COMMUNITY COURT OF JUSTICE, ECOWAS

[2012]

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

(2012)
COMMUNITY COURT OF JUSTICE, ECOWAS LAW REPORT

To be Cited as : (2012) CCJELR

2012
COMMUNITY COURT OF JUSTICE, ECOWAS
LAW REPORT

Abuja, June, 2018

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Published by
COMMUNITY COURT OF JUSTICE, ECOWAS
ABUJA, NIGERIA

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

website: courtecowas.org

ISBN - 978-978-50385-6-9

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

HOLDEN IN ABUJA, NIGERIA.

ON WEDNESDAY, THE 24TH DAY OF JANUARY, 2012

SUIT N^O^: ECW/CCJ/APP/10/07
JUDGMENT N^O^: ECW/CCJ/JUD/02/12

BETWEEN
FEMI FALANA
WAIDI MOUSTAPHA - PLAINTIFFS
V.
1. **THE REPUBLIC OF BENIN**
2. **THE FEDERAL REPUBLIC OF NIGERIA**
3. **THE REPUBLIC OF TOGO - DEFENDANTS**

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

ASSISTED BY
TONY ANENE MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES
1. **FUNMI FALANA MRS.**
2. **ADEDOTUN ISOLA-OSOBU**
3. **SOLA EGBEYINKA -** *FOR THE PLAINTIFFS*

1. **YEDE HIPPOLYTE, *(ESQ.)***
2. **F. K. KEBU**
3. **T. A. GAZALI, *(ESQ.)*** - *FOR THE DEFENDANTS*

- Jurisdiction - Access - Cause of action - Statute of limitation - Free movement - Burden of proof, literal rule of interpretation

SUMMARY OF FACTS

The Plaintiffs who are both Community Citizens and legal practitioners by profession were both President and Vice-President of the West African Bar Association (WABA) respectively. The Defendants are Members States of ECOWAS. The Plaintiffs brought an action before the Court, alleging the violation of their fundamental rights in the course of an official trip to the Republic of Togo from Nigeria on the 24th of April, 2004. They alleged that the many road blocks and harassment of passengers/travellers by the Security Agencies at the Nigerian/Benin borders were unlawful and amounted to a violation of their rights. The Plaintiffs further alleged that upon reaching the Benin/Togo border, they were not allowed access into Togo on the grounds that the Republic of Togo was holding its Presidential elections. The Plaintiffs were unable to carry out their official assignments in Lome - Togo.

Consequently, the Plaintiffs alleged that their right to free movement and several others have been infringed upon by the Defendants. They therefore, sought the order of the Court directing the Defendants to remove the various checkpoints, toll gates and obstacles to free movement of persons, goods, services and capital within the ECOWAS Member States.

The Defendants filed a Preliminary Objection on the jurisdiction of the Court and further alleged that the matter was statute barred.

LEGAL ISSUES

- *Whether the Court has jurisdiction to determine the matter.*
- *Whether the matter is statute barred.*
- *Whether or not the Plaintiff's rights have been violated.*
- *Whether the onus of proof lies on the Plaintiffs.*

DECISION OF THE COURT

The Court held, dismissing the case:

- *That it has jurisdiction to determine the case of alleged violations that occur in ECOWAS Member States and Plaintiff's Application is hinged on acts violating the rights to free movement.*
- *That Article 9(3) and (4) would be construed as if it were made in 1991 in Protocol A/P.1/7/91 even though the cause of action had arisen on the 24th of April, 2004.*
- *That the facts alleged are a violation on the Plaintiff's right to free movement provided for in the ECOWAS Protocol on Free movement.*
- *That there is nothing to show that Plaintiff's movement was restrained by the 1st, 2nd and 3rd Defendants, therefore there was no violation of the right to freedom of movement.*
- *That the onus of proof was insufficiently discharged by the Plaintiffs to influence the Court to make the orders sought.*

JUDGMENT OF THE COURT

PARTIES

1. The first Plaintiff is Femi Falana, the former President of the West African Bar Association, The second Plaintiff is Waidi Moustapha, a Vice President of the West African Bar Association, The first Defendant is the Republic of Benin; the second Defendant is the Federal Republic of Nigeria; the third Defendant is the Republic of Togo, all Member States of ECOWAS respectively.

SUMMARY OF THE FACTS OF THE CASE

2. The Plaintiffs who are Community citizens of ECOWAS and Legal practitioners, practicing as legal practitioners in the Community and elected as President and Vice President of the West African Bar Association, were on the date in question, travelling from Nigeria by road to Togo on 24th April, 2004, to perform their official duties for their Association when they encountered many road blocks, Police, Customs and Immigration officials who had obstructed the road, stopped them but were identified as Legal practitioners, and exhibited their passports before they were granted passage, even at the Seme border, which connects Nigeria and Benin.

3. However in his evidence, the first Plaintiff indicated that even though they were given access to proceed on their journey, other passengers/ travelers were harassed by the said officers who blocked the road, checking and extorting money from these travellers. They however proceeded from Nigeria to Benin and on reaching the Togolese border with Benin, the officials refused them passage / free movement to Lome - Togo on the grounds that the Republic of Togo was holding its presidential election and the order was to close the border. They were kept at the border until after the election in Togo and their official assignment in Togo was not possible to be carried out.

4. Hence, the two Plaintiffs filed an action before this Court claiming the following reliefs:

   a) A declaration that the Defendants have no powers to close the borders and erect checkpoints and toll gates in the Member States of the ECOWAS in any manner whatsoever by virtue of Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment and Article 12 of the African Charter on Human and Peoples Rights.

b) A declaration that the Defendants are under an obligation to remove all checkpoints, toll gates and obstacles to free movement of persons and goods, services and capital in the Member States of the ECOWAS.

c) An order mandating the Defendants to remove all checkpoints, toll gates and obstacles to free movement of persons and goods, services and capital in the member states of ECOWAS forthwith.

d) An order of perpetual injunction restraining the Defendants from closing their border or erecting checkpoints, tollgates and other obstacles in the Member States of the ECOWAS.

5. Initially the action by the Plaintiffs was against the 15 Member States of ECOWAS, namely:
   - The Republic of Benin;
   - The Republic of Burkina Faso:
   - The Republic of Cape Verde;
   - The Republic of Cote d'Ivoire:
   - The Republic of The Gambia;
   - The Republic of Ghana;
   - The Republic of Guinea:
   - The Republic of Guinea Bissau.
   - The Republic of Liberia;
   - The Republic of Mali;
   - The Republic of Niger;
   - The Federal Republic of Nigeria;
   - The Republic of Senegal;
   - The Republic of Sierra Leone;
   - The Togolese Republic.

6. The Plaintiffs raised preliminary objections to the jurisdiction of the Court and after consideration of the facts/law relied upon, the case was discontinued against the 2nd, 3rd, 4th, 5th, 6th, 7th 8th, 9th, 10th, 11th, 13th and 14th Defendants. The Court found that there was a prima facie evidence of alleged violation of Human rights pursuant to Article 9(4) of the Protocol A/P.1/07/91 as amended against the 1st, 12th and 15th Defendants namely Republic of Benin, The Federal Republic of Nigeria and the Togolese Republic. The Registry renumbered the latter countries as the 1st, 2nd and 3rd Defendants, respectively.

7. The first Plaintiff testified and the parties filed their written submissions and adopted same and made oral address of the written submissions. Learned Counsels made oral submissions to amplify the difficult areas and rested their respective cases. Learned counsel for the Plaintiff and the 1st and 2nd Defendants raised these issues for determination:

    (1) Whether the Court has Jurisdiction to determine the matter.

    (2) Whether from the averments of the Plaintiffs and evidence before this Court, the Plaintiffs are entitled to the claim before the Court.

LEGAL ARGUMENTS

8. On the first issue for determination as to whether this Court has jurisdiction to determine this matter, learned counsel to the 1st and 2nd Defendants reiterated that jurisdiction is the authority which a Court has to decide on matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision and referred to Halbury's Laws of England 4th edition to buttress their contention. They also referred to Black's Law dictionary and the case of **Pinner v. Pinner. 33 N.C. APP. 2004. 234 SE 2d 833**; that jurisdiction is a term of comprehensive impact embracing every kind of judicial action. They also relied on the Nigerian case from the Supreme Court, namely, **Madukolu v. Nkemdilim (1962) NSCC 374** where four conditions must be present before the Court can assume jurisdiction or be competent to hear matters before it.

9. Secondly, Learned Counsel submitted that the applicable law at the time the alleged cause of action arose in 2004 was protocol A/P.1/7/91 which provided individuals no direct access to the Court of the Community unless through their Member States which were required to represent them against another Member State in a dispute before the Court. On that score, he submitted that the Applicants had no right to approach the Court at the time the cause of action arose or accrued.

    He contended that the Court lacked jurisdiction to determine a matter on account of legislation that its provisions are repealed or apply a subsequent legislation retrospectively. He referred to Protocol A/P.1/07/91 in respect of the former Protocol and Protocol A/SP.1/01/05 regarding the latter.

10. He submitted that the latter legislation cannot be applied herein because Article 11(1) & (2) of the Supplementary Protocol Number (A/SP.1/01/05) grants no retrospective application to its provisions or that it should be subsumed with the former Protocol A/P.1/07/81 on the ground that its

provisions appeared not to have given it such interpretation. He contended that the latter Protocol provided that:

> **"this supplementary Protocol shall enter into force provisionally upon signature by the Heads of State and Government as at January 2005."**

11. He submitted that having entered into effect in 2005, it cannot be retrospectively interpreted to apply to a cause of action that arose in 2004. In response to this point Learned Counsel to the Plaintiff submitted that a subsequent Act does not affect the provision of a prior special or private Act unless it is expressly provided in a subsequent Act. He submitted that the Supplementary Protocol A/SP.1/01/05 did not repeal or amend Protocol A/P.1/07/91 to the extent of extinguishing the Plaintiffs' Fundamental Rights and that the violation complained of is that of Fundamental right, and he relied on Article 12 of the African Charter on Human and Peoples' Rights and Article 9(4) of the Supplementary Protocol. He referred to Article 10(d) of the Supplementary Protocol and submitted that since the case is not pending in any International Court, the Court has jurisdiction over the subject matter.

12. On the other second issue, learned counsel to the 1st and 2nd Defendants itemized the subject matter of this case as;

    (1) Violation of the Plaintiffs' rights to free movement of persons and goods under Article 12 of the African Charter;

    (2) Violation of free movement by erection of toll gates and collection of toll fares by Police, Customs and Immigration officials.

    (3) Violation of Plaintiff's right to free movement by occasional closure of borders and restriction of movement of persons and goods by the Defendants pursuant to the provisions of the ECOWAS free movement of persons, residence and establishment. He submitted that the Plaintiff has failed to prove his claim and that the Defendants were not in breach of Article 12 of the Charter on Human and Peoples' rights and the Universal declaration of Human rights.

13. He submitted that even the evidence given by the 1st Plaintiff has not established the claim. He submitted that Article 12(1) & (2) of the African Charter is not absolute freedom but there is a caveat that **"provided he abides by the law"** and the second caveat is that **"provided by the law for the protection of National security, law and order, public health or morality."** He submitted that the word 'provided' in its ordinary and

legislative context means an exception. He relied on Bindra's interpretation of Statutes 10th edition and submitted that the evidence of the 1st Plaintiff that there was presidential election and the border was closed fell under the proviso mentioned in Article 12 (i) of the African Charter on Human and Peoples Rights.

14. On the issue of checkpoints he submitted that the checkpoints encountered by the Plaintiffs from Badagry to Seme borders are domestic affairs of the 2nd Defendant aimed at enforcing municipal laws of the Federal Republic of Nigeria, and submitted that there was evidence that the 1st Plaintiff was not hindered nor restricted from free movement in the States of the 1st and 2nd Defendants. He submitted on the allegation of bribery, labeled against officials of Nigeria that the allegations were not proved in terms of the concreteness of the evidence and identity of the officials, that they committed the acts. He relied on the case of **Starcrest International Ltd v. President of the Commission of ECOWAS & Anor**. (unreported), decided by this Court and submitted that the Plaintiff failed to prove his claim and urged the Court to dismiss it.

15. In response, Learned Counsel to the Plaintiff submitted that the claim being civil in nature, the proof shall be by preponderance of evidence as held in **Nwokorobia v. Nwogu (2008) 50 WRN 1 at 7**. He submitted that the 1st Plaintiff gave evidence that they encountered illegal restriction on their journey which proved their claim and that once a claim of human rights violation is proved, damages need not to be proved, as was observed in **Adigun v. AG of Oyo State (1987) INWLR 684 per Kayode Eso, JSC** (as he then was) and also **Buhari v. INEC (2008) 7 WRN 1 at 6.** He further submitted that the essence of cross examination is to discredit the witness but where such witness is not discredited; the evidence stands and ought to be taken as reliable in proof of his case. He emphasized in his submissions that the free movement of the Plaintiff in the instant case was restricted without just cause and urged the Court to affirm the claim in the application.

CONSIDERATION OF THE COURT

16. On the first issue as to Jurisdiction, several issues fall out of the same as may be put thus:

    a. The trite meaning of jurisdiction and lack of it and its effect;

    b. The cause of action as prima facie shown in the application.

    c. The cause of action relied on Protocol. A/P.1/07/91 or A/SP.1/01/05 which grants Individual access to the jurisdiction of the Court;

d. Whether Article 8(3) of Protocol, A/SP.1/01/05 applied in the case to oust Jurisdiction of the Court because of the passage of the period specified therein - 3 years period.

e. Whether Protocol A/P.1/07/81was amended or repealed or substituted and the effect of Article 8 *vis-a-vis* Protocol A/SP.1/01/05 therein;

f. Whether Protocol A/SP.1/01/05 is retrospective in effect, keeping the cause of action alive or dead.

g. Whether alleged violation of human rights is affected by Statute of Limitation.

17. On the first issue under jurisdiction, it is trite law that jurisdiction is material to the determination of a case before the Court and where such is determined without jurisdiction, it goes to no issue and is rendered null and void and of no effect. See the cited case, **Madukolu v. Nkemdilim** (supra), **Pinner v. Pinner** (supra). **Essien v. Republic of The Gambia (2005) 3 CCJLR (pt. 2)1 at 45**. In the latter case, this Court held that:

> ***"the significance of the issue of jurisdiction is that where a matter is heard and determined without jurisdiction, it amounts to a nullity no matter how well conducted the case maybe."***

18. Also in **Afolabi v. Federal Republic of Nigeria (2008) 3 CCJLR (pt. 1) page 1 at 15 paragraph 2**5, the Court stated the seriousness of the issue of competence and that defect is disastrous and leads to the procedures becoming nullities, no matter how well conducted the trial might have been done and itemized the three conditions that must be present for the assumption of jurisdiction, namely:

(a) The case must be properly constituted as regards numbers and qualifications of the members of the panel and no disqualification for any reason whatsoever;

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

(c) The case comes before the Court, initiated by due process of law upon fulfillment of condition precedent to the exercise of jurisdiction.

19. The above stated conditions must be fulfilled before the Court may safely assume jurisdiction in a matter and a breakdown of the same will further specify the following sub-conditions emanating from the main thus:

(a) Whether the subject matter is within the competence of the Court;

(b) Whether the cause of action is properly initiated by due process and no condition precedent such as the issues raised relating to the retrospectivity of legislation;

Substitution of legislation.

20. The subject matter in the instant case *prima facie* relates to an alleged violation of human right of free movement as provided pursuant to Article 12 of the African Charter on Human and Peoples' Rights. The said Article 12(1) of the said Charter provides that:

> ***"1. Every individual shall have the right to freedom of movement of residence within the borders of a state provided he abides by the law.***
>
> ***2. Every individual shall have the right to leave any country including his own, and to return to his country. The right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".***

21. The second and third issues pertaining to the subject matter of the claim in respect of erection of toll gates, collection of toll fares by Police, Customs and Immigration officials of the Defendants, occasional closure of border and restriction of movement of persons and goods fall under the purview of the Protocol of ECOWAS on Free Movement of Persons, Residence and Establishment which Article 12 of the said Charter is all about and specifically on the right of free movement. For the above reasons the claims in the application no doubt fell within the said Article 9(4) of the 1991 Protocol on the Court as amended. Article 9(4) of the said Protocol provides that:

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

22. The *ipse dixit* evidence of the Plaintiff shows that the Plaintiffs were travelling from Nigeria to Togo when the alleged violations occurred. Prima facie, the facts stated therein in the Application are acts of violation of human rights and same hinder on the Plaintiffs free movement as envisaged in the ECOWAS Protocol on free movement. *See* **Falana v. FRN** (supra), Articles (4) of the Supplementary Protocol, and Article 12(1) of the African Charter on Human and Peoples Rights. Consequently, the Applicants have shown that the subject matter falls under the jurisdiction of this Court.

23. On the third condition for the assumption of jurisdiction are the following issues raised by the Parties:

    - Retrospectivity of legislation;
    - Substitution of legislation;
    - Protocol A/P.1/7/91 and Protocol A/SP.1/01/05 and their effect;
    - Statute of Limitation under Article 9(3) of the 1991 Protocol as amended.

24. These issues fall under the ambit of the said third condition for the assumption of jurisdiction which ought to be satisfied as stated earlier herein. The arguments of the Learned Counsel for the Defendants were that the Supplementary Protocol that gave access to individuals on human rights violation was not made with retrospective effect, having been made well after the cause of action arose and when Protocol A/P.1/07/91 was still in force and applicable to the case. Learned Counsel to the Plaintiff submitted that any subsequent legislation, Act, Enactment must specifically and expressly provide that the provision of the subsequent Act, and Legislation has repealed a prior legislation or enactment and he referred to the case of **Odugbo v Abu (2005) 49 WRNI at 6 and 7, 25.**

25. He submitted that the Supplementary Protocol A/SP.1/01/05 did not repeal Protocol A/P.1/7/81 to the extent of extinguishing the Plaintiffs' Fundamental Rights. However, learned counsel to the Defendant dwelt on the fact that where the subsequent Protocol is capable of being read retrospectively to confer right on the Plaintiffs to approach the Court for redress, it should be so read. After considering the arguments of Counsel on these constituents points for the third condition, the Court holds that Article 8 (3) of the Protocol on the Court as amended is a statute of limitation and applicable in this case. In the said Article 8(3) the word "shall" was used to mean that a cause of action which arose more than 3 years before the application for reliefs regarding a violation is sought is statute barred thereby making the relief non justiciable. The cause of action in the instant case arose on the 24th of April 2004 and the case was lodged into the docket of the Courts Registry on the 28th of October 2007, exceeding the prescribed period by 6 months.

26. It is trite law that where a statute is made with retrospective effect which may concern the whole provisions of the statute or a part thereof, the Court shall construe the statute in such a manner as to give effect to the

intention expressed in the statutes. It is well settled also that when the words of a statutes are themselves precise and unambiguous, then no more is necessary than to expound the words in their natural and ordinary meaning. This was the interpretation this Court maintained and adopted in **Afolabi v. FRN** (supra); These authorities from the National Court are on the same manner of interpretation decided that words should be given their natural and Ordinary meaning - *See* **Ahmad v. Kassim (1958) SCNLR 58: Nabhan v. Nabhan (1967) I All NLR 47 and 54**. Also a statute can he passed for the purpose of supplying an obvious omission in a former statute and the subsequent statute may have relation bad to the time when the prior statute was passed. In the instant case Article 3 of the Supplementary Protocol A/SP/01/05 states:

> **"Article 9 of Protocol on Community Court of Justice substituted.**
>
> **Article 9 of the Protocol relating to the Community Court of Justice is hereby deleted and substituted by the following new provisions."**

27. Under the said Article 3, there is a new Article 9 on the jurisdiction of the Court including the said Articles 9(3), 9(4) and 10(d) on the limitation of action, violation of human rights that occur in any Member State and access by individuals to the Court, respectively. The effect of the deletion of the provisions of Article 8 of Protocol A/P.1/7/81 and substitution of new Articles 8 and 10 in Protocol A/SP.1/01/05 to Protocol A/P.1/07/91 means that as stated in the Nigerian case of **Ibrahim v. Barde (1996) 8 NWLR (pt 477) at 577 paragraphs B-C**, where the Supreme Court state, *inter alia*, that the legislature is competent to make retrospective legislation and that the nature of a statute may concern the whole provisions of the statute, as where the commencement date so indicates or may concern only a section of the statute, thereby making it a retrospective legislation is apt and relevant in this case.

28. Article 9 of the Protocol A/P.1/7/91 was repealed and substituted by new Articles 9 and 10 in Protocol A/SP.1/01/05. There were other amendments and additions to the said Protocol A/P.1/7/91 in the said Supplementary Protocol. As stated earlier, where a statute is passed for the purpose of supplying provisions in the former statute, the subsequent or latter statute is returned back to the time when the prior statute was passed. On the basis of the above opinion of this Court, as it applies to this case, the new Article 8(3) and (4) would be construed as if it was made in 1991 in Protocol A/P.1/7/ 91. In the light of the expression of the opinion of the Court above, Learned Counsel for the Plaintiffs was correct in lodging his Application

under Article 8(4) as individuals even though the cause of action had arisen on the 24th of April 2004. Having stated that, the provisions of Article 8(4) was correctly relied upon, by extension, Article 8(3) of the said Protocol is also applicable.

29. The next point is the caveat to Article 8(3) of the Protocol and the fact that the action accrued in the instant case, in April 2004 and the case was lodged in October 2007, six months after the limitation period of 3 years as stated therein. The Court holds that where the issue is as to limitation of time for taking a step as contained in the Rules of the Court, the Court has the power to extend time within which to do any such thing required to be done. However, where the limitation of time is imposed in the statute like it is in Article 9(3) of the said Protocol the subject matter of jurisdiction is called to Question and unless the statute makes provision for the Extension of time, the Court cannot extend time. *See* **Akinnuoye v. Military Administrator Ondo State. (1997) INWLR (pt) 483 p 564 at 572 paragraphs E-H.**

30. However, the salient point arising from the above is on the question of human rights, and whether such alleged violation can be subject to statute of limitation of action/ time. The research on the point produced the finding that the Statute of Limitation would apply to Human rights cases except in respect of gross violation of rights which the violation in the instant case cannot be so characterized. This Court made reference to the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law which was adapted and proclaimed by the General Assembly Resolution 60/147 of 16 December, 2005 that the Statutes of Limitation, shall not apply to gross violations of international human rights law and/or serious violations of international humanitarian Law.

31. The Court is in no doubt as stated above, in the instant case, that the violation of free movement as alleged in this application, if proved cannot fall within the realm of gross violations of human rights as described in Resolution 60/ 147 of 16 December 2005, mentioned above, On the above analysis the Court finds that the Applicant even though alleged the violation of human rights, is caught by the provision of Article 8(3) of the Protocol on the Court which is applicable in this case because if the period when the cause of action arose and the date the case was lodged in the Registry of the Court are computed, the period would have fallen beyond 3years contrary to the three year period stipulated by Article 8(3) of Protocol A/P.1/7/81 as amended.

32. Freedom of Movement according to Postema Gerald (1897) Racism and the Law by Plessy Springer p.4R "is a human right that asserts that a citizen of a state in which that citizen is present has the liberty to travel, reside in, and/or work in any part of the State where one pleases within the limits and in respect for the liberty and rights of others and to leave that State and return at any time". The word, **'State'** used in Article 12 if be read in conjunction with Article 3 (iii) of the Protocol to the Community of ECOWAS would bring out the meaning of the State clearer. In that circumstance, from the above statement another recurring word to note is **"Liberty"** which is used to denote Freedom of movement.

33. The opposite of this word **'Liberty'** would be the word, **"Restraint"** which denotes violation of the Freedom of movement as guaranteed by the African Charter. The above section is clear therefore that the right conferred on every individual is not absolute but qualified, that is to say the right to freedom of movement though guaranteed is subject to the laws, national security, public health and morality of that State or Country in question. The Court holds that from the facts averred by the Plaintiffs in their application and their oral testimony before this Court there is nothing to show that their movement as they travelled from the Federal Republic of Nigeria to Republic of Benin and then to the Republic of Togo was restrained by the 1st and 2nd and 3rd Defendants. Since there was no form of restraint then inferably there was no violation of the right to freedom of movement committed against the Plaintiffs.

BURDEN OF PROOF

34. For further expantiation on the issues raised by the parties, the question of onus of proof came into focus as to whether the Plaintiffs did prove the case as required by Law. As always, the onus of proof is on the party who asserts a fact and who will fail if that fact failed to attain the standard of proof that would persuade the Court to believe the statement of the claim. Furthermore even as in this case where the Defendants rested their respective positions on the evidence of the Plaintiffs, the Plaintiff is required to still prove his claim. It must be mentioned that a party is free to choose whether to adduce evidence in support of his pleadings or not and the Court has no power to interfere with the exercise of that right. *See* the Nigerian case of **Mobil Oil (Nig.) Ltd v. FBIR (1997) 3 SC 1**, which this Court can look at under Article 38(1) of the Statute of International Court of Justice.

35. It must be stated that where the 1st, 2nd, and 3rd Defendants rested their cases on the Plaintiff's evidence, the onus of proof was still the on the Plaintiff to prove the case. The argument by the Defendants was that by

the presentation of the Plaintiff's claim and his evidence, the Plaintiffs had failed to discharge the onus of proof and particularly, whether the Plaintiff has attained this onus of proof by the standard required in International law.

36. The practice in the National Court is that the burden of proof is on the Plaintiffs to prove his claim and this onus does not lie with the Plaintiff throughout as same may shift to the Defendant. In **William A. Parker (USA) *v.* United Mexican States, (1826) 4 UNRIAA 39**, it was observed that the Tribunal in dealing with the presentation of pleadings and evidence should be governed by municipal law, as international tribunal has no clear rules of evidence.

37. In view of the flexibility of this procedure the international Courts have developed their systems of procedural evidence that would ensure that justice is done to parties in all manner of cases before them. This has been applied in several cases where an international tribunal considered the method of burden of proof and burden of persuasion on the evidence was equated to the procedure that obtains in the National Courts. However, it was stated that there is a slight difference but that the combined effect is higher in standard than preponderance of evidence which is the standard in the National Court in civil cases. How does it work, this burden of persuasion? The International tribunal in **ELSI case in R Lilich New York, (1992) 77** stated on burden of proof that Applicant's case must be objectively and realistically seen crossing a 'bright line' of proof. Its case must be made by a preponderance of evidence and should be able to persuade the Court to tilt in their favour. Therefore the burden of proof is weightier and is recognized as the twin burdens of proof and persuasion.

38. The point above is further explained that whilst pleadings and evidence must necessarily be presented in order to discharge the burden of proof, pleadings and evidence are distinct concepts. While the former is merely a step towards the latter, and may be insufficient to discharge the burden the latter is necessary to discharge the burden of proof with an added concept of burden of persuasion. This burden of persuasion should be seen as a separable element of the burden of proof which is applicable in this Court. The General Principles of Law was applied by International Courts and Tribunals OUP, London, (853) 328, where Cheng, noted thus: **'the burden of proof, however closely related to the duty to produce evidence, implies something more. It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, of sufficiency, or proof'.**

39. Also, the maxim *actori incumbit onus probandi* connotes that the claimant carries the burden of proof which may be explained in a plainer manner for understanding that the claimant has the responsibility for adducing evidence on every point necessary to prove his case. As earlier stated above, however, in practical terms, the burden does not always lie on the claimant, for example, where a defence is put forward, the Defendant bears the burden of proving the elements necessary to establish the defence. The maxim has manifested itself in both common law and civil law traditions. For example Cross, on Evidence, noted that the legal burden of proving facts lie on him who asserts them, and the French *Nouveau Code de Procedure Civile*, adopted in 1881, states in Article 9 that' *Il incombe a chaque partie de prouver conformement a la loi les faits necessaries au success de sa pretention*.

40. This is a well-accepted principle of national law and could therefore be concluded to be a source of international law in accordance with Article 38 of the Statute of International Court of Justice as this Court is enjoined to apply same, pursuance to Article 19 (1) of Protocol A/P.1/7/91 on the Court of Justice, ECOWAS.

41. After considering the case and the evidence herein, this Court finds that the Plaintiffs have not made out any case for the Defendants to answer, and that even though the Defendants admitted the facts of the case as stated by the Plaintiff or that the Defendants have no complete answer in law to the Plaintiffs' case, the evidence is still not sufficiently proved that there was violation of human rights in respect of the Plaintiffs rights of free movement either under Article 12 of the African Charter on Human and Peoples' Rights and or under Article 3 of the Protocol on Free Movement.

42. For the import of Article 12 of the Charter on Human and Peoples Rights, the argument of Legal counsel to the 1st and 2nd Defendants are material and apt, that reference to free movement under Article 12 of the said Charter is not akin to freedom of movement under the Protocol of ECOWAS. In the former the act of right to free movement is an act within a particular State and not the Community and that as far as the 1st and 2nd Defendants were concerned, there was no restraint to the movement in Nigeria and Benin, based on the evidence of the Plaintiff. Even at the Togolese border, where there was restraint, the evidence was abundantly sufficient to the effect that the closure of the border, was due to the Presidential Election and within the confines of the Protocol on free movement.

43. To further fortify the above, let the Court examine Article 8 of the said Protocol in respect of the conditionality to free movement of persons etc.,

on restrictions, as provided for by law, for the protection of National Security, Law order, public health or mortality. Article 8 of the Supplementary Protocol (A/SP.2/7/85) on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons provides:

> **"Whenever a problem of internal security shall lean to the imposition of measures restricting the implementation of the provisions of the Protocol on free movement of persons, the right of residence and establishment the Member States concerned shall inform the Executive Secretariat and other member States within a reasonable period of time. Whenever, for reasons of internal security, a Member State shall deem it necessary to close its borders, the Member States concerned shall inform the Executive Secretariat, and the other Member State, if necessary even after the act, regardless of the reasons justifying such measures."**

44. On this note and in the final analysis, the Court agrees with the Defendants that the evidence adduced to prove the infringement of the rights of the Plaintiffs in this case is insufficient to influence the Court to make the orders sought therein by the Plaintiffs.

47. **DECISION**

1. **Whereas** the Plaintiffs who are Community citizens and Legal Practitioners were in the process of travelling to Togo to perform their professional duties claimed to have encountered many road blocks, tollgates, checkpoints and closure of border and whereas they lodged this application for A declaration that the Defendants have nil powers to close the borders and erect checkpoints and toll gates in the member states of the ECOWAS in any manner whatsoever by virtue of Protocol A/P.1/5/79 relating to Free Movement of Persons, Residence and Establishment and Article 12 of the African Charter on Human and Peoples Rights.

2. **Whereas** the Plaintiffs relied on the provisions of the Revised Treaty. Article 12 of African Charter on Human and Peoples Rights and the violation of the Protocol on Free Movement to sought for a declaration that the Defendants are under an obligation to remove all checkpoints, toll-gates and obstacles to free movement of persons and goods services and capital in the member states of the ECOWAS.

3. **Whereas** the Defendants in their summations indicated that no rights of the Plaintiffs were violated upon based on the said Article 12 of the

African Charter on Human and Peoples Rights and that there was no restraint of the Plaintiffs within Nigeria and Benin and that the Protocol on Free Movement was not absolute as the Borders of Member States may be closed on reasonable cause and that Article 9(3) of Protocol A/P.1/7/91 as amended is applicable as to make the cause of action statute barred.

4. **Whereas** the Plaintiffs with regards to the jurisdiction of the Court submitted that, By virtue of Article 9(4) of the Supplementary Protocol and Article 12(1) of the ACPHR, the Court has jurisdiction to determine the cases of alleged violations of human rights that occur in any member state and that the Supplementary Protocol (A/SP.1/01/05) did substitute some provisions including Article 9 of Protocol (A/P.1/7/91) and Such substitution could not extinguish the Plaintiffs' fundamental rights.

5. **Whereas** the Court affirmed that there was substitution of Article 9 of Protocol A/SP.1/01/05 with that of Article 9 of Protocol A/P.1/7/91 of the Court to make the application justiciable for violation of human rights; Whereas the Plaintiffs failed to prove that the claim was justiciable by the operation of Article 9(3) of Protocol A/P.1/7/91 as amended and whereas the said Protocol was amended and substituted to the effect that the amended Protocol shall apply to cases that commenced in 2004;

6. **Whereas** the onus of proof was not discharged by the Plaintiff in this case, and where such proof failed to attain sufficiency of evidence, the Plaintiff would have failed to prove his claim and as such the reliefs must he dismissed and are hereby dismissed accordingly.

COSTS

48. Whereas the Plaintiffs applied for costs but failed to substantiate the claim and where the claim is unproven, no order as to cost shall be made thereof in the circumstance, no order as to cast shall be made herein.

THIS RULING IS READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT DATED JULY 24TH 2012.

CORAM

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

HON. JUSTICE AWA DABOYA NANA - *MEMBER*

HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

Assisted by **- TONY ANENE-MAIDOH** – *CHIEF REGISTRAR*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN IN ABUJA, NIGERIA

ON THURSDAY, THE 26TH DAY OF JANUARY 2012

SUIT N°: ECW/CCJ/APP/28/11
JUDGMENT N°: ECW/CCJ/JUD/03/12

BETWEEN:
EL HAJI MAME ABDOU GAYE - ***APPLICANT***
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
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **NIANG PAPA KHALY (ESQ.)** - *FOR THE APPLICANT*
2. **MAFALL FALL** - *FOR THE DEFENDANT*

Wrongful summons for interrogation -human dignity -arbitrary detention -human rights violation -jurisdiction of the Court

SUMMARY OF FACTS

The Applicant, a national of the Republic of Senegal, brought an action before the ECOWAS Court 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. The Applicant affirmed that following the exchange of foreign intelligence information, the Senegalese Police linked him to extremist organisations, some of which had established their points of operation on the Senegalese territory under the guise of other companies, so as to use Senegal as a logistical base. He alleged that he was mistaken for a certain resident in Dakar who had been in contact with a telephone number belonging to AQMI terrorists of Somalia who had been operating in northern Mali. He equally alleged that, as a result, he was summoned for questioning by policemen who had disguised themselves as officers of a telephone company, and that he was kept in custody for 9 days before being charged and placed under committal order on 18 May 2011. By Application dated 31 October 2011, he brought his case before the Court, for human rights violation, on the ground that he was held for 9 days and detained subsequently without any preliminary inquiry or trial establishing any concrete charge against him. He also asked that his Application be brought under expedited procedure.

The Republic of Senegal countered that an inquiry demonstrated that the Applicant, just like those apprehended simultaneously with him, was in contact with a certain Abu Diaz, suspected of having a connection with the terrorist movements of Al Kaida (in North Africa) and AQMI (in Northern Mali). The Republic of Senegal further argued that the proceedings instituted in connection with the case is still pending and that it is in perfect harmony with Senegal's rules of criminal procedure. The Republic of Senegal finally asserted that the Court has no jurisdiction to adjudicate on the case and equally averred that the Applicant's action before the Court is inadmissible on the ground that the case is still pending before the Senegalese Courts.

LEGAL ISSUES

I. Where a case is pending before the domestic courts, does it automatically imply that the Court has no jurisdiction over that case, and that the

Application submitted in connection with such case is inadmissible before the Court?

2. *Does the fact that the Police employed a means other than authorised Police identity in summoning a criminal suspect for interrogation, violate the suspect's dignity?*

DECISION OF THE COURT

I. *The Court dismissed the claims raised by the Republic of Senegal and that the Court has no jurisdiction to adjudicate on the case; also, that the Application brought is inadmissible.*

2. *The Court adjudged that the arrest and detention of Mr. Mame Gaye is not arbitrary and that the Republic of Senegal did not as such violate Mr. Mame Gaye's rights.*

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 14 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 25 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 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 organisations, 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 effected his arrest 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 18 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 13 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 the Court 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 for 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 forbids 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 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 380,000,000 CFA Francs.

Arguments by the Defendant.

In its Memorial in Defence that it filed on 25 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 13 May 2011, adding that this measure started on 9 May 2011, and ended on 17 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 and 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 analysed 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 as staff of a telephone service 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, namely 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/05/11/10 of 08 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 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;

- 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

1. **Hon. Justice Awa Nana DABOYA** - *Presiding*
2. **Hon. Justice Hansine N. DONLI** - *Member*
3. **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, IN NIGERIA

ON TUESDAY, THE 31ST DAY OF JANUARY, 2012

SUIT N^O: ECW/CCJ/APP/08/11
JUDGMENT N^O: ECW/CCJ/JUG/04/12

BETWEEN:
MME AZIABLEVI YOVO & 31 OTHERS - *PLAINTIFFS*
V.
1. **TOGO TELECOM**
2. **THE REPUBLIC OF TOGO**

} *DEFENDANTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY
ABOUBACAR DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. ***ODADJE HOUNAKE (ESQ.)*** **-** *FOR THE PLAINTIFFS*
2. ***MBANEWAR BATAKA (ESQ.)*** - *FOR THE DEFENDANTS*

Human rights violation – Interest at stake – Lack of locus standi – Res judicata – Lmmunity in judgment execution – Declaration of lack of jurisdiction – Inadmissibility – Article 10(d)-iii of the 2005 Protocol on the Court

SUMMARY OF FACTS

Having won a case whose judgment had acquired the force of res judicata, Mr. Aziablevi Yovo and his Co-Applicants brought a case before the Court, against Togo and Société Togo Télécom, for human rights violation pursuant to the African Charter on Human and Peoples' Rights.

The Application of Mr. Aziablevi Yovo and Others was brought following the refusal by the Republic of Togo and Société Togo Télécom to implement decisions made by the domestic courts of Togo, in which the Republic of Togo and Société Togo Télécom had lost their case both in first instance and on appeal. The Defendants argued that Société Togo Télécom enjoyed immunity in execution of such judgment. The Applicants then took their case before the Cour Commune de Justice et d'Arbitrage de l'OHADA and it was dismissed by that court.

The Defendants cited lack of jurisdiction of the Community Court of Justice, ECOWAS and inadmissibility of the Application.

LEGAL ISSUES

- *Is the Court invested with powers to adjudicate on an application for human rights violation, once another competent International Court has already adjudicated on the same case?*
- *Can applications for human rights violation brought before the Court for non-enforcement of final and binding decisions succeed, once the Cour Commune de Justice et d'Arbitrage de l'OHADA has already heard the case and dismissed the request brought by the Applicants'?*

DECISION OF THE COURT

The Court has jurisdiction to adjudicate on cases of human rights violation. An instance of non-execution of a final decision delivered by the domestic courts constitutes a human rights violation, in accordance with Article 3 of the African Charter on Human and Peoples' Rights, which lays down the principle that:

"1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

In its judgment, the Court however declined jurisdiction over the case, in compliance with Article 10 (d)-ii of its 19 January 2005 Supplementary Protocol, in stating that another competent International Court had already adjudicated on the case and dismissed the Applicants' request.

JUDGMENT OF THE COURT

Procedure

1. By Application lodged at the Registry of the Community Court of Justice, ECOWAS on 11 May 2011, Messrs. Mr. Aziablevi YOVO, Ayao DOSSOU, SAMA Ninakabou, Sowoanou ANATO, Bruno O. HOUNNAKE, Julien AMEGBLE, Koudekouto LAWSON LATE, Simekpe LAWSON, Massamesso BOUHEWA, Comlan AMOUSSOU, Kokou SEKLE, Lady KOKU Adjowoavi ALLAH, dame Beatrice Kayi LASSEY, Kanke Antoine FOLICOUE, Koffi MawuenaAKOUTOU, Komlan Ametepe AHOLOU, Yaovi DOSSOU, Koffi Paul AMEDODJI, the heirs of late Gerson AMEDODJI represented by Koffi Paul AMEDODJI, Koffi Agbessinyale ADEKPO, Mrs. AHYEH, Folly Cika Senam, Lady Lalagnidou BAKA, Kodjo GAFA, Ekoue HANVI, Kossi AGBONKOU, Efoe TAMEKLOE, Kouassivi QUASHIE, Koffi DOSSOU, Kpogo KPETIGO, Anani ADJOH, Messan Theophile KAVEGE and Kpatcha BATOR represented by Odadje HOUNNAKE (Esq.), Lawyer residing in Lome, 22 rue du Chemin de Fer, brought a case against the company TOGO TELECOM and THE REPUBLIC OF TOGO, whose Counsel is Mbanewar Bataka (Esq.), Lawyer registered with the Bar in Lome, with address at Boulevard Jean Paul II, before the Court of Justice of the Economic Community of West African States, with a plea that the Court should note the violation, by the Republic of Togo, of Article 3 of the African Charter on Human and Peoples Rights, and to order the Republic of Togo, to direct TOGO TELECOM, to enforce Court Judgment No. 27 of 10 July 2003, delivered by the Court of Appeal in Lome.

FACTS

The facts as related by Plaintiffs

2. Plaintiffs aver that upon a case they took before the Industrial Court in Lome, Judgment No. 083/2001 was delivered on 2st April 2001, by the Industrial Court, ordering TOGO TELECOM to pay them various sums of money, made up of entitlements due, together with damages and interest; they add that this Judgment having been upheld by the Appeal Court in Lame, TOGO TELECOM filed further appeal at the Supreme Court in Lame against the Appeal Court Judgment which the Supreme Court struck out.

3. Plaintiffs further aver that up till the time they brought the instant case before this Honourable Court they have been finding it difficult to get the Court Judgment delivered in their favour enforced despite all efforts made

in this regard. They claim that all measures taken to get the said Judgment enforced were blocked by the Republic of Togo, on the ground that TOGO TELECOM has immunity from forced Court judgment.

The facts as related by Defendants

4. Both TOGO TELECOM and the REPUBLIC OF TOGO confirmed the facts as related by Plaintiffs however they aver that for the enforcement of the Court judgment in their favour they contested the immunity from formal enforcement of Court judgments which the Togo Justice has pointed out in favour of TOGO TELECOM thus, Plaintiffs chose the way of full litigation by taking a case before the OHADA Common Court of Arbitration which struck out their case.

Pleas-in-Law by Parties

Pleas-in-law by Plaintiffs

5. In support of their claims Plaintiffs invoke Article 3 of the African Charter on Human and Peoples Rights and both the Preamble and Articles 58 and 140 of the Togo Constitution.

Pleas-in-law by Defendants

6. Defendants invoke Article 10 (d) (ii) of the Supplementary Protocol of 2005 on the Court and Article 24 of the same Protocol amending Article 6 (2) of the Supplementary Protocol.

Legal Analysis by the Court

As to form

7. Defendants raise preliminary objections as to admissibility of the Application filed by Aziablevi YOVO & 31 others, on the ground of the *res judicata* lack of interest to act and lack of quality to act.

Concerning the interest to act and the quality to act.

8. Defendants raise objections as to inadmissibility of the Application on the grounds that on the one hand, some of the Plaintiffs are now late before the Application was filed before the Honourable Court, and on the other hand, that Plaintiffs cannot get this Court's pronouncement enforced to the reasons invoked above.

On the plea drawn from lack of quality to act.

9. The Court notes that most of the Plaintiffs are still alive and on this simple fact it cannot declare the Application inadmissible for those that are alive on the grounds of death of few of them, before the case was filed.

10. The Court points out that concerning some of Plaintiffs who are deceased before the filing of the case their heirs gave mandate to different persons by writs of notaries public dated 24 June 2011 to represent their interests before the Court; but this mandate which was given after the filing of the case and the deceased not being co-Plaintiffs in the said case they cannot be parties to the instant case.

11. Consequently, the Court believes there is need to exclude from the present procedure the heirs of late AMEDODJI Gerson, AMEDODJI Koffi Paul, ANATO Sowoanou, DOSSOU Ayao, DOSSOU Koffi, DOSSOU Yaovi, HANVI Ekoue, KAVEGE Messan, KPETIGO Kpodo, LAWSON Simekpe, LAWSON - LATE Koudekouto, and SAMA Nikabou; however, the Court declares the Application admissible only for Aziablevi Yovo and the other Plaintiffs who are still alive.

On the plea drawn from lack of interest to act.

12. Defendants claim that since forceful enforcement of Court judgments is forbidden by the Togolese Laws, hence against TOGO TELECOM, because it is a State owned company Plaintiffs cannot get any probable favourable decision of the Honourable Court enforced, since Article 24 on the Court as amended by Article 6 (2) of the Supplementary Protocol which provides that: ***"Execution of any decision of the Court shall be in the form of a writ of execution which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State."*** forward the enforcement of such decision to the Togolese Law.

13. On the contrary the Court recalls that on this plea by Defendants, the interest to act by Plaintiffs resides not in the impossibility of having the probable favourable decision of the Court enforced rather exclusively in the invocation of the violation of their human rights as enshrined in Article 3 of the African Charter on Human and Peoples' Rights.

14. Indeed Plaintiffs accuse the Republic of Togo which is the second Defendant in the instant case of the violation of Article 3 of the African Charter on

Human and Peoples Rights which provides as follows:

> ***“1) Every individual shall be equal before the law.***
>
> ***2) Every individual shall be entitled to equal protection of the law.”***

15. On the claim of the non-enforced Court decision, which was delivered in last resort as alleged by Plaintiffs and which should be enforced under normal circumstances the Court notes that this claim was not disputed by Defendants who have taken cover under their alleged immunity from prosecution.

16. Equally the Court observes that this non-enforcement came up as a result of a proviso in the Togolese Law and thus, there was a breakdown of relationship between Plaintiffs and TOGO TELECOM in regard to the principles of equality before the law and equal protection under the law as enshrined under Article 3 of the African Charter on Human and Peoples Rights, a break that renders these rights illusory for Plaintiffs yet the rights are recognized by the Republic of Togo whose responsibility it is to respect international legal instruments in this regard, the Court notes that the obligation to respect international legal instruments is violated by the Republic of Togo in the instant case owing to its refusal to ensure the enforcement of Court decisions rendered by it national courts and to ensure that the principle of the rule of law on its territory. In regard to the African Charter on Human and Peoples Rights which is domesticated in the preamble of the Togolese constitution it has been deprived of all useful effect, in the instant case.

17. Whereas this obligation on State Parties to ensure the enforcement of a final enforceable judicial decision on their territory is established by constant jurisprudence of Courts and Tribunals, as could be recalled notably from the Judgments in the **Burlov v. Russia of 7 May 2002**; **Hornsbly v. Grece of 19 March 1997** by the European Court of Human Rights which declared that:

> ***“When judicial decisions concern State owned companies (as TOGO TELECOM in the instant case) the enforcement must be automatic.”***

Consequently, on this issued also the interest to act by Plaintiffs is real and known therefore their Application is admissible.

Concerning the *res judicata*.

18. Defendants aver that having taken their case before the OHADA Common Court of Arbitration which has already sat on it, Article 10 (d) (ii) of the Supplementary Protocol which provides that: ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State if the same matter has not been instituted before another competent International Court for adjudication."*** must apply in the instant case and should lead to declare the Application filed by Aziablevi Yovo and the other co-Plaintiffs, inadmissible.

19. The Court observes that truly the OHADA Common Court of Arbitration which is a competent international Court was approached with a plea to having Judgment No. 27 of 10 July 2003, delivered by the Appeal Court in Lome enforced.

20. The Court notes that the OHADA Common Court of Arbitration had declared its jurisdiction on the instant case and really adjudicated on it.

21. Also the Court notes that the case filed before it by Aziablevi Yovo and the other co-Plaintiffs concerns exactly the non-enforcement of the Judgment of the Appeal Court in Lome as indicated above and this constitutes the allegation of human rights violations made by Plaintiffs.

22. Consequently by noting the above facts and the foregoing on the one hand but also on the other hand considering that the conditions of applying the provisions of Article 10 (d) (ii) of the Supplementary Protocol are met declares that it is its responsibility to decline jurisdiction to adjudicate on the merit of the Application filed before it by Aziablevi Yovo and the other co-Plaintiffs.

FOR THESE REASONS

The Court,

Sitting in a public hearing and after hearing both parties in a matter of human rights violations and as in last resort;

As to form,

- **Declares** that Plaintiffs have interest to act however it notes that late Amedodji Gerson and eleven others like him mentioned at paragraph 11 of the present Judgment or their heirs are not parties to the instant case;

- **Notes** the act of human right violation drawn from the non-enforcement of final enforceable Court decisions by the Republic of Togo;

- **Declares** that it has jurisdiction over human rights violations cases;

- **However pursuant** to the provisions of Article 10 (d) (ii) of the Supplementary Protocol the Court declares that the instant case having been taken before another competent international Court in this case the OHADA Common Court of Arbitration;

- **Consequently, declares** that there is no need adjudicating on the merit of the present case;

- **Orders** each party to bear its own costs.

Thus made adjudged and pronounced in a public hearing in 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:

1. **Hon. Judge Awa NANA DABOYA** - *Presiding*
2. **Hon. Judge Alfred Anthony BENIN** - *Member*
3. **Hon. Judge Eliam M. POTEY** - *Member*

Assisted by **Aboubacar Djibo Diakite -** *Registrar*

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

HOLDEN IN ABUJA, FCT, NIGERIA

ON TUESDAY 7TH DAY OF FEBRUARY, 2012

SUIT N°: ECW/CCJ/APP/15/10
RULING N°: ECW/CCJ/RUL/02/12

BETWEEN
MEDIA FOUNDATION FOR WEST AFRICA - *PLAINTIFF*
V
THE REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT

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

ASSISTED BY
TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **SOLA EGBEYINKA**
2. **DEJI MORAKINYO** - *FOR THE PLAINTIFF*

1. **T. A. GAZALI**
2 **DANIEL OFRE KULO** - *FOR THE DEFENDANT*

-Preliminary Objection- Locus standi - Cause of Action - Compensation -Presumption of Death-

SUMMARY OF FACTS

The Plaintiffs case is based on the findings of this Court in its judgment of 5th June 2008, that Chief Ebrimah Manneh was in illegal custody of the Defendant and the order that he be released from custody and be paid US$100,000 in damages. However, when upon the service of writ of execution, the Defendant informed this Court that it could not comply with the terms of the judgment on the ground that Chief Ebrimah Manneh was not in its custody and could not be located, the Plaintiff concluded that Chief Ebrimah Manneh had disappeared.

The Plaintiff then brought this action against the Defendant seeking a declaration that the disappearance of Chief Ebrimah Manneh while in the custody of the Defendant is illegal, as it violates Article 4 of the African Charter on Human and Peoples' Rights and an order directing the Defendant to pay the sum of $10 million being compensation to the family of Chief Ebrimah Manneh.

The Defendant raised a Preliminary Objection asking the Court to dismiss the suit for lack of jurisdiction on the ground that the Plaintiff is not a juristic person, lacks the locus standi to institute this action and also that the action is premature and cannot be maintained.

LEGAL ISSUES

1. *Whether there is prima facie evidence that the Plaintiff has juristic capacity.*
2. *Whether the Plaintiff has the locus standi to bring this action in human rights albeit on behalf of Chief Ebrimah Manneh.*
3. *Whether the family of Chief Ebrimah Manneh are victims of human right violation.*
4. *Whether the Plaintiff can sue to recover compensation for the family of Chief Ebrimah Manneh.*
5. *Whether Cause of action has arisen.*

DECISION OF THE COURT

- *The Court decides that there is a prima facie evidence that the Plaintiff has legal capacity and locus standi to bring an action in human rights albeit on behalf of Chief Ebrimah Manneh.*

- *The Court also decides that Chief Ebrimah Manneh's family are not victims of human rights violation and the Plaintiff cannot sue to recover compensation for the family.*

- *The Court further holds that the action for compensation or account of presumption of death is premature as the cause of action has not yet arisen.*

- *The Court adjudges that the Plaintiff could proceed on the issue of human rights violation on behalf of Chief Ebrimah Manneh, whilst other reliefs sought are rejected as inadmissible.*

JUDGMENT OF THE COURT

PARTIES

1. The Plaintiff is a non-governmental organization based in Accra, Ghana, a Member State of ECOWAS whilst the Defendant is a Member State of ECOWAS. The Plaintiff is represented by Falana & Falana, a firm of Solicitors based in Abuja, inter alia, whilst the Defendant is represented by the office of the Attorney General and Minister of Justice of the Republic of The Gambia.

Facts of the case

2. The Plaintiff filed the instant action against the Defendant seeking for a declaration that the disappearance of Chief Ebrimah Manneh while in the custody of the Defendant is illegal as it violates his right to life as guaranteed by Article 4 of the African Charter on Human and Peoples' Rights and an order directing the Defendant to pay the sum of US$ 10 million being compensation to the family of Chief Ebrimah Manneh.

3. The Plaintiff pleaded that Chief Ebrimah Manneh was arrested in July 2006 by security operatives of the Defendant. After several pleas for the Defendant to release Chief Ebrimah Manneh yielded no results, the Plaintiff herein brought an action on his behalf to this Court. The Plaintiff continued that the Defendant failed to appear before the Court to defend the case because it had no defence to the action. Further, Plaintiff stated that three witnesses were called by Chief Ebrimah Manneh who gave evidence to the fact that he was arrested by named officials of the Defendant, but that notwithstanding the Defendant failed to produce those officials to testify because they had no justification for his detention.

4. The Plaintiff also averred that this Court in its judgment delivered on 5th June 2008 found that Chief Ebrimah Manneh was in illegal custody of the Defendant and ordered the Defendant to release him from custody and pay him US$100,000.00 in damages. Plaintiff says upon the service of the writ of execution, the Defendant informed this Court that it could not comply with the terms of the judgment on the ground that Chief Ebrimah Manneh was not in its custody and could not be located. Plaintiff concluded that Chief Ebrimah Manneh has disappeared, hence this Application.

Preliminary procedure

5. Upon service of the application on the Defendant, they raised a preliminary objection seeking the following reliefs:

1. An order dismissing the suit on the grounds of lack of jurisdiction.
2. Such other orders which in the opinion of the Court would enhance the course of justice.

The Defendant based the preliminary objection on three grounds.

i. There is no paragraph in the narration filed in support of the substantive application which shows that the Plaintiff is a juristic person.

ii. The Plaintiff lacks the *locus standi* to institute this action.

iii. The action is premature and cannot be maintained.

Arguments of Defendant/Applicant

6. In respect of the issue as to whether the Plaintiff is a juristic person or not, learned counsel to the Defendant/Applicant submitted that a perusal of the pleadings shows that the Plaintiff is not a person known to law and therefore, cannot sue or be sued. Counsel submitted further that Plaintiff at paragraph 1 of its application merely described itself as **"A Non-Governmental Organization based at Accra, Ghana"** and that there is nothing on record to show that the Plaintiff is in fact a juristic person recognized by the laws of any Member State of ECOWAS or the Commonwealth countries. Counsel relied on the case of **Salomon v Salomon (1897) AC 22**, where it was held that ***"the Company is at law, a different person altogether from the subscribers to the Memorandum and although it may be that after incorporation, the business is precisely the same as it was before yet the company is not in law, an agent of the subscribers or trustee for them…"***

7. Counsel submitted further that a Court lacks jurisdiction once there is an element or feature in a case which detracts from the jurisdiction of the Court or inhibits the Court from exercising its powers. Learned counsel concluded this leg of his arguments by stating that there exist many features in this case which will prevent the Court from exercising its jurisdiction and urged the Court to strike out the case. Counsel relied on the case of **Araka v Nwankwo Ejeaagwu (2001) FWLR pt. 36, p.830 at 860** where the Supreme Court of Nigeria held thus ***"A Court is said to be competent to adjudicate on an action where: it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the other; the subject matter is within its jurisdiction and there is no feature in the case which prevents the Court***

from exercising its jurisdiction and the case came before the Court initiated by the due process of the law and upon fulfilment of any condition precedent to the exercise of jurisdiction."

