amount to human rights violation.

34. The complaints made by the Criminal Chamber concerning the circumstances of the issuing of the warrant do not suffice to contest the jurisdiction, independence and impartiality of the trial court which issued the warrant complained of, for those complaints have to do with

professional error**.** More relevant is the fact that the judge who made the warrant was competent to do so, and barring any additional declaration that may come from the Malian State authorities, the independence and impartiality of the judge cannot be challenged.

35. The Applicant constituted counsel before the courts of Mali in the procedures instituted against him, so he cannot duly claim that his rights to defence were not respected, or that his cause was not fairly and publicly heard.

36. The judiciary of Mali responded in reasonable time to the requests for withdrawal of the arrest warrant and recusal of the investigating judge of Trial Chamber 2 of the Court of Commune IV of Bamako, as evidenced by the summings-up for prosecution made by the Prosecutor General and the State Prosecutor at the Court of Appeal of Bamako. Equally, the case file of the trial proceedings conducted against the Applicant at the Criminal Chamber were actually transmitted to the Criminal Chamber, and the latter did hear the case it was seised with before the instant proceedings.

37. On the whole, since no human rights violation could be established against the Republic of Mali, the Court dismisses the requests for monetary reparation formulated by the Applicant, which he connects to human rights violations he has failed to establish before this Honourable Court.

Regarding the requests for re-opening the judicial inquiry and for the annulment of the arrest warrant issued against the Applicant

38. The Court observes that the requests to re-open the judicial inquiry and annul the arrest warrant derive from the sphere of the domestic judicial competence of the Republic of Mali, and that in that respect, the Court recalls its consistently held case law and declines jurisdiction on any application brought seeking to overturn decisions of the domestic courts of ECOWAS Member States; this Honourable Court is neither an appeal court nor a court of cassation of the domestic courts of the ECOWAS Member States **(refer to Judgment No. ECW/CCJ/APP/05/06 of 22nd March, 2007)**. Consequently, the Court dismisses all those requests as inappropriate and unjustified.

Regarding the counter-claim made by the Republic of Mali

39. The Republic of Mali claims that the action brought against it by the Applicant seriously harmed its image and esteem, and that it incurred costs as a result of having to defend itself in connection with the case. It therefore asks for reparation to the tune of CFA F 10,000,000 (Ten Million CFA Francs).

40. The Court notes, after closely examining the circumstances of the case, that in the light of that request for damages, there is no right violation in the Applicant dragging the Defendant before this Honourable Court. The Court deduces thereby that it shall be appropriate to dismiss the requests relating to reparation of harm and payment of costs concerning court proceedings, as submitted by the Republic of Mali.

FOR THESE REASONS

41. **THE COURT,**

Adjudicating in a public hearing, after hearing both Parties, in a matter on Human Rights, in first and last resort;

In terms of formal presentation

- **Declares** that the Application brought by Mr. Cheick Abdoulaye Mbengue is admissible;

- **Dismisses** his request seeking to bring the said Application under expedited procedure in accordance with Article 59 of the Rules of Procedure of the Court.

In terms of merits

- **Declares** that the allegations of human rights violations made by the Applicant against the Republic of Mali were not established;

- **Declines** jurisdiction to adjudicate on the applications seeking an order of the Court to compel the Republic of Mali to re-open the judicial inquiry referred to and to annul the arrest warrant issued against the Applicant;

- **Dismisses** as ill-founded the requests for damages made by the Applicant;

- **Equally dismisses** as not justified, the requests for damages made by the Republic of Mali;

- **Asks** each Party to bear its costs.

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

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*

HON. JUSTICE BENFEITO MOSSO RAMOS - *MEMBER*

HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY
MAÎTRE ATHANASE ATANNON - *REGISTRAR.*

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

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, THE 19TH DAY OF DECEMBER, 2011

SUIT NO: ECW/CCJ/APP/07/11
RULING NO: ECW/CCJ/RUL/10/11

VALENTINE AYIKA - ***PLAINTIFF***

V.

REPUBLIC OF LIBERIA - ***DEFENDANT***

COMPOSITION OF THE COURT:
HON. JUSTICE HANSINE N. DONLI - *PRESIDING*
HON. JUSTICE BENFEITO M. RAMOS - *MEMBER*
HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **C. O. EJEZIE ESQ** - *FOR THE PLANTIFF*
2. **COUNSELLOR M. WILLIAMS WRIGHT,** *WITH* **COUNSELLORS EMMANUEL B. JAMES, ROSE MARIE B. JAMES** *AND* **A. KANIE WESSO** - *FOR THE DEFENDANT*

- Limitation period -How construed, non-exhaustion of local remedies -Effect, Domestic Pendency of action -Effect on jurisdiction.

SUMMARY OF FACTS

The Plaintiff, a national of the Federal Republic of Nigeria entered the Republic of Liberia on the 9th of September, 2006 with the sum of US$508,200.00 which was seized by the Liberian authorities for failing to declare the stated sum as required by the Laws of Liberia. Subsequently, the Plaintiff was brought before a Court in Liberia which formally confiscated the money pending the outcome of investigations. The investigations lasted from 2006 to 2009 after which the Liberian Attorney General wrote a letter to the Central Bank of Liberia confirming that investigations on the matter had been concluded in the Plaintiff's favour and advised the bank to release the money to the Plaintiff less the penalty sum for non-declaration of the money. The said letter was later withdrawn. The Defendant refused to return the money to the Plaintiff. Whereupon the Plaintiff brought this application before this Court seeking for an order of the Court directing the Republic of The Gambia to release the money to him as the confiscation has affected his business adversely.

The Defendant relying on Article 9(3) of the 1991 Protocol of the Court as amended raised a preliminary objection urging the Court to dismiss the Plaintiffs' action grounds that the action was commenced more than three years after the cause of action arose, that the Plaintiff had not exhausted local remedies and that an action is pending before the Supreme Court of Liberia.

LEGAL ISSUES

1. *When did the cause of action arise?*

2. *Whether in view of Article 10 (d) of the Protocol as amended, this Court can adjudicate on a matter pending before the Supreme Court of Liberia?*

3. *Whether the exhaustion of local remedies is a prerequisite for an action to be heard by the Community Court of Justice, ECOWAS?*

4. *Whether in the circumstances of the present application, this Court can apply Article 59 (1) of the Rules.*

DECISIONS OF THE COURT

The Court rejected the application for dismissal and held:

1. *That the action was not statute barred as the cause of action arose in January, 2009 after police investigations.*

2. *That the pendency of an action before the Liberia Supreme Court is no bar to proceedings before this Court.*

3. *That the exhaustion of local remedies is not a prerequisite for coming before the Community Court of Justice, ECOWAS.*

On the application for expedited procedure under Article 59(1) of the Rules, the Court held that pleadings having been filed and exchanged, the matter is ripe for hearing and as such there is no need for an order of expedited procedure.

RULING OF THE COURT

1. The Plaintiff herein is a national of the Federal Republic of Nigeria. The Defendant is a member state of the Economic Community of West African States (ECOWAS). The brief facts of this case are as follows. On or about 9th September 2006, the Plaintiff arrived in Monrovia, the capital city of the Republic of Liberia, aboard a flight from the Federal Republic of Nigeria. He had on his person the sum of US$508,200.00 which was seized by the authorities of Defendant because the Plaintiff had not declared it as required by the laws of the country.

2. Subsequently, by an order dated 30th November 2006, the Circuit Court in Liberia formally confiscated the money. But the court's record is clear that the order was sought for and granted without reference to the Plaintiff herein. The proceedings before this court further shows that the matter did not end with the court order. It is clear investigations continued into the source of the money, the purpose for which it was brought into the country as well as the ownership thereof. The receipt from the Central Bank of Liberia dated 11th September, 2006 confirms this. These investigations continued from 2006 through 2009 as confirmed by correspondence dated 10th December, 2008 (Annexure B), 27th December 2008 (Annexure C), both of which form part of Plaintiff's pleadings in this case. By a letter dated 23rd January 2009, the Defendant's Minister of Justice and Attorney-General wrote a letter to the Central Bank of Liberia confirming that investigations into the confiscated amount had been concluded and it was in favour of the Plaintiff so the bank should release the money to him, less the penalty for non-declaration of the money.

3. The Defendant said that this letter was withdrawn the very next day when it was discovered that it had been written on misrepresented facts and that the Central Bank of Liberia was directed to continue to hold the money pending further investigations.

4. In the meantime the record discloses that an action is pending before the Supreme Court of Liberia in respect of the same subject-matter.

5. The foregoing facts are largely undisputed. The issue of what interpretation to put on them has brought about this conflict. On one hand the Plaintiff

believes that the Defendant has unfairly treated him and has no justification to hold on to his money; the Defendant on the other hand believes the Plaintiff was in breach of the country's currency laws, albeit prima facie, and so they were entitled to confiscate the money.

6. The Plaintiff has therefore brought this action seeking, inter alia, an order directing the Defendant to release the amount to him. The Plaintiff averred that the seizure of the money from him ***"has crippled his businesses in Liberia and Nigeria as the money is his businesses' operating capital"***. For that reason, the Plaintiff applied for the case to be placed on the expedited hearing list in order to save the Plaintiff's workmen from being retrenched.

7. For their part the Defendant urged the court to dismiss the action for stated reasons which are:

   i) The action is statute-barred since it was commenced more than three years after the cause of action arose.

   ii) The action is pending before the Supreme Court of Liberia in a case where domestic laws are clearly applicable.

   iii) The action before this court could not proceed as the Plaintiff has not exhausted local remedies.

8. At its sitting at the Supreme Court building at Porto Novo, Republic of Benin, on the 22nd of November 2011, the court allowed both applications to be argued, namely the one for expedited hearing as well as the one to dismiss the action. The court thus proceeds to deliver its opinions on the applications. First the application to dismiss. The Defendant relied on Article 9(3) of the 1991 Protocol on the Court, as amended by Article 3 of the Supplementary Protocol of 2005, whereby a right of action becomes barred three years after the date when it accrued to the party.

9. The Defendant contends that the right of action, often referred to as the cause of action, arose on the 9th of September 2006, when the money was seized from the Plaintiff in Monrovia. The Plaintiff contends otherwise. He says that the cause of action arose in 2009 when the security agents in Liberia concluded their investigations. The question that logically arises from these two positions is this: <u>when did the cause of action arise in this case?</u>

10. The expression used in Article 9(3) of the Protocol is 'right of action', which means the right to bring a specific case to a court or tribunal. That right is dependent on whether as of the date the action is brought to court all the necessary facts are available and any prerequisite legal or factual situations have been satisfied. Jurists have found it difficult to define what a cause of action is. **Edwin E. Bryant, in The Law of Pleading under the Codes of Civil Procedure *170 (2d ed. 1899)*** defined it to be **"a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts maybe – (a) a primary right of the Plaintiff actually violated by the Defendant; or (b) the threatened violation of such right, which violation the Plaintiff is entitled to restrain or prevent or (c) it may be that there are doubts as to some duty or right, or the right be clouded by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that he may safely....enjoy his property."**

11. The record shows that the money was initially seized and lodged with the Central Bank of Liberia pending investigations. This extract from the bank's receipt is self-explanatory and it reads: 'On September 11, 2006, the said amount was taken to the Central Bank of Liberia for counterfeit verification. The verification exercise proved that the money was not counterfeit. However, the money is being safe-kept at the Central Bank of Liberia while the probe is being conducted to determine the origin, the ownership and the purpose of the funds.' On December 24, 2008, the police investigation division submitted their report to the Deputy Inspector General of Police. Upon receipt of the investigative report, the Deputy Inspector General of Police forwarded same to the Ministry of Justice by letter dated January 6 2009. On 23rd January 2009, the Minister of Justice wrote to the Central Bank of Liberia on the result of the investigations and directed them to release the money to the Plaintiff. All these facts are undisputed. What the Defendant said, however, was that the last letter from the Minister of Justice was withdrawn on the 24th January, 2009 to enable further investigations to be conducted.

12. From the foregoing facts, it is clear that the seizure, and/or confiscation of the money from the Plaintiff in September 2006 was not a final act, it was just to safeguard the funds whilst investigations proceeded. It was the

Defendant who had made the conclusion of investigations 'sine qua non' to a final decision on the fate of the money. Thus not until the police concluded their investigations and submitted their report to the Ministry of Justice, no cause of action lay to any party. The official notification to the Ministry of Justice by the police that their investigations were over was sent by letter dated 6th January 2009. It is the court's opinion that following the police investigations into all criminal elements that exonerated the Plaintiff herein, a cause of action in civil law arose thenceforth. It should be stated that where a violation of a right continues, a cause of action lies so long as the infringement persists. Thus a person detained will have a cause of action against his galore any day that the detention continues, and time will not run from the date of the first detention. Hence the facts and circumstances of each particular case will have to be examined in determining when the cause of action arose.

13. The second limb of the argument was that there is a pending case before the Supreme Court of Liberia in respect of the same subject-matter so the Plaintiff should go and pursue it and should not be allowed to engage in forum shopping. In his submission, Counsel for the Plaintiff referred to Article 10(d) of the 1991 Protocol on the court as amended by Article 4 of the 2005 Supplementary Protocol and argued that under that provision, this court cannot take a case in human rights only when the same issue is pending before an international court. That submission is correct. The Supreme Court of Liberia, and for that matter any other domestic court in member states, does not qualify as international court within the meaning of Article 10(d)(ii) of the Protocol, as amended.