8. With respect to the *locus standi* of the Plaintiff, learned counsel to Defendant/ Applicant submitted that the Plaintiff has not disclosed sufficient interest or locus in this matter so as to clothe it with *locus standi* to sue on behalf of Ebrimah Manneh. Counsel further argued that Plaintiff averred in its narration that "when all pleas for the release of Ebrimah Manneh ... fell on deaf ears the Media Foundation for West Africa instructed its counsel Falana & Falana Chambers to sue". According to counsel for Defendant/Applicant, this does not clothe Plaintiff with the locus required to sue on behalf of Ebrimah Manneh and therefore the proper party is not before the Court. Counsel concluded that to maintain an action, the Plaintiff must show that he has a legal right or *locus standi* to sue else the Court would lack the jurisdiction to adjudicate on the matter in question. Counsel relied on the case of **In Re: Benson (2002) 1 NWLR pt. 802 p.570 at 584** where the Nigeria Court of Appeal held that ***"A person having an interest in a matter means a person who has suffered a legal grievance... such interest must be a genuine and legally recognizable interest..."*** Counsel also supported his argument by citing the case of **Abraham Adesanya v The President of Nigeria (2001) FWLR pt. 46 p.859 at 895**, where the Nigerian Supreme Court held that: ***"the question of standing of a Plaintiff is not dependent on the success or merits but is a condition precedent to the determination on the merits, therefore where a Plaintiff has no locus standi, his claim must be dismissed on the ground that it will be unnecessary to decide the ...claims."***

9. With respect to whether the action is premature, learned counsel argued that the action is premature based on Plaintiffs own averments. Counsel submitted that Plaintiff averred that **"Chief Ebrimah Manneh was arrested on 11th July 2006 by the Defendant"**. Counsel submitted that granting without conceding that the averment is true, the action is premature based on Section 150 (1) of the Evidence Act Cap 10 Vol. 111, Laws of the Gambia, which provides thus:

> ***"A person shown not to have been heard of for seven years by those, if any, who if he had been alive, would naturally have heard of him is presumed to be dead…"***

10. Learned counsel for the Defendant/Applicant further submitted that section 144 of the Evidence Act Cap 112 Laws of the Federal Republic of Nigeria 1990 is in *pari materia* with the above provisions of the Gambian Evidence Act and urged the Court to apply the provision to this case. Counsel supported

his arguments with the cases of **Orji Ogbah v Bende Divisional Union, Jos Branch & 17 Ors (2001) FWLR pt. 83, p.25 at 40** and **Samson Owie v Ighiwi (2005) vol. 3 MJSC p.82 at 91.**

In the **Orji case** (Supra) the Nigeria Court of Appeal defined a cause of action as: ***"Every fact which is material to be proved to entitle the Plaintiff to succeed... the operative fact or facts which give rise to a right of action... a right of action is the right to enforce a cause of action"***. The Nigeria Supreme Court held in the **Samson Owie** case (supra) that ***"the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin to maintain his cause of action."***

Arguments of Plaintiff/Respondent

11. In response, learned counsel to the Plaintiff/Respondent opposed the application on all grounds and urged the Court to dismiss the application in its entirety and go into the merits of the case. With respect to its legal personality, counsel submitted that the Plaintiff/Respondent is duly registered as a Non-Governmental organization based in Accra, Ghana and attached as ANNEXURE "A" a copy of its Certificate of Registration. Counsel submitted that it is trite law that Certificate of Registration is the evidence that a body, association or entity is known to law and cited the case of **African Continental Bank PLC & Anor. v Emostrade Limited (2006) 10 WRN 42 at 47** where it was held thus ***"Where a body is pleaded to be incorporated as a limited liability company and the opposing party categorically denied the fact of its incorporation, the certificate of incorporation is the only means by which its legal personality can be proved. In the instant case, there was need for the Plaintiff to produce the certificate of incorporation if it was duly incorporated as a limited liability company and that nothing else would suffice ..."***

    Counsel concluded this part of his argument by urging the Court to hold that as a juristic person, Plaintiff/Respondent can sue and be sued.

13. With respect to the Plaintiff/respondent's locus to sue, learned counsel submitted that counsel to the Defendant/applicant's position on the issue has ceased to be the law as the decision in the case of **Abraham Adesanya v The President of Nigeria** (supra) that he relied on has since been overruled by the Supreme Court of Nigeria in the case **of Fawehinmi v Akilu (1987) 4 NWLR (PT. 67) 797.**

14. Counsel also submitted that in **Jammeh v Attorney General (2002) A HRLR 72**, the Supreme Court of The Gambia held that every Gambian

citizen has the *locus standi* to challenge any illegal and unconstitutional action in that country. Furthermore, counsel submitted that in **Tuffour v Attorney-General (1980) GLR 637**, the Supreme Court of Ghana held that any concerned citizen of Ghana can institute an action for a declaration that an official act is unconstitutional.

15. Based on the above submissions, counsel urged the Court to hold that Plaintiff/ Respondent has *locus standi* to institute this suit as there is no need for it to establish that a next-of-kin relationship exists between it and Chief Ebrimah Manneh to institute this action before this Honourable Court.

16. On the issue of whether the action is premature, learned counsel to Plaintiff /Respondent submitted that the pertinent question is what constitutes a cause of action. Learned counsel submitted that the answer to that question can be found in the decision in the case of **Chartered Brains Ltd v Intercity Bank PLC (2009) 49 WRN 111 at 113** where it was held thus:

    "A cause of Action was defined as the entire set of circumstances giving rise to an enforceable action. It is in effect the fact or combination of facts which gives rise to a right to sue and it consists of two elements viz:

    (a) The wrongful act of the Defendant which gives the Plaintiff his cause of complaint and

    (b) The consequent damage."

17. Counsel submitted that since 11th day of July, 2006 when the Defendant's agents arrested Chief Ebrimah Manneh without a warrant of arrest, the Defendant has till date failed to justify the arrest and detention. As a result a suit was filed in 2007 to enforce the fundamental human rights of Chief Ebrimah Manneh and this Honourable Court gave judgment in his favour.

18. Counsel submitted further that it must be emphasized that if the Plaintiff waits until the expiration of the statutory seven year period, this action would be statute barred by virtue of Article 3 of the Supplementary Protocol of 2005 (A/SP.1/01/05). The said Article 3 stipulates that an action cannot be instituted before this Court after three years when the cause of action arose, same having become time barred. Learned counsel concluded that since the 5th of June 2008 when judgment was given in favour of Chief Ebrimah Manneh, Defendant/Applicant has not disclosed his whereabouts and therefore a cause of action has arisen within the three year period. Counsel urged the Court to dismiss the preliminary objection and assume jurisdiction over this suit.

Arguments in reply by Defendant/Applicant

19. In his rejoinder on points of law, learned counsel to Defendant/Applicant submitted that although the authority cited by learned counsel to the Plaintiff/ Respondent with respect to the issue of its legal personality is correct, that position is not applicable in this case. Counsel submitted that it is not applicable because Plaintiff attached an uncertified copy of its Certificate of Incorporation. Since it is not a certified copy of the original, it cannot be used and relied on by this Honourable Court. Further, counsel submitted that "Annexure A" is not an exhibit before this Court because it was not certified and properly filed in the Registry of this Court through a counter affidavit.

20. Further, counsel to the Defendant/Applicant submitted that based on the case of **Chartered Brains Ltd v. Intercity Plc.** (supra) relied upon by learned counsel to Plaintiff/Respondent, a cause of action for compensation for the death of Chief Ebrimah Manneh will arise at the expiration of the period fixed by the Evidence Act for presuming that a man is dead. Counsel submitted further that the provisions of Article 3 of the Supplementary Protocol of 2005 (A/SP.1/01/05) with respect to the time within which an action can be instituted will only come into effect after the expiration of the statutory set period for the presumption of death. Therefore, counsel concluded that a valid cause of action for compensation for the death of Chief Ebrimah Manneh will arise at the expiration of seven years calculated from the 11th day of July 2006 when he is alleged to have been arrested. A valid cause of action will arise in July 2013 and not earlier.

Arguments in reply by Plaintiff/Respondent

21. In reply, learned counsel for the Plaintiff/Respondent argued that the reliance on the Evidence Act by counsel to the Defendant/Applicant is misplaced because that Act is not applicable before this Court. Counsel cited Section 1 (2) of the Evidence Act Cap. 144 of the Laws of the Federation of Nigeria, 2004 which states thus **"This Act shall apply to all judicial proceedings in or before any Court established in the Federal Republic of Nigeria but it shall not apply: (a) to proceedings before an arbitrator; or (b) to a case before the general Court martial...."**

22. Counsel submitted further that reference to the courts established in the Federal Republic of Nigeria are courts within the contemplation of Section 6 (5) of the 1999 Constitution of the Federal Republic of Nigeria. Section 6 (1) of the 1999 Constitution of the Federal Republic of Nigeria clearly states that **"The judicial powers of the Federation shall be rested in the courts**

to which this section relates, being courts established for the Federation". Again, counsel argued that counsel to Defendant/Applicant did not demonstrate the fact that the Evidence Act applicable in the Republic of Gambia will apply to proceedings before this Court as it is a statute applicable solely within its jurisdiction. Counsel concluded that a cause of action has arisen in this suit.

23. Counsel to the Plaintiff/Respondent also argued that it is untenable for counsel to Defendant/Applicant to submit that the Plaintiff/Respondent ought to have filed its Certificate of Incorporation marked "Annexure A" with an attached counter affidavit. Learned counsel to Plaintiff/Respondent submitted that the failure of Defendant/Applicant to file an affidavit in support of their notice of preliminary objection will automatically enjoin Plaintiff/Respondent not to file a counter affidavit because there will be nothing to oppose. Counsel to Plaintiff/Respondent concluded that its Certificate of Incorporation marked "Annexure A" is properly filed before the Court and urged the Court to dismiss the preliminary objection as it is frivolous and unmeritorious.

CONSIDERATIONS BY THE COURT.

a. Whether Plaintiff has legal capacity to sue.

24. Learned counsel to the Defendant/Applicant argued that the Plaintiff/ Respondent does not possess the requisite legal capacity to institute the present action because the Certificate of Incorporation it attached to its reply to the preliminary objection was not a certified true copy and therefore not a document that this Court could rely on. Counsel also contended that the Certificate of Incorporation was not properly filed before the Court, same was filed without a counter affidavit. Learned Counsel to the Plaintiff/ Respondent in opposition argued that its Certificate of Incorporation was properly filed before the Court as Defendant/Applicant had not filed any affidavit which it had to oppose and urged the Court to hold that it has the capacity to institute and maintain the present suit.

25. The primary factor to consider in determining whether an entity has legal capacity to sue and be sued is its certificate of incorporation as held in the case of **African Continental Bank PLC & Anor v Emostrade Limited** (supra). From the record before the Court, both counsel for Defendant/ Applicant and Plaintiff/ Respondent are in agreement that this is the position of the law. However, learned counsel to Defendant/Applicant contended that the Certificate of Incorporation submitted by the Plaintiff/Respondent is not a certified copy and was also not properly filed before the Court so it ought to be rejected. A public document is presumed to be authentic until

the contrary is established. The Plaintiff/Respondent has submitted its Certificate of Incorporation, which prima facie is valid so the Court accepts it. This is especially the case as this is a preliminary procedure wherein the Court is not required to go into evidence.

26. Next, learned counsel to the Defendant/Applicant also urged the Court to discountenance the Certificate of Incorporation submitted by the Plaintiff/ Respondent because it was not properly filed before the Court, same having been filed without a counter affidavit. Learned counsel to Plaintiff/Respondent rejected this argument and argued that the document was properly filed as Defendant/Applicant had not filed any affidavit which could be opposed. The argument canvassed by counsel to Plaintiff/Respondent is correct in so far as Article 87(3) enjoins a Respondent to an application for preliminary objection to file a reply with all the necessary pleas, both facts and law, annexed. The certificate of incorporation could only be produced at this stage that the Defendant is challenging it, and the rules do not require it to be introduced in any particular manner other than to annex it to their reply to the application wherein the objection was first raised. The Court thus holds that the Certificate of Incorporation filed by Plaintiff/Respondent is properly filed before the Court.

b. Whether Plaintiff has locus standi to initiate this suit.

27. With respect to the *locus standi* of the Plaintiff Respondent, learned counsel to Defendant/Applicant submitted that the Plaintiff/Respondent has not disclosed sufficient interest or locus in this matter so as to clothe it with *locus standi* to sue on behalf of Chief Ebrimah Manneh. Counsel argued that Plaintiff/Respondent has not established a sufficient nexus or a next-of-kin relationship existing between itself and Chief Ebrimah Manneh that will suffice for it to sue on his behalf. Counsel contended that Plaintiff s action must fail irrespective of the merits once it cannot show that it has a legal right to sue. He supported his contention with the cases of **In Re: Benson** (supra) **and Abraham Adesanya v The President of Nigeria** (supra). Learned counsel to the Plaintiff/Respondent rejected this argument and submitted that the position articulated by counsel to Defendant/Applicant is no longer the position of the law and that a Plaintiff need not establish that his legal right has been breached in order to have the *locus standi* to sue. Counsel continued that Plaintiff/Respondent does not need to establish a next-of-kin relationship with Chief Ebrimah Manneh in order to sue on his behalf and supported his argument with the cases of **Fawehinmi v Akilu** (supra) **Jammeh v Attorney General** (supra) and **Tuffour v Attorney-General** (supra).

28. It is pertinent to state here that the case **Abraham Adesanya v the President of Nigeria** (supra) was widely regarded as the *''locus classicus''* on the issue of standing in the Federal Republic of Nigeria. However, as rightly pointed out by learned counsel to the Plaintiff/Respondent, the ratio in that decision was overruled in the case of **Fawehinmi v Akilu** (supra) by the Supreme Court of the Federal Republic of Nigeria. For emphasis, it was stated in **Fawehinmi v Akilu** per Kayode Eso, JSC (as he then was) that:

> ***"In this instant appeal before this Court, I think, with respect, that the lead judgment of my learned brother Obaseki JSC is advancement on the position hitherto held in this Court on locus standi. I think, again with respect, that it is a departure from the former narrow attitude of this Court in the Abraham Adesanya case and subsequent decisions. My humble view, and this Court should accept it as such, is that the present decision of my learned brother, Obaseki JSC, in this appeal has gone beyond the Abraham Adesanya's case. I am in complete agreement with the new trend, and with respect my agreement with the judgment is my belief that it has gone beyond the Abraham Adesanya's case."***

29. With respect, the narrow construction with respect to locus standi has progressively given way to a wider construction of the doctrine especially in human rights causes and thus a Plaintiff ought not to prove that he has directly suffered the breach of a legal right. The cases of **Jammeh v Attorney General** (supra), and **Tuffour v Attorney-General** (supra), from the Republic of the Gambia and the Republic of Ghana respectively support the viewpoint that the strict interpretation of the doctrine has given way to a more progressive and broader interpretation where Plaintiffs need not show that they have suffered personally before they can sue in human rights causes. In **Fertilizer Corporation Kamager Union v Union of India (1981) A.I.R. (SC) 344**, it was stated thus:

> ***"Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law. If a Plaintiff with a good cause is turned away merely because he is not sufficiently affected personally that could mean that some government agency is left free to violate the law. Such a situation would be extremely unhealthy and contrary to the public interest."***

30. This Court held in the case of **Registered Trustees of the Socio-Economic Right and Accountability Project (SERAP) v Federal Republic of Nigeria** and **the Universal Basic Education Commission, Suit No ECW/CCJ/APP/08/08,** ruling delivered on the 27th day of October 2009 and other cases that a Plaintiff need not establish that he has suffered personally in order to clothe him with *locus standi* to institute an action for the relief of violation of human rights.

31. The Plaintiff/Respondent in its originating application sought for a declaration that the disappearance of Chief Ebrimah Manneh while in the custody of the Defendant is illegal as it violates his right to life guaranteed by Article 4 of the African Charter on Human and Peoples' Rights. From the discussions above on *locus standi*, the Plaintiff/Respondent clearly has the *locus standi* to sue for the protection, promotion and restoration of the fundamental rights of Chief Ebrimah Manneh. The Court also takes judicial notice of the fact that the question of whether Chief Ebrimah Manneh was in the custody of the Defendant has been adjudged by this Court in the case titled **Chief Ebrimah Manneh v. The Republic of The Gambia, Suit no. ECW/CCJ/APP/04/07, dated 5th June 2008, (2004-2009) CCJELR 181** as a case of human rights violation. The present action is accordingly not misplaced.

32. The Plaintiff/Respondent also sought for an order directing the Defendant to pay the sum of US$10 million being compensation to the family of Chief Ebrimah Manneh. If the Plaintiff/Respondent's claim is upheld, it would receive the sum of money on behalf of Chief Ebrimah Manneh's family. However, there is no record before the Court to prove that he has a family, and if he does, who the members are. Again, there is nothing on record to show that the family of Chief Ebrimah Manneh, if any, have authorised the Plaintiff/Respondent to sue on their behalf. The family members, if any, of Chief Ebrirnah Manneh, are not the victims of human rights abuse, so the claim on their behalf could not be said to be a claim in human rights so as to clothe the Plaintiff with locus standi to sue. The Court is thus of the view that the Plaintiff/Respondent lacks the requisite locus standi to pursue a monetary claim on behalf of the family of Chief Ebrimah Manneh.

c. Whether action is premature.

33. Learned counsel to the Defendant/Applicant argued that the action is premature as a cause of action has not arisen based on Plaintiff s own averments that Chief Ebrimah Manneh was arrested on 11th July 2006. Learned counsel submitted that a cause of action has not arisen because Plaintiffs action is predicated on the presumption that Chief Ebrimah Manneh

is dead. However, counsel to the Defendant/Applicant contends that until seven years after the purported arrest and/or disappearance of Chief Ebrimah Manneh, no one can presume that he is dead. Counsel relied on section 150 (1) of the Evidence Act Cap 10 Vol. 111, Laws of The Gambia which provides that there is a presumption of death only after seven years. Learned counsel for the Defendant/Applicant further submitted that section 144 of the Evidence Act Cap 112 Laws of the Federal Republic of Nigeria 1990 is in *pari materia* with the above provisions of the Gambian Evidence Act and urged the Court to apply the provisions thereof to this case. Based on the above provisions, counsel to the Defendant/Applicant contended that one can only safely presume that Chief Ebrimah Manneh is dead on 10th July 2013, seven years after 11th July 2006, the date on which his *alleged* arrest took place. Counsel also relied on the cases of **Orji Ogbah v Bende Divisional Union, Jos Branch &17 Ors** (supra) and **Samson Owie v Ighiwi** (supra) and urged the Court to hold that a cause of action has not arisen in this suit.

34. Learned counsel to the Plaintiff/Applicant on the other hand contended that a cause of action has arisen in the suit and relied on the case of **Chartered Brains Ltd v Intercity Bank PLC** (supra). Counsel submitted that if the Plaintiff/Respondent should wait for seven years before presuming that Chief Ebrimah Manneh is dead, the action will become statute barred by the provisions of Article 3 of the Supplementary Protocol of 2005 (A/SP.1/01/05) which stipulates that an action cannot be instituted before this Court after three years when the cause of action arose. Counsel submitted that judgment was given in favour of Chief Ebrimah Manneh on the 5th June 2008 and this action was filed within three years of that date and therefore a valid cause of action has arisen. Further, counsel for the Plaintiff/Respondent argued that the reliance on the Evidence Acts of the Gambia and the Federal Republic of Nigeria are misplaced as these Acts are applicable to disputes before domestic courts within their domestic territories and not this Court.

35. A cause of action has been defined in **Black's Law Dictionary, Ninth Edition (Bryan A. Garner) p.254** thus: ***"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person"***. See also 'cause of action' as defined in **Chartered Brains Ltd v Intercity Bank PLC** (supra) and in **Orji Ogbah v Bende Divisional Union, Jos Branch & 17Ors** (supra), both of which are correct statements of the law.

36. Thus by a cause of action, every material fact that has to be proved by a Plaintiff in order for him to succeed must exist. In the instant case, a material fact that has to be proved by the Plaintiff in order to succeed is the death of Chief Ebrimah Manneh. Whilst counsel to the Defendant/Applicant contends that Chief Ebrimah Manneh's death cannot be presumed until seven years after his alleged arrest, counsel to the Plaintiff/Respondent argues that those Gambian and Nigerian legislations on which the Defendant/Applicant relies are not applicable in this Court.

37. The general presumption of death at law is succinctly stated in **Black's Law Dictionary, Ninth Edition (Bryan A. Garner) p.1306** that **"A presumption that arises on the unexpected disappearance and continued absence of a person for an extended period, commonly seven years"**, Article 19(1) of the Court's 1991 Protocol, number A/P/1/7/91 entitles the Court to rely on the body of laws as contained in Article 38 of the Statutes of the International Court of Justice which include works of renowned publicists. And the authors of Black's Law Dictionary are among such publicists whose work has been cited as authoritative. Thus, it is clear that a person can only be presumed dead after seven years, so learned counsel to the Defendant/Applicant's argument with respect to the presumption of death is valid and correct.

38. Learned counsel to the Plaintiff/Respondent also urged the Court to hold that a cause of action has arisen as the action will be statute barred at the expiration of the seven year period for the presumption of death to be valid. However, from the decisions in the cases of **Chartered Brains Ltd v Intercity Bank PLC** (supra) and **Orji Ogbah v Bende Divisional Union, Jos Branch & 17 Ors** (supra), a cause of action will not arise until all the conditions precedent have been fulfilled. Therefore, a cause of action in respect of the alleged death of Chief Ebrimah Manneh will only arise after the expiration of the seven year period. It *is* after this period that the three years stipulated for actions to be brought before this Court will begin to run and not conversely. From the foregoing, the Court holds that a cause of action has not arisen and the action is therefore premature.

39. DECISION

- **WHEREAS** the Court is satisfied that there is *prima faci*e evidence that the Plaintiff has juristic capacity;

- **WHEREAS** the Plaintiff has the *locus standi* to bring this action in human rights, albeit on behalf of Chief Ebrimah Manneh;

- **WHEREAS** the family of Chief Ebrimah Manneh are not victims of human rights violation;

- **WHEREAS** the Plaintiff could not sue to recover compensation for the family of Chief Ebrimah Manneh;

- **WHEREAS** the action for compensation on account of presumption of death is premature as the cause of action has not yet arisen;

The Court, sitting in public at Abuja, decides that the Plaintiff could only proceed on the issue of human rights violation on behalf of Chief Ebrimah Manneh, whilst the other reliefs sought are rejected as inadmissible. The preliminary objection thus succeeds in part.

The parties are to bear their own costs.

DATED AT ABUJA, THIS 7TH DAY OF FEBRUARY, 2012

HON. JUSTICE HANSINE N. DONLI - *PRESIDING*

HON. JUSTICE AWA NANA DABOYA - *MEMBER*

HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

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

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

HOLDEN AT ABUJA, FCT NIGERIA.

ON TUESDAY 7TH FEBRUARY, 2012

SUIT N^O: ECW/CCJ/APP/11/07
RULING N^O: ECW/CCJ/APP/RUL/03/12

BETWEEN

MUSA SAIDYKHAN - ***PLAINTIFF***

V.

THE REPUBLIC OF THE GAMBIA - ***DEFENDANT***

COMPOSITION OF THE COURT

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

ASSISTED BY

MR TONY ANENE-MAIDOH - CHIEF REGISTRAR

REPRESENTATION TO THE PARTIES

1. **MRS. FUNMI FALANA** - *FOR THE PLAINTIFF/RESPONDENT*
2. **MR D. O. KULO & P. H. JAMMEH** - *FOR THE DEFENDANT/APPLICANT.*

-Revision of judgment -Time limit for filing application for revision.

SUMMARY OF FACTS

The Defendant/Applicant, being dissatisfied with the award of damages in the judgment of the Court dated 16th December, 2010, brought the instant application for its revision pursuant to Article 93, 92 and 94 of the Rules, on the grounds that there was a miscarriage of justice when the Court failed to properly appraise the evidence on record, as the award of US$200,000 is outrageous. The Plaintiff/ Respondent however opposed the application on the grounds that the Defendant/ Applicant ought to have filed his application for revision within a period of 3 months after the judgment was delivered as provided in Article 92 of the Rules. He further contended that the Defendant/Applicant did not comply fully with the provisions of Article 32,33 and 93 (1) of the Rules. He further contended that the Defendant/Applicant did not demonstrate that new fact has arisen to justify their application for revision. On the issue of damages, he contended that the Court can exercise its discretion in the award of damages once a violation has been provided

LEGAL ISSUES

1. *Whether the Court can exercise discretion in the award of damages.*
2. *Whether there are new facts to justify the application for revision.*
3. *Whether the application for revision is filed within the time limit*

DECISION OF THE COURT

The Court decides that this is not a proper case for revision as no fresh fact has been discovered since the judgment; moreover, the facts relied upon by the Applicant were known at the time of the judgment. The Court therefore rejects the Application and the Defendant to bear the cost of the application in accordance with Article 66 of the Rules.

RULING OF THE COURT

Facts

1. The Applicant herein, being dissatisfied with the award of damages in the judgment of this Court dated 16th December 2010, brought the instant application for its revision pursuant to Articles 92, 93 and 94 of the Rules of this Court. The application for revision is based on the ground that there was a miscarriage of justice when the Court failed to properly appraise the evidence on record. The Applicant contends that the award of USD $200,000 (Two Hundred Thousand United States Dollars) to the Plaintiff as compensation is outrageous and cannot be supported having regard to the evidence on record.

Arguments of Defendant/Applicant

2. Learned counsel to the Defendant/Applicant contended that from the evidence of the Plaintiff/Respondent himself, he was detained for twenty-two (22) days without trial and that he was tortured while in detention. Counsel submits that there is no evidence of pecuniary loss during this period of detention. Counsel submitted further that the Plaintiff/Respondent did not tell the Court how much he was earning, what he lost as a result of the detention and how much he will continue to lose, if at all, and there is no evidence of permanent injury arising from the alleged torture.

3. Counsel submitted that the whole essence of the law of damages was captured in **Admiralty Commissioners v SS Susquehanna (1926) AC 655 at 661** thus" *... the common law says that damages due either for breach of contract or for tort are damages which* so *far as money can compensate, will give the injured party reparation for the wrongful act ..."* Counsel also relied on the cases of **Obasuyi v Business Ventures Ltd (1995) 7 NWLR (pt 406) p. 184** and **Singam Investment Company v N H Farage Co. Ltd (2002-2008) GLR vol. 1 p.68** to argue that the essence of awarding damages is to restore the Plaintiff to the position he would have been if there had been no breach.

4. Learned counsel to the Defendant/Applicant also submitted that the evidence of Plaintiff/Respondent is silent on key issues which the Court would usually consider in making an award for damages. That being the case, counsel contends the Court ought to have awarded general, nominal or conventional damages. Counsel submitted that this is in line with the views expressed by Kemp & Kemp in his book; **'The quantum of damages'** volume 1, para. 1-003 where the learned author wrote:

> ***"What then is the Court to do? It recognizes that the injured person is entitled to compensation but can find no logical basis upon which to evaluate that compensation. The answer reached by courts is that it awards a sum which is in the nature of a conventional award."***

5. Learned counsel further submitted that the ratios in the cases of **Alsford v British Telecommunications Plc. (1986) AC 37** and **Wright v British Airways Board (1983) 2 AC 773** is that nominal damages are awarded for pains and suffering. Counsel concluded that the evidence of Plaintiff/ Respondent established acts of torture at best, which falls under pains and suffering so nominal damages ought to be awarded.

6. Finally, counsel submitted that the award is excessive having regard to the awards made by this Honourable Court in the cases of **Chief Ebrimah Manneh v Republic of The Gambia [2004-2009] CCJLR p.181**and **Hadijatou** Mani **Koraou v The Republic of Niger [2004-2009] CCJLR p. 217.**

Arguments of Plaintiff/Respondent

7. The Plaintiff/Respondent opposed the application. Learned counsel to the Plaintiff/Respondent submitted that by Article 92 of the Rules of this Court, the Defendant/Applicant ought to have filed his application for revision within a period of three months after the judgment was delivered on the 16th day of December, 2010 but only filed the application for revision on the 31st March, 2011. Counsel further submitted that the Defendant/Applicant did not comply fully with the provisions of Article 32, 33 and 93(1) of the Rules of this Court.

8. Further, counsel contended that the Defendant/Applicant did not demonstrate in any material particular or by any form of substance whatsoever that any new fact has arisen to justify their application for revision of the judgment delivered on the 16th December, 2010.

9. Learned counsel to the Plaintiff/Respondent also argued that the submissions of counsel to the Defendant/Applicant are misconceived as the principle is that in fundamental human right cases, damages suffered need not be proved. Counsel submitted that the Court can exercise its discretion in the award of damages once a violation has been proved. He referred to the cases of **Ahmed Selmouni v State of France (2005) CHR 237** and **Miroslav Cenbauer v Republic of Croatia (2005) CHR 429.** In both cases, the European Court of Human Rights awarded damages to the Plaintiffs who

established to the satisfaction of the Court that they were subjected to treatments that were in contravention of Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

10. Learned counsel to the Plaintiff/Respondent relied heavily on the judgment of this Honourable Court in the case of Chief **Ebrimah Manneh v Republic of The Gambia (supra)**, quoting thus "Having concluded in issues 1 and 2 above, that the Plaintiffs right to his personal liberty has been abused, the Plaintiff is entitled to some damages for the wrong that he has suffered. The amount of damages, however, is dependent on the facts of this application and the relevant rules governing the award of damages". Therefore, counsel concluded that the amount of damages to be awarded a successful Plaintiff is within the discretion of the Court and does not follow any arithmetic formula.

Consideration by the Court

11. An application for review of a judgment or decision of this Court is governed principally by Article 25 of the Protocol on the Court of Justice (A/P.1/7/91) and Article 92 of the Rules of the Court. The relevant portions thereof read thus:

***Article 25* of the Protocol**

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

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

***Article 92* of the Rules of Court:**

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.

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

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

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

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

13. Thus, for an Application for review to succeed in this Court, the party making the application should satisfy all these three conditions precedent. The Application for revision is based on the ground that there was a miscarriage of justice when the Court failed to properly appraise the evidence on record and awarded the sum of Two Hundred Thousand United States Dollars ($200,000.00) to the Plaintiff/ Respondent which is excessive, having regard to the evidence before the Court. Learned counsel to the Plaintiff/ Respondent submitted that this is not a new fact within the contemplation of Article 25 of Protocol A/P.1/7/91 which would warrant a review of the judgment in question.

14. The first condition to be met in order to succeed with a review application is that the review application must have been filed within five years of the date on which the judgment that is being sought to be reviewed was delivered. From the record, the judgment in question was delivered on the 16th day of December, 2010 whilst the Application for review was filed on the 31st March, 2011. This is clearly within the five years within which a party is permitted to bring an application for a review of a judgment or decision of this Court.

15. The second condition that has to be satisfied in order to secure a review of a judgment or decision of this Court is that the party applying for a review must file his application within three months of his discovering the fact/ facts upon which his application is based. Learned counsel to the Plaintiff/ Respondent submitted that the application for review ought to be rejected on this ground because it was filed more than three months after the judgment was delivered, the judgment itself being the ground upon which the review is sought. As noted previously, the judgment was delivered on the 16th December, 2010 whilst the application for review was filed on the 31st March, 2011. Thus, the review was filed over three months after the judgment was delivered as three months from the date of judgment expired on the 1st of March, 2011. However, on the 22nd June 2011 the Defendant/ Applicant made an application for extension of time within which to file their application for a review in order to regularize it, but it was opposed by

learned counsel to the Plaintiff/Respondent. After the argument of the parties on the issue, the Court in a reasoned opinion overruled the objection and granted the Defendant/Applicant the extension of time sought. Thus, the application was deemed to have been filed within time. It therefore does not lie in the mouth of counsel to the Plaintiff/Respondent to say that the application was filed out of time. The issue was closed by the ruling of the Court and thus cannot be re-opened.

16. The final condition precedent to a successful application for a review of a judgment or decision of this Court is that the application for a review must be premised on the discovery of some fact/s that is/are of a decisive nature, which fact/s was/were unknown to the Court or the party claiming revision provided that such ignorance was not due to negligence. The application for revision is based on the ground that there was a miscarriage of justice when the Court failed to properly appraise the evidence on record and awarded the sum of US $200,000 (Two Hundred Thousand United States Dollars) to the Plaintiff/Respondent which they consider excessive, having regard to the evidence before the Court. Learned counsel to the Plaintiff/ Respondent contends that this is not a new fact within the contemplation of Article 25 of the Protocol on the Court (A/P.1/7/91).

17. A careful reading of Article 25 of Protocol A/P.1/7/91 reveals clearly that facts contemplated by the said Article are facts that were in existence at the time of the decision but were unknown to both the Court and the party claiming revision. It also reveals that the facts in question are facts that could have had a decisive influence on the judgment. Can a judgment of the Court be said to be a fact that could have had a decisive influence on that same judgment? The answer is obviously in the negative. Again, can one say a judgment of the Court is a fact that was in existence before that same judgment was delivered? The answer is certainly not in the affirmative,

18. The Defendant/Applicant in claiming that the amount of damages awarded to the Plaintiff/Respondent is excessive having regard to the evidence before the Court is simply claiming that the judgment is erroneous. It is trite learning that if a judgment is erroneous, it is a ground for appeal but not a review as contemplated by Article 25 of Protocol A/P.1/7/91 and Article 92 of the Rules of this Court. Article 19(2) of Protocol A/P.1/7/91 makes it clear that judgments of this Court are final and binding, subject to the provisions of a review. The decisions of this Court are thus not subject to appeal. The Court will not welcome any attempt to use the limited review process as an appeal process, and thereby circumvent the fact that these decisions are final.

19. Besides, even on the facts of this case, the Court in the judgment complained of carefully reviewed the evidence that led it to the award of damages. The cases of **Chief Ebrimah Manneh (supra) and Hadijatou Mani Koraou (supra)** that Counsel for the Defendant/Applicant cited for purposes of comparing awards made by this Court in human rights cases are of no relevance for three reasons: first, the facts in those two cases are not on all fours with the instant case; secondly, the awards in the three cases were based on the peculiar facts and circumstances of each case; thirdly, they were known to the Court and the parties at the time the judgment was delivered; the former was even considered in that decision.

20. **Decision**

For the foregoing reasons, the Court decides that this is not a proper case for revision as no fresh fact has been discovered since the judgment; moreover, the facts relied upon by the Applicant were known at the time of the judgment. The Court rejects the Application accordingly.

21. **Costs**

The Defendant/Applicant shall bear the costs of this application in accordance with Article 66 of the Rules of Court.

DATED AT ABUJA THIS 7TH DAY OF FEBRUARY, 2012.

Hon. Justice Hansine N. Donli - *Presiding*
Hon. Justice Awa Nana Daboya - *Member*
Hon. Justice Anthony A. Benin - *Member*

Mr. Tony Anene-Maidoh - *Chief Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY THE 22ND DAY OF FEBRUARY, 2012

SUIT NO:ECW/CCJ/APP/01/08
RULING NO: ECW/CCJ/RUL/05/12

BETWEEN
STARCREST INVESTMENT LTD - ***PLAINTIFFS***
V.
1. **THE PRESIDENT, ECOWAS COMMISSION**
2. **THE FEDERAL REPUBLIC OF NIGERIA**
3. **STARCREST NIGERIA ENERGY LTD**
4. **EMEKA OFFOR**

} ***DEFENDANTS***

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

ASSISTED BY
TONY ANENE- MAIDOH - CHIEF REGISTRAR

REPRESENTATION TO THE PARTIES
1. **WOLE OLANIPEKUN & CO** - *FOR THE APPLICANT*
2. **MR DANIEL LAGO** - *FOR THE 1ST DEFENDANT*
3. **PAMELA OHABOR WITH T. N. AKOSA AND N. EZEA** - *FOR THE 2ND DEFENDANT*
4. **ADEYEMI PITAN & IKE-ECHIE BRIAN** - *FOR THE 3RD & 4TH DEFENDANTS*

-Non diligent prosecution

SUMMARY OF FACTS

The Applicant is a Company registered in Nigeria and the 1st Defendant is the head of ECOWAS Commission, the 2nd Defendant is a Member State of ECOWAS, the 3rd Defendant is a Company and the 4th Defendant is a citizen of the Community. The Applicant brought an application for the revision of the Court's judgment of 8th July, 2011 pursuant to the provisions of Articles 25 of Protocol A/P.1/7/91 and Article 92 of the Rules of Procedure of the Court.

Parties exchanged their applications and replies, a date was fixed for the hearing and all the parties were served. On the said date fixed for hearing, without representation or justification for the absence, Plaintiff failed to enter appearance. Based upon this, the 2nd Defendant urged the Court to strike out the case for non-diligent of prosecution with Cost of N300,000.00 (Three hundred thousand naira) the 3rd and 4th Defendants also urged the Court to strike out the case for the same reasons with N50,000.00 (Fifty thousand naira) as Cost.

LEGAL ISSUES

Whether the non-appearance of the Applicant in Court for hearing on the date fixed for the hearing despite being served, amounts to non-diligent prosecution of the application for revision of judgment.

DECISION OF THE COURT

The Court held:

That having considered the application for revision of judgment and the reasons given by the Defendants for striking out the case for non-diligent prosecution despite being served. Also, having failed to comply with the requirements of the law in diligently prosecuting the case, the action was

struck out and the sum of N50, 000 (Fifty thousand naira) was awarded as cost to the 2nd Defendant on one part and 3rd and 4th Defendants on the other against the Plaintiff. The Court also held that in case the Applicant opts for the re-listing of the case, the cost awarded shall be paid fully before lodging the said application for re-listing of the case at the Registry of the Court.

RULING OF THE COURT

PARTIES

1. The Plaintiff are: STARCREST INVESTMENT LIMITED, Plot 1066 Adetokunbo Ademola Crescent Wuse 11, Abuja, Nigeria. The Plaintiff companies registered in Nigeria.

2. President, ECOWAS COMMISSION, ECOWAS Secretariat, Asokoro, Abuja, Functions as per revised ECOWAS Treaty.

3. The 2nd Defendants, the Federal Republic of Nigeria c/o Attorney General of the Federation Federal Republic of Nigeria, Ministry of Justice, Abuja.

4. The 3rd Defendants are Starcrest Nigeria Energy Limited, No. 22or Plot 457 Lobito Crescent, Wuse II, Abuja. Company registered in Nigeria.

5. The 4th Defendant, Emeka Offor of No. 22 or Plot 457 Lobito Crescent Wuse II, Abuja.

SUMMARY OF THE FACTS OF THE CASE

5. This is an application for Revision of the judgment of this Court dated 8th July, 2011 and brought pursuant to Article 25 of Protocol A/P.1/7/91 and Article 92 of the Rules of Procedure of this Court which stated the procedure for an order for Revision of the judgment of the Court.

6. In order to appreciate the essentials of the procedure for Revision, it is necessary to refer to the provisions for revision set out succinctly below, thus:

   Article 25 of protocol A/P.1/7/91 states:

   > ***"An Application for revision of a decision may be made only when it is based only where it is based upon the discovery of some fact of such a nature are 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 done to negligence."***

Article 92 of the Rules states:

> ***'An application for revision of a judgment should be made within three months of the date which the facts on which the application is based came to the applicant's knowledge'.***

7. Parties in this case have exchanged the Application replies and the cases slated for hearing. On the last adjourned date there was no service on the Applicant and the case was adjourned with an order that the Applicant shall be served before the date for hearing, which is the 22/02/12.

8. On this date, there was no appearance by the Plaintiff and no representation and no justification for the absence of the Plaintiff Court. Learned Counsel for the 2nd Defendant representing the Federal Republic of Nigeria urged the Court to strike out the case with N300,000.00 costs for non-diligent prosecution of the matter.

9. Also learned counsel for the 3rd and 4th Defendants urged the Court to strike out the case for non-diligent prosecution of the case within N50,000.00 costs.

10. The Court has considered the application for revision and the reason given by the Defendants counsel for striking out the case for non-diligent prosecution as the Applicant and his counsel are absent despite the fact that they have been served.

11. It is trite law that an Applicant is required to prosecute his application lodged in the dockets of the Court diligently and where there is a failure on the part of the Applicant by way of filing of pleadings or appearance in the Court to diligently prosecute the case, it would be appropriate for the Court to strike out the case from the Court's list with cost.

12. Having failed to so comply with the requirements of the law in prosecuting this case, the action should be struck out with cost. In the circumstance, the Court strikes out the case accordingly as per reasons stated above.

COSTS

13. As always, cost shall be awarded when the party who asked for it is successful. In the circumstance, the Court awards N50,000.00 to the 2nd Defendant on one part and 3rd and 4th Defendants on the other, against the Plaintiff/Applicant accordingly. In case that the Applicant opts for the relisting of this case, the costs awarded shall be paid fully before lodging the said application for relisting of the case at the Registry of the Court.

The Ruling is Read in Public in accordance with the Rules of this Court dated July 24th 2012.

CORAM

Hon. Justice Hansine N. Donli - *Presiding Judge*

Hon. Justice Awa Daboya Nana - *Member*

Hon. Justice Anthony A. Benin - *Member*

Assisted by Tony Anene-Maidoh - *Chief Registrar*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON THIS 13TH DAY OF MARCH 2012

(APPLICATION FOR REVISION)

SUIT N^O: ECW/CCJ/APP/12/10
JUDGMENT N^O: ECW/CCJ/JUG/06/12

IN THE CASE

BETWEEN
MADAM ISABELLA MANAVI AMEGANVI & ORS - *PLAINTIFF*
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

MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **MAITRE AJAVON ATA MESSAN ZEUS** - *FOR THE PLAINTIFF*
2. **SCP MARTIAL AKAKPO &**
   MAITRE EDAH ABBY N'DJELLE - *FOR THE DEFENDANT*

Omission to adjudicate on an order sought
- Initial procedure finally ended
- Non reformation of decisions by national courts.

SUMMARY OF FACTS

By Judgment N°. ECW/CCJ/JUD/09/11 of 7 October 2011, in a case filed by Lady AMEGANVI Manavi Isabelle and others, the Court adjudged that the State of Togo has violated Plaintiffs' fundamental human rights to be heard, pursuant to the provisions of Articles 10 of the Universal Declaration of Human Rights, and 7 of the African Charter on Human and Peoples' Rights. Consequently, the Court ordered the State of Togo to pay each of the Plaintiffs, a sum of 3 000 000 CFA francs, as damages.

By Application dated 16 November 2011, Mrs. Isabelle Manavi and others filed a fresh case seeking revision of the said Judgment, on the ground that the Court failed to adjudicate on one of the orders sought, which was their re-instatement, as MPs to the Togo National Parliament.

LEGAL ISSUES

- *Can the consequential effect of a human right violation be considered an order sought, which shall be independent of the main Application?*

- *Does this Honourable Court have jurisdiction to examine the decision of the national court of a Member State?*

DECISION OF THE COURT

In its Judgment, the Court declared the Application by Plaintiffs, as admissible, and declared that it did not omit to adjudicate on any earlier order sought, and further declared that it is not competent to order Plaintiffs' re-instatement into the Togo National Assembly, since the loss of membership, which they complained about had been noted by the Togo Constitutional Court, which made a pronouncement on it.

JUDGEMENT OF THE COURT

PROCEDURE

1. By Application dated 16 November 2011, received by the Registry of the Court on 17 November 2011, Madam lsabelle Manavi Ameganvi and Messrs. Jean Pierre Fabre, Boevi Patrick Lawson-Banku, Tchagnaou Nafiou Ouro-Akakpo, kojo Thomas Atakpamey, Kwami Nanti, Akakpo Attikpa, Yao Victor Ketoglo and Brice Ahli Apenya, whose Counsel is Maitre Ajavon Ata Messan Zeus, Lawyer registered with the Appeal Court of Lome, with address at 1169 Avenue de Calais, BP 1202, Lome, Togo, brought the Republic of Togo before the Court seeking orders to compel the Republic of Togo to reinstate them in their seats as Parliamentarians at the National Assembly of Togo.

THE FACTS OF THE CASE

The facts of the case as narrated by the Applicants

2. The Applicants pleaded that the Honourable Court delivered judgment No. ECW/CCJ/JUD/09 of 7 October 2011 in regard to their Application; that of the head claims made in the said Application before the Court, to wit their reinstatement back to their seats in the National Assembly of the Republic of Togo, was not examined, nor was the issue settled by the Court; they concluded that the object of the instant Application was to rectify the omission, by asking the Court to adjudicate on that head of claim and ask the Republic of Togo to restore them back to their seats as Members of Parliament; that they had never given up those positions,

3. In that regard, the Applicants argued out their case, that from paragraphs 60, 61 and 62 of the above-cited Judgment, the Court admitted that the Applicants never intended to resign from their seats as Parliamentarians at the National Assembly, since they never submitted any letter of resignation to that effect.

The facts of the case as narrated by the Defendant

4. The Republic of Togo affirmed that it had completely implemented the obligations Imposed on it by Judgment No. ECW/CCJ/JUD/09 of 7

October 2011, in favour of the Applicants, consequent to the subject-matter of the Application filed by Isabelle Manavi Ameganvi and her Co-Applicants. The Defendant further contended that the instant Application, as brought by the Applicants, is as a result of the fact that they were unsuccessful in getting the Republic of Togo to restore back to them, the parliamentary seats they had lost following Decision No. E018/1D of 22 November 2010, as made by the Constitutional Court of the Republic of Togo.

PLEAS IN LAW BY THE PARTIES

Pleas-in-law filed by the Applicants

5. The Applicants invoked, in support of their Application, Article 64 of the Rules of Procedure of the Court; they asked the Court to make a clear pronouncement in regard to their reinstatement back to the National Assembly and they cited Judgment No. ECW/CCJ/JUD/03/08 of 8 June 2008 where the Court ordered the Republic of the Gambia to release Chief Ebrimah Manneh, and that the order was to be implemented immediately upon receipt of the Judgment.

Pleas-In-law filed by the Defendant

6. The Republic of Togo relied partly on Article 7(1) of the Rules of Procedure of the National Assembly, and partly on Article 106 of the Constitution of the Republic of Togo, and in conjunct ion with that, cited the consistently held case law of the Court.

7. The Defendant argued that Article 7(1) of the Rules of Procedure of the National Assembly of Togo, which provides that, ***"The President shall inform the National Assembly, as soon as he is notified of vacancies which may have occurred as a result of one of the causes enumerated under Title 3, Chapter 1 of the Electoral Code, and for any other cause. He shall notify the Constitutional Court of the name of the Parliamentarian whose seat has become vacant and he shall ask the Court to communicate to him the name of the person entitled to fill the vacancy, in accordance with Article 192 of the Electoral Code",*** was adhered to; the Defendant further argued that the text does not provide that the Constitutional Court shall hear the Applicants in the

course of the procedure leading to their replacement: such that, the only right of the Applicants which was violated was the right to be heard before the plenary of the National Assembly, and concluded that the reparation of that right violation cannot result in reinstating the Applicants back to the National Assembly.

8. As regards Article 106 of the Constitution of Togo, the Republic of Togo indicated that in the terms of the text, Decision No. E018/10 of 22 November 2010 of the Constitutional Court ruled that the Applicants had lost their tenure as Parliamentarians and as such, the judgment had become *res judicata* and acquired *ergo omnes* effect, and therefore the said Decision cannot be contested.

9. The Defendant equally affirmed that since the ECOWAS Court has consistently held that applications brought before it seeking to annul decisions of the domestic courts of Member States fall outside its jurisdiction, the Court, not being an appeal court or a *cour de cassation* over decisions of the domestic courts, it does not have the Jurisdiction to overturn the said Decision of the Constitutional Court of Togo, by ordering the Republic of Togo to reinstate the Applicants back into those parliamentary seats already declared as lost seats by the national court.

ANALYSIS OF THE COURT

As to the admissibility of the Application

10. Judgment No. ECW/CCJ/JUD/09 of 11 October 2011 was served on the Applicants on 24 October 2011 by a DHL mail dated 21 October 2011, dispatched by the Registry of the Court; the Applicants registered their Application dated 16 November 2011 at the Registry of the Court, on 17 November 2011, asking the Court to adjudicate on an omission in adjudication; this means that the Application for Revision was filed in the very month that the said Judgment was served on the Applicants.

11. The Court finds that the Application brought in regard to the said omission in adjudication, by Isabelle Manavi Ameganvi and her Co-Applicants, is admissible, because it was filed in accordance with Article 64 of the Rules of the Court, and the Court so declares.

As to the merits of the case

12. The Applicants maintain that the Court omitted to adjudicate on their application for reinstatement to the National Assembly of Togo, whereas that request was made in the original Application brought before the Court, giving rise to the Judgment being complained of in the instant Application.

13. First and foremost, the Court notes that the original Application brought by lsabelle Ameganvi and her Co-Applicants, which gave rise to the Judgment being complained of in the instant Application, asked the Court to adjudicate on human rights violations allegedly committed by the Republic of Togo against the Applicants, notably the human rights provided by Articles 7(1), 7(1)-c and 10 of the African Charter on Human and Peoples' Rights.

14. The Court notes that within the circumstances of the case, the issue of reinstatement the Applicants back to the National Assembly of Togo simply comes up as a possible consequence of a human rights violation found as having been committed against the Applicants, and not as a head of claim which the Court must adjudicate on *per se*.

15. In this regard, the Court finds that the Judgment in question admitted human rights violation, specifically violation of the right to be heard by the plenary session of the National Assembly, and even subsequently by Constitutional Court.

16. Also, the Court finds that by upholding the right violation, as alleged by lsabelle Ameganvi and her Co-Accused against the Republic of Togo, it has adjudicated exhaustively upon the matter brought before it for determination, which consists of making a pronouncement as to whether or not the Republic of Togo violated any human rights, which ended up harming the Applicants.

17. The Court finds that the application to retrieve the lost seats is akin to an Application brought against Decision No. E018/ 10 of 22 November 2010 of the Constitutional Court of the Republic of Togo, which is a domestic court of a Member State; and in following its established jurisprudence, the Court has no Jurisdiction to sit as an appellate court or a cassation court, and so it cannot reverse the said Decision.

18. The Court shall therefore not go beyond its scope of competence and adjudicate on the reinstatement of the Applicants; If it were to make an order to that effect, it would amount to annulling the decision made by the Constitutional Court, an act which would be outside the purview of the Community Court of Justice.

19. Consequently, the Court declares that the presumed omission to adjudicate on the issue of reinstatement, as brought by the Applicants, has no grounds, and must therefore be dismissed.

As to costs

The Court is of the view that considering the circumstances of the case, it shall be fair to ask each Party to bear its costs.

FOR THESE REASONS

In terms of formal presentation

The Court,

- **Declares** that the Application filed by Isabelle Ameganvi and her Co-Applicants, alleging omission in adjudication, is admissible.

In terms of merits

- **Adjudges** that there is no omission in adjudication, and that the Court has no mandate to order the reinstatement of the Applicants back to the parliamentary seats they have lost following the ruling made by the Constitutional Court;

- **Asks** each Party to bear its costs,

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

AND THE FOLLOWING APPEND THEIR SIGNATURES

1. **HON. JUSTICE BENFEITO MOSSO RAMOS -** *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **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, IN NIGERIA

THIS 15TH DAY OF MARCH, 2012

SUIT NO. ECW/CCJ/APP/03/10
JUDGMENT NO ECW/CCJ/RUL/07/12

BETWEEN

ALHAJI MUHAMMED IBRAHIM HASSAN- *APPLICANT*

V

GOVERNOR OF GOMBE STATE - *1ST DEFENDANT*

FEDERAL GOVERNMENT OF NIGERIA - *2ND DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE M. NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY

MR. TONY ANENE-MAIDOH- *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **MRS. FUNMI FALANA,** ***(ESQ.)***
2. **MR. SOLA EGBEYINKA,** ***(ESQ.)***
3. **MR. PAUL OYACHI ESQ.** **-***FOR THE APPLICANT*

1. **CHIEF BAYO OJO** ***(ESQ.)***
2. **MR. LAWRENCE AZUBUIKE A. BABALOLA** **-***FOR THE 1ST DEFENDANT*

1. **MR. F. N. NWOSU** ***(ESQ.)***
2. **MR. OBINNA DARLINGTON** ***(ESQ.)*** - *FOR THE 2ND DEFENDANT*

Death of Applicant -Effect on provisional measure - Locus standi -How established; Article 9(4) Supplementary Protocol -Limit thereof; Ratione personae jurisdiction -Article 10(d) Supplementary Protocol

SUMMARY OF FACTS

The Plaintiff brought this action alleging that between 2003 and 2009, 71 citizens of Gombe state were killed judicially by the 1st Defendant armed gang called "Kalare" and the 2ndDefendant refused/failed to disarm, disband and prosecute the members of the armed gang. Before the matter was heard Plaintiff filed an application asking the Court for provisional order restraining the Defendants from harassing and intimidating him.

The Defendants raised a Preliminary Objection on lack of the court's jurisdiction to entertain the suit; the inadmissibility of the substantive application due to non-exhaustion of local remedies and lack of locus standi by Plaintiff.

Before the Ruling was delivered on the Preliminary Objection and the Application for provisional measures, the Plaintiff died.

LEGAL ISSUES

1) *Whether this Court can in view of the death of Plaintiff consider the application for provisional measures.*

2) *Whether this Court can entertain an action on Human Rights violation brought against a non-member State of ECOWAS?*

3) *Whether this Court has jurisdiction to examine alleged violations of Articles 1, 4, 5 and 7 of the African Charter?*

4) *Whether in view of Article 10(d) of the Supplementary Protocol, a non-victim of rights abuse can maintain an action before this Court.*

DECISION OF THE COURT

The Court held dismissing the Application:

1) *That there are no grounds to consider the Application for provisional measures since the death of the Applicant has defeated the purpose of that provisional measure.*

2) *That its human rights jurisdiction is in regard to action against member states and is established once the facts relate to human rights violation within the region and the 1st Defendant not being a Member State cannot be brought before the Court for human rights violation.*

3) *That it has jurisdiction to examine violation of Articles 1, 4, 5 and 7of the African Charter*

4) *That it cannot admit a party to a case merely on the grounds of being a necessary party.*

5) *That the Applicant not being a victim or a relation to a victim of the violation of human rights, has no locus standi to institute the action.*

RULING OF THE COURT

FACTS AND PROCEDURE

1. Alhaji Muhammed Ibrahim Hassan, a Nigerian national, whose Counsel is Mrs. Funmi Falana Esq., Mr. Sola Egbeyinka Esq. and Mr. Paul Dyachi Esq., all lawyers of Falana & Falana's Chambers, brought a case before the Court on 15 February 2010 against the Governor of Gombe State, Nigeria and the Federal Government of Nigeria, on violation of Articles 1, 4, 5 and 7 of the African Charter on Human and Peoples' Rights.

2. In his Application, he sought the following reliefs:

   - A **Declaration** that the extra judicial killing of 71 community citizens in Gombe, Gombe State from 2003 to 2009 by the 1st Defendant's armed gang called "Kalare" is illegal as it contravenes Article 4 of the African Charter on Human and Peoples' Rights;

   - A **Declaration** that the failure or refusal of the 2nd Defendant to disarm, disband and prosecute the members of the 1st Defendant's armed gang called "Kalare" is illegal as it constitutes a threat to the lives of the Plaintiff-and other community citizens in Gombe, Gombe State;

   - An **Order** directing the 1st Defendant to pay N50,000,000.00 (Fifty Million Naira) to the family of each of the 70 (sic) community citizens killed in Gombe, Gombe State by his armed gang called "Kalare".

   - An **Order** directing the 2nd Defendant to disarm, disband and prosecute the members of the 1st Defendant's armed gang called "Kalare" forthwith.

3. The Application was followed by a motion on notice in which the Court was asked to make provisional orders restraining the Defendants, their agents, privies, and servants from attacking, harassing and intimidating the Plaintiff pending the determination of the substantive suit.

4. The Governor of Gombe State, represented by his Counsel, Chief Bayo Ojo, SAN and Mr. Lawrence Azubuike Ayodele Babalola, lawyers at the Bayo Ojo and Co. Chambers, lodged a notice of preliminary objection at the Registry of the Court on 22 March 2010, In that application, he raised a preliminary objection on lack of jurisdiction of the Court and inadmissibility of the substantive application.

5. In response, Counsel to the Plaintiff lodged at the Registry of the Court on 25 August 2010, his written address on the said preliminary Objections. Further, during the hearing of 7 July 2011, he withdrew the said written submissions and stated that he wanted to limit himself to oral arguments only.

6. Further, the Federal Government of Nigeria, represented by its Counsel F. N. Nwosu Esq. and Mr. Obinna Darlington of Goldmark Law Firm, lodged on 10 December 2010 at the Registry of the Court, an application in which it adopted the Preliminary Objection lodged and filed by the Governor of Gombe State as well as all the pleas in law, arguments he invoked in support of his claim. It also prayed the Court to grant that application, which it acknowledged was filed out of time.

7. On 21 December 2010, the Plaintiff filed a counter affidavit and prayed the Court to dismiss the application for adoption of the Preliminary Objection as submitted by the Federal Government of Nigeria, on the ground that by acting in such manner, the Federal Government of Nigeria had not filed its own notice of preliminary objection in a separate application as required by the Rules of the Court.

8. On 23 June 2011, the Governor of Gombe State lodged at the Registry of the Court, a supplementary written address in support of the Preliminary Objection raised on 22 March 2010. Then, on 5 July 2011, he also lodged a motion on notice asking the Court to accept the submissions lodged on 23 June 2011 in support of the Preliminary Objection raised on 22 March 2010. He also lodged that same day, upon leave granted by the Court at the hearing of 23 June 2011, a counter affidavit in response to the application for issuance of provisional orders brought by the Applicant on 15 February 2010.

9. On 6 July 2011, the Federal Government of Nigeria lodged its counter affidavit at the Registry of the Court in accordance with the leave granted by the Court at the hearing of 23 June 2011.

10. All the written pleadings lodged in the instant case were served on the Parties by the Registry of the Court.

11. At the hearing of 7 July 2011, upon the request of Counsel to the Applicant, and by application of Article 87 of the Rules of the Court, the Court dismissed the supplementary written address in support of the Preliminary Objection raised on 23 June 2011 by the Governor of Gombe State.

12. At that hearing, judgment of the case was reserved for further consideration and the Court indicated that it would deliver its judgment on 14 December 2011. When hearing was due, Counsels to the Defendants raised new facts and upon their earnest request, Counsel to the Applicant informed the Court of the death of Alhaji Muhammed lbrahim Hassan. Due to the new situation, deliberation was wound up and after hearing the Parties, judgment of the case was once again reserved for further consideration, for decision on 15 February 2012; and then on that date, the deliberation was further deferred to 15 March 2012.

ARGUMENTS OF THE PARTIES

A. As to provisional measures

(i) Regarding the Applicant

13. The Applicant submitted, as circumstances justifying the application for provisional orders, that since he was granted bail, the armed agents of the 1st Defendant had been threatening to kill him and that if the Court processes were not served on the Defendants, his life will be further endangered; that if the application was refused, he may not be alive to pursue the case and save the lives of other people in Gombe State.

(ii) Regarding the Governor of Gombe State

14. Counsel to the Governor of Gombe State affirmed, in response, that a party seeking provisional orders must meet three (3) conditions. First of

all, it must show that the Court has jurisdiction in the matter. Further, it has to show that if the Court does not make provisional measures, the party will suffer irreparable prejudice/damage. Finally, it must prove that the instructions are urgently required. He submitted that the Applicant neither invoked nor demonstrated any of these conditions and that as a result his application for provisional orders must be dismissed as ill-founded.

I5. With respect to the first ground, as to whether the Court has jurisdiction in the Matter, he contended further that there are two aspects to jurisdiction in an application for provisional measures. The first is the power to consider or inquire into the issue of provisional measures and the second is whether the Court has substantive jurisdiction. He argued that while the practice is to consider applications for provisional measures even before reaching the question of jurisdiction,

> ***"the rule is that where it is manifest, clear, obvious and apparent that the Court does not have jurisdiction ab initio, the Court cannot issue provisional measures or make provisional instructions. The burden on the Applicant is to show a slight indication of jurisdiction on the merits coupled with the absence of any obvious bar to jurisdiction."***

In other words, the Plaintiff has the burden of showing *prima facie* jurisdiction of the Court.

16. He concluded, in connect ion with the second criterion, as to whether the party will suffer irreparable damage if the Court does not give provisional orders, that the Court should reject the application on the basis that the said criterion is at the heart of the provisional measures or instructions. He indicated that by definition, such measures or instructions are necessitated by the desire to avoid a situation in which the court's judgment on the merits will be rendered nugatory.

17. Concerning the third condition to be met before an application for provisional measures or instructions can be granted, i.e. proof of the urgency of the claim for interim measures, same Counsel affirmed that Plaintiff has not shown that the orders sought cannot wait until the end of the case.

18. For all these reasons, Counsel to the 1st Defendant urged the Court to reject Plaintiff's application for provisional orders on the grounds that it is unfounded and does not meet any of the criteria of admissibility for provisional measures, and that it is based on speculation and hearsay.

(iii) Regarding the Federal Government of Nigeria

19. Counsel to the 2nd Defendant adopted the arguments of 1st Defendant regarding lack of prima facie jurisdiction and requirement of irreparable damage. Besides, he stated that since the filing of the substantive application and application for provisional measures, Plaintiff has been moving about freely in Gombe State and other places within the Federal Republic of Nigeria without let or hindrance. He added that the Applicant has not provide any evidence concerning attack on him, threat to his life or intimidation by 1st Defendant - who had ceased to be the Governor of Gombe State since 29 May 2011 - or by the Federal authorities who, on the contrary, had always protected the Plaintiff/Applicant.

B. As to preliminary objections on lack or jurisdiction of the Court and inadmissibility of the substantive suit

(i) Regarding the Governor of Gombe State

20. According to Counsel to the Governor of Gombe State, the Court lacks jurisdiction to entertain the substantive suit and it has no jurisdiction over Gombe State. In support of these pleas in law, he invokes the same arguments already pleaded to buttress the manifest lack of jurisdiction of the Court to issue provisional orders. Moreover, he stated that the Court has no jurisdiction over disputes between nationals of the Community Member States and other administrative authorities within Member States such as the 1st Defendant.

21. Besides, he raised four grounds of inadmissibility of the substantive suit, as follows:

    - Firstly, that the Plaintiff cannot use the process of the Court to undermine the judicial powers of domestic Nigerian courts;
    - Further, that the Plaintiff has not exhausted domestic remedies available before the domestic courts of Nigeria and as such, the suit

is hasty and premature. As was indicated by the Court's **Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008 in Suit No. ECW/CCJ/APP/08/08, Hadijatou Mani Koraou v. Niger**, only State Parties to the Protocol on the Court may choose to renounce the rule on exhaustion of local remedies; since 1st Defendant is not party and cannot be party to the Treaty and Protocols establishing the ECOWAS Community Court of Justice, he cannot be taken to have waived the requirement of exhaustion of local remedies;

- Also, the Plaintiff lacks *locus standi* to institute the action. He does not claim any relationship with any of the individuals allegedly killed, He does not demonstrate any personal interest at stake, He does not also have the standing required of a victim as set out under the new Article 10 of the Protocol on the Court, amended by the 19 January 2005 Supplementary Protocol.

- Finally, that the averments of the Applicant are without any evidence. Indeed, he contented himself with drawing up two unsigned lists of persons allegedly killed, with no reference to any death certificates or any other way by which deaths can be established. In the final analysis, Plaintiff merely made gratuitous and unsubstantiated statements against the Governor of Gombe State, amounting to serious accusations.

22. For these reasons, he requested the Court to strike out the Application.

(ii) Regarding the Federal Government of Nigeria

23. Counsel to the 2nd Defendant also pleaded that Plaintiffs Application was inadmissible. He relied on the arguments of Counsel to the 1st Defendant in regard to lack of locus standi and lack of evidence. He equally argued that the Applicant is attempting to use the process before the Court to avoid criminal proceedings instituted against him before the domestic Courts of Nigeria.

(iii) Regarding the Applicant

24. In response to the arguments made by the Defendants to buttress their Preliminary Objection, Counsel to the Plaintiff maintained that even if 1st

Defendant is not a Member State of the Community and not a principal party to the procedure, he is a necessary party. On that ground, Plaintiff has the right to sue him before the Court because there cannot be an effective determination of the suit without the joining of the 1st Defendant. In his view, the Court has Jurisdiction to adjudicate on the case. He cited for illustration purposes, **Ruling No. ECW/CCJ /RUL/05/11 of 7 July 2011 in Suit No. ECW/CCJ/APP/02/11, Moukhtar Ibrahim Aminu v. Government of Jigawa State & ORS,** and **Judgment No. ECW/ CCJ /JUD/04/07 of 28 June 2007 in Suit No. ECW/CCJ/APP/01/ 06, El Hadji Tidjani v. Federal Republic of Nigeria & ORS**.

25. He affirmed that the Supreme Court of Nigeria has had an occasion to consider the expanded horizon of *locus standi*. In line with the said interpretation, it is no more a requirement that there must be a blood relationship or a nexus between the party filing the claim and the party on whose behalf the claim is filed. In terms of human rights, according to the Applicant, what applies is the principle of a common public interest, by virtue of which each member of the society may bring complaints on human rights violation that may occur against his neighbour. Consequently, in his view, the Applicant who attempts to defend the rights of his oppressed fellow citizens has *locus standi*.

26. Concerning exhaustion of local remedies, he refers to **Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008 in Suit No. ECW/CCJ/ APP/08/08 Hadijatou Mani Koraou v. Niger**, in which the Court indicated that the rule on exhaustion of local remedies is not applicable before it. He stressed that the matter before the Nigerian courts is a criminal proceeding against the Applicant for allegedly providing false information. The substantive issue in that case is therefore different from the action in human rights violation brought before the Court. The new Article 10 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol cannot be invoked as a basis of the inadmissibility of the Application, since the domestic courts of Nigeria are not international courts.

27. As regards *rationae personae* jurisdiction in regard to the Defendants, he alleged that in **Judgment No. ECW/CCJ/JUD/01/06 of 5 April 2006 in Suit No. ECW/CCJ/APP/01/04 Tokunbo Lijadu Oyemade**

v. Executive Secretary of ECOWAS & Ors, and **Judgment No. ECW/CCJ/JUD/02/08 of 4 June 2008 in Suit No. ECW/CCJ/APP/02/07 Tokunbo Lijadu Oyemade v. Council of Ministers & Ors**, individuals sued Community Institutions, which are administrative bodies. Since the Court affirmed its jurisdiction in those cases, the same principle should apply to the Governors of States within the Federation.

28. In response to the argument regarding lack of evidence, he replied that when the time comes for the case to be considered on its merits, he will produce the witnesses and the documents expected to prove the allegations contained in the initiating application.

29. Finally, he prayed the Court to dismiss the Preliminary Objection regarding lack of jurisdiction of the Court and inadmissibility of his Application.

C. As to consequences of the death of the Applicant

(i) Regarding the Applicant

30. Counsel to the Applicant maintained that the death of the Plaintiff does not terminate the mandate given him to represent the Plaintiff. He further contended that he reserves the right to decide whether to pursue the case further or not, once the Court has decided on the issues pending prior to the death of his client; more so because it is an Application regarding fundamental human rights, which offers the Court an opportunity to build on and consolidate its case-law. He added that the Rules of the Court do not contain provisions applicable to the instance of death of an Applicant while proceedings are still on course, and considering the fact that the Court had reserved judgment on the case for further consideration, prior to the death of Plaintiff} the Court was required to deliver its judgment. He therefore concluded that the death of his Client cannot pose an obstacle to the pronouncement of the Court's judgment concerning the pending applications, prior to the occurrence of death.

(ii) Regarding the Governor of Gombe State

31. Counsel to the 1st Defendant emphasised on his part that the death of Plaintiff, on one hand, renders the application for provisional measures purposeless, and that on the other hand, there are grounds to hold that

there is no Applicant to the suit any more. Consequently, he urged the Court to declare that there was no ground any more for adjudication on the case, in line with paragraph 2 of Article 88 of the Rules of the Court.

(iii) Regarding the Federal Government of Nigeria

32. As for 2nd Defendant, it adopted the same arguments brought forth by Counsel to the 1st Defendant. 2nd Defendant considered that the formal conditions of admissibility of applications lodged before the Court as provided for in Articles 11 and 12 of the Protocol relating to the Court (A/P.1/7/91) as well as the provisions of Article 33 of the Rules of the Court have not been met and that the death of the Applicant should result in termination of the procedure.

ANALYSIS OFTHE COURT

33. The death of the Applicant occurred within a context where pending applications on provisional measures applied for by the Applicant were subsisting, on one hand, and on the other hand, judgment on Preliminary Objections on lack of jurisdiction and inadmissibility of the substantive suit, as raised by the Defendants, had been reserved for further consideration. The Court is of the view that in such a situation, it is worthy, first of all, to make a pronouncement on the consequences of the death of the Applicant on the said applications.

A- Consequences of the death of the Applicant on the applications for provisional measures and the Preliminary Objections

(i) As regards the application for provisional measures

34. The objective behind applying for provisional orders is for the Court to indicate interim measures capable of guaranteeing the physical security and safety of the principal applicant's person, till delivery of the final judgment. The death of the Applicant brings about a situation where there is no physical integrity to be secured anymore and no life to be protected. In such circumstances, if the orders were to be granted, they cannot be implemented. The object to which the instructions must be applied would be missing and no result will be obtained. The Court therefore concludes that the death of the Applicant defeats the purpose for the provisional

measures. Consequently, and by application of paragraph 2, Article 88 of the Rules of the Court, the Court holds that there is no purpose for adjudicating on the said application.

(ii) As regards the Preliminary Objections raised

35. The Court recalls that judgment on the Preliminary Objections were reserved for further consideration before the death of the Applicant. It holds that the occurrence of death does not make it irrelevant for the Court to provide appropriate responses to the fundamental questions relating to its jurisdiction and the admissibility of the substantive suit. The Court will therefore give appropriate responses to questions of law that may arise in the future. In these circumstances, the Court intends to examine the said Preliminary Objections as well as the consequences of the occurrence of death of the Applicant on the substantive suit.

(iii) Jurisdiction

36. The Governor of Gombe State maintained that the Court is manifestly incompetent to adjudicate on the Application brought against him, in that he is neither a Member State of the Community or a Community Institution, much less a Community official, He referred to the jurisprudence of the Court in relation to **Ruling No. ECW/CCJ/RUL/07/10 of 10 December 2010, In Suit No. ECW/CCJ/ APP/07/10, SERAP v. President of the Republic of Nigeria & 8 Others**; and **Ruling No. ECW/CCJ/ RUL/03/10 of 11 June 2009, in Suit No. ECW/CCJ/APP/04/09, Peter David v. Ambassador Raph Uwechue**. He pointed out that this jurisprudence is in line with current trend in international law, in which terms only States are subjects of international law, the notable exception being the powers granted international criminal courts to try individuals accused of committing specific crimes. The Federal Government of Nigeria adopted the same arguments.

37. On the contrary, the Applicant maintained that the Court has jurisdiction over the Governor of Gombe State because he considered that the latter is a necessary party to the dispute and that the Court has already declared that it has jurisdiction to sit on cases brought against non-state entities, notably administrative bodies such as Community Institutions, as may be attested to by the judgments he cited (cf. paragraph 27 supra).

(a) *Rationae materiae* jurisdiction of the Court in regard to human rights violation

38. The Court notes that none of the Parties contested its *rationae materiae* jurisdiction. As things stand, the Court has consistently held that it has jurisdiction on matters concerning human rights protection. The Court recalls that its jurisdiction is established once the facts brought relate to human rights violation and where the main purpose of the application is for the Court to find that there is an occurrence of such violations in a Member State **(Ruling No. ECW/CCJ/RUL/02/10 of 14 May 2010** on Preliminary Objections in **Suit No. ECW/CCJ/APP/07/08 Hissein Habre v. Senegal, paragraphs 53, 58 and 59; Judgment No. ECW/CCJ/JUD/05/10 of 8 November 2010 in Suit No. ECW/APP/05/09 Mamadou Tandja v. Niger, paragraph 18.1b; Judgment No. ECW/CCJ/JUD/01/11 of 8 February 2011, in Suit No. ECW/CCJ/APP/13/08, Alhaji Tidjani Aboubacar v. BCEAO and Niger, paragraph 23)**. In the instant case, the Applicant alleged violation of Articles 1, 4, 5 and 7 of the African Charter on Human and Peoples' Rights. Hence the Court has *rationae materiae* jurisdiction.

(b) *Rationae personae* jurisdiction of the Court in regard to human rights violation

39. Evidently, the point of law discussed by the Parties in the instant proceedings is the *rationae personae* jurisdiction of the Court over the Governor of Gombe State as an administrative authority of Gombe State.

40. The Court notes that in terms of human rights, its jurisdiction is established exclusively in regard to Member States of the Community, and for human rights violations com mitted in the territory of Member States.

41. The Court finds that by considering the principle it has always applied, Gombe State, which is a constituent state of the Federal Republic of Nigeria, not qualified as a Member State of ECOWAS, cannot be brought before the Court. (*See* **Ruling No. ECW/CCJ/RUL/05/11 of 1 June 2011 in Suit No. ECW/CCJ/ RUL/03/09) Private Alimu Akeem v. Nigeria, paragraph 35; Ruling No. ECW/CCJ/RUL/03/10 of 11 June 2009 in Suit No. ECW/CCJ/APP/04/09, Peter David v.**

Ambassador Raph Uwechue, paragraphs 41, 42, 46 and 47; Judgment No. ECW/CCJ/JUD/05/10 of 8 November 2010 in Suit No. ECW/CCJ/APP/05/09, Mamadou Tandja v. Niger, paragraph 18.1(a). The Court equally finds that as regards the Governor of Gombe State. He also does not qualify, on the basis of the same principle, to be brought before the Court, either in his capacity as Governor of Gombe State or as an individual.

42. The Court further notes that the Applicant invoked the concept of necessary party as a basis for establishing the jurisdiction of the Court over the Governor of Gombe State, Such an issue essentially falls within the domain of an aspect of procedure which is governed by the rules enshrined in the Court's own texts. Following the said rules, parties to a dispute before the Court shall be **"Applicant"**, **"Defendant"** or **"intervener"**. (*See* **Ruling No. ECW/CCJ/RUL/05/11 of 1 June 2011 in Suit No., ECW/CCJ/APP/03/09, Private Alimu Akeem v. Federal Republic of Nigeria, paragraphs 29 and 30).** Consequently, the Court is of the view that, in applying its own texts, it cannot admit a party to a case on the mere basis of being a 'necessary party'. Consequently, the Court declares that this plea-in-law must be dismissed.

43. The Court notes finally that the case-law cited by the Applicant and deriving from **Judgment No. ECW/CCJ/JUD/01/06 of 5 April 2006 in Suit No. ECW/CCJ/APP/01/04, Tokunbo Lijadu Oyemade v. Executive Secretary of ECOWAS & 3 ORS;** and **Judgment No. ECW/CCJ/JUD/02/08 of 4 June 2008 in Suit No. ECW/CCJ/APP/02/07, Tokunbo Lijadu Oyemade v. Council of Ministers & 4 ORS**, cannot be applied to the instant ease, because the case-law in question does not concern human rights but causes related rather to the Community civil service and administrative appeal.

44. Consequently, the Court finds that it has no jurisdiction to try Gombe State and the Governor of Gombe State.

ii) Admissibility

45. Counsel to the Governor of Gombe State and Counsel to the Federal Government of Nigeria pleaded that the Application is inadmissible on

the ground of lack *locus standi* on the part of the Applicant, non-exhaustion of local remedies, attempt by Applicant to undermine the judicial powers of Nigeria n national courts and lack of evidence. Counsel to the Applicant pleaded against these arguments.

46. Paragraph (d) of new Article 10 of the Protocol on the Community Court of Justice as amended by Protocol A/SP.1/01/05 of 19 January 2005 provides: ***"Access to the Court is open to ... individuals on application for relief for violation of their human rights"***, By virtue of this Article, for every action relating to human rights protection, cases before the Court must be filed by an individual or a corporate body who fulfills the requirement of being a victim. (*See* **Judgment No. ECW/CCJ/JUD/05/11 of 9 May 2011 in Suit No. ECW/CCJ/APP/07/09**, **CDD and CDHRD v. Mamadou Tandja and Niger, paragraphs 27 and 28)**. As far as the texts of the Court are concerned, it is the essential criterion which enables one to declare whether an application for human rights violation is admissible, even though not an exclusive criterion.

47. The Court notes that the Applicant is not the person who is the victim of the human rights violations alleged by him; the Court equally notes that the Applicant has no family relationship with the victims of the human rights violations at issue.

    The Court therefore finds in regard to Article 10 (d) of the Supplementary Protocol, and from its jurisprudence relating to the application of that provision, that the Applicant has no *locus standi* for bringing the instant case, more so when the human right s charges brought are related to inviolability of human beings and the right to life (Article 4, ACHPRL) right to dignity and recognition of legal status (Article 5, ACHPR) and right to have one's cause heard, i.e. petition right (Article 7, ACHPRL provided for in the African Charter on Human and Peoples' Rights (ACHPR) as rights of the individual, exclusively ascribed to the person of the individual, not as collective rights or rights of peoples.

48. Consequently, without the need for examining the various grounds of inadmissibility as raised, the Court declares that the substantive suit is manifestly inadmissible for lack of *locus standi* of the Applicant.

C- Consequences of the death of the Applicant on the substantive suit

49. In the instant case, since the substantive suit is declared inadmissible for lack of *locus standi* of the Applicant, he is *ab initio* not entitled to any right of action, and hence, the Court is of the view that no other consequence may be deduced from his death.

DECISION

For These Reasons,

50. The Court,

Adjudicating in a public hearing, after hearing both Parties, and after deliberating:

- in regard to the application for provisional measures

Adjudges that there are no grounds to consider the application for provisional measures; as a result of the death of the Applicant;

- in regard to the Preliminary Objections

- **As to the jurisdiction of the Court,**

Adjudges that it has jurisdiction to examine violations of Articles 1, 4, 5 and 7 of the African Charter on Human and Peoples' Rights as alleged by the Applicant;

Adjudges that it has no jurisdiction over the Governor of Gombe State.

- **As to the admissibility of the substantive suit,**

Adjudges that the substantive suit is inadmissible for lack of *locus standi* of the Applicant;

COSTS

51. By Application of paragraph 12, Article 66 of the Rules of the Court, each Party shall bear its own costs.

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

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

    Hon. Justice Benfeito Mosso Ramos - *Presiding*
    Hon. Justice Clotilde Medegan Nougbode - *Member*
    Hon. Justice Eliam Potey - *Member*

    Assisted by :
    Mr. Tony Anene-Maidoh (Esq.) - *Chief Registrar*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN IN ABUJA, NIGERIA

ON FRIDAY THE 23RD DAY OF MARCH, 2012

SUIT NO: ECW/CCJ/APP/01/12
JUDGMENT NO: ECW/CCJ/JUG/05/12

BETWEEN
BARTHELEMY DIAS - *PLAINTIFF*
V.
REPUBLIC OF SENEGAL - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDENT*
2. **HON. JUSTICE ALFRED ANTHONY BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY
ABOUBACAR DJIBO DIAKITE - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. ***PAPA KHALY NIANG,***
2. ***BOUCOUNTA DIALLO*** - *FOR THE PLANTIFF*

1. ***M. PAPA DIOMAYE LOUMAND***
2. ***BABACAR BA*** - *FOR THE DEFENDANT*

- Human rights violation -Arbitrary arrest and detention -Right to equality before the law -Principle of presumption of innocence -Expedited procedure

SUMMARY OF THE FACTS

Mr. Barthelemy Dias, Mayor of Sicap-Sacre-Coeur-Merrnoz, dragged the Republic of Senegal before the Community Court of Justice, ECOWAS for violation of his rights. He claimed that he and his municipal council were attacked by State Militia on 22 December 2011; that to defend himself, he brought out his gun and gave a warning shot. That fortunately, no one died, nor did anyone get hurt. He further pleaded that whereas he was the one attacked, a Court case was made against him and the investigating judge placed him under a committal order. He therefore claimed that he was arbitrarily arrested and detained; he pleaded violation of his right to equality before the law, since only persons belonging to his side in the case were sued and prosecuted by the Senegalese judiciary whereas the attackers (members of the State Militia) were not prosecuted. Finally, Mr. Barthelemy Dias affirmed that he was denied presumption of innocence.

The Republic of Senegal claimed that the Applicant was detained within the framework of a criminal procedure, and that his detention had a legal basis, because the legal provisions in force and the right to defence were both respected. The Defendant argued that there was no case of arbitrary arrest nor arbitrary detention, and therefore there was no violation of any international human rights instrument.

LEGAL ISSUES

- *Was the Applicant arbitrarily arrested and detained?*

- *Did the Applicant suffer violation of right to equality before the law and violation of presumption of innocence?*

DECISION OF THE COURT

- *All the complaints made for human rights violation against the Republic of Senegal were done within the context of a criminal procedure which commenced in accordance with the legal principles in force in the Republic of Senegal; thus, the Applicant was not arbitrarily arrested, nor was his right to presumption of innocence violated.*

- *The Court declared that the Applicant did not bring evidence to prove that only persons belonging to his side in the case were sued and prosecuted by the Senegalese judiciary; consequently, the Court adjudged that the Applicant's right to equality before the law was not violated by the Republic of Senegal.*

- *Finally, the Court was of the view that presumption of innocence involves examining the facts of the case in relation to the natural persons against whom charges are made, and as such, such matters fall exclusively under the jurisdiction of the domestic courts, and are therefore not under the ambit of the Community Court, before which the matter on human rights violation is pending against a Member State of the Community.*

- *The Republic of Senegal therefore did not commit any human rights violation against the Applicant.*

JUDGMENT OF THE COURT

PROCEDURE

1. By Application dated 20 January 2012, and filed at the Registry of the Court on 31st January 2012, Mr. Barthelemy Dias, who is a resident of Sicab Baobab, at 734 Goma Street, in Dakar, Senegal, having as Counsel Papa Khaly Niang, Lawyer residing in France, with address at 8 Rue Montespan - 91000, Evry, who, for the purpose of the present procedure chooses as address the Law Firm of Barrister Boucounta Diallo, Lawyer registered with the Bar in Senegal, located at Immeuble Air Afrique, Place de I'independence, Dakar, brought a case against the Republic of Senegal, before the Court, with a plea that the Court should note *"the manifest and abusive violations of his human rights, by the Republic of Senegal, together with all international conventions ratified by Senegal relating thereto."*

2. In the said Application, Mr. Barthelemy Dias also seeks from the Court, an order for his immediate release, sequel to abusive Court process, and an order on the Republic of Senegal to pay him the sum of one (1) billion CFA Francs as damages for all the prejudice suffered, and another sum of one (1) hundred million CFA Francs, as honorarium for his Counsel.

   Plaintiff equally seeks that the case be admitted to expedited procedure, pursuant to the provisions of Article 59 of the Rules of procedure of the Court.

AS TO FACTS

The facts as related by Plaintiff

3. Plaintiff avers that on 23rd June 2011, the Senegalese People organized a peaceful demonstration in front of the National Assembly in Dakar, against a decision that they considered anti-constitutional, and which was in relation to the wish of the President of Senegal to create the post of a Vice-President in Senegal, and to change the constitutional provision of 50% of the total vote cast to 25%, to win the presidential elections.

4. That this demonstration, to which he was one of the leaders, forced the President to back down. That since then, Members of the *Parti Democratique du Senegal*, the party in power, constituted armed gangs nicknamed "Nervis" which have been launching attacks on the leaders who were opposed to the President aborted plans; and that he himself has escaped on so many occasions such attacks by Nervis.

5. Plaintiff claims that, it was in these circumstances that, being aware of his popularity, and with a view to avoiding any surprising happening, that he attended the Congress of the Senegalese People slated for 23 December 2011, at the *Place de l'Obelisque Senegalaise*, as one of the organisers, that the *Parti Democratique Senegalais* recruited Nervis, to eliminate him.

6. Plaintiff further claims that, it was after their meeting at their *Parti Democratique Senegalais* base, on 22 December 2011, that members of Nervis, left on board of six pick-up vans, and drove straight to the Town Hall of Sicap-Sacre - Coeur Mermoz, and attacked himself, the Mayor as well as the Mayoralty Council.

7. Plaintiff further claims that, it was in a state of self defence that he brought out his pistol and fired some shots into the air, and thereafter to defend himself, and that, luckily, no one was hurt, talkless of losing his life, during the scene.

8. Plaintiff finally claims that, despite the fact that he was the one attacked, during the operation, a judicial investigation was ordered against him and the investigating Judge issued a committal order against him.

The facts according to the Republic of Senegal

The Republic of Senegal did not relate any fact.

PLEAS-IN-LAW BY PARTIES

Pleas-in-law by Plaintiff.

As to form

9. Plaintiff invokes Article 10 (d) and 9 (g) of the Supplementary Protocol on the Court, for the admissibility of his Application.

As to merit

10. In support of his Application, Plaintiff invokes Articles 2, 3, 9 and 14 of the International Covenant on Civil and Political rights, Article 5 (4) of the European Convention on Human Rights, Articles 7 and 98 of the Constitution of Senegal, 2001, Articles 5, 7, 8, 9, 10, 11 and 25 of the Universal Declaration of Human Rights, Articles 2, 3, 6, 7 and 16 of the African Charter on Human and Peoples' Rights, Article 316 of the Criminal Code of Senegal; finally, he also invokes Universal Principles on Rule of Law on Democracy, as can be deduced from the Judgments of the European Court

of human Rights (especially in the cases of **Engels Anor. v. Holland of 8 June 1976; De Wilde, 0 oms x Versyp v. Belgium of 18 June 1971.)**

Pleas-in-law by Defendant.

11. As to form, the Republic of Senegal declares that it relies on the account of Plaintiff.

12. As to merit, the Republic of Senegal recalls the jurisprudence of the Court, in the case of **Cheikh Abdou Gueye v. the Republic of Senegal**, and draws a similitude between the facts in that case and in those that Barthelemy Dias has exposed the instant case.

13. To this effect, the Republic of Senegal avers that Plaintiff's detention, which is sequel to an on-going criminal procedure in Senegal, is pursuant to legal provisions in force, with all guarantee for the right of defence, and therefore concludes that there is neither arrest nor arbitrary detention, how much more unfair hearing, therefore, none of the human rights instruments is violated.

LEGAL ANALYSIS BY THE COURT

On the admissibility of the Application

14. In his Application, Mr. Barthelemy Dias alleges human rights violations that he suffered, and which were said to have been committed in the Republic of Senegal, an ECOWAS Member State;

15. The Court deduces that, from this allegation, which is based on the invocation of Articles 10 (d) and 9 (g) of the Supplementary Protocol on the Court, the said allegation is pursuant to the provisions of the said articles, and therefore, there is need to declare such an Application admissible;

As to merit

16. Mr. Barthelemy Dias alleges that his arrest and detention were effected on political grounds, and therefore, they are arbitrary; he also claims that the national Court before which the case is pending, as well as the procedure followed there, was, and still is heavily under the influence of high political authorities of the Republic of Senegal, especially the President, the Prime Minister, and the Minister for Internal Affairs consequently, such procedure is impartial and not independent.

17. Plaintiff equally avers that there is violation of the right of equality before the law against his person, because only persons from his camp are arrested and prosecuted by the Senegalese judiciary, and none from the camp of the aggressors, that is the 'Nervis'.

18. Finally, Plaintiff claims that the principle of presumption of innocence was not respected, in his favour, and that, by issuing a committal order against him, the investigating judge did not take cognisance of the guarantee for representation that this principle offers his person, as an elected political leader and representative of the people;

19. The Court notes that all grievances of human right violations allegations leveled against the Republic of Senegal are within the framework of an on-going judicial criminal procedure in Senegal, and are pursuant to legal principles in force in the Republic of Senegal;

20. The Court points out that, in this judicial procedure, whether at the level of preliminary investigation, which led to an order by the State Prosecutor, to carry out a proper and thorough investigation, for acts that are inscribed in, and punishable under the Senegalese laws, to the study of the case file by the Doyen of investigating judges, constitutes a very solid legal basis for the arrest and detention of Plaintiff; an arrest and detention, which, therefore are not arbitrary, within the purview of the provisions of Articles 6 of the African Charter on Human and Peoples' Rights, 5 (1) of the European Convention on Human Rights or even 9 of the International Covenant on Civil and Political Rights;

21. The Court equally observes that statements made by political authorities in Senegal against Plaintiff, relating to the acts that led to the trial of Plaintiff are personal opinions, for which only their authors are to be held responsible, and are not statements of authority made within the official functions of such political authorities;

22. The Court is of strong opinion that such opinions, .even emanating from high level political figures, as in the instant case, are not likely to compromise the independence and impartiality of the investigating judge, in charge of the case file, aside any non- equivocal injunction that is likely to influence justice in a certain direction;

23. Thus, the Court deduces that there is no violation of Articles 10 and 11 of the Universal Declaration of Human Rights, 14 of the International Covenant on Civil and Political Rights, 1 of the African Charter on Human and Peoples' Rights, and even of the principle of separation of powers;

24. Concerning the allegation on equality before the law, the Court notes that Plaintiff did not bring proofs for selective trial that he denounces against the Republic of Senegal, by averring that only persons his political camp are tried, and not members of the 'Nervis' the aggressors; but, on the contrary, it can be deduced from the warrant forward to the investigating judge, from the State Prosecutor, that, out of thirteen (13) persons mentioned, ten (10) are from Plaintiff s political camp; and apart from this , the Court points out that facts were presented to the investigating judge, and he has all powers to try persons that any link whatsoever with the facts of the case ; in order words, the State Prosecutor who referred the case to the investigating judge does not have any power to exclude some persons from the trial;

25. Consequently from the foregoing, the Court notes that the principle of equality before the law is not violated by the Republic of Senegal, against Plaintiff. Finally, concerning the principle of presumption of innocence, to which Plaintiff associates the legitimate defence for himself and other persons in the Town Hall, as well as public properties under his Management, and the guarantee for representation, which is tied to his qualities as a local elected leader, all these which the investigating judge did not take into account before issuing a committal order against his person, the Court recalls that all these issues relate to the consideration of the facts in the instant case, concerning the accused individuals, and consequently, they are the exclusive preserve of the jurisdiction of the national courts, and not that of the Community Court, before which a case is brought against a Community Member State;

26. In the instant case, concerning these issues, the Court opines that the important thing for her to do is, to ensure that, during the procedure, principles of fair hearing, and the respect for the right of defence were observed; to .this effect, the Court declares that it has already admitted that the criminal procedure followed against Mr. Barthelemy Dias has been fair, and underlines the fact that Plaintiff has been adequately assisted by his Counsel, right from his first appearance before the investigating judge;

27. Thus, on these last points raised, the Court is sufficiently convinced that the Republic of Senegal has not committed human rights violations against Plaintiff.

    Finally, owing to the circumstances of the case, the Court orders that each party bears its own costs.

FOR THESE REASONS

The Court,

28. Sitting in a public hearing, and after hearing both parties, in a matter of human rights violations, and as in last resort;

As to form,

29. **Declares** that the Application filed by Mr. Barthelemy Dias, against the Republic of Senegal, on human right's violations, is admissible;

30. **As to merit,**

- **Declares** that the Republic of Senegal did not violate Plaintiff's human rights;

- **Consequently, declares** that there is no need to adjudicate on the other reliefs sought by Plaintiff;

- **Orders** that each party bear its own costs.

Thus made, adjudged, and pronounced, in a public hearing in 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 - *President*

Hon. Justice Alfred Anthony BENIN - *Member*

Hon. Justice Eliam M. POTEY - *Member*

Assisted by:
Aboubacar Djibo Diakite - *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 23RD DAY OF MARCH 2012

SUIT N^O: ECW/CCJ/APP/17/11
JUDGMENT N^O: ECW/CCJ/RUL/08/12

BETWEEN
LAURENT SIMONE & MICHEL GBAGBO - ***APPLICANTS***
V.
1. **THE REPUBLIC OF COTE D'IVOIRE**
2. **ALASSANE OUATTARA**

} ***DEFENDANTS***

COMPOSITION OF THE COURT

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

ASSISTED BY
ABOUBACAR DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **CIRE CLEDOR LY *(ESQ.)***
2. **FRANCOIS SERRES *(ESQ.)***
3. **JEAN CHARLES TCHIKUYA *(ESQ.)*** -*FOR THE APPLICANTS*

1. **JEAN CHRYSOSTOME BLESSY *(ESQ.)***
2. **SOUNGALO KOULIBALY *(ESQ.)*** - *FOR THE DEFENDANTS*

Human rights violation -Right to dignity -Right to effective remedy -Free movement of persons -Arrest and detention -Immunity from Court proceedings -principle of constitutional convergence -Access to the Court -International Criminal Court (ICC) -Preliminary Objection -Admissibility -Lis pendence -Disjoining of cases -Article 10(d)-ii of the Supplementary Protocol on the Court

SUMMARY OF FACTS

On 25 July 2011, Mr. Laurent Gbagbo, on one hand, and Simone and Michel Gbagbo, on the other hand, brought two joined cases before the Court dated 20 July 2011, both filed against the Republic of Cote d'Ivoire and Mr. Alassane Ouattara. The Applicants were detained and put under house arrest till the Republic of Cote d'Ivoire transferred Mr. Laurent Gbagbo to the International Criminal Court (ICC), in compliance with an international arrest warrant issued by Trial Chamber 3 of ICC on 30 November 2011. Mr. Laurent Gbagbo made a complaint against the Republic of Cote d'Ivoire for violation of his human rights and political rights and for disregard of his privileges and immunity from prosecution.

Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo filed the same complaints. Notably, they cited violation of their human rights, violation of the principles enshrined in the Constitution of the Republic of Cote d'Ivoire, and violation of the rights of their friends and close associates who were brought under house arrest without any administrative or judicial basis. At the Court hearing of 22 November 2011, the ECOWAS Court of Justice ordered first of all that the two cases be joined as one. Subsequently, upon the prompting of Plaintiff Counsel, the Court granted the Parties leave to bring arguments as to why the two proceedings must be joined or disjoined. The Parties adopted fundamentally opposed stands on the matter.

The Defendant State was of the view that it was mandatory to order that the two proceedings be disjoined, and that the Court must rule on its own competence to adjudicate on the matter brought, since another competent International Court had been seised with the same matter. Again, according to the Defendant, disjoining the two cases will help avoid a situation where contrary decisions are made by the two adjudicating bodies, owing to lis pendence of the case before the ECOWAS Court of Justice.

LEGAL ISSUES

- *Does the transfer of the Applicant before the ICCJ in compliance with the international arrest warrant of its Trial Chamber 3J imply that the matter is no more before the ECOWAS Court of Justice?*

- *Does the fact of the ICC being seised with the case imply that the proceedings before the ECOWAS Court of Justice is suspended?*

DECISION OF THE COURT

The Court declared, within the meaning of Article 38 of its Rules of Procedure, that when a matter brought before it is pending before another competent International Court, ***"The Court may, at any time, after hearing the parties, order that two or more cases concerning the same subject matter shall, on account of the connection between them, be joined for the purposes of the written or oral procedure or of the final judgment."***

RULING OF THE COURT

FACTS AND PROCEDURE

1. By Application dated 20 July 2011, and filed at the Registry of the Court on 25 July 2011, Mr. Laurent Gbagbo, through his Counsel, Cire Cledor Ly (Esq.) brought a complaint before the Court, against the Republic of Cote d'Ivoire and Mr. Alassane Ouattara, on serious violation of his political rights, and the violation of his human rights, as enshrined in Articles 2, 5, 6, 7 (1), 12 and 23 of the African Charter on Human and Peoples Rights, 3, 7, 9, 12 and 14 of the International Covenant on Civil and Political Rights, Article 3, 5, 6, 7, 8, 9, 13 and 16 (3) of the Universal Declaration of Human Rights, Articles 4 (g) and 1 (h) of the Revised ECOWAS Treaty, the Protocol A/SP.1/12/1 on Democracy and Good Governance, the Preamble to, and Articles 2, 22 (1) of the Ivoirian Constitution.

2. Mr. Laurent Gbagbo pleads with and requests the Court to declare and adjudge that:

    - His detention is arbitrary;
    - His rights to moral wellbeing and the recognition of his legal status are violated;
    - He is arbitrarily been denied of his right to access the law courts;
    - His freedom of movement has been curtailed and his right to the residence of his choice has not been granted him;
    - The decision to put him under house arrest which is a political decision, violates the provisions of ECOWAS Community Law, and the Laws of the Republic of Cote d'Ivoire;
    - His right to carry out an elective mandate, and his right to carry out state functions are violated;
    - His immunity from trial, as well as the privileges attached to his status as a Head of State are violated;
    - The applicable constitutional principles in matters of justice are violated and caused him a prejudice that he suffered;
    - The principles of constitutional convergence are violated and caused prejudice to his political rights, as a candidate.

3. He further requests the Court:

- To order the Republic of Cote d'Ivoire to conform itself to its internal legislation, and the Decision of the Constitutional Council, which declared him winner of the Presidential polls; if not,

- To order a fresh consideration of his **case through which he rejects the results** of the Presidential Elections, pursuant to the Ivorian Law, and the international law. in vogue, by putting in place an *ad-hoc* international Commission of impartial experts, and whose competences are recognised from their home countries, and who would submit a report that would enable the Court to Impose respect for the rule of law in Cote d'Ivoire, through the publication of the true results of the polls;

- To order his full or provisional release, pending the time the independent Commission put in place shall submit its findings;

- To enjoin the Republic of Cote d'Ivoire to refrain from taking any judicial step whatsoever, that could lead to either the arrest of Applicant, or his trial in violation to the immunity from trial attached to his status as Head of State;

- To enjoin Mr. ALASSANE OUATTARA to abide by the Ivorian Electoral Law, and the Decision of the Constitutional Council No. CI/2010/EP/34/03/12/CC/SG of 3 December, 2010.

4. By another Application dated 20 July 2011, and filed at the Registry of the Court on 25 July 2011, Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo, having as Counsels Cire Cledor Ly (Esq.), Francois Serres (Esq.) and Jean Charles Tchikaya (Esq.) have equally brought a case before the Court, against the Republic of Cote d'Ivoire, for the violation of their human rights, particularly, as regards Mrs. Simone Ehivet Gbagbo, the violation of her political rights. They rely mainly on the violation of 2, 5, 6, 7 (1), 12 and 23 of the African Charter on Human and Peoples' Rights, 9, 12 and 14 of the International Covenant on Civil and Political Rights, Article 3, 5, 6, 7, 8, 9, 13 and 16 (3) of the Universal Declaration of Human Rights, Articles 4 (g) and 1 (h) of the Revised ECOWAS Treaty, the Preamble to, and Articles 2, 22 (1) of the Ivoirian Constitution.

5. Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo plead with the Court to declare and adjudge that:

- Their arrest and detention is arbitrary;
- Their right to access the law Court is violated;
- Their freedom of movement has been curtailed and their right to the residence of their choice has not been granted them;
- Their rights to moral wellbeing and the recognition of their legal status is violated;
- The rights to the moral wellbeing of their family is violated;
- Mrs. Simone Ehivet Gbagbo's immunity as Member of Parliament is violated.

6. They further request the Court:

   - To order the Republic of Cote d'Ivoire to respect the privileges and parliamentary immunity of Mrs. Simone Ehivet Gbagbo, pursuant to both the ECOWAS Community law and the Ivorian Law;
   - To order the immediate release of both Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo;
   - To order the immediate release of all persons, collaborators and friends of Applicants who ark slammed into house arrest without any administrative and judicial justification.

7. The two Applications were accompanied by requests to submit them to expedited procedure, and these requests too were filed at the Registry of the Court on 25 July 2011.

8. At the hearing of 22 November 2011, at Porto - Novo, the Court ordered that the two Applications be consolidated, and that they be submitted to expedited procedure.

9. On 30 November 2011, the Republic of Cote d'Ivoire, pursuant to the international warrant of arrest delivered by the Preliminary Chamber III of the International Criminal Court, against Mr. Laurent Gbagbo transferred him to that Court.

10. With regard to this new development, to which its attention was drawn, by Applicants' Counsels, the Court, at its hearing of 1 February 2012, invited the two parties to make a pronouncement on the applicability of paragraph

ii) of new Article 10 (d) of the protocol on the Court as amended by the Supplementary Protocol of 19 January 2005, to Mr. Laurent Gbagbo's Application relating to the violation of his human rights, that he brought before the Court; the Court also invited both parties to make a pronouncement on the **consolidation of proceedings** in the two cases.

ARGUMENTS BY PARTIES

i) Arguments by Applicants

11. Counsel to Applicants claims that after the case was brought before the Honourable Court, on 25 July 2011, the Republic of Cote d'Ivoire worsened the judicial situation of Applicants, by initiating proceedings against them. Indeed, he submits that after the 22 November 2011 Court sitting at Porto - Novo, the Defendant State proceeded with the transfer of Mr. Laurent Gbagbo to the ICC. He adds that the recognition of the jurisdiction of the ICC by the Republic of Cote d'Ivoire is not akin to bringing a case before that Court; he further states that the Republic of Cote d'Ivoire did not bring any case against Mr. Laurent Gbagbo before the ICC, and that the ICC's Prosecutor acted ***proprio motu***, pursuant to Article 13(c) of the Statute of Rome.

12. He draws the attention of the Court to the fact that the Republic of Cote d'Ivoire cannot argue that the consequence of Mr. Laurent Gbagbo's transfer to the ICC is an abandonment of the proceedings initiated in the Ivorian Courts, in violation of the provisions of Ivorian Laws, which confer presidential immunity on him, or the striking out of the warrant delivered against him, in violation of Ivorian laws. He further claims that even if the ICC grants him provisional release, and if he comes back to Cote d'Ivoire, he will be incarcerated. Consequently, he believes that the problems that led to bringing the instant case before the ECOWAS Court of Justice are still unsolved, and that Mr. Laurent Gbagbo's case before this Court remains unchanged.

13. He further posits that the two courts do not exercise their jurisdiction on the similar subject-matters, and each draws its strength from the instruction that govern it, with the ICC tied to its statutes, while the ECOWAS Court is tied to its Protocol, especially its new Article 9. He further avers that each of these Courts is approached on different points of law, while cases that relate to crimes against humanity-criminal actions - are brought before the ICC, the case that was brought before the ECOWAS Court of Justice borders on human rights violations. He equally alleges that the decision of this

Honourable Court can neither have any influence on the proceedings initiated at the ICC, especially in its aspect relating to a probable release of Mr. Laurent Gbagbo, nor hinder the investigation opened against him, and his trial. In support of his argument, he invokes the Court's judgment in the **Hadijatou Mani Koraou v. The Republic of Niger** case. He therefore concludes that there is no risk of conflict between the two international Courts.

14. For all these reasons, he believes that notwithstanding the charging of Mr. Laurent Gbagbo at the ICC, the provisions of Article 10(d) (ii) are respected, and that there is no need to consolidate proceedings. He finally prays the Court to adjudicate on the two cases, to avoid further aggravations.

ii) Arguments by the Republic of Cote d'Ivoire and Mr. Alassane Ouattara

15. Counsel to Defendants avers that in international jurisprudence, even if the case before the ICC was not taken there against a named individual, it is nevertheless a case properly taken before an international Court, in the case of Mr. Laurent Gbagbo.

16. He claims that the case brought before the ICC was done in June 2011, and that Mr. Laurent Gbagbo's Application was filed before the ECOWAS Court in July 2011. He recalls that way back in 2002, Mr. Laurent Gbagbo, then as Head of State of the Republic of Cote d'Ivoire, recognised the jurisdiction of the ICC, following the unfortunate events that occurred with the acts of the rebellion in 2002; that, in furtherance to this fact, Mr. Alassane Ouattara too officially came before the same Court in June 2011, so that the latter conduct investigations into crimes against humanity that were perpetrated in Cote d'Ivoire. He therefore argues that the case before the ICC was taken there before Mr. Laurent Gbagbo's Application was filed before ECOWAS Court of Justice.

17. Counsel to Defendants claims that, pursuant to its statute and Rules of procedure, the ICC cannot try an individual for "crimes against humanity" if due process is not scrupulously followed, as regards the arrest, the service of warrant, and the transfer of the concerned individual, or if these procedures are marred by deficiency. He recalls that, on the one hand, in his Application before this Honourable Court, Mr. Laurent Gbagbo solicits the Court to note that the decision to place him under house arrest is arbitrary, that it violates his human rights, his rights to health and residence, as well as his constitutional rights, and on the other hand, during the confirmation of charges hearing of 18 June 2012, the Preliminary Chamber III of the

International Criminal Court is to consider whether the procedure (placement under house arrest, detention, transfer), which culminated to Mr. Laurent Gbagbo's transfer to the ICC, was done according to the law. He further avers that, regarding Mr. Laurent Gbagbo's Application brought before it, the ECOWAS Court is to consider the legality and the regularity of Mr. Laurent Gbagbo's transfer to the ICC. He further adds that Mr. Laurent Gbagbo did evoke before the ICC, during the initial appearance of 5 December, 2011, his condition of detention in Cote d'Ivoire. He thus argues that the question of the violation of Mr. Laurent Gbagbo's human rights is already embedded in the procedure pending before the ICC, and that in the instant case, there is the risk of contrariety of decisions. Consequently, he submits that this is a case of *listispendence*, and that the provisions of Article 10 (d) (ii) new of the Protocol on the Court must apply.

18. He further states that, since a case was first brought before the ICC, the Court must consider, as a matter of priority, the issues of inadmissibility due to preliminary objection and lack of jurisdiction raised against Mr. Laurent Gbagbo's Application. For all these reasons, he requests the consolidation of proceedings.

LEGAL ANALYSIS BY THE COURT

19. The Court observes that, when requested to make submissions on the applicability of the new Article 10 (d) (ii) of the Protocol on the Court, to the Application of human rights violation filed by Mr. Laurent Gbagbo, in the light of his judicial standing resulting from his transfer to the ICC, as well as on the possibility of the consolidation of proceedings, Counsels to the parties held opposing views.

20. For Counsel to Applicants, in the real sense of the word, there was neither ***"a case brought before the ICC"***, nor is there any conflict of, jurisdiction; there is no need for the provisions of the new Article 10 (d) (ii) of the Protocol on the Court to apply to the Application filed by Mr. Laurent Gbagbo. He pleads with the Court not to disjoin proceedings, and to continue with the expedited procedure, so as to avoid the aggravation of the situation of Applicants. On the other hand, Counsel to Defendant strongly believes that there was really "**a case brought before the ICC**", and there is the risk of contrariety of decisions, hence *lis pendence*. He therefore concludes that there should be consolidation of proceedings; he equally recalls that he raised, before the Honourable Court, a preliminary objection on inadmissibility and lack of jurisdiction, and that he pleads with the Court to declare all Applications by Applicants as having become of no effect any more.

21. Whereas at the hearing of 22 November 2011, at Port - Novo, the Court ordered that the two Applications be consolidated, and that they be submitted to expedited procedure;

22. Whereas at the hearing of 1st February 2012, Counsel to Applicants informed the Court that on 30 November 2011, the Republic of Cote d'Ivoire, pursuant to the international warrant of arrest issued by the Preliminary Chamber III of the International Criminal Court, against Mr. Laurent Gbagbo transferred him to that Court;

23. Whereas upon this information brought to the knowledge of the Court, it invited both parties to make a pronouncement on the need to consolidate the proceedings;

24. Whereas the Court has equally invited parties to make a pronouncement on the applicability of the new Article 10 (d) (ii) of the Protocol on the Court, as amended by the Supplementary Protocol of 19 January 2005, on the Application relating to human rights violations, brought before it by Mr. Laurent Gbagbo;

25. Whereas, with regard to consolidation of proceedings, Article 38 of the Rules of procedure of the Court provides that:

> ***"1). The Court may, at any time, after hearing the parties, order that two or more cases concerning the same subject matter shall, on account of the connection between them, be joined for the purposes of the written or oral procedure or of the final judgment. 2). the cases may subsequently be disjoined."***

26. Whereas, with regard to the annexure files, to the case file, at the time consolidation was ordered, the parties were the same, the subject-matter in the two cases are similar, and that the alleged human rights violations occurred in a Member State of the Community, in this case the Republic of Cote d'Ivoire;

27. Whereas Mr. Laurent Gbagbo is currently transferred to the ICC, and that Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo are still under detention in Cote d'Ivoire;

28. Whereas as a result of this incident, there is a change in circumstances, regarding to the absence of the condition that binds the other Applicants to Mr. Laurent Gbagbo;

29. Whereas for a good administration of justice, there is need to consolidate, the Laurent Gbagbo versus the Republic of Cote d'Ivoire and Alassane Ouattara case, on the one hand, and, on the other hand, the Simone Ehivet Gbagbo and Michel Gbagbo versus the Republic of Cote d'Ivoire case;

30. Whereas the main order sought in Mr. Laurent Gbagbo's initiating Application is that the Court should order his immediate release;

31. Whereas if the Court was to go ahead in examining Laurent Gbagbo's case, and comes to the conclusion that his freedom of movement was actually violated, ordering his immediate release would come to naught, because he is currently detained at the Hague by the ICC;

32. Whereas the Court cannot accomplish such a futile exercise;

33. Whereas it is in the interest of justice, to suspend the procedure in the Laurent Gbagbo versus the Republic of Cote d'Ivoire and Alassane Ouattara case, pending the determination of the case against Laurent Gbagbo before the ICC;

34. Whereas new Article 10 (d) (ii) of the Protocol on the Court provides for one of the conditions that can lead to inadmissibility of human rights violation cases, brought before the Court;

35. Whereas at this stage of the procedure, there is no need to apply new Article 10 (d) (ii) of the Protocol on the Court;

36. On these grounds, the Court, sitting in a public hearing, and having heard both parties, in a preliminary ruling, hereby:

    - **Orders** that Case **No.: ECW/CCJ/APP/17/11**, **Laurent Gbagbo v. The Republic of Cote d'Ivoire and Alassane Ouattara**, and **Case No.: ECW/CCJ/APP/18/11** be consolidated;

    - **Orders** the suspension in the procedure of **Case No.: ECW/CCJ/ APP/17/11**, **Laurent Gbagbo v. The Republic of Cote d'1voire and Alassane Ouattara**, pending the determination of the case against Laurent Gbagbo at the ICC;

    - **Reserves** the applicability of new Article 10 (d) (ii) of the Protocol on the Court, in examining the case, and taking a decision on same, till the time when **Case (N°: ECW/CCJ/APP/17/11) Laurent Gbagbo v. The Republic of Cote d'Ivoire and Alassane Ouattara** comes up again for hearing.