14. The final leg of the submission was that the court should not entertain the action because the Plaintiff had failed to exhaust local remedies available to him in Liberia. This is an issue on which jurisprudence abounds in this court. The court has decided in a long line of cases that the exhaustion of local remedies is not a requirement of the community texts before an action could be instituted before it. See for instance the court's decision on this issue in the **case of OCEAN KING NIGERIA LTD. V. REPUBLIC OF SENEGAL, Suit no ECW/CCJ/APP/05/08** delivered on **8th July, 2011**.

15. Now to the application for expedited procedure brought under Article 59 of the Rules of Court. The key reason for the application is that it is the Plaintiff's capital which has been seized by the Defendant and has adversely affected his businesses. The Defendant opposed the application arguing that there was no urgency in this matter. This is because since the money was seized in 2006 the Plaintiff and his lawyers had made no serious effort to expedite the action they initiated before the court in Liberia. That action is still pending before the Supreme Court of Liberia. The Plaintiff responded that since the Defendant did not respond to the Plaintiff's affidavit, they are deemed to have admitted it.

16. Article 59(1) of the Rules requires that in exceptional case, the court may grant an expedited procedure where the particular urgency of the case calls for it. There are no hard and fast rules to determine cases that may be heard under this procedure; each case is to be decided upon its own peculiar facts and circumstances. Under an expedited procedure, the court has the power to abridge the time to file pleadings, or even to dispense with some of the pleadings if it is deemed necessary. See Article 59(3) of the Rules. And once the defence has been lodged the court could immediately fix a hearing date if it grants an application for expedited hearing.

17. In the instant case, all the pleadings had been filed already prior to the hearing of the application. Thus the application has been overtaken by subsequent events. It is the court's opinion, therefore, that the case is ripe for hearing thereby rendering a decision on the application for expedited hearing otiose. The court will accordingly fix the case for hearing.

18. In conclusion, the court rejects the application to dismiss the suit for reasons explained above namely that the cause of action arose in January 2009 after police investigations so this action is not time barred; that the pendency of an action before the Liberia Supreme Court is no bar to proceedings before this court; and, lastly that the exhaustion of local remedies is not a prerequisite in this court. It also decides that since the case is ripe for hearing the application for expedited hearing is rendered irrelevant, and any decision will serve no useful purpose.

19. There is no order as to costs.

THIS RULING HAS BEEN DELIVERED IN PUBLIC SITTING OF THE COURT AT ABUJA ON 19TH DECEMBER, 2011 IN THE PRESENCE OF THEIR LORDSHIPS:

Hon. Justice Hansine N. DONLI -*Presiding*

Hon. Justice Benfeito M. RAMOS -*Member*

Hon. Justice Anthony A. BENIN - *Member*

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

[ORIGINALTEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 26TH DAY OF JANUARY, 2012

SUIT NO: ECW/CCJ/APP/28/11
RULING NO: ECW/CCJ/RUL/01/12

EL HAJI MAME ABDOU GAYE - ***PLAINTIFF***
V.
THE REPUBLIC OF SENEGAL - ***DEFENDANT***

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:

ATANASE ATANNON - REGISTRAR

REPRESENTATION TO THE PARTIES:

1. **NIANG PAPA KHALY *(ESQ.)*** - *FOR THE APPLICANT*
2. **MAFALL FALL** - *FOR THE DEFENDANT*

- Expedited procedure - Urgency - Detention - Human right

SUMMARY OF FACTS

By an application received on 31st October, 2011 at the Registry of the Court, Mr. Elhadj Mame Abdou Gaye brought the Republic of Senegal before the Court for human rights violation resulting in his arrest and detention on the charges of criminal association, money laundering and terrorism financing. By another application dated 31st October 2011, he requested that his case be brought under expedited procedure on the basis of Article 59 of the Rules of Procedure of the Court.

In its response to the application filed by Elhadj Mame Abdou Gaye, which was dated November 2011 and lodged at the Registry of the Court on 15th November 2011, the Republic of Senegal refuted the allegations made by the Applicant and asked the Community Court of Justice to dismiss the application for expedited procedure, on the grounds that:

- *The Applicant did not disclose any pertinent reasons for his application, and that the application requires no utmost urgency;*
- *The Applicant is entitled to his rights regarding legal detention, and that the hearing of the case is still following its normal course.*

LEGAL ISSUES

Does the detention of the Applicant Elhadj Mame Abdou Gaye warrant that his Application be brought under expedited procedure, as provided for in Article 59 of the Rules of Procedure of the Court?

DECISION OF THE COURT

The Court held:

That detention constitutes a limitation to the personal liberty of an individual, which is a fundamental human right, and therefore there is a call for urgency in adjudication where there is an alleged violation of that right.

Relying on Article 59 of the Rules of Procedure of the Court, the Court granted the Applicant the request for expedited procedure.

JUDGMENT OF THE COURT

1. By Application registered at the Registry of the Court on 31st October 2011, Mr. El Hadji Abdou Cheikh Mame Gaye, a Senegalese national, residing at Yoff Apecsy in Dakar, Republic of Senegal, and having as Counsel, Niang Papa KHALY (Esq.), Lawyer registered with the Bar in Senegal, brought a case against the State of Senegal, for the violation of his human rights, because he was arrested and put behind bars, up till this day, under the charges of being a member of a gang, money laundering and financing of terrorism.

2. Applicant solicits that may it please the Court;

   - To Declare and adjudge that the accusations put against him, as well as his detention, for the past four months constitute a manifest violation of his fundamental human rights;

   - To order his immediate release from detention, while hearing of the case continues;

   - To award costs for the reparation of the prejudice suffered.

3. By another Application filed the same day at the Registry of the Court, Mr. El Hadji Abdou Cheikh Mame Gaye solicits that his case be heard under an expedited procedure, pursuant to the provisions of Article 59 of the Rules of Procedure of the Court.

   At the out-of-seat Court hearing that was held in Porto-Novo, Republic of Benin, on 14th November 2011, the Court, after taking the submission of Counsel to Applicant on the expedited procedure, as well as the Republic of Senegal 's written submission on the same issue, gave an interim ruling, on the following grounds:

   - ***"...The Court orders that the case be heard under the expedited procedure and that parties must appear in Court on 1st December 2011, at 10.00 am, for hearing;***

   - ***The Court further orders that parties must file all submissions and exchange written addresses by Friday 25th November 2011;***

- ***Parties are therefore to appear on the said date;***

- ***The Court reserves its pronouncement as to costs"***

4. The case was finally heard at the Court session of 8-a December 2011, with Counsel to Applicant and the State Judicial Officer of Defendant in attendance.

FACTS

The facts according to Applicant

5. Applicant avers that following exchanges of information between the Senegalese Police Authorities and their foreign counterparts, the Senegalese Police Authorities have grouped him with members of extremist organizations, some of whom took part in terrorist attacks in Somalia, while others had links with an extremist Islamic Group based near BAFATA, in the Republic of Guinea Bissau.