Thus adjudged and pronounced in French, as the language of deliberation, in a public hearing at the Seat of the Court in Abuja, this 22 March 2012.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon. Justice Awa NANA DABOYA- *Presiding*

Hon. Justice Benfeito MOSSO-RAMOS- *Member*

Hon. Justice Hansine N. DONLI- *Member*

Hon. Justice Anthony A. BENIN - *Member*

Hon. Justice Clotilde MEDEGAN-NOUGBODE- *Member*

Assisted by:
Aboubacar Diakite ***(Esq.)*** - *Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 15TH DAY OF MAY, 2012

SUIT N°: ECW/CCJ/APP/10/10
RULING N°: ECW/CCJ/RUL/09/12

BETWEEN
THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) & 10 ORS - *PLAINTIFFS*

AND
THE FEDERAL REPUBLIC OF NIGERIA & 4 ORS - *DEFENDANTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE B. M. RAMOS** - *PRESIDING*
2. **HON. JUSTICE C. N. MEDEGAN** - *MEMBER*
3. **HON. JUSTICE E. M. POTEY** - *MEMBER*

ASSISTED BY
ABOUBACAR DIAKITE - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. ***A. A MUMUNI; SOLA EGBEYINKA; OLATIGBE OLAKITAN*** - *FOR THE PLANTIFFS*
2. ***R. N. GODWINS (ESQ); A. A. KARIBO; O. GBASSAM ESE; MAIMUNA LAMI SHUNI*** - *FOR THE DEFENDANTS*

- Compliance with the Rules of Court

SUMMARY OF FACTS

The Plaintiffs filed a motion asking for an order of the Court to grant it leave to call 12 witnesses listed in an annexure and to produce and tender documentary evidence specified in the said motion.

The Defendants responded by raising objections to the motion, submitting that it does not comply with the Rules of the Court due to deficiencies in the identification of witnesses and absence of any reference to the way the documentary evidence is going to be produced and tendered. The Defendants argued that this can harm their ability to examine and scrutinize the evidence the Plaintiffs intend to produce.

LEGAL ISSUES

- *Whether or not the Plaintiff's Application to call witnesses complies with the Rules of Court.*

DECISION OF THE COURT

Upon hearing the Parties and considering the arguments put forth by them, the Court held that:

- *That it is undisputable that the motion under consideration falls short of the requirements established in the Rules for the presentation of evidence, namely in Articles 41(4) and 43(4). In fact, besides the omission of some details necessary for an accurate identification of the witnesses, it also fails to provide indication on how the documentary evidence the Plaintiffs intend to submit is going to be produced.*

- *That despite the deficiencies pointed out which for sure are not insurmountable, this Court holds that the interest of justice in the search for the truth recommends that the evidence be adduced as long as the guarantees of the opposing parties in challenging it are respected during the presentation.*

Based on the reasons above, the Court ORDERS as follows:

a) The motion is granted;

b) The list of 12 witnesses to be examined.

c) The facts about which the witnesses are to be examined.

d) Upon their request, the Defendants are entitled to a reasonable time to prepare themselves for the examination of said evidence.

e) This order shall be served as prescribed by Article 43, paragraph 5, of the Rules.

ORDER OF THE COURT

ON MOTION FOR PRESENTATION OF EVIDENCE

At the beginning of the hearing held on this 15th May 2012, the Plaintiffs moved a motion filed with the Registry on 17th February 2012 asking for an order of this Court granting leave to call 12 witnesses listed in an annexure and to produce and tender documentary evidence specified in the same motion.

The motion is supported by an Affidavit.

The Defendants raised objections to that motion submitting that its presentation does not comply with the formalities established in the Rules of the Court due to deficiencies in the identification of witnesses and absence of any reference to the way the documentary evidence is going to be produced and tendered. Those omissions, the Defendants argue, can harm their guarantees and their ability to examine and scrutinize the evidence the Plaintiffs intend to produce.

The Applicant replied to the Defendants' objection pointing out that whatever irregularities the motion can present, the truth is that the Opposing Parties were served with it and did not file a timely counter affidavit with objections they intended to raise.

Upon hearing the Parties and considering the arguments put forth by them, the Court, having regard to the rules governing the presentation of evidence, the guarantees that the parties enjoy and in the interest of justice, hereby issues its decision.

It is undisputable that the motion under consideration falls short of the requirements established in the Rules for the presentation of evidence, namely in Articles 41(4) and 43(4). In fact, besides the omission of some details necessary for an accurate identification of the witnesses, it also fails to provide indication on how the documentary evidence the Plaintiffs intend to submit is going to be produced.

However, despite the deficiencies pointed out which for sure are not insurmountable, this Court holds that the interest of justice in the search for the truth recommends that the evidence be adduced as long as the guarantees of the Opposing parties in challenging it are respected during the presentation.

Based on the reasons above, the Court ORDERS as follows:

a) The motion is granted;

b) The witnesses to be examined are the following;

1. **ISRAEL OKARI**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

2. **JOY WILLIAMS**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

3. **AUSTINE ONWE**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

4. **TAMNO TONYE AMA**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

5. **VICTOR OPIUM**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

6. **MARK BOMOWE**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

7. **NAPOLEON TOKUBIYE**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

8. **JONATHAN BOKOKO**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

9. **WILLIAMS TAMUNO**
   Socio-Economic Rights & Accountability Project (SERAP),
   No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
   Off Toyin Street, Ikeja, Lagos, Nigeria.

10. **LINUS JOH**
    Socio-Economic Rights & Accountability Project (SERAP),
    No. 4, Akintoye Shogunle Street, Off John Olugbo Street,
    Off Toyin Street, Ikeja, Lagos, Nigeria.

11. **MICHAEL UWE MEDIMO**
    Citizens Direct Network
    22, Okoroji Street,
    D-line, Port Harcourt
    Rivers State.

12. **SAMUITOKU IBIYE SAMUEL FUBARA**
    Citizens Direct Network
    22, Okoroji Street,
    D-line, Port Harcourt
    Rivers State.

c) The facts about which the witnesses are to be examined are the following:

1. That a protest took place on the 12th of October, 2009 within Bundu Ama Community, in the city of Port Harcourt, Rivers State following the actions of the Defendants/Respondents as contained in the Plaintiff's application filed in the Registry of this Honourable Court sometimes on 29 October 2010.

2. The number and status of individuals attacked, shot and injured by security personnel, acting in the circumstance as agents of the Defendants who invaded the Bundu Ama Community, Port Harcourt in Rivers State, Nigeria.

3. The degree of injuries sustained by individuals who were shot at on the 12th day of October, 2009 by agents of the Defendants/respondents in the course of the invasion.

d) Upon their request, the Defendants are entitled to a reasonable time to prepare themselves for the examination of said evidence

e) This order shall be served as prescribed by Article 43,paragraph 5, of the Rules.

HON. JUSTICE M. B. RAMOS - *PRESIDING*

HON. JUSTICE C. N. MEDEGAN - *MEMBER*

HON. JUSTICE E. M. POTEY - *MEMBER*

Assisted by **- Aboubacar Diakite** - *REGISTRAR*

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

HOLDEN AT ABUJA, NIGERIA

THIS 16TH DAY OF MAY, 2012

SUIT N^O^: ECW/CCJ/APP/11/10
JUDGEMENT N^O^: ECW/CCJ/JUD/07/12

MRS. OLUWATOSIN RINU ADEWALE - *PLAINTIFF*

V.

1. **COUNCIL OF MINISTERS, ECOWAS**
2. **THE PRESIDENT OF THE ECOWAS COMMISSION**
3. **THE PRESIDENT OF THE COMMUNITY COURT OF JUSTICE, ECOWAS**
4. **THE ACTING DIRECTOR OF ADMINISTRATION & FINANCE, COMMUNITY COURT OF JUSTICE, ECOWAS (MR. KOFI NDRI)**

} *DEFENDANTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE M. B. RAMOS** - *PRESIDING*
2. **HON. JUSTICE C. N. MEDEGAN** - *MEMBER*
3. **HON. JUSTICE E. M. POTEY** -*MEMBER*

ASSISTED BY

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

REPRESENTATION TO THE PARTIES

1. **K. OLOWOKERE**
2. **O. OLORUNSOLA**
3. **C. O. HENRY**
4. **K. SHIMBORA** **-** *FOR THE PLAINTIFF*

1. **LAGO DANIEL** - *FOR THE DEFENDANTS*

-Locus standi -Access to the Community Court of Justice -Jurisdiction of the Community Court of Justice

SUMMARY OF FACTS

The Plaintiff a community citizen filed an Application before this Court stating that pursuant to the advertisement by the Court in 2006, she applied for the position of Personnel Officer and was invited for an interview.

However despite the fact that she performed above all other candidates the position was given to one Miss Mariam Kone who not only applied after the expiration of the deadline but did not possess the requisite qualification as advertised and also failed at the interview.

She added that she had written a petition to the Hon. Minister of Foreign Affairs of the Federal Republic of Nigeria and was informed by the Ministry that the said Mariame Kone who had resigned her appointment at the Court had been illegally brought back to her employment by the 4th Defendant who is from the same Member State with Miss Kone.

She alleged that the Defendant's action is a violation of the ECOWAS legal regime, the right to be equal before the Law, the right to have one's case heard, the right to equal access to the public service, the right to equality and legal opportunity, the right to be free from discrimination and the right of every individual to serve his community and contribute to the best of his abilities at all times and at all levels.

She urged the Court to grant the following reliefs amongst others:

1. *A Declaration that the post of personnel officer in the Community Court of Justice, ECOWAS is vacant.*
2. *A Declaration that the re-instatement of the former Personnel Officer in the Community Court of Justice, ECOWAS after resignation is a gross violation of the ECOWAS Treaty, Staff Regulations, Legal regime of the ECOWAS and the African Charter on Human and Peoples' Rights.*
3. *A Declaration that the Applicants fundamental rights were grossly violated by the action of the Community Court of Justice, ECOWAS through the 4th Defendant.*
4. *An Order that the vacant position of the personnel officer in the Community Court of Justice, ECOWAS be filled as required and stipulated in accordance with the ECOWAS Staff Regulations.*

5. An Order for damages in the sum of Twenty million naira.

In response, the Defendants filed a Preliminary Objection urging the Court to dismiss the Plaintiffs application for lack of legal capacity as she is not a staff of any ECOWAS Institutions and lacks locus standi to institute the application.

The Defendant further submitted that the Plaintiff failed at the interview, and her action was instituted three years after the said interview and that her application aims at criticizing the administration of the Court.

The Defendants added that the act of reinstatement is an administrative act which would have prejudiced the right of the Plaintiff if she had the status of an aspirant to this position as a staff of the Court of Justice.

LEGAL ISSUES

1. *Whether or not the Plaintiff has locus standi to institute the action.*

2. *Whether or not the reinstatement of the former Personnel Officer after her resignation is an administrative decision.*

DECISION OF THE COURT

The Court held, dismissing the action:

1. *That Community citizens accessing the Court against Community institutions or their officials have to show that their own rights or interests have been violated or affected by an act or omission of those institutions or officials.*

2. *That the Plaintiff was not in a situation in which her fundamental rights could have in any way been affected or harmed by the administrative decision of the President of the Court who decided even without following a competitive selection process to reinstate an employee whose resignation had been previously accepted.*

JUDGEMENT OF THE COURT

The Applicant, Mrs. Oluwatosin Rinu Adewale, is a Community citizen of Nigerian nationality. The 1st Defendant is the ECOWAS institution charged with the responsibility of the functioning and development of the Community. The 2nd Defendant is the Principal Officer of the Community and the legal representative of the ECOWAS Community. The 3rd Defendant is the Head of Institution of the Community Court of Justice, ECOWAS. The 4th Defendant is the Acting Director of Administration and Finance of the Court.

The Applicant, on the 9th of November, 2010, filed an application before this Court seeking the following reliefs:

- **A Declaration** that the post of Personnel Officer in the Community Court of Justice, ECOWAS is vacant.
- **A Declaration** that the re-instatement of the former Personnel Officer in the Community Court of Justice, ECOWAS after resignation is a gross violation of the ECOWAS Treaty, Staff Regulations, Legal Regime of the ECOWAS and the African Charter on Human and Peoples' Rights.
- **A Declaration** that the Applicant's fundamental rights were grossly violated by the action of the Community Court of Justice, ECOWAS through the 4th Defendant.
- **A Declaration** that the 4th Defendant does not have the competence and power to appoint any person into the Court except as provided for by the ECOWAS Regulation.
- **An Order** that the action of the 4th Defendant was a clear breach of his oath of office, disrespect to constituted Authority and violation of the ECOWAS policy and vision of the ECOWAS of people and not of state, and the provisions of the African Charter on Human and Peoples' Rights.
- **An Order** for disciplinary measures to be immediately taken against the Ag. Director of Administration and Finance.
- **An Order** that the vacant position of the Personnel Officer in the Community Court of Justice, ECOWAS be filled as required and stipulated in accordance with the ECOWAS Staff Regulations.
- **An Order** that the 4th Defendant cannot and must not continue to act in such or other positions.

- **An Order** for damages in the sum of Twenty Million Naira (N20,000,000.00).

PRESENTATION OF FACTS AND PROCEDURE

1. The Applicant avers that pursuant to the advertisement by the Court in 2006, she had applied for the position of Personnel Officer (P4) wherein she was invited for an interview by a letter dated 28th February, 2007.

2. She states that at the interview from the 2nd to the 4th of May, 2007 her working experience of eleven (11) years in administration of which seven (7) years was spent as Personnel/Administrative Officer at the Judiciary of the Federal Capital Territory, Abuja, as at the time, was brought to bear, and she performed above all other candidates.

3. The Applicant avers that despite the above, the position was given to one Miss Mariame Kone who not only applied after the expiration of the deadline, but again did not possess the requisite qualifications as advertised and lastly also failed at the interview.

4. The Applicant thus forwarded a petit ion date d 4th of November, 2008 to the Hon. Minister of Foreign Affairs, Federal Republic of Nigeria with a view to look into the matter with the Court in order to ensure justice be done.

5. Again, a reminder dated 14th January, 2009 was sent to the Ministry of Foreign Affairs, Nigeria, authority responsible for ECOWAS Affairs in Nigeria, which now informed her that an official communication had been opened in respect of same.

6. She states that thereafter she was informed by same Ministry that the said Miss Kone had resigned her appointment at the Court wherein the Court had even communicated same to the Ministry through a Note Verbale received on the 6th February, 2010 which officially informed same of the said resignation and return of all her diplomatic apparatus.

7. The Applicant avers that to her utmost surprise, she was later informed by the Ministry of Foreign Affairs - Nigeria that Miss Mariame Kone had been illegally brought back to her employment by the 4th Defendant who is charged with the responsibility of recruitment and administration, because they are both from the same Member State, Cote d'Ivoire.

8. She contends that the reinstatement of Miss Kone despite her resignation from the service for a period of three (3) months was of high level disobedience by the 3rd and 4th Defendants to constituted authorities and willful violation of regulations.

9. Finally, the Applicant states that the action of the 3rd and 4th Defendants is not only a clear violation of the legal regime of the ECOWAS, in the very institution conferred with powers as to interpret and apply Community texts as well as adjudicate on the issues of Human Rights violation, as in the instant case.

10. The Applicant's alleged Human Rights violations are summed up as follows:

    i. The right to be equal before the law;

    ii. The right to have one's case heard;

    iii. The right to equal access to the public service;

    iv. The right to equality and equal opportunity;

    v. The right to be free from discrimination;

    vi. The right of every individual to serve his Community and contribute to the best of his abilities at all times and at all levels;

    vii. Violations of the legal regime of the ECOWAS, Staff Regulations.

11. To lodge her complaint, the Applicant relies on the African Charter on Human and Peoples' Rights, the Revised Treaty of the ECOWAS, the Supplementary Protocol (A/SP.1/01/05) and the Rules of the Court.

12. Upon service of the originating Application on the 1st, 2nd, 3rd and 4th Defendants, they all lodged together a Defense dated 13th December, 2010 raising objections to the Application on the following grounds:

    a) Lack of legal capacity to undertake the said action.

    b) Lack of interest to undertake this action.

13. The Defendants on the 1st ground of objection submit that the Application should be dismissed for lack of legal capacity as she is not a staff.

14. They cite Article 73 of the ECOWAS Staff Regulations and Articles 9(2) and 10(C) of the Supplementary Protocol (A/SP.1/01/05) to submit that the

Court would recognize the right of recourse of staff of ECOWAS institutions, agencies or persons who enter into contractual relationship with ECOWAS Institutions resulting into violations.

15. They state that the Applicant is not a staff of any ECOWAS Institution, and had failed at the said interview four (4) years before, thus a real third party to the administration of the ECOWAS Court of Justice and therefore does not have any locus standi to institute the present application.

16. Finally, on this note, the Defendants raise the 2nd objection being the lack of interest to undertake this action on the following grounds:

    a) The Applicant failed at the interview.

    b) She instituted this action against the Community three (3) years after the said interview, even when the Community had accepted back the staff who had resigned her office.

    c) That her application is just criticizing alleged malfunctioning of the administration of the Court of Justice, ECOWAS.

17. The Defendants submit that the act of reinstatement is an administrative act which would have been wrongful or caused prejudice to the right of the Applicant if she had the status of an aspirant to this position as a staff of the Court of Justice.

18. They state that the Applicant being a Civil Servant in Nigeria cannot therefore prove that the act of reinstatement of Personnel Officer within the Court of Justice is related to her own administrative career and has wrongfully infringed her right.

19. The Defendants in conclusion submit that her case must be rejected for lack of legal grounds as stated above even on the one of African Charter on Human and Peoples' Rights which is not applicable in this suit.

20. Consequently, they urge the Court to declare the Application inadmissible and also baseless for lack of capacity and legal protected interest which is wrongful damage.

21. Responding to the objection by the Defendants, the Applicant then filed a reply on the 8th February, 2012 stating as follows:

    i. That the legal basis for her application contrary to the Defendants objection, is based on the Articles 9(1)g, 2 & 4 of the Supplementary Protocol (A/SP.1/01/05) of the Community Court of Justice; ECOWAS;

ii. Article 10 (c) and (d) of the Supplementary Protocol (supra);

iii. Article 20 of the Protocol (A/P1/7/91) of the Community Court of Justice, ECOWAS;

iv. Articles 1, 2, 3, 7, 13(2), 19, 26, 27, 2 8, and 29 of the African Charter on Human and Peoples' Rights.

v. Articles 33 (2) a, 4 and 15 of the Revised Treaty of the ECOWAS;

vi. Article 23 of the Rules of the Community Court of Justice.

22. She submits that contrary to the position of the Defendants in paragraph 1 of page 5 of their application, the legal qualification and nature of action of her Application is based and derived as stated above.

23. The Applicant submits that by the said provisions of the Supplementary Protocol (supra) she is adequately empowered to file this action which is therefore not merely administrative or based on the abuse of power by a staff but an issue that goes to the root and foundation of violations of the legal regime of the ECOWAS, the Staff Regulations, the fundamental principles and vision of ECOWAS.

24. She argues that the analysis of the facts as enumerated by the Defendants in paragraph II at page 6 of their objection with due respect is deliberately couched in order to mislead this Honourable Court, and thus referred the Court to Article 10 of the Supplementary Protocol (supra) which clearly provides the category and condition for those who may have access to the Court.

25. The Applicant states that in line with the objection of the Defendants that she lacked legal capacity as a staff, she submits that with utmost respect the Defendants were blind to Article 10(c) and (d) of the Supplementary Protocol (supra).

26. She relies once again on all the facts as earlier stated in her Application dealing with the alleged violations, while including that after exhausting all necessary avenues from the time she became aware of the illegality and breach of her fundament al rights, brought this action.

27. She goes further to state that the action complaint occurred in March, 2010 and the action was lodged in 2010, and therefore within the time limit as allowed by law.

28. The Applicant finally concludes by submitting that her case is competent and thus has merit while urging the Honourable Court to dismiss the objection of the Defendants.

29. On the 8th day of February, 2012, Counsels on behalf of parties joined issues and arguments were taken.

ANALYSIS OF THE COURT

30. The analysis of the Court in examining the arguments put forward by both Parties shall be guided by the redresses sought by the Plaintiff with the present lawsuit filed against the Defendants.

31. Contrary to the first impression that flows from the narration of her participation in the recruitment process that led to the employment of Mrs. Mariame Kone and her feeling of being cheated, the Applicant is however not praying the said process to be nullified. Her statement of claims and the observations made by her own Counsel during the bearing of the preliminary objection are very clear on that point. He said:

> ***"The case before this Court is not a case where the Applicant is seeking to be employed because she had attended an interview. That is not the case before this Court. The case before this Court; may we be guided by the reliefs of the Applicant because the first thing is to ask the Applicant "what do you want"? If your lordships look at the prayers which encapsulates the orders sought that is on page 8 of the application sir; prayer A says, a declaration that the post of personnel officer in the Community Court of Justice is vacant. Prayer B my lord, a declaration that the reinstatement of the former Personnel Officer in the Community Court of Justice after resignation is a gross violation of ECOWAS Treaty; the Staff Regulation; the Legal Regime of ECOWAS and African Charter on Human and Peoples ; Right. C my lord is the declaration that the fundamental right of the Applicant has been grossly violated by this action. The case of the Applicant is that the Applicant as a citizen of the community has seen the wrong that is perpetrated by an organ of the community. She owes the duty; not just to herself not just to her country; but the entire community to seek a redress"***

32. Consequently, there is no request to the Court to assess the legality or otherwise of the said selection process with a view to render it null, if it be

the case. Rather, what the Applicant is seeking is just a declaration that the act of reinstatement of the employee, without a prior public selection process, is a violation of Community texts and her own fundamental rights.

33. The Applicant is, in essence, seeking that the position currently held by the employee Kone be declared vacant so it can later be filled through a public and competitive process in which the Applicant herself and other Community citizens, who feel they are qualified, can take part.

34. However, the fundamental question that must be examined and resolved, as raised in the preliminary objection, is whether the Applicant, as an individual who is not an employee of the Community, has the legal capacity to address the Court seeking the annulment of an act by the Head of an Institution who, without open selection process, decides to reinstate an employee after having accepted the termination of her contract.

35. To answer this question, it is important to start by referring to the general principle governing the actions of Community Institutions and their officials.

36. The actions of ECOWAS institutions and their officials are subject to the principle of legality. This means that when acting on behalf of the Community, these institutions and their officials must comply with the law governing the operations of ECOWAS, namely the Revised Treaty and other Community texts approved by the competent organs.

37. With the same purpose of ensuring compliance with that foundational principle of ECOWAS Community, Article 9 of the Protocol on the Court, as amended by Supplementary Protocol (A/SP.1/01/05), empowers the Court with jurisdiction to adjudicate on **"any dispute relating to the legality of regulations, directives, decisions or subsidiary instruments adopted by ECOWAS"** and **"on the actions for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions"**.

38. But for the jurisdiction of the Court to be set in motion for the adjudication of a dispute arising from an alleged violation of Community laws by ECOWAS Institutions or their officials, it is necessary that a lawsuit be lodged by an entity or individual to who is attributed, by the Court Protocol or other Community texts, the necessary capacity to do so.

39. According to Article 10 of the same Protocol, an individual can only have access to the Court in the following situations:

1) to react against an act or in action of the Community or its agents who have violated the individual's rights, Article 10(c);

2) to seek relief of violation of the human rights the individual has been the victim of, Article 10(d); and

3) if a Staff of any Community Institutions, after having exhausted all avenues of administrative appeal.

40. Being those provisions that allow the access to the Court by individuals, the Applicant, as an individual, must prove that her case falls into one of the situations listed in 1, 2, and 3.

41. It is clear and without great difficulty that the Applicant is not an employee of any Community institution. In fact, she's nowhere near even to claim that status. Therefore, this excludes the application of the situation referred to in (3) which corresponds to sub-paragraph (e) of Article 10 of the Protocol.

42. Thus, the remaining possibilities that are left to the Applicant to have access to the Court are only two: to justify her complaint based on the provision of Article 10(C); or to present her lawsuit as a complaint for violation of human rights in accordance with Article 10(d).

43. These two alternatives, invoked by the Applicant **in** her arguments, should be analyzed in order for the Court to determine whether the Applicant's situation falls at least into one of them.

44. Under Article 10 (e) of the Protocol 2005; access to the Court is open to

> **"Individuals in proceedings for the determination of an act or inaction of a Community official which violates the rights of individuals…"**

45. The wording of Article 10 (c) leaves clear from the outset that the main requirement for an individual to have access to the Court under that provision is that he or she should be the bearer of the right allegedly violated by the act or inaction of the Community or its official that is being challenged. An individual holder of such right, in the sense required by this provision, is the person whose interest is directly and immediately affected by the act or inaction that is being contested. This means that if the person is not directly or immediately affected by the act he/she seeks for annulment, such person cannot be accepted to submit a case under Article 10(c) of the Protocol on the Court of Justice, and therefore the complaint should be rejected.

46. In applying these principles to the situation described in the present case, it is easy to see that the Applicant cannot be considered directly and immediately affected or harmed by the act of the President of the Court who decided, even without following a competitive selection process, to reinstate an employee whose resignation had been previously accepted.

47. The Applicant was not in any situation where she was directly affected by the decision of the Head of that institution. Her situation is exactly the same as that of other Community citizens that would be qualified to apply for the position if a competitive recruitment process to fill this vacancy were to be opened. Contrary to the averment by the Plaintiff, the mere fact of being a Community citizen qualified to attend or with expectation to participate in any con test which however was not opened, does not place the person in a legal position to file a complaint for non-opening of the selection process.

48. In line with its previous decision, the Court holds that the status of Community citizen does not by itself afford the capacity to challenge the act of an institution that did not cause any direct damage to the person concerned ***(JUDGEMENT N^{O}: ECW/CCJ/JUD/01/08, 2004-2009 CCJELR, pag. 167)***.

49. From the foregoing, it can be concluded that because she was not directly affected by the act of the President of the Court, the Applicant cannot be permitted to file a complaint against the same act pursuant to Article 10(c) of the Protocol of the Court.

50. The same reasoning developed above to show the lack of legal capacity or *locus standi* of the Plaintiff to challenge an act of an ECOWAS Official that did not directly violate her rights or cause any harm to her, also applies if her case is analyzed as being filed under article 10 (d) of the Protocol on the Court, the provision that allows individuals to lodge complaints for human rights violations.

51. In fact, as emphatically explained above, the Plaintiff was not in a situation in which her fundamental rights could have in any way been affected or harmed by the administrative decision of the President of the Court.

52. It is true that she invokes the violation of a set of rights enshrined in the African Charter on Human and Peoples' Rights. But the mere invocation of violation on those rights unaccompanied by any nexus between the act allegedly infringing them and the situation of the person claiming such violation is not sufficient to give the necessary capacity to lodge a complaint under Article 10 (d) of the Protocol on the Court.

CONSEQUENTLY

53. **Whereas** the access to the Court is governed by the requirements laid down in Article 10 of the Protocol on the Court, as amended by the Supplementary Protocol A/SP.1/01/05.

54. **Whereas** Community citizens, as individuals, in accessing the Court against Community Institutions or their Officials have to show that their own rights or interests have been violated or affected by an act or omission of those Institutions or Officials.

55. **Whereas** the Applicant has failed to demonstrate that the act she is contesting has directly violated any of her right or caused her any harm.

56. FOR THESE REASONS

The Court, in public sitting, after hearing both Parties in respect to the objection on the lack of legal capacity and interest of the Applicant to lodge the lawsuit, upholds that objection and, consequently, dismisses the application.

COSTS

Pursuant to Article 66(11) of the Rules, each Party shall bear its own cost.

JUDGMENT READ IN PUBLIC IN ACCORDANCE WITH ARTICLE 100 OF THE RULES OF THIS COURT AND DATED THIS 16TH MAY, 2012.

Hon. Justice M. B. RAMOS - *Presiding Judge*
Hon. Justice C. N. MEDEGAN - *Member*
Hon. Justice E. M. POTEY - *Member*

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 IN ABUJA, NIGERIA

ON THURSDAY, THE 7TH DAY OF JUNE 2012

SUIT N^O: ECW/CCJ/APP/16/11
JUDGMENT N^O: ECW/CCJ/JUD/08/12

BETWEEN
GROUPE RACECO ***- PLAINTIFF***
V.
ECOWAS COMMISSION ***- DEFENDANT***

COMPOSITION OF THE COURT

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

ASSISTED BY
ABOUBACAR DJIBO DIAKITE - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **SIDIKI KABA (ESQ.)** AND **SOULEYMANE NIANG (ESQ.)** **-** *FOR THE PLAINTIFF*

3. **F.N. MOLOKWU (ESQ.)** - *FOR THE DEFENDANT*

Non-execution of contract -Claim of interest and damages -Irregularities in contract -Counter claim -The new Article 9 of the Protocol on the Court

SUMMARY OF FACTS

Groupe RACECO brought an action before the Court, against the ECOWAS Commission for breach of contract. In accordance with the terms of an airtime purchase .order, the Applicant had allegedly fulfilled its part in a contract to broadcast twelve (12) series of monthly media reportage of thirteen (13) minutes each, devoted to a programme for the Departments of Agriculture, Environment and Water Resources of ECOWAS.

The purpose of the Application was: to ask the Court to find that the ECOWAS Commission did not respect its part of a contract which involved paying to Groupe RACECO interests of 120 Million CFA Francs, representing the cost of the service; to demand that ECOWAS Commission fulfil its commitment under the contract; and, to ask the ECOWAS Commission to pay to Groupe RACECO 50 Million CFA Francs as damages.

The Defendant averred that the airtime purchase orders are non-existent contracts and therefore the Court must declare them a nullity, since there is no existing contract authorising the said purchase orders. The ECOWAS Commission asked that costs be awarded in its favour, in the sum of One Hundred Thousand US Dollars (USD 100,000) for abuse of Court process.

LEGAL ISSUES

- *Whether or not the contract is valid, whereas the Defendant is claiming irregularities which may vitiate same contract?*
- *Whether the claim for interests and damages is justified, which the Applicant evaluates at 120 Million CFA Francs?*

DECISION OF THE COURT

The Court decided that the evidence tendered by the ECOWAS Commission cannot disprove the authenticity of the documents lodged by the Applicant to the point of invalidating the contract. That, indeed, the same types of documents sufficed to establish the validity of the previous contracts between the Applicant and the Defendant.

Consequently, the ECOWAS Commission was ordered by the Court to pay to Groupe RACECO interest damages of 120 Million CFA Francs and 1.5 Million CFA Francs as costs and dismissed the requests made by the ECOWAS Commission.

JUDGMENT OF THE COURT

PROCEDURE

1. By Application dated 19 July 2011 registered at the Registry of the Court on 21 July 2011, **Plaintiff Groupe RACECO** through its Counsels Sidiki KABA (Esq.) and Souleymane NIANG (Esq.) Lawyers registered with the Bar in Senegal and whose address for service is ***quartier Carriere BP A/ 293 Thies; email: etudeskabaorange.sn,*** brought a case against ECOWAS Commission, Defendant whose Counsel is F. N MOLOKWU (Esq.) Lawyer registered with the Bar in Nigeria for the purposes of pleading with the Court:

   - To note the failure by Defendant for the payment of the sum of one hundred and twenty millions (120,000,000) CFA Francs;
   - To order ECOWAS Commission to pay to GROUPE RACECO the sum of one hundred and twenty millions (120,000,000) CFA Francs;
   - Furthermore, to order ECOWAS Commission to pay to GROUPE RACECO the sum of fifty millions (50,000,000) CFA Francs as damages for all the prejudices suffered, due to ECOWAS Commissions default;
   - To declare and adjudge that all the claimed sums of money, i.e. the principal as well as the interest shall be paid at the legal interest rates charged by GROUPE RACECO's bankers, effective their due date.

FACTS

The facts according to Plaintiff

2. Plaintiff avers that it entered into a contractual agreement with the ECOWAS Commission for the programming and broadcasting of twelve monthly reports of thirteen minutes each, relating to the activities of the Department of Agriculture Environment and Water resources, for the Community Institution;

3. Plaintiff further avers that two documents titled "Order for Slots" indicating the rights and obligations of both parties were signed, dated and approved by ECOWAS Commission;

4. Plaintiff claims that it carried out all its own obligations under the contract whereas ECOWAS Commission failed to carry out its own obligations relating

to the payment for the services rendered to the tune of one hundred and twenty million (120,000,000) CFA Francs, despite numerous amicable entreaties made by Groupe Raceco especially the intervention made by the Senegalese Authorities through Letter No. 003697, dated 22 March 2011, the Hon. Minister for Foreign Affairs of Senegal to the President ECOWAS Commission and also another correspondence from Ambassador Amadou Mactar GUEYE of the ECOWAS National Office in Senegal to the Commissioner for Finance at the ECOWAS Commission and lastly Letter from Mr. Ibou NDIAYE of the Ministry of Foreign Affairs of Senegal to H.E. Ambassador Victor James GBEHO, the then President of ECOWAS Commission;

Facts according to Defendant

Facts

5. ECOWAS Commission avers that it entered into a contractual agreement with GROUPE RACECO, for the audiovisual coverage and publicity of all ECOWAS Programmes within the 15 Member States and paid its partner a yearly fee of 90,450,000 F CFA spanning a period of five years and which was renewed severally and which was supposed to come to an end by 31 December 2009;

6. Defendant claims that it paid Applicant the totality of the contractual worth pursuant to the terms of the said contract;

7. ECOWAS Commission avers that in January 2010, following a successful bid it signed a new contract with another Communications Company, the NTA Nigeria, thus it contests having authorized any member of its staffs to enter into any contractual agreement with GROUPE RACECO. It therefore deduces that the "Order for Slots" upon which Applicant bases its claims for payment are null and void and of no effect whatsoever.

THE PLEAS-IN-LAW BY PARTIES

Pleas by Applicant

8. As to form, Applicant invokes Article 9 of the Supplementary Protocol on the Court, which provides that: ***"The Court has competence to adjudicate on any dispute relating to….the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions".***

Applicant also invokes without any further precision, the African Charter on Human and Peoples' Rights, the ECOWAS Political Declaration which was signed by Member States on 24 July 1993, as well as the ECOWAS Revised Treaty of 1993;

9. As to the merit of the case Applicant claims that Defendant is indebted to it, because the documents labelled **"Order for Slots"** upon which this indebtedness is premised were signed and counter signed by the Staffs of Defendants, who have such powers to do so. These documents were also dated and bear the stamps of ECOWAS Commission. GROUPE RACECO also avers that it suffered various forms of prejudices owing to the non-payment of its dues, especially recouping the exorbitant taxes paid to Government coffers, postponement of programmes, lateness in paying its staffs, the difficulty in signing other contracts and the loss of credibility in the estimation of its partners;

10. Following the reply filed by Defendant to the initiating Application, Applicant claims that the contracts for which it is seeking payment relate to two **"order for slots"** for ECOWAS Commission, specifically for the Department of Agriculture, Environment and Water Resources, and the Department of Macro-economic Policies, which were to be produced by GROUPE RACECO and shall be published in the magazine called WARI, and shall be broadcast on TV5 World, TV5 Africa and TV5 FBS (France, Belgium and Switzerland), over the period spanning from January to December 2010, for the first slot, and from March 2010 to February 2011, for the second slot;

11. Applicant adds that the two contracts are identical to those that the Communications Department of ECOWAS had requested in 2009, for the Department of Agriculture, Environment and Water Resources of ECOWAS Commission, and for which Defendant had effected payment to the tune of 55,000,000 CFA Francs, representing the cost of the twelve broadcast that it effected, and that the documents tendered for the claim for payment were no other than those relating to the **"order for slots"** under reference, which were signed by the then Head, Communications Department of ECOWAS Commission, Mrs. Adrienne DIOP;

12. Applicant also claims that the orders for slots, upon which it is claiming payment were not only signed by Mrs. Adrienne DIOP, they were also signed by her predecessor, Mr. Sunny UGOH, and the then Vice President of ECOWAS Commission, Mr. Jean de Dieu SOMDA, GROUPE RACECO further adds that the Defendant having sought the opinion of the Head of its Legal Department on the genuineness of the said orders for slots, its own

staff replied thus: "By counter-signing the document, ECOWAS Commission gave its approval for the job requested to be carried out, pursuant to the conditions set out in the document that it has counter signed", and recommended payment of the bill relating to the said approval;

13. Applicant therefore deduces that the refusal on the part of Defendant, for the payment is illegal and that no one can take advantage of its own turpitude.

PLEAS BY DEFENDANT

14. ECOWAS Commission invokes Article 39 of ECOWAS Code of **"Business"**, which provides that:

"1) Contracts entered into by the Community or its Institutions are signed by:

a) The President of the Commission or the Director General, when the worth of the contract ranges between, at least 25,000 UC and 250,000 UC and more;

b) The Chairman of the Adjudications Council when the worth of the contract is more than 250,000 UC;

2) Once signed the contract becomes valid and shall be executed

3) Contracts that are not signed, checked and approved, pursuant to the provisions of the present chapter are null and of no effect, together with any act made in their execution."

15. Defendant claims that the orders for slots upon which Groupe Raceco is premising its request for payment were not approved by the Financial Controller of ECOWAS Institutions, as provided under Article 38 of ECOWAS Code of **"Business"** and consequently deduces that it does not have anything to say about the bills drawn in relation to the said orders, as well as the claim on damages for non-payment of those bills.

16. Concerning the African Charter on Human and Peoples' Rights and the other Community legal instruments invoked by Applicant, Defendant is of the opinion that since the instant case relates to a contract, those instruments are ineffective in the instant case;

17. Consequently, Defendant concludes that the claims by Applicant for the payment of the sum of 120,000,000, as well as damages; it therefore asks the Court to order Groupe Raceco to pay to it the sum of 1,000,000 US Dollars, to cover the cost of the proceedings;

18. In replying to the rejoinder dated 10 November 2011, filed by Applicant, Defendant claims that all the programmes outlined in the orders for slots, upon which Groupe Raceco premises its claims, are programmes that are outlined in the contract awarded exclusively to the NTA (Nigerian Television Authority), the successful bidder of January 2010, and that the signatures appended by Mrs. Adrienne DIOP, and the other staffs of ECOWAS were also done in bad faith. Defendant claims that it was for this reason that the then Commissioner for Administration and Finance of ECOWAS Institutions had refused the approval for the payment of the bills drawn on the basis of those orders for slots, which Applicant is now putting forward.

19. In a request forwarded to the Registry of the Court, on 7 March 2012, Defendant pleads that the Court should order, pursuant to Article 43 of its Rules, the appearance before it, by its witnesses, in an interim Ruling, the Court rejected this request on the grounds that contrary to its own submission,

    "since the witnesses are in its employment, the proof that they are likely to bring before the Court could be so presented without their physical appearance, and that, since those witnesses are under Defendant's authority, there is need to fear the risks of subordination and the effect of moral burden on their person."

20. In its writs filed at the registry of the Court on 18 April 2012, Defendant recalled that the conditions (signatories, procedure and approval for contracts) provided under the ECOWAS Code of "**Business**", were not met before the contracts in the instant case were purportedly signed, and also claims that the opinion given by the Head of its Legal Department was erroneous and of no value whatsoever, it also adds that the non-use of ECOWAS letter head for the said contracts is another fundamental factor that put their genuineness in doubt;

21. Finally, Defendant concludes that, if peradventure the Court were to favourably admit as valid, the contract upon which Groupe Raceco premised its claim for payment, the damages sought are not established for failure by Applicant to get them quantified and proven, and therefore, the claim for the reparation should be set aside;

Analysis by the Court.

As to form

22. The Application was filed, pursuant to the provisions of Article 9 of the Supplementary Protocol on the Court; consequently, it should be declared admissible;

As to merit

On the contract between the parties

23. The two orders for slots upon which Groupe Raceco premises its claim for payment were signed and counter signed by staffs of ECOWAS Commission, namely Mrs. Adrienne DIOP, her predecessor and the Vice President of ECOWAS Commission;

24. While declaring that its three staffs do not have the authority to commit the Community Institution, by signing and counter signing the contractual documents, upon which Groupe Raceco premises its claims, Defendant has not for all that denounced the said contractual documents;

25. The Court is of the opinion that these staffs hold high posts of responsibility in the administration of the Defendant, such that their actions that they signed can necessarily be imputed to the Defendant. Moreover, Defendant does not contest having enjoyed the publicity services which appeared on international TV screens as a result of receiving the said contractual documents, and thus, Defendant has effectively entered into such a contractual agreement;

26. At this stage of the procedure, the Court notes that the invocation of Article 39 of the ECOWAS Code of **"Business"** by Defendant seems not pertinent, especially as Defendant has always in the past, contracted Groupe Raceco for the same services, based on the same procedure that is now the subject of litigation spanning from 2008 to 2009, and for the same broadcast purposes and that payment for those earlier contracts have always been made without any hassles or contestation;

27. Finally the Court notes that the canceling of the contract as alluded to by ECOWAS Commission between it and Applicant, does not hold water because such a revocation was not notified to Applicant and more so when Defendant does not contest the fact that Applicant carried out its own obligations under the contract, and that Defendant witnessed Applicant carrying out such obligations to the letter, without Defendant reacting to such endeavour;

28. Thus, from the foregoing, the Court declares that ECOWAS Commission is indebted to Groupe Raceco, to the tune of 120,000,000 CFA Francs, for advertisement and publicity jobs carried out on its behalf by Applicant;

29. The Court is also of the opinion that the claim for reparation of damages and interest made by Applicant, due to the sum owed it is justified; however, the Court adds that their due date starts from the date of this judgment.

On the claim for damages and interest

30. Groupe Raceco lays its claim on reparation of damages and interest on the grounds that it suffers various prejudices relating to tax burden, inability to pay its workers' salaries and emoluments, postponement of dates of its programmes, failure to win further contracts and loss of credibility in the eyes of its partners;

31. The Court notes that as is made such a claim for the reparation of damages and interest has a direct link to the non-payment of the money that Defendant owes Applicant; indeed, the Court believes that the non-payment of the money due does not only create an apparent weak financial base, but also affects Applicant's financial credibility in the eyes of third parties; also, the Court is of the opinion that such claim for damages and interest as made by Applicant is justified, and that there is need to adjudicate on it;

32. However, and by virtue of its discretionary power, the Court approves the sum of 1,500,000 CFA Francs as damages and interest;

On the claim made by Defendant for the award of cost, to cover appearance fee.

33. Defendant seeks the award of the sum of 1,000,000 US Dollars against Applicant, for abuse of Court processes. The Court notes that the Application filed by Groupe Raceco is not so filed, as an abuse of Court processes, and since Defendant has failed in its travails, this claim must be set aside;

On These Grounds

The Court;

The Court adjudicating in a public sitting after hearing both parties, in a matter on contractual agreement, in last resort, after deliberating in accordance with the law;

34. **As to form**,

- **Declares** that the Application filed by Goupe Raceco against ECOWAS Commission is admissible

35. **As to merit**,

- **Declares** that the claims for payment, as made by Goupe Raceco is well founded;

- **Consequently, Orders** ECOWAS Commission to pay Goupe Raceco the sum of 120,000,000 CFA Francs together with the due interest, as from the date of the present Judgment;

- **Equally Orders** ECOWAS Commission to pay Goupe Raceco the sum of 1,500,000 CFA Francs as interest, effective the date of the present Judgment;

- **Rejects** the claim for the award of the sum of 1,000,000 US Dollars against Applicant, as made by ECOWAS Commission;

- **Orders** ECOWAS Commission to bear all the costs;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES

1. **Hon. Justice Awa NANA DABOYA** - *President*
2. **Hon. Justice Clotilde MEDEGAN-NOUGBODE** - *Member*
3. **Hon. Justice Eliam POTEY** - *Member*

Assisted by
Tony ANENE-MAIDOH - *Chief Registrar*

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

HOLDEN AT ABUJA,
FCT IN THE FEDERAL REPUBLIC OF NIGERIA,

ON FRIDAY THE 8TH DAY OF JUNE, 2012

SUIT N°: ECW/CCJ/APP/07/11
JUDGMENT N°: ECW/CCJ/JUD/09/12

BETWEEN
VALENTINE AYIKA - ***PLAINTIFF***
V.
REPUBLIC OF LIBERIA - ***DEFENDANT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE BENFEITO M. RAMOS** - *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY
TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **C. O. EJEZIE ESQ.** - *FOR THE PLAINTIFF*

2. **COUNSELLOR M. WILLIAMS WRIGHT,** *SOLICITOR-GENERAL, REPUBLIC OF LIBERIA*, WITH **COUNSELLORS EMMANUEL B. JAMES, ROSE MARIE B. JAMES** & **A. KANIE WESSO** - *FOR THE DEFENDANT*

Revision of Judgment - Effect of Non-Ratification of Treaty and annexed Protocols - Jurisdiction - Supranationality.

SUMMARY OF FACTS

The Applicant, Republic of Liberia filed an application for revision of judgment ECW/CCJ/JUD/09/12 pursuant to Article 25 of Protocol A/P.1/7/91 and Articles 92 and 93 of the Rules of Court. The application is based on the ground that Republic of Liberia has not ratified the Protocols on the Court of Justice thus, the instruments are neither binding nor applicable to the Applicant and the Court cannot make an enforceable decision against her based on the instruments. The applicant argued that the fact that she has not ratified the Protocols was only discovered after judgment was delivered. Applicant stated further that the Protocols were duly signed by her leadership but were never submitted to the National Legislative Assembly for ratification, to give them a legal binding effect as required by the Country's domestic laws. Further, Applicant stated that she has discovered that provisions of her Constitution rendered illegal the provisions of the Supplementary Protocol upon which the Court's Judgment was based. The Applicant submitted that the Court would have arrived at a different decision had the fact of non-ratification been known and hence the need for review.

The Respondent however, opposed the application for review on the ground that the criteria under Article 25 of the Protocol must be met and submitted that the fact of non-ratification of the Protocol is a fact exclusively within the knowledge of the Applicant as it is an internal affair and if the Applicant did not know, it amounts to negligence. Further, Respondent contended that the Applicant had not submitted any evidence to the Court to prove that she had not ratified the said Protocols.

LEGAL ISSUES

1. *Whether there are new facts to justify the application for revision*
2. *Whether the new fact was unknown to both Parties and the Court at the time of the Judgment.*
3. *Whether the ignorant of new fact was not due to negligence*
4. *Whether the application for revision is filed within the time limit*
5. *Whether National law is superior to Community Law.*

DECISION OF THE COURT

The Court decides that the issue of non-ratification of the Protocols is not a new fact, it was all the time known to the Ministry of Foreign Affairs of the Applicant and for that matter the Applicant's failure to discover that fact was due to Counsel's negligence in not conducting proper and due inquiries before and during the hearing on the status of ratification of the Protocols by the Applicant. The 1991 Protocol as well the 2005 Supplementary Protocol have both been in force since they were signed, albeit provisionally, and are binding on the Applicant under Article 25 (2) of the Vienna Convention on the Law of Treaties of 1969 since they have not taken any steps to renounce them. The Court therefore decided that the application is thus without merits and accordingly dismissed

JUDGMENT OF THE COURT

SUMMARY OF THE FACTS

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. In the meantime the record discloses that an action is pending before the Supreme Court of Liberia in respect of the same subject-matter.

4. The Plaintiff instituted this action pursuant to Articles 10(c), (d) and 12 of the 1991 Protocol of the Community Court of Justice as amended by the Supplementary Protocol of 2005, Article 33 of the Rules of this Court, Articles 15, 50 and 54(2) of the Revised Treaty of ECOWAS as well as Articles 7(1)(b), 12 and 14 of the African Charter of Human and Peoples'

Rights. In particular, Plaintiff relied on Article 14 of the African Charter on Human and Peoples' Rights which states thus ***"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"***. Furthermore, the action was brought pursuant to Articles 2, 11(a), 20(a), (b), (c), (f), (h), (i), 22(a) and 24 of the 1986 Constitution of the Republic of Liberia and the inherent jurisdiction of the Court.

5. The Plaintiff sought the following orders:

   (a) Declaration that the confiscation of the sum of USD 508,200.00, being the property of the Applicant as proceeds of criminal conduct and seizure of his ECOWAS passport is unconstitutional, null and void,

   (b) An order directing the Respondent to release forthwith to the Applicant the sum of USD 508,200.00 with interest at the rule of 21% from 9/ 9/06 till date of final liquidation.

   (c) An order directing the Respondent to release forthwith to the Applicant his ECOWAS passport.

   (d) Costs of twenty thousand Liberian Dollars to the Applicant.

6. The Defendant in opposing the application stated that when the Applicant arrived at the Roberts International Airport on the 9th of September 2006, he submitted to Immigration and Customs, Bureau of Immigration and Naturalization, Ministry of Justice and the Ministry of Finance but at every point he declared that he was bringing nothing of value into the country that warranted a declaration as per the requirements of both the Immigration and Naturalization Law and the Revenue Code of Liberia Act of 2000. Defendant averred that it was when Plaintiff was leaving the airport that security personnel were alerted that the Applicant had falsely stated that he was carrying nothing that warranted a declaration. Defendant continued that when Plaintiff was accosted and searched, it was found that he had US$508,200.00 strapped to his body. The money was subsequently seized and sent to the Central Bank for verification whilst investigation continued as to why Plaintiff failed to declare to the Central Bank personnel as well as the Immigration and Custom authorities at the airport. A copy of the report of the Criminal Investigation Division of the Liberian National Police which narrates the incident was attached as Defendant's Exhibit "R-3"

7. Further, Defendant averred that whilst investigations continued, her County Attorney for Montserrado County filed an application with the Circuit Court

of the First Judicial Circuit, Criminal Assizes “C’’ for the confiscation of the money seized by the security officials from the Plaintiff. A copy of the said application was attached and marked as respondent’s Exhibit ‘’R-4". An Order of Confiscation was issued by the said Court on December 1, 2006 and a copy was attached and marked as Exhibits ‘’R-5" and “R-6” of Defendant’s pleadings.

8. Defendant stated that investigations continued into the matter and a Status Report was released on 30th September 2006 and copy of it was attached and marked Exhibit “R-3" of the Defendant’s pleadings. Following the Status Report, Defendant’s official continued their investigations, which were still ongoing when the Plaintiff filed the action.

ORAL PROCEDURE

9. The Plaintiff relied on the pleadings, particularly the documents annexed which were not in dispute, and called no oral evidence. For their part the Defendant called four witnesses to testify largely on the manner Plaintiff brought the money into their country and non-declaration thereof.

CONSIDERATION BY THE COURT

10. Defendant contended that the fact that the Plaintiff did not testify himself or call witnesses to testify on his behalf amounts to a waiver of his claim as there is no substantiating evidence upon which judgment can be granted in his favour, Defendant urged the Court to dismiss the Plaintiff’s claim as it is unverified and unsubstantiated. With respect, this position canvassed by the Defendant is not tenable at law. A Plaintiff can prove his case either by relying on documents or by providing oral evidence or he could use a combination of both. A party is free to prove his case by any means he deems appropriate.

11. At law where facts are admitted or not traversed in the pleadings, a party is not obliged to lead any further evidence. The documents on which the Plaintiff relied on in this proceeding were all admitted by the Defendant who also relied on all those documents as well as her own. In such an instance, it is not necessary for the Plaintiff to provide oral evidence to prove these facts as they are admitted by the Defendant. Thus, Defendant’s contention that Plaintiff did not provide evidence to substantiate his claims and should be deemed to have waived them is not acceptable in law and so same is respectfully rejected by the Court.

12. The facts in this case are largely undisputed and so are the documents relied upon by the parties. From the facts, the key issue that arises for determination is whether the Plaintiff is entitled to recover his, USD508,200.00 all the other issues are ancillary to this one, In determining this core issue, the Court will look at the following sub-issues:
    (i) Mode of transportation and declaration of the currency;
    (ii) Legality of the Confiscation order;
    (iii) Effect of the investigative reports by the Defendant's agents.

    The addresses by both counsels will be considered as we examine the various issues set out above.

MODE OF TRANSPORTATION AND DECLARATION/NON DECLARATION OF THE CURRENCY

13. The Defendant contends that they are right in withholding Plaintiff's money because the way and manner in which Plaintiff carried the money into her territory and the non-disclosure thereof violates the Central Bank Act of 1999, the Revenue Code Act of 2000 and the Immigration and Naturalization Law. Defendant avers that the Plaintiff strapped the money to his body in a deliberate attempt to smuggle same into her country, which act he perfected when he failed to declare same to her officials at the Roberts International Airport upon his arrival. Defendant continued that Plaintiff at the various check points at the airport declared that he was carrying nothing of value which warranted a declaration. Defendant further stated that it was only when Plaintiff had left the airport and was accosted by security officials that it was detected that he had strapped the money in question to his body,

14. Defendant's counsel contended that the mode of transportation of the money by the Plaintiff and the non-declaration thereof points to the fact that the Plaintiff never intended to use the money for any legitimate business within Defendant's territory. Defendant alleged that though the Plaintiff stated that he was a businessman with businesses in both the Federal Republic of Nigeria and Liberia for which purpose he brought in the money, there were no records produced by the Plaintiff to show that he was conducting business in Liberia. Defendant counsel contends that Plaintiff only exhibited a notarized article of incorporation of Captino Inc, which is by no means sufficient proof of his business activities in Liberia. Defendant further stated that there were no indications that Captino Inc. kept records of its activities, especially financial records, no indication that taxes were paid by Captino Inc. and no records to show that it actually transacted business with its purported business partners in Liberia.

15. Counsel to the Defendant concluded that Plaintiff deliberately strapped the money around his body determined to smuggle same into the country and violate and evade the Immigration and Revenue Laws as well as penal laws of the country. Defendant argued that she is entitled to withhold Plaintiff's money as he deliberately violated her laws.

16, In his reply to the Defendant's defence, the Plaintiff disputed the claims and arguments of the Defendant and stated that he violated no laws of the Defendant. Plaintiff stated that he did not incorrectly answer any questions put to him either in a statutory immigration from or by the Defendant's officials and challenged the Defendant to produce any document, wherein he failed to declare that he had the money in question on him. Plaintiff averred that there were no officials of Defendant's Central Bank present when he arrived at the airport and hence his inability to declare that he had the sum in question on him.

17. The Plaintiff continued that when he was accosted and questioned by security officials as he was about to leave the airport, he promptly informed them that he had the money on him. Further, counsel to the Plaintiff contends that there is no universally accepted mode of carrying cash and it is incumbent on everyone to use the means that could effectively safeguard their cash from theft. Plaintiff contended that it is of no relevance whether the cash was strapped to his body or not.

18. Plaintiff also stated that he is a businessman and has business interests in both Nigeria and Liberia. He stated that he owned a private depot in Pleebo, Maryland County, Liberia, where he stored rubber he purchased and resold to the Firestone Company in Liberia and also owned two motor vessels namely MV Valarie and MV Prince Eweka, which plied Liberian routes transporting rubber from Maryland to Monrovia. Plaintiff stated that the Status Report issued by Defendants officials during investigations confirmed that he submitted a Memorandum of Understanding between Pleebo Rubber Corporation and Captino Inc. and another Memorandum of Understanding between Firestone Company and Captino Inc. Plaintiff further stated that Exhibit '1' and other documents established that he sourced the cash in dispute from his legitimate business in Nigeria.

19. Defendant called four witnesses, Bala Camara, Alfred Korleh, Johnton Robertson Wolo Junior and Susanna Steve Blackie to give evidence on her behalf. The substance of the evidence of all four witnesses is that Plaintiff arrived with his money strapped to his body. This evidence was uncontroverted under cross examination. Plaintiff failed to produce any evidence to dispute the claim that the money was strapped to his body. The Court finds that the Plaintiff strapped the money to his body,

20. As earlier pointed out Defendant contends that this fact of strapping the money to his body is evidence of the fact that Plaintiff did not intend to use the money for any legitimate purpose, and did not prove that he had any legitimate business in Liberia and therefore entitles her to confiscate same, However, Plaintiff argued that he had legitimate business interests in both Liberia and Nigeria and that the money was intended to be used to expand his business in Liberia. Exhibit R-3 of Defendant's pleadings is a Status Report issued by her officials during the investigation and confirms that in deed the Plaintiff had legitimate business interests in Liberia. The Report listed the documents submitted by the Plaintiff to the investigative team for review which included a notarized article of incorporation of Captino Inc. dated 26th August 2005 and marked exhibit "C" as well as a Memorandum of Understanding between Pleebo Rubber Corporation, represented by its Director Moses Collins, and Captino Inc. represented by Valentine Ayika (Plaintiff) dated August 31, 2005 concerning Cavalla Rubber Farm, marked as Exhibit "H" and another Memorandum of Understanding between Firestone and Captino Inc. for the purchase and sale of unprocessed rubber.

21. A notarized Article of Incorporation is *prima facie* evidence of the existence of a business entity. A public document is presumed to be authentic until the contrary is established. Further, the Article of Incorporation was issued by Defendant's agents and she did not allege that this document was fraudulently procured. A Memorandum of Understanding between Plaintiff's registered business and other companies offers further proof that Plaintiff Indeed had business interests in Liberia.

22. The fact that the money was strapped to Plaintiff's body alone does not support the assertion by Defendant that Plaintiff had no legitimate business in Liberia. Although the method employed by the Plaintiff in carrying his cash seems a little odd or even unorthodox, that in itself does not amount to any crime. It gives rise to reasonable suspicion of crime, which would be established or not after investigations, especially when coupled with the fact that the Plaintiff did not declare the currency at the country of departure. A member state Will be Justified in carrying out investigations into the conduct of any person on its territory when it has reasonable cause, as in this case, to believe that there is crime committed by that person or to prevent that person from committing crime on its territory, Moreover, non-declaration of the money before leaving the airport might also raise suspicion that the Plaintiff might have some impure motive for bringing in the money and that might give rise to legal consequences under Liberian laws and must be dealt with in the light of the laws prevailing at the material time.

23. Defendant alleged that the Plaintiff failed to declare the money in question but the Plaintiff vehemently denied that and asked the Defendant to prove same. It is trite learning that the one who makes allegation bears the burden of proving same. It is pertinent to note that in the Status Report issued by Defendant's agents and which forms part of her pleadings they admitted that the Central Bank did not have officials at the Roberts International Airport when the Plaintiff arrived. One Mrs. Davis, the Deputy Governor of the Central Bank of Liberia whilst explaining the absence of the Bank's officials stated that the Bank had withdrawn its employees from the airport because other agencies at the airport, including customs, said that the Bank was carrying out their functions.

24. However, it is not in dispute that the relevant laws of the Defendant enjoin arriving passengers to declare the currency on them. To satisfy the law the passenger must look out for officials of the state, however designated, to declare the currency. It is not only bank officials who can perform such functions, Since the Plaintiff asserts the affirmative of the issue, he assumes the burden of producing evidence that he did declare the amount on him, All the evidence points to the conclusion that he did not declare it and he could not take solace in the fact that there was no bank official there at the time. If the law says there must be a declaration, it is the duty of the passenger to comply with it however cumbersome the process might appear to be. The Plaintiff is also not saying that only bank officials were authorised under Liberia law to receive the declaration.

    Having regards to the mode the Plaintiff carried the money it is more probable than not that he did not intend to declare that money. The Court finds the Plaintiff did not declare the money at the airport to any official of the Defendant.

LEGALITY OF CONFISCATION ORDER

25. Counsel to the Plaintiff argued that the confiscation order made by His Lordship Judge Kaba of the First Judicial Circuit, Criminal Assizes 'C' Monteserrado County, Liberia, which directed the Central Bank of Liberia to keep custody of the Plaintiff's money pending the conclusion of criminal investigations into the matter was null, void and of no effect as no notice of the proceedings was served on the Plaintiff to enable him defend his rights. Counsel continued that this is an infraction of the provisions of Section 15-119 of An Act to Amend the New Penal Law, Title 26 as amended, of the Liberian Code of Laws Revised and the 1986 Constitution of Liberia, Plaintiff says he was deported to Nigeria before the proceedings leading to the confiscation order were commenced.

26. Counsel to the Defendant rejected the arguments of the counsel to the Plaintiff and contended that the confiscation order was properly made as the laws of Liberia allow for the confiscation of proceeds suspected to derive from criminal activities pending final determination in order to prevent the criminal having access to proceeds of the crime. Counsel continued that if Applicant believed that any of his rights had been or were being violated, he the full protection of the law and could have sought legal redress. He concluded that the Applicant chose not to pursue the matter despite the availability of legal remedies.

27. The Defendant has placed nothing on record to show that Plaintiff was served with any notice before the confiscation proceedings were commenced. The Plaintiff also averred that he was deported to Nigeria before the said confiscation proceedings and the Defendant did not deny this averment. All that the Defendant said is that there were legal remedies available to the Plaintiff but he chose not to pursue them. A fundamental principle of law is the *"audi alteram partem"* rule which literally means "hear the other side". This principle requires that both parties in any judicial proceedings ought to be heard before their rights are determined. The undisputed evidence before this Court indicates that the Plaintiff was not served with a notice of the hearing of the confiscation proceedings. Indeed, the Plaintiff had already been deported out of the country. It is therefore conclusive that the Plaintiff was not heard nor given the chance to be heard in the confiscation proceedings. This offends the letter and spirit of the cardinal principle of fair hearing in judicial proceedings. The Defendant's defence in this regard is respectfully not acceptable and is therefore rejected accordingly. Be that as it may, the proceedings before the Court did not finally determine the rights of the Plaintiff. They were only provisional so as to enable investigations to be carried out. Thus no prejudice resulted from it to the detriment of the Plaintiff.

INVESTIGATIVE REPORTS BY THE DEFENDANTS OFFICIALS

28. The investigative reports are pleaded by both parties and the contents are undisputed. The only issue with respect to the investigative report is the legal effect of the documents. The Plaintiff avers that the investigative reports issued by the Defendant's National Police Force exonerated him from drug trafficking and money laundering allegations and also made a finding that in fact there was no official of the Central Bank of Liberia at the Roberts International Airport on the date the Applicant arrived at the said airport. Plaintiff further avers that it was on the strength of these reports that the Defendant's Minister of Justice and Attorney General directed the Executive

Governor of the Central Bank of Liberia to release his money to him after deducting at least 25% of same as penalty for non-declaration. According to Plaintiff this is conclusive evidence that his money is not the result of any criminal activity and therefore should be released to him.

29. The Defendant's contention is that though the Minister of Justice and Attorney-General wrote to the Executive Governor of the Central Bank of Liberia to release Plaintiff's funds to him, that letter was predicated on misrepresentations made to the Minister by one of the counsels to the Plaintiff, Defendant continued that the said letter was withdrawn the very next day when the Minister realised that the facts upon which he wrote to the Executive Governor were misrepresentations and therefore clearly indicated that further investigations into the issue were being carried out.

30. A careful analysis and evaluation of the investigative reports is essential to the core issue before the Court in this case, The basis of Plaintiffs application is that he is entitled to recover his money that is unlawfully being withheld by the Defendant as he has committed no crime which entitles Defendant to withhold his money whilst the Defendant's defence is primarily that she is entitled to keep same as Plaintiff committed crimes against her, This is the case before the Court; everything else is ancillary to this issue.

31. The record of proceedings before this Court clearly indicates that the Plaintiff's money was withheld and kept at the Defendants Central Bank after it was directed to do so by a confiscation order of His Lordship Judge Kaba of the First Judicial Circuit, Criminal Assizes 'C' Monteserrado County, A careful scrutiny of the entire proceedings that led to the confiscation of Plaintiff's money is essential as that provides the basis upon which Plaintiff was divested of his money and same kept in the custody of the Defendant. Annexure 'A' of the Plaintiff's pleadings and Exhibit R-5 of the Defendant's pleadings is the record of proceedings before the Court which made the confiscation order, The contents in both documents are the same, From these documents, the Plaintiff was charged with money laundering, Thus, the confiscation order was made pending the investigation into the alleged money laundering activities carried out by the Plaintiff as clearly shown in the record of proceedings before the Court, Thus, the Court granted the confiscation order to enable Defendant withhold Plaintiffs money whilst she investigated money laundering charges preferred against the Plaintiff.

32. Having established the basis upon which Plaintiff's money was withheld by Defendant, we will now turn our attention to the basis upon which the money ought to be returned to Plaintiff or retained by Defendant. As earlier noted the money was withheld pending investigation in to money laundering

charges preferred against the Plaintiff and therefore whether it has to be released to Plaintiff or not depends on the outcome of investigations into the money laundering charge. We will consider the reports that emanated from the investigations conducted by the Defendant's officials into the money laundering charges preferred against the Plaintiff.

33. First, the Status Report of the Liberian Police Force (Annexure 'D') addressed to the Director of the Liberia National Police and dated 30th September 2006, contains documents that were submitted by the Plaintiff to the investigation team, of particular relevance here is a document from Spring Bank, Nigeria. Plaintiff stated that he withdrew the US$508,200.00 from the account of his company, Captino Global Limited domiciled at the said bank. In making their recommendations, the investigative team stated thus ***"Having gathered the above stated documents indicating the source of the US$508,200.00 and other relevant documents which were critically scrutinized..."***.Defendant's officials conducting the investigation into the charge of money laundering against the Plaintiff at this stage acknowledged that they had critically scrutinized the documents submitted to them by the Plaintiff which indicated among other things the source of his funds, Plaintiff had indicated that the funds were sourced from his business accounts domiciled at the Spring Bank, Nigeria. The investigations did not find this to be false.

34. Next, Annexure 'C' of Plaintiff's pleadings includes two documents which were written by the Defendant's National Police Force to the Deputy inspector General of Police in charge of operations and the Inspector General of Police dated December 24, 2008 and December 27, 2008 respectively, The relevant portions of the letter to the Deputy inspector General of Police stated that ***"Investigation into the matter revealed that the subject had on his person said undeclared amount of US currency as indicated in the foregoing, but there was no illicit drugs found, Our investigation at the time was unable to associate the amount In question to either money laundering, fraud or drug"***. The letter to the Inspector General of Police read in part thus ***"During preliminary investigation conducted, it was established that Mr. Valentine Ayika is a businessman with assets in both Liberia and Nigeria. But, the manner in which he brought such a huge amount of money in Liberia violates Central Bank of Liberia (CBL) rules and regulations ...No drug was discovered"***.

35. On January 23, 2009, the Minister of Justice and Attorney General wrote to the Executive Governor of the Central Bank stating as follows: The Reports of the various officials and agencies, attached hereto, conclude that while

the act of Mr. Ayika violated the Central Bank Regulations on Foreign Currency Declaration Limit, there was no evidence that there was an attempt to engage in money laundering or that the amount was associated with or the result of any criminal activities perpetrated by Mr. Ayika or any person or institution which sought to convert Their criminal activities into a legitimate activity by laundering the money. Predicated upon the said findings that the amount was not part of any money laundering scheme, the officials have recommended that the funds be released to Mr. Ayika, subject to the penalty prescribed by the Central Bank for the violation of its regulations, and which we understand to be not less than 25% of the value of the undeclared amount.

36. On January 24, 2009, the Minister of Justice and Attorney General wrote again to the Executive Governor of the Central Bank and advised that they had received additional information which warranted further investigation into the matter and therefore with drawing the request for the funds to be released to the Plaintiff pending the conclusion of the investigation.

37. The legal justification for withholding Plaintiff's cash is clear from the record. The Court ordered for the confiscation of Plaintiff's funds pending investigations into the money laundering charges preferred against him. This is confirmed by the receipt issued by the Central Bank upon receipt of the money. 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. Thus, Plaintiff would be entitled to recover his money if investigations exonerate him from the charge of money laundering which provided the legal basis for the Defendant to confiscate the money.

38. The reports of the various investigative teams of the Defendant clearly exonerated the Plaintiff of any crime. In particular, the extracts of the reports clearly established that the Plaintiff is a businessman with legitimate business interests in both Liberia and Nigeria. Further, the extracts of the reports made it crystal clear that the Plaintiff did not carry illicit drugs into Defendant's territorial boundary. It also stated explicitly that the Plaintiff was not guilty of the money laundering charge preferred against him. These are conclusions from the investigation reports of Defendant's own agents and officials. These are documents which speak for themselves and their contents admitted without further proof.

39. It was based on the findings of the investigative teams that exonerated the Plaintiff of any crime that the Minister of Justice and Attorney General, the highest legal officer of the Defendant wrote to the Executive Governor of the Central Bank requesting the release of Plaintiffs funds subject to the penalty for non-declaration. This is based on the fact that the Minister of Justice and Attorney General knew that having been cleared of the criminal charges preferred against him, the Plaintiff was entitled to recover his money as there was no legal justification for the Defendant to hold on to same.

40. The investigative reports only faulted the Plaintiff with respect to the way he carried the money, strapped to his body. However, that in itself does not entitle the Defendant to confiscate Plaintiff's money. The way and manner Plaintiff carried his cash raised a suspicion of crime but the investigative reports clearly exonerated him of any crime which he was suspected to have committed. 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. Thus, Plaintiff would be entitled to recover his money if investigations exonerate him from the charge of money laundering which provided the legal basis for the Defendant to confiscate the money.

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40. The investigative reports only faulted the Plaintiff with respect to the way he caused the money, strapped to his body. However, that in itself does not entitle the Defendant to confiscate Plaintiff's money. The way and manner Plaintiff carried his cash raised a suspicion of crime but the investigative reports clearly exonerated him of any crime which he was suspected to have committed.

41. However, the Defendant seeks to find a legal basis for withholding Plaintiff's money by relying on the letter written to the Executive Governor of the Central Bank withdrawing the request for the release of Plaintiff's funds, The said letter stated that Plaintiff's funds should not be released pending further investigations into the matter, Defendant argued that the letter asking for the release of Plaintiff's funds was written based on misrepresentations made by one of the lawyers of the Plaintiff in Liberia, However, Defendant failed to name which lawyer made those misrepresentations, neither did she tender the said statement as evidence in this proceeding, The Court cannot accept oral statements made by the Defendant without further proof as to its veracity .

42. Further, the letter in question was written on January 24, 2009 whilst the present action was instituted on April 8, 2011. Thus, this action was commenced over two clear years from the date which the Defendant indicated that she wanted to further investigate the issue but she placed nothing on record to show the Court that indeed some further investigations have been conducted into the issue. And even if they did conduct further investigations, there is no evidence anything adverse to the Plaintiff was found. The Court will thus conclude that no crime was found against the Plaintiff from the day of his arrest to date.

43. It is important to note that the Plaintiff was divested of his money on September 9, 2006. It thus took the Defendant over two years to conclude investigations and recommend the release of Plaintiff's funds. Thus, Defendant had over four years to investigate this issue before Plaintiff commenced this action, The fact that the Defendant had not been able to find evidence to support the charge preferred against the Plaintiff in four years coupled with the fact that her officials had succinctly stated that Plaintiff was not guilty of the charges preferred against him leads the Court to the irresistible conclusion that the Plaintiff is not indeed guilty of the charge preferred against him. The Defendant therefore has no legal justification to withhold Plaintiff's money.

44. The Court must place it on record that member states have a duty to expedite investigations when they confiscate money based on reasonable suspicion that strangers entering their territory are carrying money for criminal purposes, or the money is the object of money laundering or otherwise illegally obtained. The investigations should be conducted within a reasonable time in the light of the facts and circumstances of the case in order not to place such persons who may eventually be found innocent in undue hardship, Given the facts and circumstances of this case, the time lapse of over four years between the confiscation of the money and conclusion of investigations was unduly long.

ANCILLARY ISSUES

45. Defendant also sought to establish that the Plaintiff is indeed a criminal and therefore the Court should take that into consideration in arriving at its decision. The Defendant relied on the opinion of the then Attorney-General and Minister of Justice of the Federal Republic of Nigeria as expressed in a letter written to her Attorney General and Minister of Justice (Exhibit R-1). Relevant portions of that letter were quoted extensively by the Defendant thus:

> **"(4) Mr. Ayika ... had been on the US DEA's list of wanted persons for drug" trafficking and money laundering ...** "
>
> **(7)... Valentine Ogbonna did not disclose this huge sum of money to the appropriate authorities before leaving the country (Nigeria) with same. The non-declaration of the money at the point of departure in Nigeria in accordance with the Money Laundering (Prohibition) Act 2004 as well as the circumstances surrounding the transfer of this huge sum of money outside the country without passing through a bank or financial institution are prima facie evidence that the money was laundered".**
>
> **(8) Intelligence at our disposal is that Valentine Ogbonna was convicted in Philippines in 1997 for trafficking in cocaine between Bangkok and Philippines. He is also believed to have been involved in laundering of proceeds of drugs, as he is believed to own and operate several accounts in China and Hong Kong**".

46. The Applicant denied that he had been on the US DEA's list of wanted persons for drug trafficking and money laundering and stated that he had

never been convicted for money laundering or drug trafficking in any part of the world. Further, Applicant stated that when he was deported to Nigeria, he was detained and only released after the said allegations had been investigated and proved to be untrue.

47. These were damning allegations about the Plaintiff and heightened Defendant's belief that he is a criminal and sought to perpetrate crime with in her jurisdiction. However, these allegations were not proved or substantiated. There is no document on record which shows that the Plaintiff had been on the list of wanted persons of the US DEA for drug trafficking. Similarly, there is no evidence before the Court to prove that Plaintiff had been convicted for drug trafficking or money laundering anywhere in the world. It is necessary to take cognisance of the fact that the Attorney General and Minister of Justice of the Federal Republic of Nigeria stated that there is a prima facie case of money laundering. A prima facie case calls for investigation and prosecution if necessary. It is not conclusive. Since Defendant's investigations exonerated the Plaintiff of both crimes drug trafficking and money laundering) and there was no evidence supporting these allegations, they remained nothing more than hearsay and bore no evidential weight in this case. The totality of all these raises strong suspicion of crime or criminal conduct against the Plaintiff. But in law a multitude of suspicions do not ripen into guilt.

CONCLUSION

48. Whereas the Court has found that the Plaintiff did not declare the currency on him before leaving the airport to any official of the Defendant;

- **Whereas** the Liberia Circuit Court ordered the confiscation of the money pending investigations into criminal conduct, if any, against the Plaintiff, but the investigations reveals to criminality against the Plaintiff;

- **Whereas** the Central Bank held on to the money to ascertain their genuineness as well as the source of the money, and their investigations found the money to be genuine and the Plaintiff as the true owner;

- **Whereas** the Defendant no longer had justification to keep the Plaintiff's money:

- **Whereas** Article 14 of the ACHPR is applicable, the Plaintiff having been found to be the true owner of the money and nothing adverse exist to warrant depriving him of it;

DECISION

49. The Court, sitting in public at Abuja, decides that the Plaintiff has established his claim and therefore enters judgment for him. The Defendant is here by ordered to return the amount of $508,200 to the Plaintiff less 25% of the said amount as per the country's laws. The Defendant is also ordered to restore the Plaintiff's passport to him. The claim for 21% interest is not allowed for lack of justification.

COST

50. The Court has already said that the Defendant unduly delayed the investigations. It is the court's view that at the end of the prolonged investigations if the Defendant had followed their own domestic law and released the portion of the money due to the Plaintiff to him, this action would not have been necessary. In the circumstances the Plaintiff is entitled to recover costs in this action against the Defendant which he has asked for in his application and Plaintiff is accordingly awarded the sum of $20,000.00 as costs against the Defendant.

DATED AT ABUJA, THIS 8TH DAY OF JUNE, 2012

BEFORE 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*

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

HOLDEN AT ABUJA, NIGERIA

ON MONDAY 11TH JUNE, 2012

SUIT Nº: ECW/CCJ/APP/03/11
JUDGMENT Nº: ECW/CCJ/RUL/11/12

BETWEEN

THE INCORPORATED TRUSTEES OF THE MIYETTI ALLAH KAUTAL HORE SOCIO-CULTURAL ASSOCIATION
(For and on behalf of the Fulani Community of Plateau State) — *PLAINTIFFS*

V.

FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT

HON. JUSTICE HANSINE N. DONLI - *PRESIDING*
HON. JUSTICE ANTHONY A. BENIN - *MEMBER*
HON. JUSTICE ELIAM M. POTEY - *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **M. M. NURUDEEN *ESQ.*,**
2. **A. B. TASE *ESQ.*,**
3. **MATTHIAS IKYAV *ESQ.*, &**
4. **BILKISU MOHAMMED (MISS)** - *FOR THE PLAINTIFFS*

1. **MRS. A. O. MBAMALI, SAN;**
2. **M. AGADA;**
3. **T. A. GAZALI *ESQ.* AND**
4. **A. F. UGOANI (MISS)** - *FOR THE DEFENDANT*

Locus standi, -Cause of action,
-Criminal jurisdiction of the Court

SUMMARY OF FACTS

The Plaintiff alleged the gross violation of the rights of its members over the past fifteen years by tribal hordes who had not relented in the unlawful killing of Fulani men, women and children and the continuous stealing of their cattle and other animals in breach of Articles 4 and 14 of the African Charter of Human and Peoples' Rights (ACHPR). The Plaintiff also alleged that the Defendant had not implemented any of the seven reports with blue prints for stopping the carnage submitted to it by the Committees of Inquiry which it set up. The Defendant denied all the allegations of the Plaintiff and submitted that they were unsupported by the record. The Defendant averred that between 2008 and 2011, there were crises which engulfed Plateau State and its environs based on ethnic and religious differences between the indigenous communities and the settlers over ownership of Plateau State; that it provided nationwide security particularly for the prevention of crime, protection of lives and property at all material times during the crises; and that no group was spared by the devastating effect of the violence; that the Plaintiffs claim is contrary to public policy, national unity and peaceful existence of all groups in Plateau State and will provoke similar claims from other groups in the State . The Defendants urged the Court to dismiss the Plaintiffs claims.

LEGAL ISSUES

1. *Whether the Plaintiff, a corporate body is competent to sue for the violation of the human rights of its members under Article 10(d) of the Supplementary Protocol of the Court.*

2. *Whether the Plaintiff has the legal right to institute an action based on facts which took place prior to its incorporation on 25th January 2011.*

3. *Whether there is any cause of action against the Defendant in regards to the violation of the human rights of the Plaintiff.*

4. *Whether this Court has jurisdiction to entertain this suit under Article 10 of its Supplementary Protocol.*

DECISION OF THE COURT

1. *In the instant case, the title of the application as well as the pleadings of the Plaintiff is very clear that they sue for and behalf of the Fulani people of Plateau State. The Fulani people of Plateau State are an ethnic group of human beings; and the ACHPR by its very title recognizes the rights of individuals as well as groups of persons. The objection is thus untenable in as much as the Plaintiff does not claim to be the victim of the human rights abuse. The Court holds that the Plaintiff has capacity to sue for and on behalf of the Fulani community of Plateau State.*

2. *The cause of action arose before the Plaintiff came into existence. The Plaintiff is not suing for itself and is not a beneficiary of the cause of action; hence the time of its incorporation is of no consequence to this action. The Plaintiffs incorporation is only relevant to clothe it with the requisite legal personality as at the date it mounted this action on behalf of the Fulani people. The Court holds that the date of Plaintiff's incorporation has no effect on its capacity to sue.*

3. *For the State to be liable there must be harmful act committed by an individual or an identifiable group of persons. In addition, it 'must be possible to attribute to the state some conduct with respect to the act that implies the non-performance of an international duty or obligation. The Court cannot proceed to declare the victims' human rights unless it is able to hold the Defendant liable for the murder of the victims, among other crimes. The pleadings do not disclose the identity of the alleged perpetrators of the crimes for which prima facie responsibility could not be attributed to the Defendant. The Court holds that in so far as it has no criminal jurisdiction, it cannot deal with the human rights issues because it is impossible to deal with it without necessarily delving into the criminal aspects.*

4. *The Court declared the action incompetent and inadmissible.*

RULING OF THE COURT

Summary of the facts

1. The Plaintiff alleged that the rights of its members have been grossly violated for the past fifteen (15) years by tribal hordes in Plateau State, who operate with impunity. Plaintiff avers that these tribal hordes in Plateau State have ceaselessly and relentlessly unlawfully been killing Fulani men, women and children in gross violation of Article 4 of the African Charter of Human and Peoples' Rights (ACHPR). Further, Plaintiff avers that these tribal hordes have also unlawfully and continuously been stealing the cattle and other animals belonging to the Fulani people in violation of Article 14 of the African Charter of Human and Peoples' Rights. Plaintiff stated that these violations have been possible because the Defendant has abdicated its statutory duty of protecting its own citizens. Finally, the Plaintiff avers that the Defendant has set up 7 Committees of Inquiry which have submitted their reports with blueprints for stopping the carnage but the Defendant has refused, failed or neglected to implement even one of the reports. Based on these facts, the Plaintiff instituted this action in pursuance of Articles 2, 4 and 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9 of the Laws of the Federation of Nigeria 2004, Article 33 of the Rules of the Community Court of Justice and Article 11 of the Protocol on the Community Court of Justice.

2. The Plaintiff sought the following reliefs:

    a. A Declaration that the Plaintiffs members have a right to life as guaranteed by Article 4 of the African Charter on Human and Peoples' Rights.

    b. A Declaration that the Plaintiffs members have a right to property as guaranteed by Article 14 of the African Charter on Human and Peoples' Rights.

    c. A Declaration that the killing of 384 Fulani men, women and children in Plateau ethnic cleansing campaigns is a gross violation or their rights to life as guaranteed under Article 4 of the African Charter on Human and Peoples' Rights.

    d. A Declaration that the theft or killing of thousands of Fulani cattle and sheep is a gross violation of the Fulani's right to property as guarantee d by Article 14 of the African Charter on Human and Peoples' Rights.

e. A Declaration that by virtue of Article 1 of the African Charter on Human and Peoples' Rights, Chapter A9 Laws of the Federation of Nigeria 2004 the Defendant has the duty of protecting the lives and property of all its citizens.

f. A Declaration that the Defendant is derelict/negligent in the performance of its statutory duties and which said dereliction has caused hundreds of lives and the loss of thousands of animals and houses of the Fulani.

g. A Declaration that the ceaseless and relentless attacks on Fulanis in Plateau State are an undeniable testimony of the nonchalance / negligence of the Defendant in the execution of its statutory duties.

h. An Order compelling the Defendant to pay to the Plaintiff the sum of N9,922,019,921.00 (Nine Billion Nine Hundred and Twenty-Two Million, Nineteen Thousand Nine hundred and Twenty-One Naira) being compensation for loss of 384 men, women and children slaughtered in Plateau State as well as special damages for the destruction of 222 houses and the theft or killing of 17,4 79 cows and 4,280 sheep by tribal hordes in Plateau State.

i. An Order compelling the Defendant to pay to the Plaintiff the sum of Two Hundred Billion Naira as exemplary and aggravated damages.

J. An Order compelling the Defendant to provide security / protection to all members of the Plaintiff wherever they may be in Plateau State in discharge of its domestic and international legal obligations as contained in Articles 2, 4 and 14 of the African Charter on Human and Peoples' Rights.

3. The Defendant denied all the averments in the Plaintiff's narration of facts and stated that they are untrue, baseless and unsupported by facts or record. The Defendant avers that the crisis that engulfed Plateau State and its environs between 2008 and 2011 resulted from ethnic and religious differences between the indigenous communities and the settlers over the ownership of Plateau State. Defendant further aver s that the various crises within that period were not the result of security lapses or the inability of the Federal or State Governments to protect the lives and properties of the people of Plateau State but rather the result of claims of ownership of Plateau State. The Defendant continued that it employed all the resources and mechanisms available to it to ensure that the lives and properties of its citizens within the Plateau State and its environs were secured during the violence. In particular, Defendant states that it provided nationwide security and deployed all security

agencies at its disposal for the prevention of crime, protection of lives and property at all material times during the conflict. The Defendant also states that no particular groups were spared the devastating consequences of the violence, which in some parts were known to have been triggered by members of the Plaintiff.

4. Finally, the Defendant avers that the Plaintiff's claim is contrary to public policy, national unity and peaceful existence of all groups in the Plateau State and granting any or all of Plaintiff's claims would greatly hamper Defendant's effort at national reconciliation and open the flood gate for similar claims by other religious and ethnic groups in the State. The Defendant urged the Court to dismiss Plaintiffs claim as frivolous, speculative, vexatious, baseless and incompetent and an abuse of Court process.

Preliminary procedure

5. By an application received at the Registry of this Court on 13th March 2012, the Defendant raised objection to the action brought by the Plaintiff. The application which was brought pursuant to Articles 87 and 88 of the Rules of Court, as well as under the Court's inherent jurisdiction, sought an order striking out this suit on two grounds: that it is incompetent and also for lack of jurisdiction. What appears to be a consequential relief sought for was an order to stay all further proceedings in this suit pending the hearing and determination of the application.

6. The grounds for the relief sought were set forth in the application itself and are reproduced here *'in extenso'*:

   i. The Plaintiff lacks *locus standi* to institute this action, as Article 10(d) of the Supplementary Protocol N°. A/SP.1/01/05, dated 19th January 2005, does not confer a right of action on corporate bodies.

   ii. The Plaintiff lacks *locus standi* to litigate on the complaints in this suit, all of which took place before it came into existence.

   iii. The complaints in the suit show no fundamental human right belonging to the Plaintiff.

   iv. The suit does not disclose any reasonable cause of (or any cause of) action at all against the Defendant with respect to violation of any human right of the Plaintiff.

v. This Honourable Court lacks jurisdiction to entertain this suit by virtue of the provisions of Article 10 of the Court's Supplementary Protocol of 19th January 2005.

7. The application was supported by a written address filed with the Registry on 20th March 2012. Counsel recounted briefly the material facts of the case, and proceeded to set out issues for determination in the preliminary objection. These are:

i. Whether Article 10(d) of the Supplementary Protocol confers a right of action on corporate bodies for relief for violation of human rights.

ii. Whether the Plaintiff, being a corporate body, has any human rights capable of being violated, or which have been violated in this matter.

iii. Whether the Plaintiff is competent at law to sue in respect of events which took place before January 25, 2011 when it came into existence. In other words, did the Plaintiff have any legal rights prior to January 25, 2011, which it can litigate upon in this action?

iv. Do the complaints in this suit disclose any cause of action (or any reasonable cause of action) against the Defendant for violation of the Plaintiff's human rights?

v. Whether this Honourable Court has jurisdiction to entertain this suit as constituted.

Arguments for the Defendant

8. Counsel argued Issues 1 and 2 together. Counsel's contention, in brief, was that given the clear and unambiguous wording of Article 10(d) of the Supplementary Protocol, the Plaintiff lacks *locus standi* to maintain this action, founded on human rights. Counsel also made references to some decided authorities on principles of interpretation, including **Afolabi v. Federal Republic of Nigeria (2004-2009) CCJELR 1.** Based on the foregoing, Counsel submitted that

a. The provision in Article 10(d) grants access to this Court only in respect of human rights violations, not for violation of any other kind of rights;

b. The provision creates a personal right of action, vested solely in the victim of the alleged violation. Thus it is the individual who alleges that his human right has been violated that is to apply to this Court for relief; and,

c. The right of action is vested in natural persons not corporate bodies.

9. Counsel referred to Article 10 (c) of the Supplementary Protocol whereby individuals as well as corporate bodies have been granted access to the Court in some matters, and concluded that it was not the intention of the lawmakers to include corporate bodies under Article 1O(d) applying the maxim *'expressio unuis est exclusio alterius'*. Consequently Counsel submitted that a Plaintiff could only sue under Article 10(d) if he is able to show that (i) he is an individual, within the meaning in Article 10; (ii) that he has human rights; and (iii) that his own human rights have been violated by the act of the Defendant.

10. According to Counsel for the Defendant, none of the above-mentioned factors avail the Plaintiff in this case; in the sense that the Plaintiff is a corporate body and the human rights allegedly violated do not belong to it. Counsel supported their case with two decided authorities by this Court, namely, **Starcrest Investment Ltd. v President of the ECOWAS Commission**, Suit no. ECW/CCJ/APP/01/08, decided on 8th July 2011;and, **Socio-Economic Rights and Accountability Project (SERAP) v. President of the Federal Republic of Nigeria & 8 Ors**., Suit no. ECW/CCJ/APP/08/09, delivered on 10th December 2010.

11. Next, Counsel argued Issues 3 and 4 together. The argument of Counsel for the Defendant was that, for a Plaintiff to be entitled to sue in Court, he must have a cause of action vested in him, by stating what his legal rights are, as well as what action of the Defendant has caused injury to Plaintiff's legal rights. In this regard defence counsel made reference to the Certificate of Incorporation of the Plaintiff dated 25th January 2011. Having regard to the fact that the Plaintiff was not in existence as at the period within which the acts giving rise to this case occurred, Counsel submitted that the Defendant has no cause of action, and hence no *locus standi*. In short the Plaintiff could not sue in respect of matters that occurred before its incorporation. The suit is therefore incompetent, Counsel concluded.

12. The next Issue challenges the court's jurisdiction to entertain this suit. Counsel reiterated their previous argument in respect of the Plaintiff's *locus standi*, and cause of action and submitted that these are conditions precedent to a valid exercise of jurisdiction. Arguing this same Issue, counsel recalled the facts pleaded by the Plaintiff wherein they alleged acts amounting to homicide or murder. Counsel stated that this Court lacks jurisdiction in criminal matters, and cite d this court's decision in **Starcrest Investment Ltd. v. President of the ECOWAS Commission,** supra.

Arguments for the Plaintiff.

13. With regard to the **issues 1 and 2** as formulated by Defendant's counsel, the Plaintiff's Counsel answered that the action by the Plaintiff is not for itself but for its members as the title of the suit clearly portrays. The members of the Plaintiff are known human beings who complain that their human rights have been violated. Counsel then referred to the **Starcrest Investment Ltd.** case, (supra), and drew a distinction between that case and the present one, in the sense that in the former case, the Plaintiff sued for itself, whereas in the latter the Plaintiff sued for known human beings. On the contrary, counsel for the Plaintiff urged the Court to rely on its decisions in various cases brought before it by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP), which the Court has accepted for the reason that SERAP did not complain of violation of human rights against itself but sued to protect the rights of known groups of people.

14. Counsel for the Plaintiff sought to draw a distinction between a limited liability company established for profit and non-profit organisation like Plaintiff herein. In his view, Article 10(c) of the Supplementary Protocol envisaged profit oriented companies; however, loose associations like the Plaintiff are not excluded by Article 10(d), he submitted.

15. **Issue No. 3**. Counsel reiterated his earlier position that the Plaintiff is only suing for a group of persons, not for itself. Hence the time the Plaintiff came into existence is of no consequence.

    On Issue 4. Plaintiff's Counsel re-capped the facts pleaded by the Applicant, namely that some of their members were killed, their properties were either stolen or destroyed. The Defendant has a duty to protect her citizens under both domestic and international law. The right to life, the right to property and the right to human dignity of the Fulani people having been violated, it gives them a cause of action, Counsel submitted.

16. **On Issue 5**. Counsel for the Plaintiff argued that the action before the Court is not a criminal one. It is a case of human rights violations for which they hold the Defendant responsible for having failed in her duty to protect the Fulani people, under Articles 1, 2, 3, 4 and 14 of the African Charter on Human and Peoples' Rights (ACHPR) as well as Articles 3 and 4 of the Revised Treaty of ECOWAS.

17. On the court's jurisdiction to hear this matter, Counsel for the Plaintiff referred to Article 9(1)(d) of the Court's Protocol on the Court's competence to adjudicate a dispute relating to the failure by Member States to honour

their obligations under the treaty, inter alia. He also cited Article 9(4) of the Supplementary Protocol which grants the Court jurisdiction in human rights causes. He supported this argument with some decisions of this Court.

Reply to Plaintiff's arguments

18. In response to Plaintiff Counsel's argument in respect of Issues 1 and 2, Counsel for the Defendant referred to Article 10 of the Supplementary Protocol as to who was qualified to access the Court and in what matters. Corporate bodies come in under 10(c), and it does not matter whether they are moneymaking, a limited liability company or otherwise. When it comes to 10(d), it is Counsel's argument that only individual persons can access the Court, having regard to the ordinary and plain meaning of the words in the enactment.

19. On Issue 3, Counsel literally repeated the earlier argument that the Plaintiff was not in existence at all times material to the facts giving rise to this case. Counsel argued that legal entities commence their lifespan from the date of incorporation.

20. On Issue 4, Counsel submitted that a cause of action is the aggregate of facts which gives a person the right to judicial relief. The argument continued:

> ***"It is submitted that there are no such facts distinctly suggesting abrogation of responsibility by the Defendant/ Applicant. Furthermore there are no facts before the Court tending to showing negligence of their social responsibilities towards the Fulanis which primarily is that of security…. that what is before the Court, are allegations of criminality by faceless persons…. We urge the Court to hold that no cause of action has been established against the Defendant"***

21. On Issue 5, Counsel contended that where the human rights allegations are criminal in nature the Court's jurisdiction is ousted. She submitted the allegations of killings or murders and arson are criminal in nature requiring the intervention of domestic courts of international courts with criminal jurisdiction.

Consideration by the Court

22. The Court proceeds to consider the arguments in the same pattern that they were presented before it. But before then, it must be observed that in summing up Counsels' arguments, issue 6 was omitted. This is because

the Court did not consider it necessary since the hearing of the substantive case has been postponed to await the outcome of the preliminary objection. Thus issue 6 whereby the Defendant was seeking a stay of proceedings was effectively granted. The Court also remarks that it will not repeat the arguments of counsel in considering the various issues, except when it is absolutely necessary.

Issues 1 and 2

23. These two issues essentially question the capacity of the Plaintiff to mount this action under Article 10(d) of the Court's Protocol of 1991 as amended by the Supplementary Protocol of 2005. The Plaintiff is a corporate body and not an individual human being, so it was argued it cannot bring an act ion in human rights before the Court. The Plaintiff took a contrary position that since they are suing on behalf of a group of persons they have the capacity to sue.

24. Counsel for the Plaintiff argued that the Plaintiff is a non-profit making association and as such was not included in the definition of corporate bodies envisaged by Article 10(c) of the Protocol as amended. Counsel for the Defendant rejected this argument as stated earlier. There is no ambiguity in the said Article 10(c); the provision draws no distinction of any sort between different kinds of corporate bodies, however described or whatever their objects may be. The access to the Court was granted to all corporate bodies in matters falling under Article 10(c); consequently the Court rejects the attempt to exclude certain categories of corporate bodies from the purview of this provision.

25. Whilst arguing the issue of the Plaintiff's capacity to sue, both counsel cited some decided authorities by this Court, thereby giving an impression that those decisions are contradictory of each other. On one hand counsel for the Defendant cited the case of **Starcrest Investment Ltd. v. President of ECOWAS Commission,** supra, hereinafter referred to as the **Starcrest** case. In that case the Court rejected the Plaintiff's application on ground, inter alia, that it has no capacity to sue as a victim of human rights abuse. For his part, counsel for the Plaintiff cited some cases brought before this Court by a Nigeria based NGO called Socio-Economic Rights and Accountability Project (SERAP), which the Court allowed.

26. Let us now examine the contents of the Court's decisions on this subject. The **Starcrest** case has been mentioned earlier on; in paragraph 17 of that decision the Court stated that ***"...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". A similar conclusion was reached in the case of **Ocean King Nigeria Ltd. v. Republic of Senegal**, **Suit no. ECW/CCJ/APP/05/08** dated 8th July 2011 **paragraph 72** where the Court decided that ***" .....Article 10(d) of the 1991 Protocol, as amended, is not open to corporate bodies as victims of human rights abuse; that it is open to only human beings."*** Thus in these two cases the application by the Plaintiffs both of them corporate bodies, was not accepted for the reason that they complained of being victims of human rights abuse which is not available to them under Article 10(d) of the 1991 Protocol, as amended.

27. On the other hand the Court has allowed some corporate bodies, especially NGO's, to sue in human rights where they do not claim to be the victims of human rights violations, but sue for and on behalf of individuals or groups of persons alleged to be the victims of human rights abuse , See cases like **SERAP v. The Federal Republic of Nigeria and another**, **Suit no. ECW/CCJ/APP/12/07** dated 30th November 2010; **SERAP v. President of the Federal Republic of Nigeria and 8 others**, **Suit no. ECW/CCJ/APPI08/09,** dated 10th December 2010; **Media Foundation for West Africa v. Republic of The Gambia**, **Suit no, ECW/CCJ/APP/15/10**, where an Accra based NGG brought an action on behalf of a journalist detained in The Gambia.

28. Thus there is a clear distinction between these two classes of cases, one in which the corporate body sues as the victim and the other in which it sues on behalf of the victim, the victim here being identified as a human being. In the former situation the corporate body has no locus or capacity to sue, but in the latter situation it has.

29. The position of the Court is consistent with that of the African Commission on Human Rights which accepts cases from NGO's. The same position prevails at the Inter American Court on Human Rights which allows NGO's that are legally recognised in one of the member states of OAS to submit complaints on behalf of a victim of Human rights abuse.

30. In the instant case, the title of the application as well as the pleadings of the Plaintiff is very clear that they sue for and on behalf of the Fulani people of Plateau State. The Fulani are an ethnic group of human beings; and the ACHPR by its very title recognises individuals as well as groups of persons. The objection is thus untenable in as much as the Plaintiff does not claim to be the victim of human rights abuse.

Issues 3 and 4

31. The first part of this argument relates to the fact that the Plaintiff came into existence after the cause of action had arisen; therefore they could not benefit from it. Consequently counsel argued that there was no cause of action by the Plaintiff against the Defendant.

32. The Court takes note of the fact that the cause of action arose before the Plaintiff came into existence. However, as earlier held, the Plaintiff is not suing for itself and is not the beneficiary of the cause of action; hence the time of the Plaintiff's incorporation is of no consequence to this action. The Plaintiff's incorporation is only relevant to clothe it with the requisite legal personality as at the date it mounted this action on behalf of the Fulani people. If at the time of filing the application, the Plaintiff did not possess a certificate of incorporation, it would be incompetent to bring the action. These issues are not well founded, the Court holds.

Issue 5

33. This last issue raises the question of the court's jurisdiction. The grounds are that the Plaintiff has no *locus standi* (issues 1 and 2) and that the Plaintiff has no cause of action against the Defendant (issues 3 and 4). The Court has already rejected these arguments as untenable.

34. There was yet another point raised in respect of the Court's jurisdiction, or lack of it. The Defendant argued that the facts relied upon by the Plaintiff are acts that are criminal in nature namely murder and arson which this Court has no jurisdiction to deal with; they are matters for the domestic courts to handle. The **Starcrest** case, supra, was cited in support. Counsel for the Plaintiff rejected this argument saying it is human rights violation case for which they hold the Defendant responsible and accountable under various international instruments referred to in their application.

35. This is a very fundamental issue which goes to the very foundation of the entire claim. The questions that arise are the extent of Defendant's liability; the issue of criminality and its impact on the court's jurisdiction.

36. To begin with the Court will address the question of State liability. The Court must take into account any rules of international law when examining questions concerning state responsibility in conformity with the governing principles of international law, mindful, however, of the special character of Article 10(d) of the Protocol, as amended being a human rights instrument. Under Article 9(1)(d) of the Court's Protocol, as amended, the Court has

competence to adjudicate on any dispute relating to the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS. The ACHPR has been adopted by incorporation into the ECOWAS Treaty, Article 4(g) thereof; thus non observance of its provisions would be interpreted as a breach of State responsibility and obligation.

37. In an article titled 'Private Violence, Public Wrongs, and the Responsibility of States', published in Vol. 13 Fordham International Law Journal 1 (1990), the author, Dinah L. Shelton wrote that ***".....one of the international obligations imposed upon states by treaty and custom is to respect and ensure internationally recognised human rights. Because of this duty, a state's failure to act to prevent or remedy human rights violations committee by private entities, such as death squads, may give rise to liability......"***

38. However, the strict application of this principle is watered down by the fact that responsibility is not imposed for the acts of private persons unless fault, on the part of State organs or officials, is established.

39. In short, for the State to be liable there must be a harmful act committed by an individual or an identifiable group of persons. In addition, it must be possible to attribute to the State some conduct with respect to the act that implies the non-performance of an international duty or obligation.

40. The Defendant's counsel is saying that the State is not responsible for the acts of persons she describes as 'faceless'. At this stage in the proceedings it is too early to make a definitive pronouncement whether the individuals or groups of persons alleged to have committed the various acts complained of by the Plaintiff are attributable to the Defendant; and if 30 whether the Defendant has failed in its obligations under international law. But prima facie the Court should be able to find a connection to the Defendant with the alleged perpetrators of the crimes having regard to the pleadings. Yet the pleadings are not helpful in this regard. The alleged perpetrators of the crimes are not even identified; the application merely describes them as 'tribal hordes'. How could the Court proceed to a hearing when there is no person or a clearly defined group of persons identified with the allegations of murder, arson, theft and causing unlawful damage for which the Defendant could eventually be held responsible? Thus State responsibility cannot be attributed to the Defendant, albeit prima facie, having regard to the state of the pleadings.

41. The Court will now consider the criminal elements in the case and their impact on its jurisdiction. In the **Starcrest** case, supra, the Court rejected the application on grounds, inter alia, that the underlying element in the case was the crime of bribery which the Court has no jurisdiction to deal with. In citing that decision Counsel for the Defendant urged the Court to dismiss this case the facts of which raise issues of murder, among other crimes. Counsel for the Plaintiff rejected this argument saying the case raises human rights issues only.

42. At this juncture let us refer to the subject-matter of the proceedings as articulated in the Plaintiff's application. It provides:

    a) The Defendant grossly violated the Plaintiff s members' right to life as enshrined in Article 4 of the ACHPR when it abdicated its statutory responsibility of protecting the lives of the Plaintiff's members and thereby allowed tribal hordes to kill 384 Fulani men, women and children.

    b) The Defendant grossly violated the Plaintiff s members right to property as enshrined in Article 14 of the ACHPR when it abdicated its statutory responsibility of protecting their property and as a consequence allowed tribal hordes to steal thousands of their cattle and other animals and to kill several thousand of such animals and also to burn down hundreds of their houses.

43. Criminal offences like murder, theft and arson are overtly discernible from the subject-matter of the proceedings and they are the foundation of the whole action. The Plaintiff will have to prove murder, theft and arson as matters of fact in order to claim compensation and damages in this case. Even a cursory reading of the reliefs endorsed on the application will confirm this. And even the declaratory orders are predicated upon a resolution of these crimes in the first place. The Court cannot proceed to declare the victims' human rights unless it is able to hold the Defendant liable for the murder of the victims, among other crimes. In Relief C, the Plaintiff seeks a declaration that the killinsg of its members is a violation of their human rights. And in Relief D, a similar declaration is sought in respect of the theft or killing of their cattle. Thus without determining questions of murder and theft even declaratory orders cannot be made.

44. These criminal offences are not admitted by the Defendant and nowhere in the pleadings has it been stated that there has been a prosecution of these offences in a Court of competent jurisdiction. In the absence of admission of the facts constituting the crimes, or evidence of prosecution and

conclusion of criminal proceedings, a human rights Court is unable to delve into ancillary questions, like compensation or damages, arising from such offences.

45. In the case of **Bankovic and others v. Belgium and others, ECHR (Grand Chamber), Application no. 52207/99, 41 I.L.M. 517 (2001)**, the Court considered an application whereby the Applicants sought damages for the killing and injury of their family members, who were civilians that resulted from the NATO aerial missile attack on the Serbian television and radio station in Belgrade during the Kosovo conflict. The fact of the air strike by NATO and the resultant deaths and injury was not in dispute. So the ECHR was able to accept the application though it eventually dismissed it, but on other grounds.

46. International law recognises the principle of presumption of innocence until otherwise proven guilty; see Article 7 of ACHPR, Article 10 of UN Declaration on Human Rights and Article 6 of the European Convention on Human Rights.

    Thus by denying the alleged crimes the Defendant is effectively saying that its agents are not responsible, so the presumption inures to the benefit of the Defendant until the contrary is proved. Allegations of murder, theft and arson are serious criminal offences that must be investigated and the suspects prosecuted. A human rights Court cannot sweep them under the carpet and proceed to talk about compensation, without deciding that the Defendant is at fault for the murder of the Fulani people, as well as for the theft of and arson to their property, albeit through the acts of individuals or groups for whose action it is held responsible.

Conclusion

46. **Whereas** the Court holds that the Plaintiff has capacity to sue for and on behalf of the Fulani community;

    - **Whereas** the Court holds that the date of Plaintiff's incorporation has no effect on its capacity to sue;

    - **Whereas** the pleadings do not disclose the identity of the alleged perpetrators of the crimes for which reason prima facie responsibility could not be attributed to the Defendant;

    - **Whereas** the Court holds that the criminal elements in the case must either be admitted and thus undisputed or be resolved in the domestic courts or other international courts with criminal jurisdiction;

- **Whereas** the Court holds that in so far as it has no criminal jurisdiction, it cannot deal with the human rights issues without necessarily delving into the criminal aspects;

Decision

47. The Court, sitting and adjudicating in public at its seat in Abuja, decides that in view of the foregoing reasons the action *is* incompetent and inadmissible and accordingly strikes it off the cause list.

48. The Defendant shall be entitled to the costs of this action against the Plaintiff, who is hereby ordered to pay same, as assessed by the Chief Registrar.

BEFORE THEIR LORDSHIPS

Hon. Justice Hansine N. Donli - *Presiding*

Hon. Justice Anthony A. 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 IN ABUJA, NIGERIA

THIS MONDAY, THE 11TH DAY OF JUNE, 2012

SUIT N°: ECW/CCJ/APP/05/11
JUDGMENT N°: ECW/CCJ/JUD/10/12

BETWEEN
SIKIRU ALADE - *APPLICANT/ PLAINTIFF*

V
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANTS/ RESPONDENTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE M. BENFEITO RAMOS** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

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

REPRESENTATION TO THE PARTIES

1. **O. OLORLAJE** - *FOR THE APPLICANT*
2. **GODSWILL N. IWUAJUKU** - *FOR THE DEFENDANT*

Unlawful arrest -Unlawful detention
-Right to fair trial within reasonable time, presumption of innocence
-Right to personal liberty -Motion after case adjourned for judgment.

SUMMARY OF FACTS

The Plaintiff was arrested in Lagos on the 9th day of March, 2003 by a plain cloth person who claimed to be a police officer. He alleged that the policeman forcefully dragged him to the Ketu police station where he was detained until the 5th day of May, 2003. He was subsequently arraigned before the Magistrate Court, Yaba Lagos, Nigeria for an alleged crime of armed robbery. The Plaintiff was therefore detained and ordered to be remanded in prison custody under a procedure in the Nigerian Criminal justice system known as "Holden charge" .where he continued to be in detention.

LEGAL ISSUES

- *Whether from the circumstances of the case, the alleged arrest of the Plaintiff without informing him of his offence amounts to arbitrary arrest.*
- *Whether the period between the arrest of the Plaintiff to the time of arraignment in Court was an unlawful detention.*
- *Whether the facts of the case falls under violations of human rights for the Court to exercise jurisdiction. Duty to establish claims.*
- *Whether a motion introducing documentary evidence in support of main application after the close of arguments and case adjourned for judgment can be entertained by Court.*

DECISION OF THE COURT

- *The duty to establish the claim is upon the Plaintiff to show that he was arrested and detained in prison from 2003 to date and that he had established same by credible evidence that he was and still is been detained in Kirikiri prison, Apapa.*
- *The Court adjudged the Defendant as having committed the violations of human rights against the Plaintiff pursuant to Article 9(4) of the protocol as amended, on the dates and period specified above and ordered compensation in the sum of two million and seven hundred naira only payable to the Plaintiff against the Defendant.*

- *It is trite that pleadings may be amended which introduce material fact which are not in dispute at any stage before judgment is pronounced.*

- *The Court ordered the Plaintiff to be discharged from detention accordingly.*

JUDGMENT OF THE COURT

PARTIES

1. The Applicant /Plaintiff is Sikiru Alade, a citizen of Nigeria who in his application alleged that he was and still is in detention at Kiri-Kiri Maximum Prison, Lagos.

2. The Defendant is the Federal Republic of Nigeria, a Member State of ECOWAS, with an address at the office of the Honourable Attorney General of the Federation, Ministry of Justice, Abuja, Nigeria.