6. He explains that, going by the accusation from the Senegalese Police Authorities, some individuals belonging to those terrorist groups have entered Senegal and are managing big companies, as a cover-up, and that they are likely to use Senegal as their logistic base.

   He further claims that investigation conducted in that regard, on the basis of telephone call log led the Gendarmerie to erroneously take him for a third party who also lives in Dakar, and who was in contact with a telephone number identified by foreign intelligence agents as being the one belonging to both Somali terrorist groups and members of the AQMI terrorists who are operating in northern Mali; thus they effect his by Gendarmes, who posed as staffs of the telephone services provider called Orange.

7. Applicant also claims that he was placed in police custody for nine days, which constitutes a violation of his human rights.

   He adds that on 18th May 2011, upon request by the State Prosecutor, the Dean of the Investigating Judges found him guilty and placed him under a committal order;

8. Applicant further claims that neither the preliminary investigations nor the proper investigation of the case could lead to a material fact incriminating him, and concludes that he was unjustly arrested and detained; consequently, he should be set free.

The facts according to Defendant

The Republic of Senegal submits that:

9. The Investigating Department of its National Gendarmerie got information, within the framework of International Police Cooperation against criminal activities (Interpol) relating to a purported presence of some members of some terrorist groups on its territory, who were in constant communication with other extremist religious groups of their likes based in Netherlands, Germany, United Arab Emirates, USA, Spain and Guinea Bissau;

10. It was the investigations conducted after reception of the intelligence information, together with some other incriminating facts that led to the arrest of Mohammed Gassama, Said Ali Mohamed and Mame Abdou Gaye (the Applicant).

11. Defendant further explains that the investigations revealed that Mr. Mame Gaye and the persons arrested at the same time as him were in constant touch with one Abu DIAZ suspected to be in constant touch with armed terrorist groups such as Al-Qaida in Maghreb, and AQMI in Northern Mali.

12. The State of Senegal further submits that Applicant and the other suspects were placed in police custody, within the framework of the preliminary investigations, pursuant to the provisions of Article 14 of the Senegalese Code of Criminal Procedure, and were presented to the State Prosecutor, who sent a brief dated 13rd May 2011, to the Doyen of the investigating judges, pursuant to Article 71 of the Senegalese Code of Criminal Procedure, as well as **Law No. 2009 - 16 of 2nd March, 2009 on money laundering**; thus the investigating judge indicted Mr. Mame Gaye, pursuant to Article 101 of the Senegalese Code of Criminal Procedure, in the presence of his Counsels **Niang Papa KHALY (Esq.), and another one called SCP Faye et Diallo**.

13. Finally, Defendant explains that Mr. Mame Gaye applied for his provisional release, which was turned down by orders from the investigating judge, and that these orders were each time confirmed by the investigating chamber.

Legal arguments by Parties

Arguments by Applicant

Applicant presents arguments drawn from the jurisdiction of the Court, followed by the violation of universal human rights and Community Laws, and the lack of criminal charges which are materially brought against him.

On the jurisdiction of the Court

14. Applicant evokes Article 10 (d) of the Supplementary Protocol of 2005 on the ECOWAS Court, which grants to it Community jurisdiction over cases of human rights violations that occur in any ECOWAS Member State.

    He further cites Article 5 (4) of the European Human Rights Convention, which provides thus:

    > ***"Any person who is deprived of his freedom, by arrest or detention, has the right to bring a case before a Tribunal, for the determination of the legality of his detention, within brief period, and to order his release, if the arrest is arbitrary."***

15. Applicant submits that he did not benefit from the presumption of innocence, as enshrined in Article 6 (2) of the human rights Convention, which provides that: ***"Any accused person is presumed innocent until he is legally proven guilty."***

16. He blames the Police Authorities in Senegal of deceiving him, by introducing themselves as Staffs of the Mobile Telephone services provider, ***"Orange"*** in order to effect his arrest, and accuses the investigators of using abusive and humiliating practices, in the discharge of their duty.

17. He claims that having kept him in custody for 192 hours, the Police Authorities have violated Article 55 of the Senegalese Code of Criminal Procedure, which provides that:

> **"The period of custody (48 hours fixed under the present Article) is doubled in case of crimes committed to undermine the security of the Nation; it is also doubled for crimes committed during the period of State of Emergency, when the State is under siege, or when enforcing the provisions of Article 47 of the constitution, without making the two cases of doubling the period run concurrently."**

Thus, Applicant claims that he was kept under police custody for 9 days whereas the law provides for a maximum of 196 hours, this, he believes is a violation of his human rights.

18. Applicant also invokes Articles 2 (3) and 14 of the International Covenant on Human and Political Rights, as well as Article 7 of the African Charter on Human and peoples' Rights.

He claims that the State of Senegal has violated the universal human rights as well as Community Laws, as enshrined in these international legal instruments on human rights protection.

He notably cites Article 6 of the African Charter on Human and peoples' Rights, Article 9 of the International Covenant on Human and Political Rights, which forbid arbitrary arrest.

19. Mr. Mame Gaye equally alleges the violation of Articles 238 and 239 of the Senegalese Code of Criminal Procedure, in the sense that the charge of criminal acts, which necessitate a co-action of material facts, whether committed or shall probably be committed, was not established against him, and further denies having any link with the indicted persons in this case.

20. Applicant equally contests the accusation of taking part in money laundering through the company called SALAMA INVESTMENT GROUP, and claims that the only telephone calls cannot justify the existence of such a crime.

21. He then concludes by affirming that the accusation levelled against him is not founded on any objective material fact and that by arresting and detaining him, the State of Senegal has violated his fundamental freedom.

22. He finally invokes Article 5 (5) of the European Human Rights Convention, to justify his relief sought as per reparation for the prejudice suffered, which he puts at the total sum of 380,000,000CFA Francs.

Arguments by the Defendant

In its Memorial in Defence that it filed on 25th November 2011, the State of Senegal raises some preliminary objections relating to the jurisdiction of the Court, and admissibility of the case brought before it by Mr. Mame Gaye.

On the lack of jurisdiction of the Court

23. Defendant claims that the Court cannot interfere either in on-going or already decided cases of national courts of ECOWAS Member States.

    In support of this claim, Defendant cites judgments **ECW/CCJ/APP/03/07 of 22 March, 2007** in the **Moussa Leo Keita v. the Republic of Mali**, **ECW/CCJ/APP/01/06 of 26 June 2007** in the **Alhaji Hamani Tidjani v. Federal Republic of Nigeria** cases, in which the Court declares that:

    " ...it does not have jurisdiction to review the decisions of the national courts."

    and also declares that:

    "...it is not an Appeal Court nor a Court of cassation against the decisions given by the national courts."

24. The State of Senegal also claims that within the framework of the case initiated against Mr. Mame Abdou Gaye, the competent national courts in Senegal have rendered some decisions, and that Applicant exercised his right of appeal against such decisions.

Consequently, Defendant concludes that the Honourable Court lacks jurisdiction over the instant case, which is still pending before the national courts in Senegal.