FACTS OF THE CASE

3. The Applicant lodged an amended application at the Registry of the Court on the 24th day of June, 2011, wherein he stated that on the 9th of March, 2003, he was arrested in Lagos by a plain cloth person who claimed to be a police officer. He stated that the said policeman forcefully dragged him to the Ketu Police Station and detained him until the 5th of May, 2003 when he was arraigned before the Magistrate Court, Yaba Lagos, Nigeria for an alleged crime of Armed Robbery. That after the arraignment he was detained and ordered to be remanded in prison custody under a procedure in the Nigeria criminal justice system known as "Holding Charge". Hence he filed an application for violation of human rights pursuant to Article 9(4) of Protocol A/P.1/ 7/91 as amended for the reliefs stated hereunder:

   a. A declaration that indeterminate detention without trial under the holding charge constitutes a violation of the right to fair trial within reasonable time, presumption of innocence and right to personal liberty guaranteed under the African Charter on Human and People's Rights.

   b. A declaration that the unlawful and excessive detention under the holding charge procedure since 15th May, 2003 violates the Plaintiffs right under the African Charter.

   c. A declaration that the continued detention of Plaintiff by the Defendant is a violation of the Plaintiffs right to personal liberty provided under Article 6 of the African Charter.

   d. An order compelling the Defendant to release the Plaintiff immediately.

   e. An Order for General damages for Twenty Million Naira (N20,000,000.00) for the Plaintiff against the Defendant for unlawful detention of the Plaintiff.

f. Pecuniary damages of loss of earnings, in a sum to be determined.

g. An Order that the Defendant pay the Plaintiff cost of this action, in accordance with Article 66 of the Court's Rules of procedure.

4. The Defendant filed his amended statement of defence with no annexure attached at the Court's registry on the 21st September, 2011 and raised the issue of jurisdiction of the Court, lack of credible evidence, and failure of the Plaintiff to discharge the burden of proof placed on him and asked the Court to dismiss the suit in its entirety based on the aforementioned reasons.

5. After the matter was adjourned for judgment, the Applicant filed an application for leave to introduce fresh evidence in respect of the detention, such as, the certified true copy of the holding charge and letters to the Comptroller of Prison to produce the detention warrant of the said Applicant.

6. The Defendant opposed the motion introducing further evidence after the case has been closed for judgment. There was no material fact or facts to substantiate the objection apart from the lateness of the application and the introduction of the Holding Charge and the notice to the Comptroller of Prison, Kiri-kiri Maximum Prison, Lagos to produce the warrant of detention. In view of Article 87 (S) of the Rules of procedure of this Court, the Court made an order that decision is reserved for the final judgment.

7. The question is: Is it appropriate to allow a motion introducing documentary evidence substantiating the main application after the parties have closed their arguments and adjourned for judgment?

8. It is trite that pleadings may be amended which introduced material fact which are not in dispute at any stage before judgment is pronounced. What this motion sought to do is akin to the statement stated above that pleadings may be amended and documents not in dispute introduced before judgment. This Court grants the reliefs sought and state herein that the matters introducing the motion shall be considered in this suit to determine whether the detention of the Applicant in this case in Kirikiri Maximum Prison from 2003 to date without trial amounts to a violation of human rights of the Applicant.

LEGAL ARGUMENTS BY THE PARTIES

9· Learned Counsel to the Applicant submitted that the right of the Applicant was violated by his continuous detention for nine (9) years without trial. Learned counsel for the Plaintiff/Applicant submitted that the right of the

Plaintiff was violated upon as stated in the application and further contended that the detention in the manner described in the application was contrary to Article 1, 2, 3, 4, 5, 6, 7, 8 and 26 of the African Charter on Human and People's Rights and Articles 2(3) sub (1) and (2) and 10(1) and (2) of the International Covenant on Civil and Political Rights.

10. By way of specification, he submitted that the Plaintiff/Applicant was detained under a holding Charge procedure by the magistrate and he was remanded thereafter in prison since 2003 to date and that such detention was a violation of the Plaintiffs/Applicant's human rights pursuant to Articles Six (6) and Seven (7) of the African Charter on Human and People's Rights and urge the Court to adjudge such detention as illegal, null and void. He relied on the new evidence introduced in their motion whereby they relied on exhibits OA1 (letter to the Comptroller) and OA2- Applicant's- two letters dated 21st February, 2012 addressed to the Deputy-Comptroller, Kiri-kiri Maximum Prison by the firm of Smith Worth Partners who are the solicitors to the Applicant.

11. He further relied on exhibit OA3 to wit, charge no C/61/2003 against the Applicant, on which he was arraigned before the Yaba Magistrate Court Lagos and the order made by the said Magistrate Court on 16th May, 2003 that the Applicant should be remanded in Kiri-kiri Maximum Prison, Lagos. Also attached to the affidavit is exhibit OA4- which is, the Court Order.

12. He also relied on a sworn affidavit by the Applicant himself on 2nd February, 2012 in Kiri-kiri Maximum Security Prison before Mr. Kamar Raji - a Notary Public marked as exhibit OA5. He submitted in addition in the alternative that the Court should note the Deputy Comptroller's failure to produce the detention warrant in respect of the Applicant who is in Kiri-kiri Maximum Security Prison. He urged the Court to hold that the Plaintiff/Applicant had proved his case as contained in the application to enable this Court to make an order releasing the Applicant from detention. The Defendant however, argued vehemently in response to the main application and the motion filed after the adjournment for judgment that the Plaintiff had failed to show convincingly that he the Plaintiff/Applicant is in detention at Kiri-kiri Maximum Security Prison, Lagos.

13. He further submitted that the counter affidavit which they filed denied the allegation of the Plaintiff that he is in Kiri-kiri Prison. He contended that even in the face of the further evidence filed after the adjournment date for judgment, there was no sufficient proof. He urged the Court not to attach any probative value to the annexure marked as exhibit showing that the

Plaintiff is in Kiri-kiri Maximum Security Prison. He submitted that it is settled law when documents are annexed to application before any Court, the Court ought to look at such document and when a Plaintiff intends to amend his pleadings, he is required to follow the laid down procedure for amendment. He submitted that the motion brought by the Applicant to put forward documents of this nature invariably portrayed the Applicant as trying cunningly to amend his pleading.

14. He contended that the Applicant ought to have applied to the Court to amend his pleadings instead of adopting this approach. He relied on the case of **AZAZI V. ADHEKEGBA (2008) ALL FWLR (Part 484) P.1548 N°. 2**, and contended that the prayers in the motion precluded the Defendant from properly joining issues with the Plaintiff on the set of facts introduced by the Plaintiff.

15. He submitted that the Plaintiff/Applicant has failed to exercise the option of approaching the National Court to seek for his release from custody since it is elementary law under the Nigerian Criminal Law that where an accused is charged to Court, he or she is entitled to bail if such an application is brought before a Court of competent jurisdiction. He submitted that the Plaintiff has been caught by the term "laches" and relied on the case of **CHUKWU V. AMADI (2009) ALL FWLR Part 472 page 1193 N°. 4** where the Court stated thus:

> ***"laches denote an equitable principle by which a Court denies relief to a claimant who has unreasonably delayed or negligent in his claim"***

16. He therefore contended that the Plaintiff did not exhaust all the available remedies provided before approaching this Court. He submitted also that the Plaintiff is trying to furnish the Court with the said annexure in order to persuade the Court to make an order in vain.

17. He contended that the Plaintiff is inviting the Court to sit as an appellate Court on an order made by a Court of competent jurisdiction. He also submitted that he who asserts must prove, therefore the burden lies on the Plaintiff to prove that he is in detention and that the only way to really ascertain that the Plaintiff is in custody is by adducing credible evidence through the production of the warrant of detention from the prison service. He therefore urged the Court not to attach any probative value to the annexure to the motion on notice and to dismiss the suit in its entirety for want of credible evidence.

18. In reply, the learned counsel to the Plaintiff submitted that it was the Defendant that had contended in their amended statement of defence that the Plaintiff was no longer in detention as the facts of the Plaintiffs detention was not established. He relied on the sworn affidavit by the Plaintiff himself before a notary public inside the Kiri-kiri Maximum Security Prison to prove that the Plaintiff is still in detention. He submitted that the reason for the motion and the production of the exhibit concerning the holding charge and the Plaintiff being in detention was pursuant to the directive under Article 41(1) and (2) and Article 57(1) of the Rules of the Court which the Court applied and directed the parties to show precisely whether or not the Plaintiff is in custody. He submitted that the motion was then filed with the annexure showing that the Plaintiff was indeed in custody.

19. He submitted further that the Defendant has not disputed the fact that the Plaintiff's Counsel wrote to the prison authority as shown in exhibits OA1 and OA2 attached to the affidavit in support of the motion and that the Defendant did not counter the assertion of the Plaintiff in paragraph six (6) of the affidavit in respect of exhibit OA1 and OA2 respectively.

20. In respect of accessing the national Court to exhaust local remedy before approaching this Court, learned counsel referred to pages 4-7 of his amended application to submit that the Applicant need not have any recourse to any domestic remedy before filing this application in accordance with the provision of the Protocol of this Court. He urged the Court to grant all the reliefs sought by the Plaintiff/Applicant in this case.

CONSIDERATION AND DETERMINATION OF THE COURT

Jurisdiction

21. It is foremost in terms of importance in the argument of learned Counsel of the parties to consider and determine the issue of whether the Court has jurisdiction on the matter presented by the Plaintiff/Applicant. As always jurisdiction of the Court is of paramount importance because where a Court lacks jurisdiction, no matter how well conducted a case may be it will fall to nothingness.

22. There are plethora of authorities by the jurisprudence of this Court on the importance of jurisdiction and how some should be handled with utmost care. Some of these authorities are:

    1. **Afolabi vs. FRN; reported in (2008) CCJELR (Pt 1) I paragraphs 31-33 page 16; Mr. Moussa Leo Keita vs The Republic of Mali Reported in (2004-2009) CCJELR page 63 paragraphs 32-33 page74;**

2. **Alhaji Hammani Tidjani vs. FRN & 4 ors (2004-2009) CCJELR page 77;**

3. **Professor Etim Moses Essien vs. The Republic of the Gambia & University of the Gambia (2004-2009) CCJELR page 95 at 89 paragraph 4; and**

4. **Chief Frank C. Ukor vs. Mr. Rachad Laleye & Anor (2004-2009) CCJELR page 131 at 145 paragraph 27.**

23. The application of the Plaintiff/Applicant is on the premise that he was detained on a holding charge in Kiri-kiri Maximum Prison, since 2003 to date without trial. Does the fact fall under the premise of Article 9(4) of the Protocol of the Court as amended? Article 9 (4) of the Protocol as amended provides:

    "The Court has jurisdiction to determine cases of violation of human rights that occur in any member state"

24. The said protocol did not categorize or provide catalogued of the human rights that fall under the schedules of rights recognized by the same Protocol which the Court should apply. However, Article 4 (g) of the Revised Treaty of ECOWAS provides for the recognition, promotion and protection of human rights as adumbrated in the African Charter on Human and Peoples Rights. All these provisions on rights of persons in the African Charter on Human and Peoples Rights therein are rights applicable under Article 9(4) of the Protocol of the Court as am ended.

25. The rights in the said African Charter are not the only rights that the violation of same will fall under Article 9(4) of the Protocol of the Court as amended. Those UN Conventions and Charter on Human Rights acceded to by Member States of ECOWAS are recognizable rights that the violation of which would fall within the ambit of Article 9(4) of the Protocol of the Court, just to mention a few.

26. Learned Counsel to the Plaintiff/ Applicant referred to the provisions of the Charter in question for the success of the application. For clarity and appreciation, Article 6 of the African Charter on Human and Peoples Rights provide:

    "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"

27. The Court holds therefore that an infringement on a person's liberty as alleged by the Plaintiff/Applicant as stated above would fall neatly under Article 9(4) of the Protocol of the Court. On that basis, the Court finds that the ingredients of the complaint in the Application have met the requirement pursuant to the said Article 9(4) of the Protocol. Further to this is the fact that when the allegations in the application of the Plaintiff are dissected and examined the outcome brings out clearly that the acts alleged are violation of human rights pursuant to Article 9(4) of the Protocol of the Court.

28. However, the Defendants' argument of lack of competence raised some issues that touches on the exhaustion of local remedies albeit, whether the Court is an appellate Court as to hear matters or deal with the application of the Plaintiff complaining of the order of a magistrate Court of competent jurisdiction, remanding the Applicant in Kiri-kiri Prison, Apapa, Lagos and or whether the application is seeking for bail rather than the reliefs sought for. Let us take the issues herein.

Exhaustion of Local Remedies

29. The Rule on exhaustion of local Remedies is a long aged one which enjoins a party accessing the jurisdiction of an international Court to first and foremost access the national courts for his case to be heard to conclusion of the same. In the case of the Interhandel case (**Switzerland v. United States**, **judgment of 21 March 1959**, the International Court of Justice, observed that the obligation to exhaust domestic remedies forms part of the customary international law, recognized as such in its case law. Therefore the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law.

30. It is also to be found in other international human rights treaties: the International Covenant on Civil and Political Rights and the Optional Protocol thereto, the American Convention on Human Rights, and the African Charter on Human and Peoples Rights. As was observed that the State may waive the requirement of exhaustion without there being an established international practice on this point, in view of the provisions of its Protocol as amended vide its Supplementary Protocol of 2005. However Article 10 (d) of the Protocol as amended provides that individuals may access this Court for relief for violation of their human rights on condition that the party is not anonymous nor the application be made whilst the same matter has been instituted before another International Court for adjudication.

31. The provision of Article 10(d) above puts it quite succinctly clear that the access to this Court is not subject to exhaustion of local remedies as envisaged by the customary international law on the point. The said Supplementary Protocol of the Court is an exception to the general rule. As this Court observed in **Moukhtar Bello v. Jigawa State and others suit No.ECW/CCJ/APP/02/11** that while International Customary Law is *les generale* the provisions of the Protocol as amended by the Supplementary Protocol is *lex specialis* and therefore the *lex specialis* applies as an exception to the *generale*. We find the observation postulated by this Court in the above stated case, worthy of application herein and adopt same.

32. The provision of the African Charter on Human and Peoples Rights with incorporating the International Customary Rule on exhaustion of local Remedies is a general rule. This Court has stated in numerous authorities that individuals are at liberty to choose wherever they elect to file their causes or matters pertaining to violations of their human rights once the matters imbibed the international law or community texts therein.

33. The Defendants' counsel further raised the question of whether this Court is competent to act as an appellate Court over the order of detention made by a competent Court to wit, the Yaba Magistrate Court.

34. This Court had observed several times in decisions that it does not compose itself as an appellate Court over the decisions of the National Courts as emphasized in the case of **Moussa Leo Keita versus the Republic of Mali - ECW/CCJ/JUD/03/07** and reported in **2004-2009 CCJELR 63** where the question was asked whether the Court can re-examine decisions made by the Courts of Member States? This Court held as reported on page 75 that ***"However, the Court rather deduces from the decision made by the Supreme Court of Mali that, what we have at hand is a case of damages suffered by the Applicant as it regards his artefacts and for which he was granted reparation. The Court also holds that the said reparation granted by the Supreme Court of Mali which may not have been to the satisfaction of the Applicant constitutes a different issue. In any case the Court has already responded that it has no jurisdiction to adjudicate upon decisions made by the domestic Courts of Member States of the Community."***

35. We endorse the said opinion and stand firmly by it but emphasized that there is a thin divide of not reviewing the decision but hearing the matters that flow from the decisions which allegedly pose the questions of violations of human rights particularly in this case where upon a holding charge the Applicant/Plaintiff is detained with no trial would be said to be different from the order itself.

36. The question of a holding charge became relevant in this matter raised by the Defendants' Counsel that we found this definition which is of interest in Black's Law Dictionary Deluxe Ninth Edition page 800, thus:

    '(1949) A criminal charge of some minor offense filed to keep the accused in custody while prosecutors take time to build a bigger case and prepare more serious charge.'

37. The process that resulted to a holding charge and the order made thereon is not the issue that was emphasized but whether the flow from the order which allegedly violated the human rights of the Plaintiff/Applicant and whether same allegation can be said to fall within the purview of Article 9(4) of the Protocol should be a matter for this Court.

38. Another point canvassed by the Defendants is in respect of the amendment of the pleadings at the stage the Applicant brought same for consideration and granting same. The Court agrees with Defendants that the motion to put forward more documentary evidence in support of the claim appears to be late as the case had been adjourned for judgment but rather than go with the objection of the defence which is rather technical the substantial justice angle of the matter is preferred. The power to amend pleadings like all other judicial powers must be exercised judicially and judiciously. In furtherance to the above, this Court holds fast to the trite position of our judicial system that the courts must eschew technicalities at all times and determine to do substantial justice. Articles 32-33 of the Rules of this Court support the exercise of the Court's discretion that at any stage of the proceedings before judgment is pronounced, pleadings may be amended on reasonable cause or in the interest of justice.

39. Article 15 of Protocol A/P.1/7/91 is in further support of the exercise of the discretion of the Court which Counsel to the Plaintiff relied upon to file the said motion at such a late time in the proceedings and basing same to the request made by the Court on the date of the judgment. Article 15 of the said Protocol provides:

    "At any time, the Court may request the parties to produce any documents and provide any information or explanation which it may deem useful. Formal note shall be taken of any refusal."

40. Learned Counsel to the Defendant referred to Article 87 of the Rules of the Court and emphasized on the same as supporting his argument and stance as opposed to the case of the Plaintiff. For proper appreciation of the import of Article 87 of the Rules there is the need to highlight the relevant paragraph of the Rule. Article 87(5) of the Rules is in four-folds namely these.

a) **That the application is interlocutory;**

b) **That both parties must he heard on it;**

c) **That the Court after hearing decides or reserves the decision for the final judgment;**

d) **That the substance of the application touches the substantive case.**

41. It is trite law that the provision above is interlocutory and meant for the purpose of the preservation of the substantive matter or Res. The Court cannot rule out the fact that by the above provision, it was therefore in order to make an order to ensure that the final decision on the substantive matter or the Res is preserved to the end of the trial.

42. An interlocutory action should not be allowed when same is subsumed with the facts of the substantive case and that is trite position of law. Consequently in the instant case, the application which may have the semblance of an amendment would be granted and it is granted. The evidence introduced therein shall be considered in this judgment by the application of Article 87(5) of the Rules of procedure of this Court which shall resolve the whole case in its entirety one way or the other in the Judgment. For emphasis, Article 87(5) of the Rules provides that ***"the Court shall after hearing the parties decide on the application or reserve the decision for the final judgment. If the Court refuses the application or reserves its decision, the President shall prescribe new time limits for the further steps in the proceedings."***

43. Learned Counsel for the Defendant also relied on the case of **Azazi v. Adhekegba**, **(supra)**, that they would be precluded from properly joining issues with the Plaintiff on these sets of introduced facts in the annexures. Learned Counsel furthermore based his argument on the doctrine of laches as observed in the case of **Chukwu v. Amadi**, **(supra)**, that there was unreasonable delay or that the Plaintiff was negligent in bringing his claim. The Court found no such inordinate delay to seek for the relief both for the motion and the main application which has an allegation of violation of human rights that is continuing and the question of negligence cannot apply under limitation of action under Article 9(3) of the Protocol as amended.

44. This Court takes the justifiable stance that the amendment during the pendency of an adjournment for judgment in a case would be in order and since the parties in this case have been heard in the matter with all the essentials of the rules on fair hearing in Article 7 of the African Charter on Human and Peoples Rights duly observed, the issues and submissions should

be determined in the main judgment herewith. The observations in the case of **Azazi v. Adhekegba**, **(supra)**, are not on all fours with the present situation in this case. So also the further reliance on the doctrine of laches as observed in the case of **Chukwu v. Amadi**, **(supra)**. We find that principle inapplicable and that no unreasonable delay or negligence as submitted by Counsel to the Defendant.

45. Having shown that the motion filed and argued by the Applicant was in order and that the Court met the requirements of Article 7 of the African Charter on Human and Peoples' Rights in that the parties were given fair hearing and the Defendant had opportunity to join issues with the Plaintiff, the next point is the question of the annexures attached to the said motion which are material to the case.

46. As earlier stated herein that Article 15 of the Protocol permits such admission of documentary evidence, the fact that same were annexed to an affidavit and that the annexures were secondary evidence require consideration. It is well stated position of law that where secondary evidence are admitted without objection or with the consent of the parties or have been used by the adverse party, or relevant in material particular, the Court would rightly rely upon them for its decision. Some authorities of National Courts support this stand point and by the application of Article 38(1) of the Statute of International Court of Justice which is applicable pursuant to Article 19 (1) of our Protocol as amended are apt. This authority is **Esonwune Nwadike and another v. Martin Nwadike and 5 ors 1987 4 NWLR (PART 65) 394**, where documents annexed to affidavit evidence were deemed admitted by virtue of section 76 of the Evidence Act. We think the observations made therein are relevant and are the same with the observation of this Court in this instance.

47. In the case mentioned above, the documents which were photocopies of secondary evidence within the meaning of section 94(a) of the evidence Act were relied upon and the Defendants did not dispute the existence or their authenticity as exhibited by the Plaintiff and the Defendant referred to them and quoted and used extracts from them in their counter affidavits. That Court opined that that being so, the exhibits are deemed to have been admitted by the Defendants under section 74 of the Evidence Act. In the present situation herein, the documents annexed to the motion are not only material but relevant to the fact as to whether the Applicant was remanded in prison custody or not and whether he is still in detention right now. The obvious position the Court hereby adopts is that these documents are relevant and material for examination.

ONUS OF PROOF

48. It is pertinent to note that the presentation of the case by the Plaintiff and the reply of Defendants in material particular describe whether the parties have made out their claim or defence as the case may be. The Plaintiff has a duty to place all material facts to establish the reliefs he seeks for in the present case with credibility which would convince the members of the Court or present arguments that would cause the Court to be persuaded to decide on either for the Plaintiff or Defendant. Even though in National courts the statement above is coined as burden of proof which may include the burden of proof, burden of persuasion the consideration of the same produce the same result. The burden of proof under the English law and in French law, the phrase *'la charge de la preuve'* connotes obligation to prove. In the book 'evidence before the International Court of Justice by Anna Riddell and Brendan Plant it was stated on the burden of proof thus:

> ***'the principal difference between the two legal traditions is that the former divides the burden of proof into two issues, one procedural and one substantive, whereas the civil law is concerned only with the substantive.'***

49. However in trying to analyze the evidence presented by the parties in this case it must be clearly stated that the concept of burden of proof and burden of evidence though may be interwoven are more recognized in domestic law and would not be quite appropriate for application in an international law Court setting like this Court. In **ELSI case at page 86** of the said Riddell and Plant's observations, the emphasis was to the effect that,

> ***"Applicant's case ...must be objectively and realistically seen as crossing a bright line of proof its case must be made by a preponderance of the evidence. And the hard conclusion then is that unless Applicant can carry the twin burdens of proof and persuasion; can win every single point to its case; and can establish the necessary casual link between each one: the Applicants cause of action does not hold water."***

In B Cheng-General principles of Law as applied by International Courts and Tribunals OUP London 1953 P.329, he said, ***" It means that a party having the burden to proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof".***

50. With all these principles of law on burden of proof, burden of evidence and burden of persuasion, enunciated and quoted above, this Court holds fast to the notion that every material allegation of the claim must be justified by credible evidence and the defence should also sufficiently satisfy every defence and put forward what would rebut the claim or take the risk of putting nothing at all if the claim by their estimation is weak and unproven. Where insufficient facts are placed to meet the requirements above by the Plaintiff, the claim would have failed.

51. On the question of probative value or weight to be attached to the documents annexed to the affidavit to the motion depends on the circumstances of this case and as earlier explained above. The Defendant contended that the Plaintiff should prove that he is in prison custody because the detention warrant was not produced. Considering the fact that the defence did not controvert the said documentary evidence, same are admissible and probative value of high standards would be attached to them and acted upon them. Can such detention be then within the confines of the law?

52. In the present case, m establishing its case the Plaintiff produced documents' to show that the Plaintiff was taken to Kirikiri prison in 2003 upon a holding charge by a Magistrate Court and has remained in the said prison till date. He the Plaintiff swore to an affidavit before a notary public in Kirikiri prison stating that he was detained there in 2003 till date. His Counsel further relied on the notice to produce the detention warrant served on the Deputy Comptroller of Prison of the Defendant who did not react to same. In a situation where a notice to produce was served on the officer of the Defendant to produce a vital document like the detention warrant, it would be deduced that the withholding of the warrant is indicative of the fact that same would have been unfavorable if produced. Article 6 of the said African Charter on Human and Peoples' Rights provides that every individual shall have the Rights to liberty and to the security of his person and that no one may be deprived of his freedom except for reasons and conditions previously laid down by law, in particular no one may be arbitrarily arrested or detained.

53. What amounts to detention laid down by law or arbitrary detention depends on the circumstances of the case. In the present case the Plaintiff was detained on exhibit OA3 to wit, charge no C/61/2003 against the Applicant, Mr Sikiru Alade on which he was arraigned before the Yaba Magistrate Court Lagos and the order made by the said Magistrate Court on 16t h May, 2003 that the Applicant should be remanded in Kiri-kiri Maximum Prison, Lagos and the court's order as exhibit OA4.

54. Also a sworn affidavit by Sikiru Alade- the Applicant himself on 2nd February, 2012 in Kiri-kiri Maximum Security Prison before Mr. Kamar Raji - a Notary Public marked as exhibit OA5. The notice to produce the detention warrant served on the Deputy Comptroller of the Defendant and his failure to produce the said detention warrant in respect of the Applicant that he is in Kiri-kiri Maximum Security Prison are all pieces of evidence of the truth of the detention. These circumstances are sufficient to persuade us to hold that indeed the Plaintiff is in the said prison Lagos.

55. Where deprivation of liberty continues for some time, the grounds that originally warranted detention may subsequently cease to exist. We state that even though the original detention was by a competent Court, the Magistrate Court on a holding charge and by its definition as stated supra herein, the Magistrate who made the order remanding Plaintiff in Kirikiri maximum prison was not competent to try the allegation on the charge sheet, and the holding charge ceased to be effective in law because of that influx of time. Furthermore it is the position in law that the said process was not meant to keep the Plaintiff perpetually in custody but to be tried by an appropriate Court thereby making the process legal and competent.

56. No Court would allow such prolong detention to continue without abating same. For that reason, the said detention is hereby adjudged illegal and this Court holds that the Plaintiff has satisfied the requirements of proof, as per his claim, that his human right was violated upon pursuant to Article 9(4) of the Protocol of this Court as amended by the Supplementary Protocol of 2005.

57. In the circumstance, the facts of this case have been shown as stated above that the Defendants violated the human rights of the Plaintiff as adjudged above in this case as per the reasons stated therein.

DAMAGES/COMPENSATION

58. In respect to the award of damages in paragraph 2 of the pleadings, it is well established principle of law that damages are generally awarded to place the claimant in the position he/she would have been, had the friction complained of not taken place. As always it is trite that remedies are payable in international Law where the Court has found for the Plaintiff who complained that his human rights has been violated upon by the Defendant. In 'Remedies in International Human Rights' by Dinah Shelton page 214, she observed that 'the primary function of corrective justice is to rectify the harm done to a victim of wrongdoing and corrective justice generally

aims at restitution or compensation for loss, assuming that when victims are made whole, wrongdoers are sanctioned and deterred from engaging in future misconduct'.

59. As such the award of damages in monetary terms is designed to compensate Plaintiffs for harm they have suffered, intended to make the victim as well off as he or she would have been if the injury had never occurred. The process therefore focuses on fairness to the victim and the wrongdoer.

60. In this instant case, the Applicant made a claim for a lump sum payment of N20,000,000.00 against the Defendant and for the unlawful detention of the Plaintiff and an order for pecuniary damages of loss of earnings in the sum to be determined; and an order that they shall pay the Plaintiff cost of action in accordance with Article 66 of the Rules of procedure of this Court. The last relief but one was not quantified or specified but rather speculative.

61. The last being as a matter of course in accordance with Article 66 of the Rules poses no difficulty but, the one on pecuniary finds no justification whatsoever either in the pleadings initially filed and the amended pleadings or in the one made in the motion granted by the Court, which introduced exhibits OA1 and OA2, OA3, OA4 and 0A5 respectively.

62. After having examined the evidence in this regard, the Court holds that detention from 2003 to 2004 in Kiri-kiri Maximum Prison Apapa Lagos on a holding charge without trial is manifestly a violation of the Plaintiff/ Applicant's human rights as provided in Article 9(4) of the Protocol of the Court and Articles 6 and 7 of the African Charter on Human and Peoples Rights.

63. Consequently, the Court holds that there was violation of the human rights of the Plaintiff/Applicant by the Defendant and therefore it is adjudged accordingly to the specification below:

From	2003 - 2004	N300,000.00
From	2004 - 2005	N300,000.00
From	2005 - 2006	N300,000.00
From	2006 - 2007	N300,000.00
From	2007 - 2008	N300,000.00
From	2008 - 2009	N300,000.00
From	2009 - 2010	N300,000.00
From	2010 - 2011	N300,000.00
From	2011 - 2012	N300,000.00

Computing the amount for each year and the number of years will bring to a total of the damages to the sum of N2,700,000.00.

64. **DECISION**

1. **Whereas** the Plaintiff alleged that his human rights was violated by the Defendants in that he was charged on a holding charge without trial and remanded in Kirikiri maximum prison from 16 May,2003 to 2012, a period of nine years awaiting trial;

2. **Whereas** the Defendants by their statement of defence denied that the Plaintiff is in kirikiri prison since no warrant of detention has been produced and the holding charge showed that he was ordered in prison custody by a competent Court-the Yaba Magistrate Court Lagos;

3. **Whereas** the defence raised by the Defendant were examined and found not to be credible and jettisoned by the Court in every aspect of the defence albeit, non production of credible evidence particularly the detention warrant;

4. **Whereas** the duty to establish the claim is upon the Plaintiff to show that he was arrested and detained in prison from 2003 to date and that he had established same by credible evidence that he was detained in KiriKiri prison Apapa, Lagos and he is still in detention till date;

5. **Whereas** the Court adjudged the Defendant as having committed the violations of human rights against the Plaintiff pursuant to Article 9(4) of the Protocol as amended, on the dates and period specified above and the Court adjudged same compensation in the sum of two million and seven hundred thousand naira only and payable to the Plaintiff against the Defendants;

6. **Whereas** the Plaintiff has sufficiently as stated in this judgment discharged the burden on him, he is accordingly entitled to the relief sought including that of his discharge/release from kiri-Kiri maximum prison forthwith and this Court so orders.

7. **The Applicant** is hereby discharged from detention accordingly.

65. **COSTS**

Where a party is successful and awarded damages as specified above, he is entitled to cost if asked for as specified in Article 66 of the Rules of this Court. In the circumstances, the Court awards cost in the sum of N50,000.00 for the Plaintiff against the Defendants accordingly.

The Judgment is Read in Public in accordance with the Rules of this Court.

Dated 11th June, 2012

HON. JUSTICE HANSINE N. DONLI - *PRESIDING JUDGE*
HON. JUSTICE M. BENFEITO RAMOS - *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

THIS 12TH DAY OF JUNE, 2012

SUIT NO: ECW/CCJ/APP/13/11
JUDGMENT NO: ECW/CCJ/RUL/12/12

BETWEEN
ALIYU TASHEKU - ***PLAINTIFF***
V.
FEDERAL REPUBLIC OF NIGERIA - ***DEFENDANT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE BENFEITO MOSSO RAMOS**- *PRESIDING*
2. **HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM POTEY** - *MEMBER*

ASSISTED BY

MR. ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **CHINO EDMUND OBIAGWU ESQ.** - *FOR THE PLAINTIFF*
2. **T. A. GAZALI** - *FOR THE DEFENDANT*

JUDGMENT OF 8TH JULY, 2011

Res judicata -Jurisdiction of the community Court of justice -Admissibility

SUMMARY OF FACTS

The Plaintiff filed an application alleging the violation of his rights as enshrined in Articles 4,5,6 and 12 of the African Charter on Human and people's rights and urged this Court to grant the following reliefs:

a) A Declaration that his arrest and detention since 20th September, 2010 without regard for the order of release made by the presiding Judge of the Abuja Magistrate Court is arbitrary, illegal and illicit and they constitute a violation of his right to personal liberty and freedom of movement as guaranteed by Article 6 and 12 of the Charter.

b) A Declaration that the denial of medical care during his detention and the bad condition which he was detained is a violation of his right to human dignity and health as guaranteed by the Charter.

c) An order that the Federal Republic of Nigeria must release him forthwith and pay the sum of Ten million naira (10,000,000) as damages for violation suffered.

In response the Defendant filed its defence alleging that the Plaintiffs' application was inadmissible on the grounds that it was ill-founded and inconsistent with the requirements of res judicata.

In addition, the Defendant raised a preliminary objection challenging the jurisdiction of this Court to adjudicate on this matter based on the Judgment delivered in a similar application filed by the High Court of Abuja.

LEGAL ISSUE

Whether or not the Community Court of Justice, ECOWAS has jurisdiction to adjudicate on this matter based on the principle of res judicata.

DECISION OF THE COURT

1. That the Community Court of Justice, ECOWAS has jurisdiction to adjudicate on the case.

2. *That the application brought by Mr Aliyu Tasheku (the Plaintiff) is essentially the same as the one already decided upon by the Nigerian Court and this Court cannot retry a case on which a Judgment of the domestic Court of a Member State has already been delivered and against which no contestation has been raised by the Plaintiff.*

3. *That the application is admissible.*

RULING OF THE COURT

ON PRELIMINARY OBJECTIONS

PROCEDURE

1. By Application dated 10 June 2011 and received at the Registry on 13 June 2011, Mr. Aliyu Tasheku, through his Counsel, Chino Edmund Obiagwu, lawyer registered with the Nigerian Bar, brought a complaint against the Federal Republic of Nigeria, for violation of Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights .

2. He asked the Court for:

   (i) A declaration that his arrest and detention since 20 September 2010, without regard for the order of release made by the Presiding Judge of the Abuja Magistrate Court, is arbitrary, illegal and illicit; and that they constitute a violation of his right to personal liberty and freedom of movement as guaranteed by Articles 6 and 12 of the Charter;

   (ii) A declaration that the denial of medical care during his detention and the bad conditions in which he was detained constitute a threat to his fundamental right to health and a violation of his right to human dignity as guaranteed by Articles 4 and 5 of the said Charter;

   (iii) An order that the Federal Republic of Nigeria must release him forthwith;

   (iv) An order that the Federal Republic of Nigeria must pay to him the sum of Ten Million Naira (N 10,000,000) as damages, for the violations suffered."

3. The Federal Republic of Nigeria, through its Counsel, F. F. Bebu Esq., lawyer registered with the Nigerian Bar, lodged at the Registry of the Court, on 23 January 2012, its Defence, whereby it contended that the Plaintiffs Application was inadmissible on the grounds that it was ill-founded and inconsistent with the requirements of *res judicata*. Further on, on 22 February 2012, he raised, on preliminary grounds and in a separate pleading, the lack of jurisdiction of the Court to adjudicate on the case brought before it, by virtue of the force of *res judicata.*

4. The Plaintiff Counsel filed on 21 February 2012, his written submissions in respect of the Preliminary Objections raised by the Federal Republic of Nigeria.

5. The Court heard the Parties on 23 February 2012 on the Preliminary Objections raised by the Federal Republic of Nigeria in respect of lack of jurisdiction.

ARGUMENTS OF THE PARTIES

As regards the Federal Republic of Nigeria

6. Counsel for the Federal Republic of Nigeria maintained that the Court lacks jurisdiction to adjudicate on the case, by virtue of the force of *res judicata* arising from the judgment of the High Court of Abuja (FCT). He contended, in that regard, that Plaintiff lodged an application before the said High Court which is similar in every respect to the Application brought before the instant Court. He argued further that on 19 May 2011, the judge of the said High Court granted Plaintiffs requests and awarded him damages in the amount of Five Million Naira (N 5,000,000.00). He pleaded that the Application brought by Plaintiff was lodged on 13 June 201, well after the judgment delivered by that High Court. He therefore concluded that the instant Court is compelled by the force of *res judicata* to refrain from examining the Application by Plaintiff.

As regards the Applicant

7. Plaintiff Counsel, on his part, maintained that the Court has jurisdiction to adjudicate on the case and asked the Court to use its own discretion as to the force of *res judicata.*

ANALYSIS OF THE COURT

8. The Application before the Court deals with human rights violation, notably violation of Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights. The Court has indicated on several occasions that it has jurisdiction to adjudicate on a case once the matter brought relates to human rights violation and where the subject-matter of the application is to ask the Court to find that such violation has occurred in a Member State (*cf.* **Hissein Habre v. Senegal**, **Judgment of 14 May 2010, paragraphs 53, 58 and 59**; Case Concerning **Alhaji Muhammad Ibrahim Hassan v. Gombe State and Nigeria**, **Judgment of 15 March 2012, paragraph 38**). Consequently, the case brought before the Court falls indeed within its scope of competence as provided for by the new Article 9(4) of its Protocol, as amended by the 19 January 2005 Supplementary Protocol, which provides: ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."*** The Court is therefore competent to sit on the Application brought by Mr. Aliyu Tasheku.

9. In the light of foregoing, the objection concerning *res judicata* as raised by Counsel to the Federal Republic of Nigeria, must be examined, in the view of the Court, as an objection regarding the inadmissibility of the Application, and it is evident that such objection is typically examined at the preliminary stage of the proceedings.

10. The Court notes that Counsel to the Federal Republic of Nigeria annexed to its memorial on preliminary objections, the judgment dated 19 May 2011 and delivered by the High Court of the Federal Capital Territory, relating to an action instituted by the Society Against Discrimination and Other Related Intolerance and Mallam Aliyu Tasheku against the Nigeria Police. In the terms of the said judgment, the Applicants substantially sought the following reliefs from the Court:

    (i) A declaration that Mr. Aliyu Tasheku's arrest on 18 September 2010 is illegal, unconstitutional and violates his fundamental rights, as provided for by Articles 34, 35, 36 and 41 of the 1999 Constitution of Nigeria;

    (ii) A declaration that the continuing detention of Mr. Aliyu Tasheku without release, the granting of bail or the preference of charges against him, is illegal, unconstitutional and violates his right to dignity and freedom, as provided for by Articles 34, 35, 36 and 42 of the 1999 Constitution;

    (iii) An order for Mr. Aliyu Tasheku to be released or to enjoin the Nigeria Police authorities to send him before a competent Court, as required by Article 35 of the Constitution of Nigeria and Articles 4, 5 and 12 of the African Charter on Human and Peoples' Rights;

    (iv) An order for the payment of the sum of Ten Million Naira (N10,000,000.00) as compensation for the violations and harm suffered.

11. The Court notes that from the exhibits filed in the case-file by Counsel to the Federal Republic of Nigeria, notably with reference to the Judgment of 19 May 2011 cited above, it can be observed that the reliefs sought by the Applicant were granted when the High Court judge:

    1. Declared that there was violation of Articles 34, 35, 36, 41 and 42 of the Constitution of Nigeria;

    2. Ordered that the Nigeria Police authorities must send Mr. Aliyu Tasheku before the High Court on 23 May 2011 at 2 p.m.; and,

3. Granted him a compensation of Five Million Naira (N5,000,000.00) for unlawful detention; as evidenced below from the wording of the operative statement of the said decision:

> ***"It is hereby ordered that the application succeeds and accordingly, the reliefs in the nature of declaration stated under (A) and (B) are hereby made pointing to the unlawfulness of detention till date since the arrest of the 2nd Applicant on 18 of September, 2010.***
>
> ***In addition, it is hereby ordered that the respondents produce before this Court the 2nd Applicants forthwith as well as to pay the 2nd Applicant, the sum of five million Naira (N5,000,000) for unlawful detention (...).***
>
> ***The respondents are to produce before this Court 2nd Respondent forthwith or specifically on Monday 23rd of May 2011 at 2 p.m.:"***

12. In another Judgment of 26 May 2011 from the same Court, the Nigeria Police authorities were ordered to enforce the decision to release Plaintiff on bail as previously made by the judge of the Magistrate Court in the decision of 28 March 2011, because, according to the High Court, the Nigeria Police authorities had no grounds for holding Mr. Aliyu Tasheku in detention. The operative statement of the said decision indeed states that:

> ***"It is hereby ordered that the respondents should forthwith release the 2nd Applicant on bail as granted the terms stipulated by the Chief Magistrate Court and which compliance has been made by the Applicants; the Respondent has no basis keeping in their custodianship, 2nd Applicant; compliance with the order of the Chief Magistrate Court should be made forthwith. It is so ordered."***

13. The Court is of the view that the argument concerning *res judicata* can only succeed when it is established that the Application brought before it is essentially the same as another one already satisfactorily decided upon before a competent domestic Court.

14. The Court now seeks to find out whether, on the one hand, the allegations of violation of the Charter and the corresponding reliefs sought in the instant case are essentially the same as the alleged violations of the Constitution of Nigeria and the reliefs sought before the High Court judge and on the other

hand, whether the Application, which is essentially the same, has been satisfactory dealt with before the domestic Court.

15. One may ask whether an application seeking to safeguard fundamental human rights constitutionally recognized and guaranteed before a judge at the domestic Court may be considered as analogous with another application seeking to safeguard human rights internationally recognised and guaranteed before the Court of Justice of the Economic Community of West African States (ECOWAS).

16. In that regard, the Court points out that by extending its jurisdiction to cover cases of human rights violation which occur in each Member State, ECOWAS sanctioned the guarantee, at the Community level, of the obligations subscribed to by its Member States at the African and international levels. This is apparent in Article 1, paragraph (h) of the 21 of December 2001 Protocol A/SP.1/12/01 on Democracy and Good Governance, which came into force on 20 February 2008 and which provides that ***"The rights set up in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual 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."***Even though it may not have had explicitly inview the guarantee of rights constitutionally set out in each Member State, the above-cited provision sanctioned the guarantee of human rights as a principle of constitutional convergence. **Hence, the Community Court's function of safeguarding and protecting human rights is carried out with respect to the international human rights instruments and the African Charter on Human and Peoples' Rights, which are recognized by the Community and to which the Member States are signatory, in line with the laws, practices and national policies of the Member States.**

    Consequently, even if formally, the source of the human rights cases triable before the Community Court is the African Charter on Human and Peoples' Rights and the international instruments, such human rights may substantially be considered as analogous to the fundamental human rights recognised and guaranteed by the Constitution of each Member State and Vice-versa.

17. In this light, the Court notes that Articles 34, 35, 36, 41 and 42 of the Constitution of Nigeria sanctions respectively: (1) the right to human dignity (2) the right to personal liberty (3) the right to fair trial (4) the right to free

movement (5) the right to non-discrimination. The Court equally notes that Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights sanctions respectively: (i) the inviolability of human beings and the prohibition to deprive same arbitrarily (ii) the right to respect for human dignity inherent in human beings and the recognition of legal status (iv) the right to liberty and security of person and the circumstances within which those rights may be curtailed, an finally (v) the right to freedom of movement and choice of residence.

18. The Court notes finally that the Applicant **essentially** alleges violation of his right to liberty and freedom of movement contained *mutatis mutandi* in Articles 35 and 41 of the 1999 Constitution of Nigeria, and that he also alleges violation of his right to life and human dignity, sanctioned *mutatis mutandi* by Article 34 of the said Constitution. Thus, the human rights violations alleged before the Nigerian judge are **essentially the same** as the human rights allegations brought before the Honorable Court. Besides, the Applicant pleads before the Honorable Court, his release and the payment of Ten Million Naira as damages, requests which have equally been granted by the Nigerian judge.

19. The Court therefore deduces from the foregoing, that the Application brought by Mr. Aliyu Tasheku is **essentially the same** as the one filed before the Nigerian judge, which subject-matter has already been dealt with and which outcome the Applicant neither contested nor considered to be dissatisfactory since he did not appeal the judgment before any Nigerian Court. The Applicant did not also indicate that the Nigerian authorities refused to implement the decisions made by the judge at the High Court.

Equally, he brought forth no new complaint or new application that may be entertained by the Honorable Court. The Court cannot retry a case on which a judgment of the domestic Court of a Member State has already been delivered and against which no contestation has been raised. Consequently, the Court declares that the Application brought by Mr. Aliyu Tasheku is inadmissible.

DECISION

For These Reasons,

20. The Court,

Adjudicating publicly, after hearing both Parties, and after deliberating towards this ruling,

- **Adjudges** that the Court has jurisdiction to adjudicate on the case;

- **Adjudges** that in the instant case, the Application brought by Mr. Aliyu Tasheku is essentially the same as the one already decided upon by the Nigerian Court;

- **Adjudges**, consequently, that the Application is inadmissible.

COSTS

21. In compliance with Article 66, paragraph 11 of the Rules of the Court, each Party shall bear its costs.

Thus made, declared and pronounced in English, the language of proceedings, at 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.

22. **AND THE FOLLOWING APPEND THEIR SIGNATURES:**

HON. JUSTICE BENFEITO MOSSO RAMOS - *PRESIDING*
HON. JUSTICE CLOTILDE MEDEGAN NOUGBODE - *MEMBER*
HON. JUSTICE ELIAM POTEY - *MEMBER*

ASSISTED BY: **MR. ATHANASE ATANNON** - *REGISTRAR*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

FRIDAY, THE 6TH DAY OF JULY 2012

SUIT NO: ECW/CCJ/APP/03/12
RULING NO: ECW/CCJ/RUL/14/12

BETWEEN
LA RENCONTRE AFRICAINE POUR LA DÉFENSE DES DROITS DE L'HOMME (AFRICAN FORUM FOR THE DEFENCE OF HUMAN RIGHTS) - RADDHO - ***PLAINTIFF***
AND
REPUBLIC OF SENEGAL - ***DEFENDANT***

COMPOSITION OF THE COURT

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

ASSISTED BY
MAÎTRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **MAÎTRE AMADOU ALY KANE &**
2. **MR. HORACE ADJOLOHUN** - *FOR THE PLAINTIFF*

1. **MAÎTRE MAFALL FALL,**
STATE ATTORNEY OF SENEGAL - *FOR THE DEFENDANT*

Jurisdiction of the Court -Admissibility of the Application -Locus standi

SUMMARY OF FACTS

The Applicant, RADDHO, an NGO devoted to the defence of human rights, contended that the Constitutional Council of Senegal delivered a judgment validating the candidacy of Mr. Abdoulaye Wade in the February 2012 elections, but the judgment, described as unpopular, triggered nationwide demonstrations which were dispersed by the police by means of live bullets, resulting in injuries and loss of lives among the demonstrators.

The Defendant, the Republic of Niger, did not respond to the facts of the case, but raised preliminary objections concerning the jurisdiction of the Court and the admissibility of the Applicant's request.

LEGAL ISSUES

- *Is the Honourable Court vested with the powers to adjudicate on the judgment made by the Constitutional Council of Senegal?*

- *Is the Application brought by RADDHO, a corporate body, admissible in the instant proceedings?*

DECISION OF THE COURT

- *Finding that the judgment upon which it had been requested to make a pronunciation was a decision made by a domestic court of a Member State, it declined jurisdiction over the matter, citing its own case law in that regard.*

- *The Honourable Court declared the Application admissible on the ground that the status of victim of allegations of human rights violation, as made by the Applicant against the Republic of Senegal, cannot be contested.*

- *The Court therefore adjourned proceedings on the substantive dispute between the parties and reserved costs.*

RULING OF THE COURT

PROCEDURE

1. By Application received from the Registry of the ECOWAS Court of Justice on 17 February 2012, La Rencontre Africaine pour la Défense des Droits de l'Homme (African Forum for the Defence of Human Rights) – RADDHO, whose Counsel was constituted by Maître Amadou Aly Kane, Lawyer registered with the Bar Association of Senegal, assisted by Mr. Horace Adjolohun, Jurist Counsellor at the African Commission on Human Rights, at Banjul, The Gambia, sued the Republic of Senegal before this Court. The Republic of Senegal was represented in the case by Maître Mafall Fall, State Attorney of Senegal, at post at the Ministry of Finance and the Economy, located at Avenue de la République, BP 14873, Dakar-Senegal.

The Applicant asked the Court to:

- Adjudge and declare that the Decision by the Conseil Constitutionnel (Constitutional Council) to endorse the candidacy of President Abdoulaye Wade violates the principles enshrined in the ECOWAS Protocol on Democracy and Good Governance and the spirit and letter of the Constitution of Senegal, and constitutes a stumbling block to peace and security in Senegal.

- Adjudge and declare that the use of live bullets by the police against the demonstrators violates Article 22 of the ECOWAS Protocol on Democracy and Good Governance, and Article 4 of the African Charter on Human and Peoples' Rights.

- Order the Republic of Senegal to cease the use of live bullets for dispersing the demonstrators, and to refrain from the use of all acts of violence to that same end.

- Order the Republic of Senegal to suspend the presidential election scheduled for 26 February 2012 till the Government of Senegal provides the Court with evidence of its commitment to organise the electoral process in an atmosphere guaranteeing an all-inclusive peaceful engagement among the opposition parties and stakeholder civil society groups, and to guarantee sustainable peace before, during and after the declaration of the election results.

- Order the Republic of Senegal to institute an inquiry into the cases of death and injury which occurred among the demonstrators, try the police officers implicated in the use of live bullets, and compensate the victims of human rights violations arising from the demonstrations organised in Senegal since the declaration of the Decision of the Constitutional Council on 27 June 2012.

2. By Application received at the Registry of the Court, RADDHO filed a request for expedited procedure, on the basis that it was urgent to put an end to the deterioration of human rights violation in Senegal.

3. In its Defence, received at the Registry of the Court on 9 March 2012, the Republic of Senegal raised a Preliminary Objection regarding lack of jurisdiction of the Court to adjudicate on the action and inadmissibility of the initiating application for lack of locus standi of the Applicant to bring a case before the Court.

4. On 12 March 2012, RADDHO lodged its Reply wherein it asked the Court to declare: on one hand, that the Government of Senegal, through the use of its security forces, and default in promoting freedom of association, neither enhanced favourable conditions nor a conducive atmosphere for free, fair and transparent elections; and on the other hand, that the acts of violence and intimidation perpetrated in Senegal against journalists constituted a violation of freedom of press.

5. The Applicant further asked the Court to order the Republic of Senegal to take all the necessary steps to ensure that the electoral campaign for the second round of voting was violence-free, and that it be held in a free, democratic and transparent atmosphere, altogether in adherence to the rules of ECOWAS and international law.

6. Finally, RADDHO asked the Court, in addition to its request in the initiating application, to order the Defendant to institute an inquiry into the assault of journalists and pressmen and to punish the perpetrators.

THE FACTS OF THE CASE

The facts of the case as narrated by the Applicant

7. RADDHO pleaded that on 27 January 2012, the Constitutional Council of Senegal published its decision validating the candidature of Mr. Abdoulaye Wade for the presidential elections of 26 February 2012; that the decision was contested by way of widespread demonstrations in the whole country.

8. RADHHO maintained that to disperse the protesters, the police used live bullets, resulting in injuries and loss of lives among the demonstrators.

9. RADHHO affirmed that the Republic of Senegal subsequently banned all forms of political gathering in the country, thus preventing the citizens from expressing their discontent, and from enjoying their freedom of speech.

The facts of the case as narrated by the Defendant

10. The Republic of Senegal did not respond to the facts of the case, but raised a Preliminary Objection.

THE ARGUMENTS AND PLEAS IN LAW OF THE PARTIES

Pleas in law raised by the Defendant in the form of a Preliminary Objection

11. In its Memorial in Defence, the Republic of Senegal raised *in limine litis*, a Preliminary Objection regarding inadmissibility of the action and lack of jurisdiction of the Court.

As to lack of jurisdiction of the Court

12. The Republic of Senegal avers that to back up his action, the Applicant invokes issues relating to the electoral process, and complaints of a judgment delivered by a domestic court, namely the Constitutional Court of Senegal.

13. The Republic of Senegal argues that the combination of the provisions of the Rules of Procedure of the Court and those of Protocol A/P.1/7/91 on the Court as well as Supplementary Protocol A/SP1/01/05 on the Court, do not confer powers on the Honourable Court in electoral matters, and that the Court shall therefore declare that it has no jurisdiction to adjudicate on the matter brought before it.

14. The Defendant further argues that the Application complaints of the 27 January 2012 Decision of the Constitutional Court, in that RADDHO asks the instant Court (cf. page 10 of the Application in French) to "… **examine the effects of the Decision of the Constitutional Council and to declare it inconsistent with the obligations of the Republic of Senegal under the Protocol on Democracy and Good Governance**."

15. The Defendant advances the argument that the Applicant's request urges the Honourable Court to examine a Court decision delivered by the domestic Court of a Member State; in that regard, it cites the case law of same Court, notably Judgment of 22 March 2007 on Case Concerning **Moussa**

Leo Keita v. Republic of Mali (Suit No. ECW/CCJ/APP/03/07), Judgment of 28 June 2007 on Case Concerning **Alhaji Hammani Tidjani v. Federal Republic of Nigeria (Suit No. ECW/CCJ/APP/01/07)**, and Judgment on Case Concerning **Ocean King Nigeria Limited v. Republic of Senegal** (Suit No. ECW/CCJ/APP/05/08).

16. The Defendant submits from all these cases the argument that the Court has no jurisdiction to review the decision made by the Constitutional Court of Senegal, in line with its own consistently held case law, according to which the ECOWAS Court of Justice is not a court of appeal nor a court of cassation over the decisions made by the domestic courts of the Member States.

As to inadmissibility of the action

17. The Defendant avers that the action filed by the Applicant is inadmissible, firstly, on the grounds that it has no locus standi or interest at stake in the matter. It cites the case law of the Honourable Court in Case Concerning **SERAP v. Nigeria and UBEC (Suit No. ECW/CCJ/APP/12/07)**.

18. The Defendant contends that the Applicant does not adduce evidence to the allegations on human rights violation, and claims notably that whereas RADDHO alleges that some persons died following the interventions by the State Security Forces, it does not provide evidence for the number of deceased persons alleged, nor the number of injured persons, much less the identity of the persons involved. He deduces thereby that the Applicant is anonymous within the meaning of Article 10(d) of the 19 January 2005 Protocol on the Court, which states that:

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

19. The Defendant equally cites Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that: "***The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto***", in claiming that the Honourable Court can only entertain cases from victims who are individuals or a group of individuals, with a list of their surnames and first names; and that such applications shall therefore not be anonymous.

20. The Defendant affirms that the group of individuals that may bring a case before the Court shall equally have a public interest, and avers that the locus standi in question here is that the claimant shall have a public interest at stake, implying that it must have suffered from the same harm as those against whom the violation is alleged. The situation however, as contended by the Defendant, is that RADHHO is not a victim of the alleged violation, nor does it constitute a group of victims pursuing a public interest.