As to the merit of the case

The State of Senegal believes that the violation of human rights, as alleged by Applicant, is not founded, and avers that the arrest and detention of Applicant were carried out, pursuant to legal provisions in use in Senegal.

25. Concerning the police custody, where Applicant was put, Defendant avers that it took place within the legally stipulated time-limit, and support this claim with the minutes of the preliminary investigation No. 228 of 13th May 2011, adding that this measure started on 9th May 2011, and ended on 17th May 2011, at noon, the very day Mr. Mame Abdou Gaye was taken before the State Prosecutor.

26. With regard to the preliminary detention effected on Mr. Mame Abdou Gaye, the Republic of Senegal avers that this detention was decided by judicial authorities, pursuant to the provisions of the Senegalese Code of Criminal Procedure.

27. While insisting on the regularity of the preliminary investigations and the procedure followed in the proceedings initiated against Mr. Mame Abdou Gaye, Defendant finally cites the Judgment in the **Hamani Tidjani v. Federal Republic of Nigeria** case, where the Court declares that:

> ***"... even if there were some defect in the procedure, or if there was abuse in a certain manner, Applicant Hamani Tidjani had the opportunity to seek redress, within the framework of the existing laws and procedures recognised in the hierarchy of the national courts of the Federal Republic of Nigeria."***,

before concluding that this jurisprudence of the Court could be opposed to the needs of Applicant.

Legal analysis of the Court

On the jurisdiction of the Court

28. The State of Senegal raises some preliminary objections relating to the jurisdiction of the Court, on the ground that within the framework of the proceedings initiated against Mr. Mame Abdou Gaye, are still pending before the competent national courts in Senegal, and that some decisions have already been rendered.

    To this effect, the Court holds that, it is true, it does not have jurisdiction to review the decisions rendered by the national courts of Member -States, yet, it is still of the opinion that a case that is pending before a national court of a Member State does not have any influence on its jurisdiction on cases of human rights violations; it declares that the only limit to this jurisdiction is as prescribed under Article 10 (d) (ii) of the Supplementary Protocol on the Court, which bars it from entertaining a case which is already taken before another competent International Court.

29. The Court equally recalls its jurisdiction, which indicates that the only allegation of human rights violations in a case brought before it suffices to formally confer upon it jurisdiction, without prejudging the veracity of the alleged facts .

    The Court also notes that Applicant accuses the Republic of Senegal of violating his human rights notably the right of the presumption of innocence, the right to freedom; and in support of his claim he invokes human rights protection legal instruments, namely the International Covenant on Human and Political Rights, of the African Charter on Human and peoples' Rights and the European Human Rights Convention.

30. Consequent upon the preceding grounds the Court rejects the preliminary objections raised by Defendant declares its jurisdiction to examine the human rights violation case that Mr. Mame Abdou Gaye brought before it, against the State of Senegal.

As to merit.

31. Applicant alleges that he was arbitrarily arrested and detained by the Police and Judicial Authorities of the State of Senegal, who thus violated his right to freedom, as enshrined in international legal human rights protecting instruments.

Consequently, Mr. Mame Abdou Gaye solicits from the Court to kindly,

- On the principal, strike out, purely and simple, the proceedings initiated against him, before the national courts in Senegal, for abuse of procedure, and absence of any objective ground;
- Subsidiarily, annul the said procedure, for lack of form;
- and finally, declare that it offers guarantees for certain representation and therefore order his release.

32. The two reliefs seeking annulment of the criminal procedure shall be analyzed as one, and under the following headings:

On the relief seeking annulment of the criminal procedure

33. Applicant solicits the annulment of the criminal proceedings (initiated against him before the courts in Senegal) on the ground that his arrest and detention are arbitrary and for lack of crime materially committed; He claims that the Police Authorities introduced themselves to him as staffs of the Mobile Telephone Provider **"Orange"** in order to effect his arrest, and that this was a humiliating procedure, thus violating the principle of presumption of innocence, as enshrined under Article 6(2) of the UN Human Rights Convention.

34. At this level of the Application, the Court notes that Applicant does not complain of any violence meted out on him, nor of any act likely to have caused injury to his physical body, or infringing on the dignity of his person; and that the fact that the investigating police officers had to disguise in staffs of a telephone services provider, or using any other similar manner to effect his arrest, for the obvious reason of discretion that the investigation requires, cannot, on itself constitute an infringement upon the dignity of the person arrested.

35. The Court is also of the opinion that the principle of presumption of innocence that Applicant invokes, does not forbid the police authorities of a State, to arrest a person suspected to have committed a criminal act, and that this is just the case of Applicant Mame Abdou Gaye.

36. Thus, the Court holds that his arrest does not constitute a violation of the principle of presumption of innocence.

On the detention of Applicant

37. Applicant claims that he was put under police custody for 9 days, and that this constitutes a violation of his rights, name the right to freedom; thus he invokes Articles 6 of the African Charter on Human and Peoples' Rights; 5 (1) of the International Covenant on Civil and Political Rights.

38. He further claims that he has been in police custody for 4 months without any serious charges being brought against him, thus this detention is arbitrary.

39. The Court recalls Article 6 of the African Charter on Human and Peoples' Rights, which provides thus: ***"Every individual has the right to freedom and security. None can be deprived of his freedom except on the grounds and conditions that are determined under the law; in particular, none can be arrested arbitrarily."***

    This is the same provisions under Article 5 (1) of the European Human Rights Convention, and 9 of the International Covenant on Civil and Political Rights.

40. The Court notes that at the end of the preliminary investigations, conducted by the Police Authorities, Mr. Mame Gaye was taken before the judicial authorities of the Republic of Senegal, notably State Prosecutor, who prepared a brief for grave presumptions of association of criminals, terrorism financing, association, agreement and complicity to finance terrorism, money laundering, agreement for money laundering, then before the Doyen of the Investigating Judges, who indicted him on all these charges that are punishable under the Senegalese Laws, thus issuing a committal order against him.

41. The Court equally notes that Applicant was assisted by his Counsels, at every stage of the judicial procedure, and severally exercised his right of appeal against the decisions taken by the judicial authorities; notably the appeal for provisional release.

42. Thus, the Court holds that owing to the above facts as exposed, the arrest and detention of Mr. Mame Gaye were carried out on legal grounds, and that (despite the contestation that Applicant is opposing to this detention, based on the charges brought against him) this detention is not arbitrary, pursuant to the international legal instruments invoked, and that it is the duty of this Court to examine this relief sought.

In this regard, the Court recalls its jurisprudence, in the **Mamadou Tandja v. The Republic of Niger** case, wherein Applicant's detention was arbitrary, because it was effected devoid of any legal ground. Judgment **ECW/CCJ/JUD/05/10 of 08th November, 2010** is in contrast to the instant case, to demonstrate the existence of legal grounds for the deprivation of Applicant's freedom.

On the guarantee for Applicant's representation

43. Applicant claims that he offered the guarantee for his representation, for provisional release, which was severally rejected.

44. On this issue, the Court wishes to point out that it is not its business to examine and appreciate, on behalf of the judge in the national court, the quality and the extent of the guarantees that a detainee must give; the Court insists that it is the duty of the judge that the case is assigned to, to examine the facts before him, in order to either grant or reject the guarantee of representation, and in fine, whether or not to grant the provisional release.

45. In the case of Applicant Mame Gaye, the Court notes that he was presented with the opportunity to present to the judge in charge of the case, the necessary guarantee, in support of his relief seeking a provisional release, and that when this request was rejected, he equally had the opportunity to exercise the right of appeal against the decision of rejection, which were confirmed by orders of rejection by the investigating chamber.

46. The Court recalls its constant jurisprudence, and declares that: **"it is not a Court of appeal against the decisions rendered by national courts of Member States."** And that even if it has jurisdiction to examine cases of human rights violations within the framework of the procedure before a national court, in order to ensure that the rights of the indicted persons have been respected, its action is strictly limited to the examination of the alleged violations.

47. The Court notes that in the instant Case, the arrest and detention of Applicant were effected within the framework of the criminal proceedings, for acts which are punishable by legal provisions of the Republic of Senegal;

48. Hence, the Court adjudges that compared to the **Judgment ECW/CCJ/JUD/04/07**, in the **Alhadji Hamani Tidjani *v* Federal Republic of Nigeria** case, the arrest and detention of Applicant Mame Gaye are not arbitrary, and consequently, do not constitute a violation of Applicant's right to liberty.

On the relief sought by the State of Senegal for cost.

49. In its rejoinder, the State of Senegal solicits from the Court, an order that Applicant should be made to pay to it, the sum of one hundred million (100,000,000) CFA Francs, as costs. Defendant explains, in support of this relief that this procedure has caused it an international discredit, and has generated a lot of money for it defence.

50. The Court notes that any judicial procedure engenders costs, and that it is only its duty to examine and order costs, kin relation to the facts presented by parties, and also, after analysing the case file.

51. The Court adjudges that, in the instant case, it is only suitable to order that each party bears its own costs; thus the Court rejects the relief sought by the State of Senegal for the award of the sum of one hundred million (100,000,000) CFA Francs.

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, after hearing both Parties, in a matter on human rights violation, in last resort;

As to form;

- **Rejects** the preliminary objections raised by the State of Senegal;
- **Declares** that it has jurisdiction to examine the case;

As to merit;

- **Declares** that the arrest and detention of Mr. Mame Abdou Gaye are not arbitrary;
- **Declares** that the State of Senegal has not violated the right of Mr. Mame Abdou to free movement, and rejects all claims made by him in this regard;
- **Rejects** the relief sought by the State of Senegal as to the award of costs;
- **Declares** that each party shall bear its own costs.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES

Hon. Justice Awa NANA DABOYA - *Presiding*

Hon. Justice Hansine N. DONLI - *Member*

Hon. Justice Eliam M. POTEY - *Member*

Assisted by
Athanase ATANNON (Esq.) - *Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 20TH DAY OF DECEMBER, 2011

SUIT NO: ECW/CCJ/APP/03/11
RULING NO: ECW/CCJ/RUL/07/11

THE INCORPORATED TRUSTEES OF MIYETTI ALLAH KAUTAL HORE SOCIO CULTURAL ASSOCIATION	-	***PLAINTIFF/ RESPONDENT***
V.		
THE FEDERAL REPUBLIC OF NIGERIA	-	***DEFENDANT***
PLATEAU STATE GOVERNMENT	-	***INTERVENER/ APPLICANT***

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY ALFRED BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

ATANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **M. M. NURUDEEN, (ESQ.)**	-	*FOR THE APPLICANT*
2. **Y.B MOK,**	-	*FOR THE DEFENDANT*
3. **P.A. DAFFI (ESQ.)**	-	*INTERVENER'S COUNSEL*

- Interpretation -Revision of Ruling when appropriate -Conditions for Revision -Fair hearing

SUMMARY OF FACTS

The Plaintiff/Respondent filed an application against the Federal Republic of Nigeria alleging that series of ethnic violence occurred between February 2010 and February 2011 in Plateau State during which several Fulani people were killed and their properties destroyed.

The Applicant/Intervener then brought an application to be joined as Defendant on the grounds that the action complained about occurred in its domain. That application was rejected by the Court in a Ruling of 13th July, 2011. The Applicant/Intervener then filed this application for a review of that Ruling on the grounds that it was inconsistent with the courts' earlier decision and that the Court failed to adequately analyze issues raised by the applicant thereby denying it a fair hearing.

The Plaintiff/Respondent in objecting to the review contends that under Articles 92, 93 and 94 of its Rules, the Court can only review its judgments not rulings and in that case only on emergence of new facts.

The Defendant/Respondent while submitting that the process of review applies to all decisions averred in support of the joinder that Nigeria runs a Federal system of Government with each State Government being an independent component with separate parts to play in some areas.

LEGAL ISSUES

- *Whether by the provisions of Articles 25 of the 1991 Protocol and Articles 92, 93 and 94 of the Rules of procedure, this Court can review its Rulings.*

- *Whether the facts of this application fall within the purview of the provision of Article 25 of the Protocol and Articles 92 and 93 of the Rules.*

- *Whether there is a breach of the Applicants rights to fair hearing.*

DECISION OF THE COURT

The Court in its Decision held:

a. That the guiding factor in determining the classification of a ruling is whether it determined the rights of the parties. That since the subject of that application is a final ruling having determined the rights of the Applicant/Intervener it falls within the realm of judgment/decision.

b. That the fact sought to be relied upon having come to the knowledge of the Applicant prior to the Ruling of 4th July, 2011 does not come under the provision of Articles 25 of the 1991 Protocol and 92 (2) (d) of the Rules.

c. That the Plateau State Government needs not prosecute the Application personally in order for the principle of fair hearing to be satisfied.

RULING OF THE COURT

Summary of the facts of the previous proceedings.

1. The Plaintiff/Respondent, is the Incorporated Trustees of Miyetti Allah Kautal Hore Socio-Cultural Association, a Fulani Socio-Cultural Organisation registered under Nigerian Laws, represented by their Learned Counsel, N. M. Nuruddeen (Esq.) with Mathias lkyav, and Ikenna Akubue and Tina Edobar as their Lawyers.

2. The Defendant is the Federal Republic of Nigeria with an address at the office of the Honourable Attorney General of the Federation, Federal Ministry of Justice, Abuja, Nigeria and represented by the Director Civil Litigation Mrs. Mbamali, SAN, with the following Learned Counsel.

3. The Intervener is the Plateau State Government and represented by their Learned Counsel Caleb Muftwang (Esq.), P. A. Daffi and lfeanyi Tim Anago.