21. The Defendant deduces thereby that in terms of human rights violations, the ECOWAS legislator debars corporate entities or non-victims lacking such public interest from bringing cases before the Community Court of Justice. The Defendant cites once again, in connection with this point, the case law of the instant Court in its Judgment on Case Concerning **Ocean King Nigeria Limited v. Republic of Senegal** (paragraph 72), where the Court holds that: ***"… 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."***

22. The Defendant further pleads that the above-cited case law of the Honourable Court is the same as that of the judgment of the European Court of Human Rights concerning Construction of Mosque Minarets in Switzerland where the said European Court declared the application inadmissible in line with Articles 9 and 14, on the ground that: "…***for an application to be admissible, it had to be lodged by an applicant who could claim to be the "victim" of a violation of the Convention***."

23. The Defendant thus concluded that the action brought before the Court by the Plaintiff must be dismissed since it was lodged by a corporate body.

Plaintiff (RADDHO)'s response to Defendant's Preliminary Objection

As to formal presentation

24. RADDHO affirms that it has locus standi to file a case before the ECOWAS Court of Justice for violation of every human right on the basis of *actiopopularis*, and cites in that regard, the case law of the ECOWAS Court of Justice in Case Concerning **Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria (Suit No. ECW/CCJ/APP/12/07)**.

25. In support of its claims for the instant action, RADDHO equally relies on Articles 9(4) and 10(d)-ii of the 2005 Supplementary Protocol on the Court, and also invokes Article 1(h) of ECOWAS Protocol A/SP.1/12/01 on

Democracy and Good Governance regarding the principle of constitutional convergence as well as ratification by Senegal of the African Charter on Human and Peoples' Rights, in arguing, in line with the terms of the text invoked, that: "***The rights set out in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his or her rights.***"

As to merits,

***RADDHO pleads as follows*:**

26. That the validation by the Constitutional Council of Senegal of the candidature of Mr. Abdoulaye Wade and the decision of the authorities in charge to organise the presidential elections of Senegal on 26 February 2012, despite the manifest lack of agreement among the various interested parties on the fundamental issue of eligibility, constitute a violation of the obligations of Senegal, within the terms of the Revised Treaty of ECOWAS and every other relevant Community legal instrument.

27. That there was a deterioration of human rights situation in Senegal as a result of the disproportionate use of the public security forces to quell the protests put up by the demonstrators and the refusal by the Constitutional Council to endorse some other candidatures; that this degenerated into chaos and demonstrations all over the country.

28. In its written pleadings of 12 March 2012, RADDHO states that it neither seeks to quash nor overturn, in its Application, the decisions made by the Senegalese judicial institutions in applying the electoral law of Senegal, but its objective is to ask the Court to find Senegal's default in its obligations as a Member State of ECOWAS and to ensure that Senegal acts in line with its obligations arising from the ECOWAS legal order, namely as is binding upon it under the Revised Treaty of ECOWAS and the ECOWAS Protocol on Democracy and Good Governance, in relation to the conduct of elections, democracy and human rights. RADDHO concludes that Senegal thereby violated Article 13 of the African Charter on Human and Peoples' Rights, which provides that:

    1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. ***Every citizen shall have the right of equal access to the public service of his country.***

3. ***Every individual shall have the right of access to public property and services in strict equality of all persons before the law*.**

29. Finally, the Applicant affirms that maintaining the candidature of Abdoulaye Wade for the presidential elections of 26 February 2012 violates not only the Constitution of Senegal but the Revised Treaty of ECOWAS (Article 4), the ECOWAS Protocol on Democracy and Good Governance (Article 1(h) as cited above), and the African Charter on Human and Peoples' Rights (Articles 13 and 55 as cited above), and perpetuates the conditions of tension, insecurity and breaches in the country.

Defendant's pleas in law

As to formal presentation

30. The Republic of Senegal cites in support of its Preliminary Objection: the Rules of Procedure of the Court, the two Protocols on the Court, Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the case law of the Honourable Court, notably Judgment of 22 March 2007 on Case Concerning **Moussa Leo Keita v. Republic of Mal**i (Suit No. ECW/CCJ/APP/03/07), Judgment of 28 June 2007 on Case Concerning **Alhaji Hammani Tidjani v. Federal Republic of Nigeria** (Suit No. ECW/CCJ/APP/01/07), and Judgment on Case Concerning **Ocean King Nigeria Limited v. Republic of Senegal** (Suit No. ECW/CCJ/APP/05/08), as cited above.

As to merits

31. The Defendant contends that RADDHO does not provide evidence for its allegations, and notably does not state the number of persons who died, the number of injured persons, and their identity. It deduces thereby that as filed, and within the meaning of Article 10(d)-i of the Supplementary Protocol, the Application is anonymous.

32. The Republic of Senegal equally maintains that since the presidential elections have already taken place, the Application brought by RADDHO has become devoid of purpose; that the Court has no powers to make orders against Member States on such matters, or else it runs the risk of encroaching on the sovereignty of the States, and therefore, that the requests brought by the Applicant cannot be granted by the Court since they are akin to asking the Court to go in that direction.

ANALYSIS OF THE COURT

33. At the hearing of 4 May 2012, after hearing Counsel for both Parties on the Preliminary Objection, the Court went into a session of deliberation so as to adjudicate on the points raised in the Preliminary Objection, which concerned:

- Lack of jurisdiction of the Court on the basis that the action brought deals with an electoral matter;
- Inadmissibility of the action based on the fact that the Court is requested to examine a court decision made by the domestic court of a Member State;
- Applicant's lack of locus standi or interest at stake; that corporate entities cannot bring cases before the Court;
- The position that since no evidence is provided for the allegations of violation, the Application is anonymous;
- The view that RADDHO has no status of a victim.

The Court **hereby declares** its stand on the various points raised in the Preliminary Objection and adjudges as follows:

Regarding jurisdiction of the Court

34. To strip the Court of its powers to adjudicate on the matter, the Republic of Senegal contends, on one hand, that the action brings an issue on elections, and on the other hand, that the matter brought for adjudication seeks to ask the Court to examine a decision made by the Constitutional Court (i.e. a domestic court) of a Member State.

35. The Court is of the view that the events which took place had their roots in the presidential election of 26 February 2012 in Senegal; that the Applicant cited the Decision of the Constitutional Council endorsing one candidature and invalidating others as the act which triggered the demonstrations which were put down by the police. The Court holds that it is these facts that the Applicant considers inconsistent with the ECOWAS Protocol on Democracy and Good Governance, and it asks the Court (point 10 of its Application in French) to examine the effects of that court decision and declare that it is at variance with the obligations of the Defendant State, and also determine whether or not the decision in contention is legal or illegal in regard to the Constitution of Senegal.

36. The Court holds that the decision of the Constitutional Council constitutes a Senegalese judicial act, and an act by a domestic court of a Member State of ECOWAS, not an act of by the ECOWAS Community itself. The Court recalls that pursuant to its consistently held case law, the Court has on numerous occasions decided that it is not a court of appeal nor a court of cassation over the judgments made by the domestic courts of the ECOWAS Member States. Again, concerning this point of the Application, the Court declares that it has no jurisdiction to make a pronouncement on the judgment of the Constitutional Court of Senegal validating the candidature of Mr. Abdoulaye Wade and invalidating that of others.

Regarding admissibility of the action

37. The Court holds that RADDHO blames Senegal for defaulting on its Community obligations arising from the Protocol on Democracy and Good Governance, and asks the Court to make a pronouncement on the legality of the act pronounced by the Defendant State.

38. The Court hereby reproduces the terms in the provisions of Article 10(c) of the Supplementary Protocol thus: "***Peut saisir la Cour toute personne physique ou morale pour les recours en appréciation de la légalité contre tout acte de la Communauté lui faisant grief;***"

    *(**Translator's Note**: The French text above talks of "individuals **or** corporate bodies" whereas the English text, as quoted in paragraph 18 herein above, makes mention of "individuals" only)*

39. The Court deduces thereby that RADDHO brings a complaint regarding the legality of an instrument made by a Member State of ECOWAS, and not by ECOWAS, which may have harmed him. On that ground, the Court dismisses the request thus made by the Applicant and declares the action inadmissible.

Regarding alleged human rights violations and RADDHO's capacity to sue

40. The Court finds that the Applicant equally alleges human rights violations which occurred during the demonstrations at Dakar and in the entire country in January 2012. Notably, the Court finds that the Applicant affirms that:

    "…***to disperse the protesters, the police used live bullets and that resulted in injuries and loss of lives among the demonstrators***"

and that:

> "*...the Republic of Senegal subsequently banned all forms of political gathering in the country, thus preventing the citizens from expressing their discontent, and from enjoying their freedom of speech*."

41. The Court observes that the Republic of Senegal did not make an express statement regarding these allegations but advances a plea in law concerning the Applicant's capacity to sue and relies on that plea to request that the case be dismissed by the Court.

42. The Court recalls its time honoured case law on human rights violations deriving from its jurisdiction and as enshrined in Article 9(4) of its Supplementary Protocol, and declares on that ground that as to formal presentation, the Application is admissible.

43. Indeed, in line with its jurisprudence, as established in numerous cases such as **Mamadou Tandja v. Republic of Niger**, **Kpatcha Gnassingbe and Others v. Republic of Togo**, etc., the Court reaffirms that simply invoking human rights violations which may have been committed in a Member State suffices to establish the jurisdiction of the Court over a case.

    Consequently, the action brought by RADDHO is admissible on grounds of technicalities.

Regarding RADDHO's locus standi and interest at stake

44. The Court observes that the Republic of Senegal contests RADDHO's locus standi in seeking for relief for human rights violation and it relies on the provisions of Article 10(d) of the Supplementary Protocol on the Court, which provides that:

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

45. The Defendant thus concludes that access to the Court is exclusively reserved for human beings, or as contained in Article 34 of the European Convention, the Court may receive applications brought by a group of individuals claiming to be victims of human rights violations, and not corporate entities.

46. Certainly, the Court recalls the case law of Ocean King Nigeria Ltd. Republic of Senegal (*cf.* supra) wherein it declared that:

    "… ***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.***"

47. But the Court equally recalls its abundant case law in the following cases: **The SERAP Nigeria Case (Suit Nos. ECW/CCJ/APP/12/07, ECW/CCJ/APP/08/09, ECW/CCJ/APP/07/10)**; **Centre for Democracy and Development v. Mamadou Tandja and Republic of Niger (Suit Nos. ECW/CCJ/APP/02/09, ECW/CCJ/APP/05/09, ECW/CCJ/APP/05/10)**, where it held that the Court is open to non-governmental organisations seeking relief for human rights violations. The Court declared that in matters concerning human rights violation, it shall not only recognise natural persons as admissible, to the exclusion of corporate bodies, but equally admit corporate bodies which are qualified to bring cases before it, on condition that they justify their status as victims.

48. The Court notes that in the instant case, RADHHO is a corporate entity with capacity to sue, and duly so, meaning that it is an NGO (cf. page 1 of Application) incorporated in Senegal, where its headquarters is based and it is engaged in promoting and defending human rights both in Senegal and throughout Africa, in the interest of natural persons who are victims of human rights violation.

49. The Court equally adjudges that the subject matter of the Application filed by RADDHO against the Republic of Senegal is on human rights violation committed in the course of demonstrations by the masses of the people. Consequently:

50. The Court holds that the complaints on allegations of human rights violations are really and directly linked to the defence and promotion of human rights, which constitute the core objective of RADDHO.

51. Hence, the Court concludes that the "victim" status of RADDHO cannot be put in doubt even if it remains to be proved. Consequently, the Court declares, in this Ruling, that the action brought by RADDHO is admissible.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing both Parties, in a matter on human rights violation, and upon deliberation for this Ruling:

52. **Declares** that the Application for human rights violation filed by RADDHO against the Republic of Senegal is admissible;

53. **Adjourns** the proceedings for further hearing on the merits of the case;

54. **Reserves** costs.

The case was heard by the following Judges:

Hon. Justice Awa Nana Daboya - *Presiding*
Hon. Justice Benfeito Mosso Ramos - *Member*
Hon. Justice Hansine N. Donli - *Member*
Hon. Justice Anthony A. Benin - *Member*
Hon. Justice Eliam M. Potey- *Member*

Assisted By **Athanase Atannon (Esq.)** - *Registrar*

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

HOLDEN AT ABUJA, NIGERIA

THIS FRIDAY 6TH DAY OF JULY, 2012

SUIT NO: ECW/CCJ/APP/07/10
JUDGEMENT NO: ECW/CCJ/JUD/11/12

BETWEEN
KEMI PINHEIRO (SAN) - *PLAINTIFF*
AND
THE REPUBLIC OF GHANA - *DEFENDANT*

COMPOSITION OF THE COURT
1. **HON. JUSTICE M. B. RAMOS** - *PRESIDING*
2. **HON. JUSTICE H. N. DONLI** - *MEMBER*
3. **HON. JUSTICE E. M. POTEY** - *MEMBER*

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

REPRESENTATION TO THE PARTIES
1. **KEMI PINHEIRO (SAN)**
2. **ADEBOWALE KAMORU**
3. **DEJI KAJOGBOLA**
4. **SESAN OLA** -*FOR THE PLAINTIFF*

DEFENDANT: **NOT REPRESENTED**

- Member States failure to honour Treaty obligations
-People's Rights under Articles 20 and 22 of the African Charter meaning
-jurisdiction of the Community Court of Justice.

SUMMARY OF FACTS

The Plaintiff a Nigerian citizen and a Senior Advocate of Nigeria (SAN) filed an action before the Community Court of justice, ECOWAS alleging the violation of his rights under the provisions of Articles 1, 2 and 12 of the ECOWAS Supplementary Protocol on Free Movement of Persons, Rights of Residence and Establishment as well as Articles 20 and 22 of the African Charter on Human and Peoples' Rights.

He stated that upon his enquiry, he was informed of the requirements to practice Law in Ghana and after he applied to the Ghana School of Law to be enrolled as an aspirant, he noticed that a further requirement had been included stating that an Applicant should be of Ghanaian nationality for eligibility for admission contrary to the outcome of his initial enquiry.

Subsequently, he sent an email seeking clarification from the Ghana Law School which replied stating that it was unable to offer admission to the Plaintiff for not being a citizen of Ghana.

In his application before this Court, he urged the Court to hold the Defendants' decision to exclude him from admission in to the Ghana Law School as null and void as it is inconsistent with and in breach of the ECOWAS Treaty, the Protocols on free movement, residence and establishment as well as the African Charter on Human and Peoples' Rights. He also asked for the following reliefs:

a) A Declaration that the Ghana Law School of the Republic of Ghana in denying the Plaintiff access to qualifying examinations violated the principles enshrined in Articles 2 paragraph 2 of the ECOWAS Treaty.

b) A Declaration that the Ghana Law school wilfully deprived the Plaintiff of his right of establishment as guaranteed by Article 1 and 2 of the Supplementary Protocol A/SP.2/5/90 and is in violation of Articles 20 and 22 of the African Charter on Human and Peoples' Rights and therefore is illegal, null and void.

c) An Order mandating the Ghana Law School to allow the immediate participation of the Applicant in its entrance qualifying examination.

LEGAL ISSUES

Whether or not the Defendant is in violation of the Plaintiff right enshrined in Articles 20 and 22 of the African Charter on Human and Peoples' Rights and Articles 1, 2 and 12 of the ECOWAS Supplementary Protocol A/SP.2/5/90 on free-movement of persons, Rights of Residence and Establishment.

DECISION OF THE COURT

The Court held, dismissing the action:

1. *That the Applicant has no Legal capacity to file an action against a Member State for failure to honour its obligations arising from Community text and dismissed the action.*

2. *Each party shall bear its costs.*

JUDGMENT OF THE COURT

1. The Applicant, Mr. Kemi Pinheiro, is a lawyer and Community citizen of Nigerian nationality. The Defendant, The Republic of Ghana, is a Member State of ECOWAS.

2. On the 25th August, 2010, the Applicant filed an application against the Defendant pursuant to Articles 7, 12, 20, 22, and 23 of the African Charter on Human and Peoples' Rights; Article 1 of Protocol A/P.3/5/82 of the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment; and Articles 1, 2, and 12 of the ECOWAS Protocol A/SP./2/5/90 on Free Movement of Persons, Rights of Residence and Establishment. In the application, the Applicant sought for the following reliefs:

   a) A DECLARATION that the Ghana Law School of the Republic of Ghana in denying the Plaintiff access to qualifying examinations violated the principles enshrined in Article 2, paragraph 2 of the ECOWAS Treaty.

   b) A DECLARATION that the Ghana Law School willfully deprived the Plaintiff his right of establishment as guaranteed by Article 1 and 2 of the Supplementary Protocol A/SP 2/5/90 and a fortiori is in violation of Articles 20 and 22 of the African Charter on Human and Peoples' Rights and therefore is illegal, null and void.

   c) AN ORDER mandating the Ghana Law School to allow the immediate participation of the Applicant in its entrance qualifying examination.

PRESENTATION OF FACTS AND PROCEDURE:

3. The Republic of Ghana is signatory to the African Charter on Human and Peoples' Rights.

4. The Plaintiff is a Community citizen by virtue of Article 1(1) (a) of the Protocol A/P3/5/83 which particularly describes who a citizen is; and by virtue of the fact that he has an ECOWAS passport, with passport number A01017374.

5. The Plaintiff is a Nigerian citizen and a Senior Advocate of Nigeria, and a Principal Partner of Pinheiro & Company, a firm of Legal Practitioners.

6. Sometime in February 2009, the Plaintiff, interested in establishing a branch of his Law firm in Ghana, was informed of the requirements to practice

Law in that country. Having met the said requirements, he applied to the Ghana School of Law to be enrolled as an aspirant.

7. The Plaintiff averred that thereafter he was short listed and invited for an interview to participate in the 2009 post - call courses vide an email dated 10th June, 2009 from one Mrs. Georgina Ahorbo, which has been marked "Exhibit A1".

8. He was therefore surprised when he noticed a further requirement had been included which stated that Applicants should be of Ghanaian nationality for eligibility for admission, which was contrary to the results of the initial enquiry as conducted by him.

9. The Applicant, based on the foregoing development, replied via email on the 13th June, 2009 asking for clarifications with regards to the requirement on citizenship, a copy of which was marked as "Exhibit A2".

10. The Ghana law school again replied via email dated the 15th June, 2009 that it was unable to offer admission to the Plaintiff for not being a citizen of Ghana, a copy of which was marked "Exhibit A3".

11. The Plaintiff stated that by the decision of the Ghana Law School to exclude him from admission, as conveyed in the aforementioned Exhibits, his rights have been violated under the above quoted provisions of the ECOWAS Protocol and the African Charter on Human and Peoples' Rights.

12. The Plaintiff averred that, apart from being a violation under the relevant provisions of the law, if allowed to stand, the actions of the Defendant will bring to futility, the aims and objectives of ECOWAS.

13. The Applicant stated that in line with the Defendant's decision in the present circumstance of the case, the Court should hold the said action to be null and void on grounds of breach of, or inconsistency with the ECOWAS Treaty and Protocols and the African Charter on Human and Peoples' Rights.

14. Served with the Application, the Defendant filed its defense on the 16th Dec 2010 stating that the Applicant's claim is not maintainable and should be dismissed *in limine*.

15. The Defendant submitted that even by the provisions of the Professional Law Course Regulations 1984 (L.1.1296) that the Applicant relied on made in furtherance of the Legal Profession Act 1960, particularly Art. 32, which provides in part 111 rule 24 thus:

An Applicant shall be considered for admission to the post - call law course if he produces evidence to show that:

a) He is of good character

b) He holds a degree conferred by a university approved by the council, and

c) He has successfully completed a law professional training course in a country with a legal system analogous to Ghana,

16. The Applicant had therefore not met the said requirements as given above and as claimed by him.

17. The Defendant stated that the Applicant had not yet satisfied the required qualifications of the said statutory requirements, as his degree should be conferred by a university approved by the Ghana Legal Council. That moreover, the Ghana School of Law did not request for a letter of good standing from the “Home Bar”.

18. It was averred that the said advert clearly stated that the registration for 2009 post-call law course which closed on the 22nd of May 2009, was limited to Ghanaians. That the advert specifically requested applicants to attach the following: photocopies of L.L.B degree or its equivalent, Bar certificates and current practicing certificate upon which applicants shall be invited for interview. The Defendant further averred that the Applicant has not shown that he fulfilled the above requirements nor submitted a completed registration form on or before the closing date of 22nd May, 2009.

19. The Defendant further explained that the application for the Post -call legal course is generally open to all persons who meet the statutory and other requirements listed by both the General Legal Council and the Ghana School of Law. He observed that Nigerians & British citizens had participated in previous programs in 2008 & 2009 but that due to the desire to clear a back log of Ghanaian applicants, a limitation was however placed on the intake in 2009.

20. It was submitted that the rights of the Applicants was not violated under the African Charter on Human and Peoples’ Rights. The Defendant however enjoined the Applicant to register and go through the selection process just like any other person without any restrictions, as he had failed to meet the earlier registration criteria.

21. The Defendant went further to state that the Applicant's reliance on Articles 20 and 22 of the African Charter on Human and Peoples' Rights to lay claims to his rights to self-determination, economic, social and cultural development was not tenable as it refers to "peoples" or "groups" which therefore is not a right enjoyable by an individual.

22. It was submitted that it is trite learning that a statute or other legal document must be read as a whole to ascertain the intention of the maker and give effect to his intention. Therefore, that Article 20, 21 and 23 of the African Charter on Human and Peoples' Rights deals with "peoples" or "groups" rights. Thus concluding on this note, that individual rights as recognized under the African Charter on Human and Peoples' Rights are generally covered under Articles 2 to 15.

23. It was further submitted that since the Applicant is not claiming a group right under Article 20, therefore none of his rights has been infringed upon in terms of the African Charter on Human & Peoples' Rights.

24 The Defendant submitted that it has been a champion of the Community Integration and it will therefore be unfortunate to rule its actions as a violation of the principles governing Community integration, bearing in mind that the preamble of the Revised Treaty stated that diversities of the Community in the integration process should be respected.

25. Finally, it contended that the provisions of the Supplementary Protocol A/SP.2/5/90 cited, could not be relied upon, as the restriction did not in any way violate the Applicant's rights to establishment in Ghana and urged the Court to recognize the peculiar situation as faced in 2009 by the Ghana School of Law and dismiss the application *in limine*.

26. In reply to the Defense, the Applicant submitted that there is nothing on the face of the Professional Law Course Regulations, 1984 and the advert (Exhibit AG 2) relied upon by the Defendant that disqualifies him.

27. He contended that listing his degree among the requirements for admission, subject to the General Legal Council's approval, is without merit, as no such condition is contained in the Professional Law Course Regulation, 1984. That the purported advert calling for application by interested candidates is not also a requirement in the aforementioned Regulation.

28. The Applicant submitted that the Defendant's argument, that the provisions of Articles 20 and 22 of the African Charter on Human & Peoples' Rights deal with rights covering only "groups" & "peoples" and not individual, is

totally misconceived in law. That the general reading of the African Charter on Human & Peoples' Right makes it clear that the provisions envisage clearly, the rights of persons (both as individual and as a group).

29. He went further to state that the Supplementary Protocol A/SP.2/5/90 tends to elaborate on the rights of personal establishment, and there is therefore nothing derogating the individual right of persons under the Charter to self-establishment.

30. Lastly, the Applicant submitted that being a Community citizen within the covering of Article 1(1) (a) of the Protocol A/P.3/5/82, he possesses and is entitled to equal right and ought not to be discriminated by reaction of his nationality which runs contrary to the intention of Article 2 of the African Charter on Human and Peoples' Rights.

31. On 21st November, 2011, The Plaintiff filed an amended application that was rejected by the Court on 14th February 2012.

32. On 20th March, 2012, the Court heard the final submission from the Plaintiff as the Defendant was not present nor represented in Court.

ANALYSIS OF THE COURT

33. In his application, the Applicant alleges violation by the Defendant of his rights pursuant to Articles 20 and 22 of the African Charter on Human and Peoples' Rights. He further alleges the violation of Articles 1, 2, and 12 of the ECOWAS Supplementary Protocol A/SP.2/5/90, on Free Movement of Persons, Right of Residence and Establishment.

34. Article 20, paragraph 1 of the African Charter, which the Plaintiff alleges was violated by the Defendant, provides as follows:

    "All people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen" .

35. The second provision of African Charter that the Plaintiff has alleged as having been violated by the Defendant is Article 22, which provides for peoples' right to development in the following terms:

    (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

(2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

36. In his pleadings and address the Plaintiff has not specified how he, as an individual, came to be the bearer or holder of those rights and how the rights have been violated by the Defendant. However, from the wording of those provisions, it is undisputable that those are rights that protect peoples rather than individuals.

37. It is *opinio juris communis* that the rights referred to in Articles 19 to 24 of the African Charter are rights of (all) "peoples" in contrast to the rights of "every individual", "every human being" or "every citizen" proclaimed in Articles 2 to 17 . If one can concede that an individual in his capacity of peoples' representative may be admitted to lodge a complaint for alleged violation of that people's right, as it was the case of the Representative of People of Katanga, before the African Commission, the ultimate beneficiary of that action should be the people and not the individual.

38. In order words, peoples' rights provided for in African Charter shall be enjoyed collectively and not individually. Consequently, the said Articles 20 and 22, allegedly violated by the Defendant cannot be invoked by the Plaintiff as source of an individual right to be enrolled in Ghana Law School for the single reason that the purported right does not emerge from those two provisions.

39. In conclusion, the alleged violation of Articles 20 and 22 of African Charter on Human and Peoples' Rights in the instant case is completely baseless.

40. Considering the second legal point raised by the Plaintiff, that the Defendant has violated his rights recognized by Articles 1, 2 and 12 of ECOWAS Protocol A/S.P.2/5/90 on Free Movement of Persons, Right of Residence and Establishment, according to the definition inserted in Article 1 of the Protocol on the Right of Establishment, it means:

    "the right granted to a citizen who is national of the Member State to settle or establish in another Member State other than his State of origin and to have access to economic activities, and in particular companies, under the same conditions as defined by the legislation of the host Member State for its own nationals."

41. Article 2 of the same instrument provides that

    "the right of establishment as defined in Article 1 above shall include access to non-salaried activities…"

42. Article 12 of the same Protocol calls for close cooperation among Member States and between them and the ECOWAS Commission in order to remove the remaining obstacles and to facilitate the full realization of the right of establishment by Community citizens.

43. There is consequently, at least in abstract, a solid and consistent legal foundation that points to the existence of a right of establishment by a citizen of ECOWAS within any Member State other than the one of its origin.

44. What must be considered now is whether in the instant case, the Republic of Ghana has violated that right the Plaintiff enjoys as a Community citizen. This is actually the substance of the dispute. However, to move to that point, this Court will first and foremost, determine whether the complaint has been brought to its jurisdiction in full compliance with the rules that govern the access to the Court.

45. The refusal by a Member State to implement in the internal order a Community Protocol in which it is voluntarily bound or under obligation to recognize the right of a Community citizen, as derived from that Protocol, constitutes a violation of obligations arising from Community texts.

46. In this regard, Article 9(1) subparagraph (d) provides that the Court has competence to adjudicate on any dispute relating to ***"the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations or decisions of ECOWAS"***.

47. Therefore, there is no doubt that any Member State that fails to implement its obligations arising from Community texts to which it is bound, can be brought before the ECOWAS Court of Justice.

48. But, contrary to other situations in which individuals are allowed direct access to the Court, in particular, for actions against the Community, its Institutions or its employees (Article 10(c)) or against Member States for violations of human rights (Article 10(d)), the Protocol on the Court does not empower individuals with the *locus standi* to sue a Member State for violation of its obligations enshrined in Community texts. According to Article 10(a), only a Member State or the ECOWAS Commission has access to the Court to compel a Member State to fulfill an obligation.

49. Therefore, the Community citizen who has been a victim of an alleged violation of a right enshrined in the Community Protocol by a Member State is provided with only two alternatives:

a) To ask his own State to take on the defence of his interest and file an action before the Community Court of Justice against the defaulting Member State, pursuant to Article 10(a);

Or

b) To decide to file an action against the defaulting Member State, addressing the domestic jurisdiction of the State where the alleged violation of his rights has occurred.

50. At this point, one should bear in mind that national courts are also Community courts as they have competence to apply the Community law which forms part of the internal order.

51. For clarification on the interpretation of the content and norms required for application of the community texts, National Courts may refer the matter to the Court of Justice under the tenet of Article 10(f) of the Protocol which provides:

> ***"Where in any action before a Court of Member State, an issue arises as to the interpretation of provision of the Treaty; or other Protocols or Regulations, the national Court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation."***

52. It is in this relationship between the Community Court of Justice and National Courts that the Community law will strive and be appropriated by the entire Community.

CONSEQUENTLY,

53. Whereas the Community Court of Justice is competent to adjudicate on any dispute relating to the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations or decisions of ECOWAS ;

54. Whereas for actions against Member States for violation of their obligations under Community law, only Member States and the ECOWAS Commission have access to the Court of Justice.

DECISION

FOR THESE REASONS

55. The Court, after hearing the parties in an open hearing, holds that the Applicant has no legal capacity to file an action against a Member State for failure to honour its obligations arising from Community texts. Therefore, the action is dismissed.

COSTS

In compliance with Article 66, paragraph 11 of the Rules of the Court, each Party shall bear its costs.

Thus made, declared and pronounced in English, the language of proceedings, at 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 HEREBY APPEND THEIR SIGNATURES

Hon. Justice Benfeito M. RAMOS - *Presiding*

Hon. Justice Hansine N. DONLI - *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)

**SITTING AT ABUJA, FCT,
IN THE FEDERAL REPUBLIC OF NIGERIA.**

ON WEDNESDAY 25TH JANUARY, 2012.

SUIT Nº. ECW/CCJ/APP/10/11 & ECW/CCJ/11/11 (CONSOLIDATED)
RULING NO. ECW/CCJ/RUL/01/12

BETWEEN
HARUNA WARKANI & 3 ORS - *PLAINTIFFS*
V.
1. **PRESIDENT, ECOWAS COMMISSION**
2. **ECOWAS COMMISSION**

} *DEFENDANTS*

COMPOSITION OF THE COURT
1. **JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **JUSTICE ELIAM M. POTEY** - *MEMBER*

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

REPRESENTATION TO THE PARTIES
1. **ADEBAYO ESQ.** - *FOR THE PLAINTIFFS*
2. **MRS. MOLOKWU** - *FOR THE DEFENDANTS*

Consolidation of Cases - Amendment of Court Process -

SUMMARY OF FACTS

The Plaintiffs are employees as well as Staff representatives of ECOWAS Commission. They filed two separate actions against their employer. The two suits were consolidated. The Defendants however, filed motion for leave to amend their rejoinder, the 10 paragraph affidavit in support of the motion, stated that the delay in bringing the amended rejoinder was not intentional and will not be prejudicial to the Plaintiff as it is in the interest of justice for the Court to grant the Application. The Plaintiffs, by a Counter Affidavit, opposed the Defendants' motion to amend on the grounds that the amended rejoinder purports to seek a fresh order of dismissal, in addition to the orders already sought in their defence and has raises new pleas in law, seeks fresh reliefs and offer further evidence to which the Plaintiffs have no opportunity to respond to. The Plaintiffs therefore submitted that it is in the interest of justice to strike out Defendants' motion because it contains utter falsehood, and is unknown to law and prejudicial to the interest of the Plaintiffs. The Defendants, in their reply submit that the Court should deal with the request for amendment under its inherent jurisdiction since there is no provision in the Rules for amendment of rejoinder.

LEGAL ISSUES

1. *Whether or not an amendment may be allowed at any stage of the proceedings even before judgment.*

2. *Whether or not an amendment of pleading is prejudicial to the other party.*

3. *Whether the Court can grant application for amendment of rejoinder under its inherent jurisdiction.*

DECISION OF THE COURT

The Court held while dismissing the application for amendment of rejoinder that:

(1) *Under Article 36(l) of the Rules, rejoinder is the last act in the process of filing pleadings, thus it is logical that rejoinder is not the place for fresh pleas to be introduced;*

(2) *That the proposed amendment of the rejoinder is not appropriate to introduce new pleas, or introduce further evidence without acceptable explanation;*

(3) *That it is also not the place to seek reliefs from the Court. Thus, the pleas contained in the proposed amendment paragraphs 8, 10 to 17 and 20 are rejected.*

RULING OF THE COURT

1. The Plaintiffs are employees as well as the staff representatives of the ECOWAS Commission, second Defendant herein; they brought two separate actions against their employer and the President of the Commission, the first Defendant herein. The suits were consolidated as the facts, issues and reliefs sought were essentially the same in both.

2. After the exchange of pleadings, that is, the statement of claim, statement of defence, reply and rejoinder between the parties, the Defendants brought a motion on notice under the inherent jurisdiction of the Court, Article 19 of the Protocol on the Community Court of Justice and Article 36 (1) of the Rules of Court for an order granting them leave to amend their rejoinder to the Plaintiff's reply and for such other orders as the Honourable Court may deem fit to make in the circumstance,

3. The application was supported by a ten (10) paragraph affidavit. The affidavit stated that the delay in bringing the application was not intentional. Further, *it* stated that it would not be prejudicial to the Plaintiffs/respondents and it was in the interest of justice for the Court to grant the application.

4. The application filed by the Defendants/applicants was opposed by the Plaintiffs. In their counter affidavit, the Plaintiffs deposed, among others, that the proposed amended rejoinder purports to seek a fresh order of dismissal in addition to the orders already sought in the Defendants' defence without an amendment of the defence. Again, they stated that the Defendants/Applicants' rejoinder raises new pleas in law and/or seeks fresh reliefs to which the Plaintiffs have no opportunity to respond to, having regard to the fact that the Defendants' rejoinder is the last document to be lodged in the written procedure. They further stated that the proposed amended rejoinder purports to offer further evidence without giving any reasons for the delay in offering it.

5. Further, the Plaintiffs deposed in their affidavit that it was in the interest of justice to strike out Defendants/Applicants' motion on notice because it contains utter falsehoods which were already known to the Defendants at the time they lodged their defence. Finally, they stated that Defendants/ Applicants' application is unknown to law, prejudicial to the interest of the Plaintiff and in the interest of justice to strike out same.

6. Counsel for the Defendants argued that the Court should deal with the request for amendment by virtue of the court's inherent jurisdiction since there is no provision in the Rules of Court on amendments. Counsel for the Plaintiffs did not oppose this request. Indeed the Court has the power that is intrinsic with its set up to do substantial justice to the parties devoid of technicalities that it could do away with. And one of such technicalities is the absence of express provision in the Rules of Court with regard to amendments. The Court could therefore allow any party to amend the pleadings after the other party has been notified and duly heard and upon good cause shown. This inherent power is derived from the Court's competence to receive the pleadings in accordance with the Rules of Court.

7. Counsel for the Defendants argued further that the amendment seeks to bring in all the facts, which were initially left out through inadvertence on the part of Counsel, whose sin, she argued should not be visited on the party.

8. Counsel for the Plaintiffs seriously opposed the application. The objection to the proposed amendment focused on the fact that it was pleading new facts, and was also seeking fresh orders, and for that reason the rejoinder was not the appropriate place to plead them, since it will deprive the Plaintiffs from answering them.

Analysis by the Court

9. In the process of pleadings, a rejoinder is the stage whereby the Defendant is offered the opportunity to provide answer to any issue raised by the Plaintiff in his reply to the Defendant's statement of defence. And under the provisions of Article 36(1) of the Rules of Court, it is the last act in the process of filing pleadings. It is thus logical that the rejoinder is not the place for fresh pleas to be introduced since the Plaintiff will have no opportunity to answer them. The Plaintiff could not amend the claim or reply to answer averments in a rejoinder as that will be contrary to the rules which require the Defendant to have the last word in pleadings. And on the question of asking for an order from the Court, this is clearly a relief which may be sought by the Plaintiff in the statement of claim or by a Defendant in the statement of defence following a counter-claim.

10. Let us begin with the order sought by paragraph 20 of the proposed amendment; it reads: In addition to the Orders sought in paragraph 27 of the Defendants defence, the Defendants here by seek the order of dismissal of the suit for lack of competence.

11. Even a cursory reading of this new paragraph would indicate that it is the defence that should be amended to add to the reliefs sought the rein. A rejoinder is not the appropriate place for the Defendant to seek reliefs from the Court; nor is it the appropriate place to add to reliefs pleaded in the statement of defence. Dismissal of a suit for want of competence requires facts and/or law to support, which the other party must have a right to react to. It is noted that paragraphs 18 and 19 of the proposed amendment set out the grounds for this relief, yet the Plaintiffs are denied the opportunity to react since the Rules of Court make no provision for a Plaintiff to file any reply after the rejoinder has been filed by the Defendant.

12. Now to the other pleas raised in the proposed amendment. The Plaintiffs contend that the amendments are founded on facts which are either false or disputed and for that reason should be pleaded in the statement of defence to enable them to answer thereto. The Court will examine the proposed pleas seriatim. Paragraph 2 merely denies the averment in paragraph 4 of the Reply, so there is no problem with that. Paragraphs 5, 6 and 7 provide an answer to paragraph 28 of the Reply by repeating portions of the defence, which is also in order. But it goes further in paragraph 8 to refer to a memorandum numbered ECW/PER01-00011-P/19-04, dated 18th April 2011, where by the Plaintiffs were invited to appear before the Joint Disciplinary Board. It is observed that in the statement of defence, this memorandum bearing the same number was listed as one of the documents that Defendants will rely upon at the hearing. But the date of this memorandum in the Statement of defence differs from that in the proposed rejoinder. It is thus clear that the proposed amendment will contradict the defence in respect of this memorandum. That being so the appropriate place to ask for the amendment is the defence to enable the Plaintiffs to answer whether they indeed received this memorandum which the Defendants now seek to introduce in an amended rejoinder.

13. Paragraph 9 of the proposed amendment is a repetition of document number 11 listed in the statement of defence as one of the documents the Defendants will rely upon. Thus no surprise arises here as the Plaintiffs have had the opportunity to react to it in the Reply.

14. Paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 introduce facts concerning the proceedings during and after the sittings of the Joint Disciplinary Board. These are facts that must be pleaded in the defence to enable the Plaintiffs to answer, since they appear to be the basis for the Board's findings and recommendations that resulted in the penalties imposed on the Plaintiffs. They are so fundamental that the rejoinder is not the appropriate place to introduce them either for the first time, or to give further evidence thereof. Since Counsel realised that it was through her inadvertence that those facts were not introduced earlier on, in the same vein she ought to allow the Plaintiffs the opportunity to react.

15. In conclusion, the Court decides that the proposed amendment of the rejoinder is not appropriate to introduce new pleas, or introduce further evidence without acceptable explanation; it is also not the place to seek reliefs from the Court. For these reasons, the pleas contained in the proposed amendment paragraphs 8, 10 to 17 and 20 are rejected.

16. There will be no order as to costs.

This ruling has been read at the public sitting of the Community Court of Justice, ECOWAS, on Wednesday, 25th January, 2012.

Hon. Justice Awa Nana Daboya - *Presiding Judge*

Hon. Justice Anthony A. Benin - *Member*

Hon. Justice Eliam M. Potey - *Member*

Tony Anene-Maidoh ***(Esq.)*** - *Chief Registrar*

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

HOLDEN AT ABUJA

ON TUESDAY, 21ST FEBRUARY, 2012

SUIT N°: ECW/CCJ/APP/10/11
RULING N°: ECW/CCJ/RUL/04/12

BETWEEN
HARUNA WARKANI & 3 ORS - *PLAINTIFFS*
V.
PRESIDENT OF ECOWAS COMMISSION & ANOR - *DEFENDANTS*

COMPOSITION OF THE COURT
1. **HON. JUSTICE ANTHONY A. BENIN** - *PRESIDING*
2. **HON. JUSTICE AWA DABOYA NANA** - *MEMBER*
3. **HON. JUSTICE ELIAM POTEY** - *MEMBER*

ASSISTED BY
ABOUBAKAR DJIBO DIAKITE - *REGISTRAR*

REPRESENTATION TO THE PARTIES
1. **MRS. IHEANACHO ONOME, MR. AKINBULI EBENEZER MR. MOSES ADEDOTUN** - *FOR THE PLAINTIFFS*
2. **MRS. F.N. MOLOKWU** - *FOR THE DEFENDANTS*

Amendment of Pleading -Filing out of time

SUMMARY OF FACTS

The Defendant applied for leave of Court to amend portions of their Statement of Defence, arguing that the amendments will enable all facts to be brought before the Court and not intended to overreach and no injustice will result as the Plaintiffs have the opportunity to reply afterwards.

Plaintiffs' Counsel opposed the application on the ground that it is unfair, prejudicial and will cause undue delay to the case, in view of the predicament of the Plaintiffs who are out of work and not being paid salary.

LEGAL ISSUES

1. *Whether or not an amendment may be allowed at any stage of the proceedings even before judgment.*
2. *Whether or not an amendment of pleading is prejudicial to the other party.*

DECISION OF THE COURT

The Court granted the application and the amended Statement of Defence, deemed as properly filed and served. The Defendants are however, ordered to pay cost of N200,000.00 (Two hundred thousand naira) to the Plaintiffs.

RULING OF THE COURT

This is an application for leave by the Defendants to amend portions of their statement of defence, and to deem as filed the amended statement of defence already filed. Counsel for the Defendants stated that it was her inadvertence that those facts were not earlier pleaded in the statement of defence. Counsel argued that the amendment will enable all the facts to be brought before the Court and that it is not intended to overreach and no injustice will result as the Plaintiffs have the opportunity to reply if they so wish. Counsel further argued that there is no undue delay having regard to the circumstances of this case.

For their part, counsel for the Plaintiffs opposed the application on ground that it is unfair, prejudicial and will cause undue delay to this case in view of the predicament of the Plaintiffs who are out of work and not being paid any salary.

It is recalled that in an earlier application filed by the Defendants to amend the rejoinder, which this Court rejected, the same points now being sought to be amended were raised therein. The facts are therefore not new to the Plaintiffs, so no surprise arises here. It is a cardinal principle of law that all facts must be pleaded and nothing should be hidden from the Court. In this Court a party is bound to bring every fact before the Court as soon as the party becomes aware of it. An amendment may be allowed at any stage of the proceedings even before judgment so long as no injustice results to the other party. The fact that there is delay should not per se prevent a party from presenting the facts to the Court, as the other party can be compensated in costs. And the fact that the opposing party considers a fact sought to be introduced by a party to be false is also not a legitimate factor to consider in an application to amend.

The Court thus decides to grant the application and the amendment statement of defence is deemed to have been filed. The Defendants are ordered to pay costs of N200,000.00 *(two hundred thousand Naira)* to the Plaintiffs. The case is adjourned to 12th March 2012. In the meantime, the Plaintiffs are to file an Amended Reply within one week from today if they so wish. And upon being served with the amended Reply the Defendants are to file an amended rejoinder within one week if they so wish.

HON. JUSTICE A. A. BENIN - *PRESIDING*

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

HOLDEN AT ABUJA

ON TUESDAY, 5TH JUNE, 2012

SUIT N°: ECW/CCJ/APP/03/11
SUIT N°: ECW/CCJ/APP/10/11
RULING N°: ECW/CCJ/RUL/10/12

BETWEEN
HARUNA WARKANI & 3 ORS - ***PLAINTIFFS***
V
PRESIDENT
OF ECOWAS COMMISSION & ANOR - ***DEFENDANTS***

BEFORE THEIR LORDSHIPS
HON. JUSTICE ANTHONY A. BENIN - *PRESIDING*
HON. JUSTICE AWA DABOYA NANA - *MEMBER*
HON. JUSTICE ELIAM POTEY - *MEMBER*

ASSISTED BY
ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES
1. **MR. ADEWOLE ADEBAYO** *WITH*
2. **MR. EBENEZER AKINBULI,**
3. **MR. MOSES ADEDOTUN AND**
4. **MR. GODSENT** - *FOR THE PLAINTIFFS*

1. **MRS. F. N. MOLOKWU** - *FOR THE DEFENDANTS*

- Amicable Settlement

SUMMARY OF FACTS

The Plaintiffs' Counsel informed the Court that there is no communication from the Defendant to the Plaintiffs, not even in response to letters, with respect to the proposed amicable settlement. The Defendant's Counsel asks for a short adjournment to enable ECOWAS Commission take steps to resolve the issue.

LEGAL ISSUES

Whether adjournment should be granted to enable amicable settlement.

DECISION OF THE COURT

The Court considers a last adjournment to enable the Defendant, ECOWAS Commission take steps to resolve the case amicably and adjourned the case for settlement to be announced, failing which the Court will be compelled to take some measures. ***Process for settlement is still on, according to instructions of defence counsel****.*

RULING OF THE COURT

The Court takes a serious view of the situation on hand, whereby the hearing of this case has been suspended pending a quick amicable settlement, but we are told there is no communication from the Defendants to the Plaintiffs, not even in response to their letters. The Court observes that the Plaintiffs are not being paid salaries since this matter arose. The Court takes note of the last meeting of AFC in Abidjan which seriously encouraged parties to settle. In view of the foregoing the Court will consider this last adjournment to enable the ECOWAS Commission to take steps to resolve this issue. The matter will be adjourned to 6th July, 2012 for settlement to be announced failing which the Court will be compelled to take some measures.

HON. JUSTICE A. A. BENIN - *PRESIDING*
HON. JUSTICE AWA DABOYA NANA - *MEMBER*
HON. JUSTICE ELIAM POTEY - *MEMBER*

Assisted by **ATHANASE ATANNON** - *REGISTRAR*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECON0MIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 9TH DAY OF OCTOBER, 2012

SUIT Nº: ECW/CCJ/APP/10/11 (CONSOLIDATED)

BETWEEN

1. **HARUNA WARKANI**
2. **DR. GUEYE ABDOULAT** } ***PLAINTIFFS***

V

1. **THE PRESIDENT OF ECOWAS COMMISSION**
2. **THE ECOWAS COMMISSION** } ***DEFENDANTS***

AND **SUIT No: ECW/CCJ/APP/11/11**

1. **MR. JOSHUA IYAMU**
2. **MS. OLAYINKA ABAYOMI** } ***PLAINTIFFS***

V

1. **THE PRESIDENT OF ECOWAS COMMISSION**
2. **THE ECOWAS COMMISSION** } ***DEFENDANTS***

COMPOSITION OF THE COURT

1. **HON. JUSTICE A. A. BENIN** - *PRESIDING*
2. **HON. JUSTICE A. D. NANA** - *MEMBER*
3. **HON. JUSTICE E. M. POTEY** - *MEMBER*

ASSISTED BY

ABOUBAKAR DJIBO DIAKITE - *COURT REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **AKIMBULI E. O.; A. P. MOSES; G. O. IMIANVAN** **-** *FOR THE PLAINTIFFS*
2. **F. N. MOLOKWU (MRS.)** - *FOR THE DEFENDANTS*

-Amicable Settlement -Adoption of Terms of Settlement as Judgment

SUMMARYOF FACTS

Both Parties and their Counsel filed at the Registry of the Court, duly signed 5 paragraph TERMS OF SETTLEMENT and urged the Court to enter judgment in the suit in accordance with the terms of settlement

LEGAL ISSUES

Whether terms of settlement can be adopted as judgment of the Court?

DECISION OF THE COURT

The Court Struck off the action from the Cause List and entered Judgment in accordance with the terms of settlement filed on 3rd October, 2012, read by the Lawyer of the Applicants and as confirmed by the Applicants as well as the Lawyer for the Respondents in open Court. In the terms of settlement, the parties unanimously agreed that the Defendants will overrule all disciplinary actions against the Plaintiffs, reinstate and deploy them, the Plaintiffs to maintain salaries due to them within the period of disciplinary process, including all allowances and withdraw the suit on the afore mentioned terms.

RULING OF THE COURT

The actions brought before this Court by the Applicants herein against the Respondent, are hereby struck off the Cause List and judgment is hereby entered in accordance with the Terms of Settlement filed on 3rd October, 2012, read by the Lawyer of the Applicants and as confirmed by the Applicants as well as the Lawyer for the Respondents in open Court. The Terms of Settlement is attached herewith. There is no order as to cost.

This ruling has been read at the public sitting of the Community Court of Justice, ECOWAS on Tuesday, 9th October, 2012.

Hon. Justice Anthony A. Benin - *Presiding Judge*

Aboubakar Djibo Diakite - *Court Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, 3RD OF OCTOBER, 2012

SUIT NO: ECW/CCJ/APP/10/2011

1. **HARUNA WARKANI**
   (Professional Staff Representative ECOWAS Commission)
2. **DR. GUEYE ABDOULAT**
   (Professional Staff Representative ECOWAS Commission)
3. **MR. JOSHUA IYAMU**
   (General Staff Representative ECOWAS Commission)
4. **MS. OLAYINKA ABAYOMI**
   (General Staff Representative ECOWAS Commission)

V.

1. **PRESIDENT OF THE ECOWAS COMMISSION**
2. **ECOWAS COMMISSION**

TERMS OF SETTLEMENT

The Plaintiffs and the Defendants, being desirous to settle this suit amicably out of Court have agreed to resolve the suit on the following Terms of Settlement namely:

1. The Defendants have agreed to entirely overrule and cancel the disciplinary action against all the Plaintiffs;
2. The Defendants shall reinstate and deploy the Plaintiffs to their former areas of responsibility provided there are subsisting job vacancies in those areas;
3. The Plaintiffs are to maintain the salaries due to them within the period of disciplinary process including all allowances which might have accrued to them within the interim period;
4. The Plaintiffs shall withdraw this suit on the above terms; and
5. There shall be no order as to costs.

The parties hereto request the Court to enter judgment in the Suit in accordance with the Terms of Settlement.

Dated at Abuja, this 3rd day of October, 2012

Adewole Adebayo (Esq.)
(Defendants' Counsel)

F. N. Molokwu (Mrs)
(Plaintiffs' Counsel)

[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 31ST DAY OF OCTOBER 2012

SUIT N^{O}: ECW/CCJ/APP/18/11
RULING NO: ECW/CCJ/RUL/20/12

BETWEEN
SIMONE EHIVET & MICHEL GBAGBO - ***APPLICANTS***
V
REPUBLIC OF COTE D'IVOIRE - ***DEFENDANT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *MEMBER*
3. **HON. JUSTICE HANSINE N. DONLI** - *MEMBER*
4. **HON. JUSTICE ALFRED A. BENIN** - *MEMBER*
5. **HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ** - *MEMBER*

ASSISTED BY

ABOUBAKAR DJIBO DIAKITÉ ***(ESQ.)*** - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **CIRE CLEDOR LY** ***(ESQ.)***
2. **FRANÇOIS SERRES** ***(ESQ.)***
3. **JEAN CHARLES TCHIKAYA** ***(ESQ.)*** - *FOR THE APPLICANT*

1. **JEAN CHRYSOSTOME BLESSY** ***(ESQ.)*** - *FOR THE DEFENDANT*

Human rights violation -Right to human dignity -Arrest and detention -Freedom of movement and choice of residence -Right to health -Parliamentary immunity -Lack of jurisdiction -Inadmissibility -Article 9(4) of the 19 January 2005 Protocol on the Court -Article 87(5) of the Rules of the Court

SUMMARY OF FACTS

Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo brought the Republic of Cote d'Ivoire before the Court for violation of their human rights, as enshrined in the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Revised Treaty of ECOWAS and the Constitution of the Republic of Cote d'Ivoire.

The Applicants blamed the Republic of Cote d'Ivoire for infringement on their rights to freedom of movement, choice of residence, moral health, and legal the recognition of their status. Mrs. Simone Ehivet Gbagbo further contended that her political rights inherent in the privileges and immunities she is entitled to as a Parliamentarian, were denied her.

The Republic of Cote d'Ivoire, in a Preliminary Objection, pleaded that the Court lacks jurisdiction to order the release of persons indicted by the domestic courts of a Member State. The Republic of Cote d'Ivoire again argued that every request for the provisional release of the accused persons shall come before the investigating judge.

LEGAL ISSUES

Is the Court competent to order the release of the Applicants, who have been accused by the domestic courts of an ECOWAS Member State?

DECISION OF THE COURT

The Court adjudged that it was needless to examine the Preliminary Objection claiming lack of jurisdiction of the Court. The Court thus adjudged that the plea-in-law seeking the release of the Applicants goes to the merits of the case. Consequently, the Court declared that it could not examine the matter brought before it within the meaning of Article 87(5) of the Rules of the Court.

RULING OF THE COURT

(Preliminary Objections)

The Court thus constituted delivers the following Ruling:

FACTS AND PROCEDURE

1. By Application dated 20 July 2011, and filed at the Registry of the Court on 25 July 2011, Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo through their Counsels, Ciré Clédor Ly (Esq.), François Serres (Esq.) and Jean Charles Tchikaya, Lawyers registered with the Bar respectively at Dakar, Paris and Bordeau, brought a complaint before the Court, against the Republic of Côte d'Ivoire, on serious violation of their human rights and the political rights of Mrs. Simone Ehivet Gbagbo, as enshrined in Articles 2, 5, 6, 7 (1), 12 and 23 of the African Charter on Human and Peoples' Rights, 9, 12 and 14 of the International Covenant on Civil and Political Rights, Article 3, 5, 6, 7, 8, 9, 13 and 16 (3) of the Universal Declaration of Human Rights, Articles 4 (g) and 1 (h) of the Revised ECOWAS Treaty, the Preamble and Articles 2,and 22 (1) of the Constitution of Côte d'Ivoire;

2. They asked the Court to adjudge and declare that:

    · Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo's detention is arbitrary;

    · Their right to effective remedy has been violated;

    · Their right to freedom of movement, and freedom to choose their residence were denied;

    · Their rights to moral wellbeing and the recognition of their legal status were violated;

    · The right to the moral wellbeing of their family was violated;

    · Mrs. Simone Ehivet Gbagbo's immunity, and the privileges attached to her status as a Member of Parliament were violated;

3. They further asked the Court:

    - To order the Republic of Côte d'Ivoire to respect the right to privileges and the parliamentary immunity of Mrs. Simone Ehivet Gbagbo, pursuant to the domestic law of Côte d'Ivoire and the ECOWAS Community law;

    - To order the immediate release of both Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo;

    - To order the immediate release of all persons, assistants and friends of the Applicants brought under house arrest without administrative or judicial warrant;

    - To order the immediate release of all persons, former workers and friends of Plaintiffs, who were placed under house arrest, on no administrative or judicial ground;

    - To enjoin the Republic of Côte d'Ivoire not to undertake any judicial action that may lead to the arrest of Mrs. Simone Ehivet Gbagbo, in violation of the immunity attached to her status as Member of Parliament.

4. In its Memorial in Defence filed at the Registry of the Court on 2 November 2011, the Republic of Côte d'Ivoire raised *in limine litis* an objection as to the lack of jurisdiction of the Court, to order the release of persons indicted in Côte d'Ivoire.

5. In their Rejoinder sent to the Registry of the Court on 14 December 2011, Plaintiffs argued against the objection raised by Defendant *in limine litis*.

6. Service of all these writs was regularly done to all parties.

7. At the hearing of 23 March 2012, the Court heard the parties on the said objection raised, but the Republic of Côte d'Ivoire was not represented.

ARGUMENTS BY PARTIES.