4. The main application by the Plaintiffs/Applicants may be summarized as follows;

   a) That in the series of ethnic violence that have engulfed Plateau State in the past few years, many lives and property valued at several millions of Naira have been lost and destroyed.

   b) That Fulani people of Plateau State were greatly affected by these unending crises in the State.

   c) That the crises occurred between February 2010 to February 2011 and the Fulani people lost over 175 men, women and children who died in various areas of the State.

   d) That the Fulani people lost a lot of property which include livestock, houses and other household items as specified in the pleadings;

   e) That the Plaintiffs/Applicants claim pursuant to Articles 2, 4 and 14 of the African Charter on Human and Peoples' Rights'.

5. The Defendant had filed its defence as required by the Rules.

6. The applicant/Intervener filed an application for leave to intervene brought pursuant to Articles 89, 32, and 33 of the Rules of Court. Article 10(c) of Supplementary Protocol A/SP.1/01/05 amending Protocol A/P1/7/91 relating to the Court, Articles 12 and 21 of Protocol A/PI/7/91 on the Court, Inherent Powers of the Court and the rudimentary principles of natural justice and fair play and consequential directives that the Court may deem fit to make.

7. The Applicants/Interveners supported their application with sworn statement of the circumstances to establish their right to intervene by restating the parties in the main case and the fact that the interveners should not be a constituent of the Defendant; and supported facts of their interest in the case and the grounds upon which the main application was filed by the Plaintiffs which manifestly referred to the crisis from February 2010 to February 2011 that erupted/occurred in the jurisdiction of the applicant Intervener - now the applicant for review.

8. Upon the facts stated above, this court gave a ruling dated 13th July 2011 against the grant of the application for intervention: hence the application for review by the said applicants/interveners under consideration with facts that may support a review and allow the applicants as interveners in this case. The grounds for the Relief sought are stated hereunder:

   a) That the ruling referred to in paragraph 7 was inconsistent with the decision of the court in **Ugokwe vs FRN CCJLR (2008) (PT 1) and Protocol A/P1/7/91**;

   b) That the Court did not exhaustively consider, analyse and make sufficient pronouncements on issues raised and canvassed by the applicant/intervener in support of its application which was delivered on 13th July 2011;

   c) That the said ruling denied the applicant the fundamental right to fair hearing thereby offending the fundamental principles of natural justice

   d) That exhibit B a letter by the Solicitor General of the Federation and Permanent Secretary of the Defendant to the main action in the

Federal Ministry of Justice, Abuja, Nigeria to the Secretary of the Plateau State Government (Applicant/Intervener) and acknowledged by the Honourable Attorney General and Commissioner of Justice, Plateau State on 4th July, 2011 requesting for relevant facts to enable it to file an appropriate defence to the action showed that the action revolved around Plateau State (the Applicant/Intervener)

e) That the facts in the affidavit and exhibits A and B attached thereto which came to light after the Ruling aforesaid mentioned were facts evidencing interest of the applicant in the said suit and necessary component for the applicant to he joined/admitted as an intervener;

f) That the said Ruling now contested was delivered within three months of this application for review.

9. The Plaintiffs now respondents even though marked their reaction to the application for review as Preliminary Objection' were allowed to move same as an opposition to the application for Review and the Defendants, the Federal Government of Nigeria's counter affidavit to the preliminary objection as reaction also with a central focus to the application for Review.

10. The Plaintiffs' Counsel relied on the facts deposed in the affidavit in support wherein he submitted that Articles 92, 93 and 94 of the Rules of the Court made reference to the word Judgment and not Ruling and that new facts applied to Judgments and not Rulings and that even if the review applied to Rulings there were no new facts or evidence to justify a review and the letter relied upon was in existence before the Ruling of l3th July 2011 and therefore was not new.

11. Learned Counsel to the Defendant. Director Civil Litigation, Mrs. Mhamali SAN, relied on the facts in their Counter affidavit of 20 paragraphs to submit in a nutshell thus:

a) That the intervener, Plateau State Government is a necessary and proper party in this matter as the incident occurred in Plateau State of Nigeria and the Rules of the Court and other authorities support the application for Review where sufficient interest like in this case was evidently shown ;

b) That Nigeria operates a Federal system with each state government as an independent component in sums areas of its actions;

c) That the Federal Government of Nigeria operates a federal system with each component having a separate part to play;

d) That the Plateau State Government is responsible for the good governance in its State;

e) That the process of a review is applicable to all decisions of the Court.

f) That it is not in the interest of justice to deny the intervener the right to he heard.

12. Learned Counsel to the Plaintiffs in his reply, further submitted that a person who is not a party and whose application to be a party has been dismissed should not rely on the provision of the Rules on new facts. He amplified his submission regarding the point on whether a judgment is equated as Ruling but maintained that Judgment is final and determines the rights and obligations of the parties.

13. Learned Counsel to the Intervener submitted regarding whether this court can review a Ruling or not by referring to authorities on the definition of ruling vis-a-vis decision/judgment and contended that decision and Judgment signify what is final and determines the rights and obligations of the parties and that the Ruling of 13th July, 2011 fell within what may he described as a final decision and not interlocutory. He relied on local authority of **USHAE V. C.O.P., CROSS RIVER STATE COMMAND (2006)** ***AII FWLR (Pt) 313, page 86 at 112 paragraphs E*** and **FALOLA V. UBA. Plc. (2005)** ***AII FWLR (Pt 257).***

CONSIDERATION OF THE APPLICATION

14. The Court has examined the affidavits relied upon by the parties, the legal points raised, the provisions of the law under reference as to the success of this application or otherwise and the order to review or not the ruling of this court of 13th July, 2011 concerning the application for intervention by the Plateau state Government.

15. The pertinent question that must be settled first and foremost is that relating to the provisions of the Rules of this court and whether the decision to be reviewed as anticipated therein in the Rules distinguished Ruling from Judgments since both may be classified or not as decisions.

I6. On this point, the argument of the Plaintiff is that while judgment may be reviewed under the circumstances therein, Ruling could not attract same review because of its lack of finality envisaged by the Rules of Court. On the other hand the intervener and the Defendant had a convergent view that the said ruling is reviewable because of its finality on the rights of the applicant, once the conditions stated therein in the Rules are met and in the interest of justice.

17. There is no struggle in finding on this point that Articles 92, 93 and Article 94 of the Rules of Court are the offshoot of Article 25 of Protocol A/P1/ 7/91 which provide for review procedures and the words referred therein are 'judgment and decision'. The question to ask is whether the word judgments or decision includes Ruling because the word ruling is not used in the said provisions of Articles 92, 93 and 94 of the Rules and Article 25 of the said Protocol.

In Black's Law Dictionary as amply relied upon in arguments, the word Judgment was defined as follows:

> **"A Court's final determination of the rights and obligations of the parties in a case; the term judgment includes an equitable decree and any order from which an appeal lies; also termed RULING OPINION....."**

18. The guiding factor in determining the classification of a ruling will depend on whether the ruling determined the rights of the parties and therefore became appealable in a subordinate Court or reviewable in a Court of finality like the instant Court and many Regional and International Courts.

It must he stated that from this description above of Judgment/Decision, the ruling of 13th July, 2011 in this case which is the subject of this application is a final ruling as same has determined the rights of the intervener not to pursue his case any further as an intervener in this case, hence the application for a review.

19. Having stated that the said Ruling falls within the realm of judgment/ decision, the opinion that emerged herein is whether it is reviewable pursuant to Article 25 of the said Protocol and Articles 92, 93 and 94 of the Rules of the Court if the conditions stated therein are fulfilled. That settles the submissions made regarding its reviewability.

20. To the issue as to the conditions for a review/revision of the Ruling of the court as in this case, Article 93 (d) of the Rules of Court is pertinent for consideration and therefore necessary for reproduction thus:

> **"Indicate the nature of the evidence to show that there are facts justifying revision of the judgment and that the time limit laid down in article 92 has been observed."**

Article 92 provides that:

> **"An application for revision of a 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."**

21. As stated herein before, Article 25 of Protocol A/P1/7/91 on the Court regarding application for Revision from which Articles 92, 93, and 94 of the Rules derived their sustenance provides, as follows:

"Article 25: Application for Revision

> **1) An application for revision for 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.**
>
> **2) The proceedings for revision shall be opened by a decision of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision and declaring the application admissible on this ground.**
>
> **3) The Court may require prior compliance with the terms of the decision before it admits proceedings in revision.**

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

5) The decision of the Court has no binding force except between the parties and in respect of that particular case."

22. In this regard the applicants/ interveners are enjoined to satisfy the condition in Article 92 of the Rules before embarking on justification of the conditions in Article 93 (2) (d) of the Rules of the Court. The requirement pursuant to Article 92 of the Rules is on the fact that the action for revision shall be filed within 3 months of the date on which the facts on which the application is based came to the applicant's knowledge.

23. The analysis of the facts of this application shows that the Applicant received exhibit B on July 4, 2011, about nine days before the Court delivered its Ruling on July 13, 2011. On this point the applicant/intervener's contention is that exhibit B did not get to Counsel to the applicant until after the ruling and that the court should hold that time should be based from the date the said letter, exhibit was received by Counsel to the Applicant/Intervener; meaning that the information in the letter came to their knowledge after the ruling of 13th July 2011 and that if same was considered in the said Ruling it would have made the difference and the decision would have been different and in their favour as special interest would have been shown to satisfy the conditions in Article 25 of the Protocol of the Court and Article 93 (2) (d) of the Rules.

24. On the above strong and persuasive arguments learned Counsel to the applicant failed to see the divide between who should come by the new fact or knowledge of the new fact that should guide the court on the justification for revision. In the instant case, the facts showed that exhibit B was received on the 4th of July, 2011 by the Plateau State Government through its Secretary to the Government, which is the party in this application for intervention. However, Counsel for the Intervener received the said letter exhibit B after the Ruling of 13th July, 2011 precisely in September 2011, because of bureaucracy in the government and the Ministry of Justice Plateau State and that the said delay, made the applicant's Counsel to receive exhibit B after the Ruling in this case hence the fact came to their knowledge after the Ruling.

25. The Court is of the view that the operative guideline in Article 92 of the Rules is the last phrase of the said Article of the Rules that states '**….came to the applicants knowledge.'**

26. The interpretation that is feasible herein is that the facts in exhibit B must have come to the knowledge of Plateau State Government, the applicant after the Ruling whereas the converse is the case in the instant application. The question is not when Counsel to the Applicant received exhibit B but when the Applicant received exhibit B. Consequently, it is clear that the Applicant received exhibit B during the pendency of the case and before the said Ruling so there was nothing new that came to the knowledge of the Applicant after the said Ruling.

27. On the last point on the issue of interest of justice or fair hearing, these have also taken their turn in the consideration of this case. The right to fair hearing is an obligation on a tribunal be it national or international to abide by its norms in the determination of civil rights of any party before the Court and the party is given hearing in the cause or matter in accordance with the statute or law of procedure in respect thereof.

28. As for the phrase ***'interest of justice'*** it is also a requirement that the interests of not only the applicant but all the parties must be given equal treatment in order to achieve the desired goal in accordance with law. When these two principles of law are considered together would the ordinary man sitting at the public hearing of the case perceive without bias that the principles have been satisfied in this case? Must the State government of Plateau State prosecute their case directly before these two principles would have been satisfied? To further expand our scope of thoughts in respect of the above point and relate same to a criminal trial for instance, would it be said that the victim of a crime must prosecute his case personally and not through the organ of the government to wit a prosecuting state counsel, before the said two principles would have been met?

29. This Court is clearly for a justiciable determination of cases before it and to achieve that process, it is not necessary to grant the request for a review of the ruling given on the 13th of July, 2011 when the procedures for such review had not been fulfilled as analyzed above.

30. In the circumstance, the application fell short of attaining the high standard for Review of the Ruling dated 13th July, 2011.

31. **DECISION**

1. Whereas the application herein is for Review of its decision of 13th July 2011, pursuant to Articles 92, 93, and 94 of the Rules of this Court in consonance with Article 25 of Protocol A/P1/7/91 setting out the conditions for a Review of final decision; and whereas the condition pursuant to Article 92 of the Rules stipulate that application of this nature shall be filed within three months of the date on which the facts on which the application is based came to the applicants knowledge which in this case was on the 4th of July 2011 and the Ruling was on the 13th July 2011, a period of more than three months before the application was filed thereby breaching the requirements of Article 92 of the Rules;

2. Whereas the condition stated therein in Article 25 of the said Protocol inter alia is that of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown In the court and also to the party claiming revision, provided always that such ignorance was not due to negligence; and whereas there was no discovery of a new fact after the said Ruling;

3. Whereas the document, exhibit B relied upon by the applicant as a new fact discovered after the said Ruling of the Court was received on the 4th of July 2011 before the Ruling was given on 13th July 2011, a fact not new to the applicant in this case as provided by Article 25 of the said 1991 Protocol;

4. Whereas by the decision in paragraphs 1-4 above stated, no justifiable cause for revision is revealed, the application is refused and the decision of 13th July 2011 stands accordingly.

32. COSTS

This Court awards cost for the Respondent/Plaintiff in the sum of 500,000 Naira Only against the Applicant/Intervener in accordance with Article 66 of the Rules accordingly.

RULING READ IN PUBLIC IN ACCORDANCE WITH ARTICLE 100 OF THE RULES OF THIS COURT AND DATED THIS 20TH DECEMBER, 2011.

HON. JUSTICE HANSINE N. DONLI - *PRESIDING JUDGE*

HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY:

TONY ANENE-MAIDOH - *CHIEF REGISTRAR.*

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