8. The Republic of Côte d'Ivoire insisted on its objection raised as to the lack of jurisdiction of the Court to order the release of persons indicted in

Côte d'Ivoire. It argues that within the framework of the criminal proceedings initiated against Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo, the latter have the opportunity to file an Application seeking their release, to the investigating judge, pursuant to Article 141 new of the Code of Criminal Procedure, which provides that: "**An Application for provisional release can be brought before the trial judge, at any moment, either by the indicted person or by his/her Counsel.**"

9. The Republic of Côte d'Ivoire pointed out that the ECOWAS Court of Justice does not have the mandate to carry out the duties of national Courts, and that if the Community Court were to examine an application for provisional release, filed by persons who are indicted by national Courts in Côte d'Ivoire, this would amount to a serious denial of the authority of the said Courts, and would constitute a serious infringement upon the sovereignty of the State of Côte d'Ivoire. On these grounds, the Republic of Côte d'Ivoire argues that the Court should declare its lack of jurisdiction to order the release of Plaintiffs.

10. As for Plaintiffs, they recognise the fact that Defendant raised the objection as to the lack of jurisdiction of the Court, in its Memorial in Defence; they plead with the Court to declare it inadmissible, because, by so doing, the Republic of Côte d'Ivoire did not act pursuant to Article 87 (1) of the Rules of the Court, which provides that: "***A Party applying to the Court for a decision on preliminary objection or other preliminary plea not going to the substance of the case shall make the application by a separate document.***" Moreover, they averred that the objection raised is ill-founded, because Applicants did not bring an Application for '*provisional release before the Court, rather, an Application on human rights violations* ***sus generis*** *and derived human rights (political rights)*'

ANALYSIS BY THE COURT.

11. The Court observes that the case brought before it by Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo mainly borders on human rights violations. In their joint Application, apart from the alleged human rights violations, Plaintiffs sought from the Court to take diverse measures, which could be analysed as being the guarantee for the respect for their rights, and measures which shall ensure the reparation for such rights which are

alleged to have been violated. It is in regard to one of these pleas, that is, the one bordering on provisional release that the Republic of Côte d'Ivoire raised, *in limine litis,* an objection as to the jurisdiction of the Court.

12. The Court is of the strong opinion that, in principle, the preliminary objection referred to under Article 87 (1) of its Rules is in relation to any question on its jurisdiction, as provided in the new Article 9 of the Protocol on the Court, as amended by the Supplementary Protocol of 19 January 2005, or which relates to the admissibility of the case brought before it. Thus, an objection raised *in limine litis* is necessarily to be understood as a question bordering on the jurisdiction *rationae materiae* of the Court to examine the subject-matter of the substantive case brought before it. If the objection prospered, it would amount to an obstacle to the main case.

13. Equally, the Court is of the opinion that it could only be inclined to order for the release of Plaintiffs, if it notices human rights violations and it observes that the order sought is appropriate, taking into account the circumstances and the facts of the case.

14. Whereas, in the instant case, the Court notes that the objection raised by the Republic of Côte d'Ivoire can be interpreted as a plea used in challenging the request for the release of Plaintiffs. Thus, although the objection is against a specific request within the main Application, it is not raised against the subject – matter of the case. In substance, it does not call to question the jurisdiction *rationae materiae* of the Court to examine the case of human rights violations brought before it by Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo; it is not an obstacle to the jurisdiction of the Court, and the consideration of that objection could only be justified if the Court were to examine the request for the release of Applicants, consequent upon noticing the alleged human rights violations. Indeed, it is not possible to debate it without prior examining the case on its merit.

15. Hence, the Court holds that there is no need to consider the said preliminary objection. Consequently, pursuant to the provisions of Article 87 (5) of its Rules, the Court reserves its decision on this plea to the final judgment.

DECISION

For these reasons,

16. The Court, adjudicating in a public session, after hearing both Parties and after deliberation, in a preliminary ruling:

    - **Declares** that there is no need to examine the plea drawn from the objection raised as to the lack of jurisdiction of the Court, to order the release of Plaintiffs, as preliminary objections;

    - **Reserves** its decision regarding this plea in the final judgment, after considering the case on its merit.

As to costs

17. The Court reserves its pronouncement as to costs

Thus made, adjudged and pronounced, in a public hearing at the seat of the Court at Abuja, on the day and month mentioned above.

18. AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon. Justice Awa Nana Daboya - *Presiding*

Hon. Justice Benfeito Mosso Ramos - *Member*

Hon. Justice Hansine Donli - *Member*

Hon. Justice Anthony Benin - *Member*

Hon. Justice Clotilde Médégan Nougbodé - *Member*

Assisted by **Mr. Aboubakar Djibo Diakité** - *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

WEDNESDAY, 31 OCTOBER 2012

SUIT N°: ECW/CCJ/APP/16/10
RULING N°: ECW/CCJ/RUL/15/12

BETWEEN
IVORIAN FOUNDATION FOR OBSERVATION AND MONITORING (FIDHOP) & 4 ORS - *PLAINTIFFS*
V.
AUTHORITY OF HEADS OF STATE AND GOVERNMENT OF ECOWAS - *DEFENDANT*

COMPOSITION OF THE COURT:

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

ASSISTED BY
ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **MAITRES CLAUDE MENTENON**
2. **MOHAMED LAMINE FAYE** - *FOR THE PLAINTIFF*

1. **MAITRES AGBANTOU** - *FOR THE DEFENDANT*

Action of the annulment of the Decision of the Authority -Application for intervention - Default of appearance -Evolution of facts -Application become without object -Judgment by default deemed adversarial -Strike out

SUMMARY OF FACTS

On 24 December 2010, the Government of Ivory Coast, Mr. Laurent Gbagbo and three Ivorian associations brought before the Court, a motion to quash the decisions taken on 7 and 24 December, 2010 by the ECOWAS Authority of Heads of States and Government in which it recognized Mr. Alassane Ouattara as President-elect of Cote d'Ivoire and made an injunction on Mr. Laurent Gbagbo to peacefully transfer power to him.

On 29 March 2011, shortly before the seizure of power by Mr. Alassane Ouattara, the latter and the Government of Cote d'Ivoire came before the Court with an application for intervention.

Counsels to the applicants did not appear at the hearings of 1 February 2012, 13 March 2012,31 October 2012 and 13 March 2013.

Mr. Laurent Gbagbo also came before the Court with an application for Human Rights violation against the Government of Cote d'Ivoire. In view of the transfer of the latter to the International Criminal Court, the Court decided to suspend the proceedings relating to the action on Human Rights violation.

LEGAL ISSUES

- *Is the application to intervene admissible?*
- *Is the motion to quash the decision without object?*

DECISION OF THE COURT

The Court found that the interveners have an interest to act and therefore declared their application admissible.

In addition, it stated that the loss of power by Mr. Laurent Gbagbo, his transfer to the ICC, the suspension of his appeal for Human Rights violation outweigh as a result in a change of facts; these findings, coupled with the lack of representation at the hearing by the applicants imply that the cause of hearing has become without object. Accordingly, the Court declared the main application inadmissible and ordered it to be stuck out of its cause list.

RULING OF THE COURT

FACTS AND PROCEDURE

1. By Initiating Application registered at the Registry of the Court on 24 December 2010, *la Fondation Ivoirienne pour l'Observation et la Surveillance des Droits de l'Homme et de la Vie Politique* (Ivorian Foundation for the Observation and Monitoring of Human Rights and Political Life) or **FIDHOP**, *Action pour la Protection des Droits de l'Homme* (Action for Human Rights Protection) or **APDH**, and *Fideles a la Democtatie et a la Nation de Cote d'Ivoire* (Faithful to Democracy and the Nation of Cote d'Ivoire) or **FIDENACI**, all rights associations of Cote d'Ivoire, together with the **Republic of Cote d'Ivoire** and **Mr. Laurent Gbagbo**, all pleading as **APPLICANTS**, brought a case before the Court against **the Authority of Heads of State and Government of ECOWAS**, seeking to annul the Decisions of 7 and 24 December 2010 as adopted by the said Authority, in the terms of which Mr. Alassane Dramane Ouattara is recognised as the elected President of Cote d'Ivoire, and wherein it declared that the status of Mr. Alassane Dramane Ouattara as elected President of Cote d'Ivoire was non-negotiable by Mr. Laurent Gbagbo and enjoined Mr. Laurent Gbagbo to transfer power to Mr. Alassane Dramane Ouattara peacefully and without delay, and that in case of non-compliance, ECOWAS may be compelled to use force. Counsel for the Applicants was constituted by Maitres Claude Mentenon and Mohamed Lamine Faye, both lawyers registered with the Bar Association of Cote d'Ivoire.

2. By Ruling of 18 March 2011, the Honourable Court ordered the Member States and Institutions of ECOWAS to adhere strictly to the provisions of the new Article 23 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol on the Court, which states that:

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

   and adjourned proceedings on the matter for further hearing on the merits of the case.

3. However, by application dated 29 March 2011, registered at the Court Registry on 5 April 2011, Maitre Saidou Agbantou, a lawyer registered with the Bar Association of Benin, mandated by the Garde des Sceaux (Keeper of the Seals) Minister of Justice and Human Rights, who was standing in for the Prime Minister of Cote d'Ivoire, to represent and assist the Republic of

Cote d'Ivoire and Mr. Alassane Ouattara, filed a request for intervention on behalf of his clients, namely the Republic of Cote d'Ivoire (whose appearance in Court was assumed by Mr. Alassane Ouattara) and Mr. Alassane Ouattara.

4. The case was successively adjourned on 1 February, 2012 and 13 March, 2012 upon the request of the Applicants. The Applicants did not appear in Court nor did they put in a representation up to 31 October 2012 when the Court resumed hearing of the case. The Court noted that the Applicant had repeatedly failed to put in an appearance in Court, but equally observed that the Defendant, namely the Authority of Heads of State and Government of ECOWAS, put in an appearance in Court, represented by the ECOWAS Commission, whose representation was assumed by Maitre Youza Ouro Sama, Legal Adviser at the Legal Affairs Department of the ECOWAS Commission. The Court also noted that the Interveners, namely the Republic of Cote d'Ivoire and Mr. Alassane Dramane Ouattara, were represented in Court by their Counsel, Maitre Saidou Agbantou.

5. At the hearing of 13 March 2013, Counsel for the Interveners argued the following pleas in law in the form of orders sought from the Court:

Arguments pleaded by the interveners

6. The Interveners asserted:

   - That the Applicants, comprising FIDHOP, APDH, FINADECI, the Republic of Cote d'Ivoire (then represented by Mr. Laurent Gbagbo) and Mr. Laurent Gbagbo, by the substantive action contained in their Application of 24 December 2010, brought a case before the Court which sought to annul the Decisions of 7 and 24 December 2010 adopted by the Authority of Heads of State and Government of ECOWAS;

   - That the Ruling of 18 March 2011, referred to above, not only admitted the Republic of Cote d'Ivoire as a Party to the proceedings, as sought for in the substantive case, and represented by Mr. Laurent Gbagbo, but the ruling given, violated the interests of the Interveners;

   - That indeed, the Decisions of 7 and 24 December, as complained of in the substantive case, do state that ECOWAS recognises Mr. Alassane Ouattara as elected President of Cote d'Ivoire.

7. The Interveners therefore contended that the Republic of Cote d'Ivoire, now represented by its President and legitimately recognised as such by

ECOWAS in the person of Alassane Dramane Ouattara, may validly bring a case before the Honourable Court through its Agent or Counsel (or Lawyer) as was the case, and as provided for by Article 12 of Protocol A/P.1/7/91 on the Court (now Article 13 in the amended Supplementary Protocol A/SP.1/01/05 on the Court) to assert its rights, to the effect that the Republic of Cote d'Ivoire, represented by Mr. Alassane Ouattara, had not given any mandate to Lawyers Claude Mentenon and Lamine Faye Mohamed to file a case before the Honourable Court to complain of the said Decisions of the Authority of Heads of State and Government of ECOWAS, nor has the Republic of Cote d'Ivoire sought to suspend the use of force, nor requested that Mr. Laurent Gbagbo be compelled to transfer power to Mr. Alassane Dramane Ouattara without delay. That since the Republic of Cote d'Ivoire, now legitimately represented by its President Alassane Ouattara, has not filed any case in respect of the instant substantive proceedings, it follows nevertheless, that) he Republic of Cote d'Ivoire has an interest at stake in the procedure, in accordance with Article 21 of Protocol A/P.1/7/911 now Article 22 of Protocol A/AP1/01/05 as amended, which states that: ***"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."*** The Interveners therefore asked that the Court to grant their request to intervene.

OBSERVATIONS OF THE COURT

As to formal presentation

8. Whereas indeed, at the current stage of the procedure, it is undeniable that the Republic of Cote d'Ivoire is recognised as a Member State of ECOWAS whose President is Mr. Alassane Dramane Ouattara, who, besides, is the current Chairman of the Authority of Heads of State and Government of ECOWAS, and whereas the Interveners have every interest at stake in the matter, and whereas it is appropriate to state that the application for intervention is in line with the spirit and letter of Article 22 of the aforementioned Article 22 of the Supplementary Protocol, the request for intervention is therefore admissible.

As to the merits of the case

9. Whereas the Interveners further assert that after putting up a resistance in the transfer of power, thereby plunging la Cote d'Ivoire into a civil war, with a litany of attendant widespread human rights violations, Mr. Laurent Gbagbo now finds himself sued to Court and transferred to the International Criminal Court (ICC); in the light of all the foregoing, the Interveners ask

the Court to consider carefully and find that there has been a change in the trend of events, and thereby dismiss the requests brought by the NGOs named FIDHOP, APDH, FIDENACI and Mr. Laurent Gbagbo, in the name of Republic of Cote d'Ivoire, and adjudge that the Decisions of 7 and 24 December, 2010 of the Authority of Heads of State and Government of ECOWAS shall carry their full effects; whereas indeed when the procedure had reached this stage, by an application dated 20 July, 2011 and registered at the Court Registry on 25 July 2011, Mr. Laurent Gbagbo, assisted by another Counsel, Maitre Cire Cledor Ly, filed a case before the Court against the Republic of Cote d'Ivoire and Mr. Alassane Dramane Ouattara, for the violation of his political and human rights; whereas Counsel Maitres Mentenon and Faye did not appear in the first procedure, it must be closed; whereas indeed on 30 November 2011, the Honourable Court was informed on the Cote d'Ivoire media that in compliance with the international arrest warrant issued by the International Criminal Court (ICC) against Mr. Laurent Gbagbo, he had been transferred to the ICC at The Hague, in the Netherlands.

10. Whereas following that information, confirmed by Counsel for Mr. Laurent Gbagbo in the second procedure, the Court ordered the suspension of proceedings on the Applicant Laurent Gbagbo; whereas by the Ruling of 1 February 2012, it was decided that said proceedings be suspended; whereas during the hearing of 13 March 2012 in the first procedure of the instant case, Counsel for the Interveners, Maitre Saidou Agbantou, asked the Honourable Court to find and adjudge that the Application brought by FIDOP & Others and Laurent Gbagbo against the Authority of Heads of State and Government of ECOWAS had become devoid of purpose.

11. Whereas the Court shares the stand taken by the Interveners, and holds that since the Applicants have no mandate anymore, and have not appeared in Court any more in connection with the instant proceedings; and since the situation of the case has changed in the sense that Mr. Alassane Dramane Ouattara has been confirmed as legitimate President of la Cote d'Ivoire, the Court is of the view that the matter has become devoid of purpose, and must be declared as such.

FOR THESE REASONS

12. **The Court**,

Adjudicating in a public hearing, in a matter on legality of Community Decisions, in last resort;

- **Makes** a default ruling in regard to the Applicants;

- **Admits** the application for intervention filed by la Cote d'Ivoire and Mr. Alassane Dramane Ouattara, and declares that the said application is well founded in formal presentation and follows due process;
- **In terms of merits**, finds that the action brought by Mr. Laurent Gbagbo and Others against the Authority of Heads of State and Government of ECOWAS has become devoid of purpose;
- **Thereby declares that the instant action is devoid of purpose**;
- **As a result, and for the purposes of efficient administration of justice, orders that the case must purely and simply be struck off the cause list of the Court**;
- **Adjudges** that there are no grounds for the award of costs.

And the following hereby append their signatures:

1. **Hon. Justice Awa Nana Daboya** - *Presiding*
2. **Hon. Justice Benfeito Mosso Ramos** - *Member*
3. **Hon. Justice Hansine N. Donli** - *Member*
4. **Hon. Justice Anthony A. Benin** - *Member*
5. **Hon. Justice Clotilde Medegan Nougbode** - *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, IN NIGERIA

ON WEDNESDAY 31 OCTOBER, 2012

SUIT N^O: ECW/CCJ/APP/14/10
JUDGMENT N^O: ECW/CCJ/JUD/13/12

BETWEEN
BADINI SALFO ***- PLAINTIFF***
V
THE REPUBLIC OF BURKINA FASO ***- 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
1. **ISSA H. DIALLO** ***(ESQ.)*** **-** *FOR THE PLAINTIFF*
2. **MR. BRUNO BAMOUNI** - *FOR THE DEFENDANT*

-Violation of right to freedom and security -Legal time-limit for holding a person in custody -Arbitrary summoning for questioning and arbitrary detention -Presumption of innocence

SUMMARY OF FACTS

By Application received at the Court on 3rd December 2010, the Applicant Mr. Badini Salfo, brought his case before the Court for violation of his rights. He alleged that upon the pretext that he had bought two motor-cycles and one car in 3 days, the Search Department of the Burkina Faso Gendarmerie arrested him in September 2010, accusing him of being the architect of several attacks carried out in Burkina Faso and outside the country. When the legally provided time-limit for keeping him in custody expired, the Police continued to hold him in detention for 60 days without bringing him before a judge for trial, despite numerous steps taken by his Counsel, before the Public Prosecutor. He averred that his arrest and detention were arbitrary and violate Article 6 of the African Charter on Human and Peoples' Rights.

Burkina Faso stated in response, that within the framework of a joint collaboration between the Gendarmeries of Burkina Faso and Togo, to apprehend the perpetrators of an attack which occurred in Togo, investigations conducted by the Research Section led to Mr. Badini Salfo being identified as the ringleader of a criminal gang. Burkina Faso further claimed that the arrest and detention period lasted the time-period in which the negotiations were being carried out between Burkina Faso and Togo, towards extraditing the gang.

LEGAL ISSUES

1. *Is presumption of innocence violated where a person is arrested, held in custody, and presumed guilty?*

2. *Can justification be provided for holding a person in custody beyond the legally stipulated period?*

3. *Is a measure of unlawful custody sufficient to discontinue the prosecution of a person presumed guilty?*

DECISION OF THE COURT

Arresting and holding a person in custody on charges provided for and punishable under the law cannot solely constitute violation of presumption of innocence. However, holding a person in custody beyond the legally permissible time-limit is unlawful. Such an act calls for reparation but does not constitute a legal ground for discontinuation of proceedings.

The Court adjudged that the arrest of Mr. Badini Salfo is not arbitrary; but that holding him in custody beyond the period provided for by Law No. 017-2009/AN of 5 May, 2009 on Elimination of Bandits is unlawful and liable for reparation. The Court adjudged that violation of the right to equal protection of the law and the right to presumption of innocence were not established. The Court dismissed the requests for release of the Applicant and discontinuation of the proceedings instituted by the Applicant.

JUDGMENT OF THE COURT

PARTIES

Mr. BADINI Salfo, born 1st April 1965 at Bourzanga/Kongoussi, a Burkinabe national, who lives in secteur 24 of the Nongr-Massom district of the Commune of Ouagadougou, Rue 24.88 whose Counsel is Barr. H. Diallo, Lawyer registered with the Bar in Burkina Faso, who lives in Song-Naba at secteur 16 of the Boulmiougou district of the Commune of Ouagadougou, Rue 16,273, Immeuble des cail1oux, 1er etage au dessus de Ruben's Pressing, 01 BP 6529.

THE REPUBLIC OF BURKINA FASO, who was represented by its Agent, Mr. Bruno Bamouni, residing at Agence Judiciaire du Tresor located at 3rd Floor of Batirnent B of the Directorate General of Treasury and Public Accounts, Secteur 4, Quatier KOULOUBA, 806 Avenue de l'Independence, Avenue du Tresor, Commune de Ouagadougou.

PROCEDURE

1. By Application filed at the Registry the Court, on 3 December, 2010, which was rectified on 13 December 2010, Mr. Badini Salfo, through his Lawyer Ban. H. Diallo, Lawyer registered with the Bar in Burkina Faso, brought a case before the Court, seeking that the Court should note the violation by the Republic of Burkina Faso, of his fundamental human rights, as guaranteed under Articles 3 (2), 5, 6 and 7 (1b) of the African Charier on Human and Peoples' Rights, as well as a plea that the Court should order his immediate release, and the cessation of the said violations, by Burkina Faso.

2. Following the second service of the initiating Application effected on it, on 6 May 2011, upon request made on 11 April 2011, the Republic of Burkina Faso, represented by its Agent, Mr. Bruno Bamouni, the State Judicial Officer in the Public Treasury Department, through a correspondence dated 7 June 2011, but received at the Registry on 11 June 2011, requested for an elongation of time-limit, to enable him file his Memorial in Defence.

3. The Defendant State filed its Memorial in Defence on 28 July 2011, in which it raised objections to the allegations and claims made by Plaintiff, and plead with the Court to strike out the case, and order costs against Plaintiff.

4. The Court heard parties at its sittings of 17 November 2011, and 31 January 2012.

AS TO FACTS AND LAW

5. Plaintiff alleges the violation of his right to freedom and the security of his human person, the right to respect for, and the dignity of his human person, his right to the presumption of innocence, his right to equal protection of the law, as guaranteed respectively under Articles 3 (2), 5, 6 and 7 (1 b) of the African Charter on Human and People's Rights.

A) On the violation of Article 6 of the African Charter on human and Peoples, Rights.

- Plaintiff

6. Plaintiff alleges that, the Security Personnel, from the Search Department of the Burkina Faso Gendarmerie, during the month of September 2010 (15th to be precise), effected his arrest, at his, home, in Ouagadougou, on the grounds that he, Plaintiff could not afford to buy two motorcycles, and one car, for which he had just paid, within the space of three days, even if he pulled his resources together with his wife's, thereby accusing him of being the brain behind several armed robbery attacks that were perpetrated both within and outside of the Burkina Faso territory. He avers that he was taken to the Gendarmerie, the same day, together with all other persons, especially those that passed in front of his home, at the time of the arrest.

7. Counsel to Plaintiff avers that, at the expiration of the legal time - limit of preventive detention, he verbally informed the Chambers of the State Prosecutor, of Burkina Faso, on 27 September 20 10, of the presence of Plaintiff in the Gendarmerie, in violation of any legality, and all human rights protection instruments. He also states that, despite the promptness, with which the Chambers of the State Prosecutor reacted to the news, and requesting that Plaintiff be transferred to his own custody, pursuant to Article 39.1 of the Code of penal procedure, which provides that***: "Claims and counter claims shall be filed at the State Prosecutor 's Chamber, who shall decide on which action that shall be given to them, In case the matter is filed away, for lack of grounds, he shall so inform Plaintiff (...)"***, the said Gendarmerie failed to respond. Following this first set back, a correspondence, dated 21 October 20 10 was again forwarded to the Chamber of the State Prosecutor by Plaintiff, who had just spent a whole month in custody. He claims that despite the repeated request from the Chambers of the State Prosecutor, the officers of the Investigative Police, in the Search Department of the Gendarmerie, again failed to comply. He avers that, by so behaving, the said Officers have infringed upon Mr Badini Salfo's right to be heard by a competent Judge empowered by law, to

judge, and to guarantee, both individual and collective public freedom and liberties, pursuant to the provisions of Article 25 of the Constitution of Burkina Faso.

8. Plaintiff further avers that, having failed to be brought before a competent judge, he equally solicited, via a correspondence dated 29 October 2010, the intervention du Prosecutor General at the Court of Appeal in Ouagadougou, pursuant to Article 37 of the Code of Criminal Procedure, which provides that: ***"Security officers are placed; under the supervision of the State prosecutor (...)"***, and that, instead of transferring him to the custody of the Prosecutor, they rather organized a Press conference, and introduced him to the Press in Burkina Faso.

9. Plaintiff points out that, at the time his case was brought before the Honourable Court, he had spent more than 60 days in custody, in violation of every legality; consequently, he concludes that, not only his arrest and detention were arbitrary, and violate Article 6 of the African Charter on Human and Peoples' Rights, but also, he was prevented from being heard by a competent Judge empowered under the law.

The State of Burkina Faso

10. Concerning the arrest of Plaintiff, the Defendant State claims that on 21 August 2010, around 19 hours GMT, some armed robbers carried out an operation in Lorne, Republic of Togo. According to the indices found about the armed group of men, and firsthand information gathered, the Togo Gendarmerie came to the conclusion that the authors of armed robbery highly probably came from Burkina Faso. The Togo Gendarmerie therefore sent one officer, with a ***"Request for Assistance"*** dated 26 August 2010, and pleaded that the investigation should be carried out in Ouagadougou.

11. Defendant also claims that, having taken over the case, the Burkinabe Gendarmerie, through its Search Department, after investigation and information gathered in Ouagadougou, Mr. Badini Salfo, was the brain behind the group of armed robbers that struck in Lome. The Burkinabe Gendarmerie therefore arrested him, while he was in a meeting with other members of his gang, planning their next armed robbery operation.

12. According to Counsel to Defendant, the search conducted in the home of Mr. Badini Salfo, led to the seisure of the exhibits presented before the Honourable Court; he also points out that, from the proceedings, the items seized establish perfectly that Plaintiff is the presumed perpetrator of the acts, and above all, witnesses' accounts, claims and counter claims on

armed robberies, resulting in deaths, involving Plaintiff and his gang members, his own statements, as well as those of some members of his gang, and family, constitute serious grounds for indictment that make the Gendarmerie to conclude that ***"Mr. Badini Salfo and members of his gang are the presumed authors of the armed robbery that took place on the Togolese territory".*** Thus, Counsel to Defendant concludes that Mr. Badini Salfo was not arrested arbitrarily.

13. Concerning the period of custody for Plaintiff, the Defendant State claims that Mr. Badini Salfo and members of his gang were placed in custody on 16 September 2010, at 15 hours GMT. He adds that, considering the determination of the Togolese judicial authorities, requesting that Plaintiff and members of the dangerous gang that he heads be put at their disposal, informal exchanges were initiated by the Togolese judicial authorities, on the possible extradition of the presumed perpetrators to Togo. He further claims that the official request from the Togolese authorities ***"to transfer the presumed perpetrators"*** to Togo was only formalized on 2 November 2010, via correspondence no029174-GN/CAB/CB, and that these negotiations between the two countries required that Mr. Badini Salfo and his gang members be kept in custody, pending further instructions on the said negotiations, and the reply to give to them, as well as the need for the investigations, which were still ongoing, on each side of the two borders, in order to better examine the request from the Togo Gendarmerie. He rejects the allegations without proofs, by Plaintiff, seeking to make believe that the State Prosecutor of Burkina Faso was not aware of the proceedings, or that the Gendarmerie has brushed aside the instructions of the Tribunal, whereas the State Prosecutor of Burkina Faso was well acquainted with all goings-on about the case.

14. Defendant further points out that, once the doubt was removed from the Burkina Faso authorities intention not to transfer the indicted persons to the disposal of the Togo Gendarmerie, but to try them in Burkina Faso, Plaintiff was brought before the Tribunal, which, by a brief dated 24 December 2010, requested the examining Magistrate to initiate proceedings, and to place Mr. Badini Salfo and others under a committal order, for association of criminals, grave stealing and obtaining stolen goods, pursuant to Law no017-2009/1N on armed robbery.

15. According to the Defendant, Mr. Badini Salfo was thus indicted, and a committal order was issued against him on 27 December 2010 by the examining Judge, who, by an Order dated 21 June 2011, prolonged his preventive detention, with effect from 27 June 2011, ***"this order does not give any guarantee of being represented in Court."***

16. Thus, the Defendant State claims that Plaintiff was put in preventive detention, and that the proceedings were still ongoing, consequently, it concludes that the custody in which Mr. Badini Salfo is placed is not arbitrary, and that his right to be heard by a competent judge was not infringed upon.

Legal analysis by the Court.

i) As to the arbitrariness of Plaintiff arrest.

17. The Court notes that Mr. Badini Salfo was arrested within the framework of investigations opened by the Search Department of the National Gendarmerie of Burkina Faso, located in Ouagadougou, as a reply to the request for cooperation made on 26 August 2010, by the Director General of the Togolese National Gendarmerie, following an armed robbery that occurred on Togolese territory, on 21 August 2010, against the person of the Representative of **"Kanis International",** a corporate individual, whose Headquarters is in Ouagadougou. From the content of the aforementioned request for judicial cooperation, it can be deduced that the request specifically borders on the ***"identification (...) of a sample of (...) ammunitions"*** [which were said to have been used in the robbery operation.] The said correspondence also indicates that ***"exhibits and witnesses' accounts that were recorded relating to the perpetrators point to the conclusion that they came from Burkina-Faso"***. Thus, it appears, that Mr. Badini Salfo was arrested within the framework of the search for the perpetrators of the infringement on the penal law, notably on the strength of information, which portrayed him as the *"brain behind the gang of robbers"* that the Gendarmerie was looking for.

18. Article 6 of the African Charter on Human and Peoples' Right provides that: ***"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom <u>except for reasons and conditions previously laid down by law</u>. In particular, no one may be arbitrarily arrested or detained."***

19. **The Court believes that, according to the African Charter, any arrest that takes place, without legitimate or reasonable ground is arbitrary, and it violates the conditions previously established by law**. *Il ressort de l'analyse des elements du dossier que Monsieur Badini Salfo a ete arrete dans le cadre d'une enquete judiciaire pour des infractions penales*. **In these conditions, the Court is of a strong opinion that the arrest that took place, on the ground of the fight against highway armed robbery, and pursuant to the provisions of the penal law** (Code of criminal procedure and Law n017-2009/AN of 5 May 2009 on the fight against

highway armed robbery), **and above all, within the framework of judicial cooperation with the Togolese Authorities is not arbitrary**.

ii) On the arbitrariness of the police custody under which Plaintiff was placed.

20. The Court points out that even if the exact date of Mr. Badini Salfo's arrest does not appear clearly in the case file, (15 September according to Plaintiff and 16 according to the Minutes of the investigations proceedings), it nevertheless can be deduced that the placement of Plaintiff under police custody took place, on the strength of the existence of *"serious and incriminating indices of indictment"*; According to the Minutes of proceeding of the preliminary investigations, Plaintiff was placed under police custody from 16 September 2010 at 15 hours GMT to 15 hours GMT of 30 September 2010. The Court equally notes that Plaintiff was taken to Court in Ouagadougou during the month of December 2010, and that he was indicted and a committal order was made against him by the examining Magistrate on 27 December 2010.

21. **The Court holds that an arbitrary detention is any form of curtailment of individual liberty that occurs without a legitimate or reasonable ground, and is in violation of the conditions set out under the law. One or all of these indices shall be said to be missing, if the detention, which is, at the beginning, not arbitrary, but is too prolonged. It thus leads to an abusive detention. Hence, the essential legal issue is to determine is if, in the instant case, the curtailment of Plaintiff's liberty, which the police custody constitutes, took place without any reasonable or legitimate ground, and is in violation of the laws of Burkina Faso.**

22. Concerning putting a presumed criminal into police custody, the Burkina Faso criminal law envisages two situations. One of these is as provided for under Article 75 of the Code of penal procedure and the other is as provided for under Article 5 of Law no017-2009/AN of 5 May 2009 on the fight against highway armed robbery. The said Articles provide respectively thus:

Article 75 of the Code of penal procedure:

> *"If for the needs of the investigations, the investigating police officer is required to keep under his custody one or many persons against whom there exist very incriminating facts, as to indictment,* ***he cannot keep them for more than seventy two hours.***

*The State Prosecutor [of Burkina Faso] may grant authorisation to prolong the period of police custody by **forty - eight hours**."*

Article 5 of the Law on the fight against highway armed robbery:

*"If for the needs of the investigations, the investigating police officer or the Magistrate is required to keep under his custody one or many persons, mentioned under Article 2 (authors, co-authors, accomplices, receivers of stolen goods), **he cannot keep them/or more than ten days.***

*This period **may be elongated by five days**, upon authorization by the State Prosecutor of Burkina Faso."*

23. Thus, if, pursuant to Article 75 of the Code of criminal procedure, the period of police custody cannot exceed five (05) days, it cannot exceed fifteen (15) days, pursuant to Law n0017-2009/AN of5 May 2009 on the fight against highway armed robbery.

24. Whereas the Court notes that Mr. Badini Salfo was placed under police custody, pursuant to Law n0017-2009/AN of 5 May 2009, ,on the fight against highway armed robbery, as show on the minutes of proceedings of the preliminary investigations. In the instant case, pursuant to the penal law of Burkina Faso, the provisions of Article 5 of the said Law are applicable to the police custody under which he was kept.

25. The Court notes that between 16 September 2010, the date on which Plaintiff was put under police custody and 27 December 2010, the date on which he was indicted, 3 months and 8 days have lapsed. Furthermore, the Court notes that the Republic of Burkina Faso did not produce, in its writs and exhibits, the authorizations to elongate the period of police custody that the State Prosecutor of Burkina Faso should have approved, pursuant to the afore-mentioned Law. **The Court therefore holds that the period of police custody of Plaintiff exceeded ten days, and even fifteen days, if it were legally prolonged, all in total violation of Article 5 of the afore-mentioned Law**.

26. The Republic of Burkina Faso justifies that situation by the prevailing circumstances of the case, notably the existence of bilateral negotiations between the Burkinabe and Togolese authorities concerning the request for cooperation, made by the Togolese authorities, and which took the form of a request of extradition of the presumed authors and/or a request to hand over the said authors.

27. The Court now tries to unravel the genuineness of such claims as to constitute a legitimate or reasonable ground justifying the prolonged police custody of Mr. Badini Salfo, beyond the legally approved period.

28. But, before doing so, the Court notes that, concerning the crimes committed by Burkinabe nationals outside the shores of the country, the Burkina Faso Code of criminal procedure empowers the Burkina Faso Courts to adjudicate, this, under its Articles 670, 671, 672 and 674. Indeed, the said Articles provide as follows:

Article 670:

> ***"Any [Burkinabe] national who, outside the national territory*** *[of Burkina Faso] is found guilty of an offense, qualified as crime, and which is punishable under the [Burkinabe] law* ***shall he tried and adjudged by the courts [in Burkina Faso]****.*
>
> ***Any [Burkinabe] national who, outside the national territory*** *[of Burkina Faso] is found guilty of an act qualified as crime, and punishable under the laws [of Burkina Faso]* ***shall be tried and adjudged by the Courts [of Burkina Faso] if the offense is punishable by the law of the country where it was committed (...)****."*

Article 671:

> *"****Whoever has associated himself with a crime or an offense committed either on the territory [of Burkina Faso] or abroad shall be tried and adjudged by the [Burkinabe Courts]*** *if the offense is punishable both by the foreign law, and by the [Burkinabe law] on the condition that such an offense has been noted and adjudged as a crime, by a final decision/ram the foreign land's Court."*

Article 672:

> *"In a case of an offense committed against an individual, proceedings shall only initiated upon an Application by the Justice Ministry;* ***such an Application must be preceded*** *by a complaint from the aggrieved party or* ***by a formal information from the authorities of the country where it has been committed, to the [burkinabe] authorities.****"*

Article 674:

> ***"Shall he deemed to have been committed on the national territory [of Burkina Faso] any offense that is characterised by any of these constituting acts that are committed on the territory of [Burkina Faso]."***

29. The Court observes that, in these conditions, Burkina Faso produced, in its concluding, writs, two letters written to it, by the Togolese Authorities from which the first one concerns *"a request for judicial assistance",* the second relating to *"a request for extradition of the criminals."*

30. The Court notes that the first correspondence dated 26 August 2010, through which the Director General of the Togolese National Gendarmerie pleaded with the Chief of Headquarters of the Gendarmerie of Burkina-Faso to *"kindly do everything possible* ***to assist in identifying****, from his competent Commands,* ***a sample of (...) ammunitions****, which are currently under the custody of the Head of Search and Investigations Departments of the National Gendarmerie of Togo."* can really be understood to be a request for judicial assistance, aimed at furnishing information and exhibits. Such a correspondence predates the measure of police custody, and there is no request of extraditing the criminals, or any other request that could be likened to a request that could prevent the Burkinabe Authorities to initiate criminal proceedings against the presumed, perpetrators, pursuant to the afore - mentioned provisions of Articles 670, 671, 672 et 674 of the Code of criminal procedure, which grant jurisdiction to the courts in Burkina Faso, because of the nationality of the perpetrators, of the crime, the indictment for the crime, by both the Togolese and Burkinabe laws, the official denunciation of the robbery operations by the Togolese authorities to their Burkina Faso counterparts, the identification in Burkina Faso of an act, which is characteristic of the crime. The Court is of a strong opinion that such a request cannot constitute a legitimate or reasonable ground for the elongation of the period of police custody.

31. As for the second correspondence dated 2 November 2010, it makes one to believe that it is a request for judicial assistance, or extradition. Indeed, it is framed as follows: *"it is with great sigh of relief (...) that we learnt about the arrest, by your commands, of Messrs. Badini Salfo (...) and others, the presumed authors, and a group of criminals and perpetrators of armed robbery committed in Lome, on 21 August 2010 (...). Thus, in order to allow these presumed perpetrators to answer for the acts they have committed, before the Togolese Courts, in continuation or the judicial proceedings that have been initiated against them, for which a copy of the Minutes is hereby attached, I have the singular honour to request that you should kindly* ***put the afore-mentioned persons at the disposal of the Togolese National Gendarmerie (...)"*** After analysing the said correspondence, the Court notes that, at the date it was sent, the period of police custody had already been prolonged, beyond the legally approved period, all in violation of the Burkinabe law.

32. For all that, the Court observes that the Defendant State does not bring proof that the Burkina Faso courts were not in a position to exercise their jurisdiction over cases of criminal activities committed on the territory of Togo, by Mr. Badini Salfo, for the offenses he is accused , or in doing so, it could lead the national courts in Burkina Faso to act in a manner which is incompatible with the conventional obligations that bind the two countries, in terms of extradition, and judicial assistance in criminal matters.

    There is nothing, in the Burkinabe laws that prevents the Defendant State, from referring Mr. Badini Salfo's case to the Burkina Faso Courts, in order to examine the requests from the Togolese authorities, regarding extradition and judicial assistance**. In these circumstances, the request for cooperation made by the Togolese authorities, no matter what form it took (whether written or oral) or even the subject-matter of such request, cannot be admitted by the Court, as constituting a legitimate or reasonable ground for the elongation, beyond the legally approved period, of the police custody of Mr. Badini Salfo**. Consequently, the Court concludes that the elongated police custody of Plaintiff was abusive.

33. **From all the foregoing, the Court declares that there is partial violation of Article 6 of the African Charter on Human and Peoples' Rights.**

B. On the violation of Article 5 of the African Charter on Human and Peoples' Rights.

34. Plaintiff claims that during his detention, he was put in chains, from hands to legs, like a wild animal, and was deprived of food, for two weeks, and was put to moral torture, all these which are debasing to human dignity. He supports his claims with the facts that, by arresting and detaining him as the Defendant State did, all in violation of Articles 75 of the Code of criminal procedure applicable in Burkina Faso, and 5 of the Law on the Fight against Highway armed robbery, despite the injunctions of the judicial authority, for more than sixty (60) days, the Republic of Burkina Faso has failed in its obligations which are binding on it, pursuant to Article 5 of the Charter. He further claims that, by depriving him of his right to have his case heard by a competent judge, during the legal period of police custody, in order that the judge could examine his indictment or otherwise, constitutes a cruel and inhuman treatment. Thus, he concludes that The Defendant State has violated his human rights, as guaranteed under Article 5 of the African Charter on Human and Peoples' Rights, which provides that: ***"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of***

exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"

The Republic of Burkina Faso

35. Counsel to the Republic of Burkina Faso did not raise any counter view concerning this claim.

Legal Analysis by the Court.

36. The Court notes that Mr. Badini Salfo alleges that he was put to moral torture, due to the conditions of his detention and that he was subjected to cruel and inhuman treatment, because the Defendant State failed to bring him before a competent judge.

37. The Court observes that Plaintiff did not show any proof for this allegation. He did not even make any edifying description of ill-treatment that he suffered, of those who meted them out on his person, of circumstances of times and places that these treatments took place. Worse still, he does not even show the moral sufferings that he underwent, or the body pains that he felt, owing to the acts that he alleges were meted out on his person. The Court can, therefore, not adjudicate on this claim.

38. Moreover, since the Charter does neither define what constitutes **"cruel, inhuman or degrading treatment"** nor indicate the acts that can be termed as constituting that category of treatment, the Court holds that a treatment is **"inhuman"** if it is meted out to intentionally inflict heavy mental sufferings or great physical pains on the sufferer; such a treatment is **"cruel"** if it connotes a disregard for the fragility for the human person, and greatly hits human conscience; it is **"degrading"** if it is meted out, with a view to humiliate, de debase or to touch negatively the human dignity of the person, to whom it is inflicted. Thus, a cruel, inhuman or degrading treatment is any infringement upon the physical integrity, and moral wellbeing of the human person, with the intention to harm, to inflict great atrocity or humiliate. Consequently, the fact that the failure on the part of the Defendant State to bring Plaintiff before a competent judge, cannot be examined, and likened to a cruel, inhuman or degrading treatment. Hence, there is no violation of Article 5 of the Charter, on this premise.

39. However, the Court notes that Article 7.1(d) of the Charter provides that: **"Every individual shall have the right to have his cause heard. This comprises: (...) the right to be tried within a reasonable time by an**

impartial Court or tribunal."; also, the Court observes that Article 9.3 of the International Covenant on Civil and Political Rights, which Burkina Faso ratified on 4 January 1999 provides that: **"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or any other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release (...)."**

40. The afore-mentioned provisions constitute good complementary leverage that guarantees to an individual, the right to benefit from a trail that takes place within reasonable time; therefore, national judicial authorities are under the obligation to act with the required diligence so that, at all levels of the criminal procedure, (investigation, examination of the case, and judgment) there is no considered, excessive or unjustified delay, Thus, any excessive or unjustified delay that crops up at the stages of the procedure inevitably affects the right to be tried within reasonable time. The claim that Plaintiff was not taken before a competent judge, within the legally approve period of police custody, so that the judge could examine whether he was guilty of the offence, can be analysed autonomously, whether in the eyes of the Charter or the Covenant.

41. The Court holds that, for the Burkinabe authorities to have arrested Plaintiff on 16 September 2011, placed him in police custody beyond the legally approved period, without legitimate and reasonable ground, before presenting him to a judge on 27 December 2011, has manifestly elongated, in a manner that is prejudicial to the whole procedure that could lead to the trial of Plaintiff. The Court therefore concludes that there is violation of Articles 7.1(d) of the Charter and 9.3 of the International Covenant on Civil and Political Rights.

C. On the violation of Article 7. 1(h) of the African Charter on Human and Peoples' Rights.

Plaintiff

42. Mr. Badini Salfo claims that, by introducing him to the Press during November 2010, and labeling. him as the head of an armed robbery gang "who was creating terror, both in Burkina Faso and beyond [the] borders [of Burkina Faso]" and as a "criminal" has infringed upon his right to presumption of innocence and **"thus pronouncing a judgment against him whereas his case was yet to be taken before a competent judge."**

The Republic of Burkina Faso

43. Counsel to the Republic of Burkina Faso did, not raise any counter view concerning this claim.

Legal Analysis by the Court.

44. Article 7.1(b) of the Charter provides:

> **"every individual shall have the right to have his cause heard. This comprises: the right to be presumed innocent until proved guilty by a competent Court or tribunal (...)"**

45. To arrive at the conclusion that his introduction to the Press constitutes a violation of his right to presumption of innocence, Plaintiff also bases his claim, apart from this introduction to the Press itself, on the sensational coverage that one of the dailies in Ouagadougou « L'Observateur Paalga » has done of it, in its issue n0 7760 of Friday 19 to Sunday 21 November 2010, which he tendered before the Court, and refers to the article written on it at page 7 of the said issue. The Court also notes that Plaintiff has accused the republic of Burkina Faso, of this alleged violation.

46. Article 1(k) of the ECOWAS Protocol on Democracy and Good Governance, which came into effect on 20 February 2008 ranks the freedom of the Press under the principle of Common Constitutional Convergence in all ECOWAS Member - States; Article 37 (1) of the said Protocol provides that:

> **"Member States resolve to work for the plurality of information, and the development of the media outfits."** As for Article 9 of the Charter, it provides that: **"(1) Every individual shall have the right to receive information. (2). Every individual shall have the right to express and disseminate his opinions within the law."**

Article 19 of the International Covenant on Civil and political Rights provides that:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. ***The exercise of the rights provided for in paragraph of this article carries with it special duties and responsibilities, It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:***

   (a) ***For respect of the rights or reputations of others;***

   (b) ***For the protection of national security or of public order (ordre public), or of public health or morals."***

47. Pursuant to the afore-mentioned legal instruments, the right to information, and the freedom of the Press are guaranteed by the State, which ensures that they are effective. The State is also under the obligation to allow citizens enjoy the exercise of this right, and freedom, in order that the rights and reputations of other citizens are preserved, as well as national security, public order, the health and public morals are safeguarded. The State shall make those who exercise these rights to be aware of special duties, and responsibilities, which are binding on them, and shall create the enabling institutional regulating environment, which relate to the respect for these rights.

48. The Court wishes to point out that the degree of freedom that characterises the opinion that is expressed in the Press, is such that, at first sight, the statements and information given in articles that are written in daily newspapers can only be taken as the views of their authors, in such a way that only such authors can be held responsible for the damaging consequences that result from the freedom of expression in the Press; it is difficult to accuse, directly, the State, for being responsible for such damaging consequences.

49. In such circumstances, the Court holds that the State can only be accused of violating the right to presumption of innocence if it were established that its officials, through their own acts of commission or omission, made an individual to appear as "guilty" of the crimes that he is accused, even before a Court judgment. In the instant case, Plaintiff has not brought before the Court proof of a declaration, a statement, an act of serious consequences, for which either the Republic of Burkina Faso or any of its officials can be blamed, seeking to introduce Plaintiff to public opinion as being "guilty". Also, Plaintiff did not show that there was a concerted effort between the Press and the Burkinabe authorities, to introduce him to public opinion under such appellation. For all that, the Court notes that in the Court processes that they filed, during the procedure in the instant case, Counsels to the Republic of Burkina Faso were so careful to name Mr. Badini Salfo as "presumed author".

50. Hence, the Court concludes that, in the instant case, the claim on the violation of the right to presumption of innocence cannot prosper.

D. On the violation of Article 3.2 of the African Charter on Human and Peoples' Rights.

Plaintiff

51. Plaintiff pleads the violation of the right to equal protection under the law, on the ground that the Republic of Burkina Faso kept him in police custody beyond the legally approved period.

52. Counsel to the Republic of Burkina Faso did not react to this claim.

Legal analysis by the Court.

53. Article 3.2 of the Charter provides: **"(...) every individual shall be entitled to equal protection of the law."**

54. As the Court had already made it abundantly clear in its Judgments in both the **Coordination Nationale des Delegues Departementaux de la Filiere Cafe Cacao v. Republic of Cote d'Ivoire of 17 December 2009 (§55)** and **Professor Etim Moses Essien v. Republic of the Gambia of 29 October 2007 (§31)** cases, equality before the law presupposes that equal treatment be accorded people finding themselves in similar situations. Thus, examining the allegation of the violation of the principle of equality requires that, at least two similar legal situations be put side by side, so as to compare, and find out whether unequal treatment was concretely meted out to either one or both of them. In the instant case, Plaintiff does not report any judicial situation that he is comparing with his own situation, to which the Republic of Burkina Faso applied different laws; he only brings to knowledge of the Court, his own situation. Consequently, the Court holds that the claim on the alleged violation of Article 3.2 of the Charter is ill-founded, therefore, it cannot prosper.

E. On the request for immediate release and cessation of all forms of proceedings against him.

Plaintiff

55. Considering all the alleged violations, Plaintiff pleads with the Court to order his immediate release, as well as the cessation of all proceedings against him.

The Republic of Burkina Faso

56. According to Counsel to the Republic of Burkina Faso, since Plaintiff was no longer in police custody, but in preventive detention, the only alternative for him was to apply for provisional release; he therefore erred in law, to plead with Court, to order the investigating judge, to effect his immediate release.

57. Counsel to Defendant claims that there is no means of fact or of law that underlines such a claim on the part of Plaintiff. This is because, on the one hand, the legally approved period for preventive detention has not yet expired; on the other hand, there was no vice, nor any irregularity attached to such a detention; finally, even if the police custody was illegal, as it were, it did not have any negative impact on the following stages of the procedure, because the period of police custody is not an obligatory stage, in the procedure, and which must take place before the period of preventive detention, in such a way that if one is stained with irregularity, the other must necessarily be so affected. He thus deduces that a probable canceling of the police custody has a limited effect, and cannot have any consequence, as to lead to the release of Mr. Badini Salfo.

58. He further points out that if by any eventuality the Court accedes to Plaintiff's plea for release, while the proceedings are still on - going, the Republic of Burkina Faso and other countries are at the risk of having highway armed robbers continue their menace, with impunity; within the sub-region, thereby compromising the fight against money laundering, and organized crimes. Hence he pleads with the Court to examine, *in concreto*, the delicate nature of investigations on highway armed robbery in Africa, and the necessary duration for a transborder investigation on an organized crime, involving a very dangerous gang having external branches and in which the Gendarmerie of two neighbouring countries are cooperating, and, consequently, reject the allegations made by Plaintiff.

Legal Analysis by the Court

59. Whenever the Court observes that there is human rights violation, the measures that it orders have, as final aim, the cessation of the said violations and reparations. The Court takes into account, the circumstances for each case, in order to make adequate orders. The legitimacy of the measures as well as their chances of realisation are the principles that guide the Court, in its pronouncements. When examining a case, whose proceedings are still on-going in a Member State, the decisions of the Court are not geared towards interfering with the decisions that national courts shall take in their

own proceedings. The Court cannot make orders, whose enforcement shall be seen to weaken or rubbish the authority and independence of the judge in the national Court, in the examination of cases that are brought before it.

60. From the exhibits contained in the case file, it can be deduced that the grievances of human rights violation, for which the Republic of Burkina Faso is accused, are within the framework of 3 criminal procedure, still on-going, pursuant to the provisions of laws and rules in vogue in that country. In this regard, the Court already found out that, if Plaintiff's arrest for the acts provided for, and punishable under the laws of Burkina Faso, is not arbitrary, pursuant to Article 6 of the African Charter on Human and Peoples' Rights, the police custody that Plaintiff was placed, went beyond the legally approved period, and therefore, was abusive, and, as such, constitutes a violation of the same Article.

61. The Court points out that Article 6 of the Charter provides for the restriction of freedom of movement, on the grounds and conditions that are provided for under the law; the Court also points out that Mr. Badini Salfo was, after the period of police custody, indicted, and placed in preventive detention, by the investigative judge, on the basis of the crimes for which he is accused; the Court thus holds that such a detention, premised on legal basis, is pursuant to the provisions of Article 6 of the Charter.

62. Pursuant to Article 9(5) of the International Covenant on Civil and Political Rights, which provides that: ***"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."*** the Court believes that the abusive nature of the length of keeping Plaintiff under police custody, at least opens the way for Plaintiff to reparation, but, at the same time, cannot be genuine ground to either make an order for the release of Plaintiff, or the cessation of the trial, which is pursuant to the law; hence, the Court declares that his pleas should be rejected.

DECISION

For these reasons,

63. The Court, sitting in a public hearing, after hearing both parties, and after deliberating:

On violations

- **Declares** that Mr. Badini Salfo's arrest is not arbitrary;

- **Declares** however, that the period of police custody of Plaintiff which went beyond the legally approved period, under Law N°017-2009/ AN of 5 May 2009, on the Fight against highway armed robbery, is abusive;

- **Consequently, declares** that there is partial violation of Article 6 of the African Charter on Human and Peoples' Rights;

- **Declares** that the acts of torture and inhuman and degrading treatments invoked by Mr. Badini Salfo, pursuant to Article 5 of the Charter, are not established;

- **Declares** that, for arresting, and keeping Plaintiff in police custody, from 16 September 2011, and failing to bring him before a judge, not until 27 December 2011, making a period of more than three months, constitutes a violation of Articles 7(1)(d) of the Charter, and 9 (3) of the International Covenant on Civil and Political Rights;

- **Declares** that the violation of the right to equal protection under the law, and of the right to the presumption of innocence, as alleged by plaintiff, and which are respectively provided for under Article 3 (2) and 7 (1) (b) of the Charter is not established;

On reparation

- **Declares** that the abusive period of police custody, under which Plaintiff was kept, opens the way for reparation;

On the pleas made by the Plaintiff

- **Rejects** the request for immediate release, and the cessation of the trial, as solicited by Plaintiff.

COSTS

64. Pursuant to Article 66 (4) of its Rules of procedure, the Court declares that each party shall bear its own costs.

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

65. **AND THE FOLLOWIG HAVE APPENDED THEIR SIGNATURES:**

Hon. Justice Awa NANA DABOYA - *President*
Hon. Justice Clotilde MEDEGAN NOUGBODE - *Member*
Hon. Justice Eliam M. POTEY - *Member*

Assisted by **Mr Athanase ATANNON** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, THE 31ST DAY OF OCTOBER, 2012

SUIT N°: ECW/CCJ/APP/14/11
JUDGMENT N°: ECW/CCJ/JUG/14/12

BETWEEN
BATIONO IDA FLEUR PELAGIE ***- PLAINTIFF***
V.
THE STATE OF BURKINA FASO ***- DEFENDANT***

COMPOSITION OF THE COURT

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

ASSISTED BY
ATHANASE ATANNON ESQ. - *REGISTER*

REPRESENTATION TO THE PATIES

1. **ISSA H. DIALLO,**
LAWYER AT THE BAR OF BURKINA FASO - FOR THE PLAINTIFF

Human Rights Violation -Presumption of innocence -Arbitrary Detention - Right to effective appeal - Inadmissibility -Articles 9(4) and 10 (d) of the Supplementary Protocol on the Court - Articles 5 & 7 of the African Charter on Human and Peoples' Rights.

SUMMARY OF FACTS

Plaintiff, against whom an international warrant of arrest was issued, stood trial on charges of fraud, before she was later incarcerated at the ***'maison d'arrêt et de correction de Ouagadougou'*** *following a committal order made by the investigating judge, and pursuant to the provisions of the Penal Code, as well as the Code of Penal Procedure* of *Burkina Faso.*

While she was still leaving under the effect of the committal order, Plaintiff made two requests of provisional release, dated 29 March 2010 and 12 April 2010, respectively. While confirming the two orders on the refusal for provisional release, the indictment Chamber in the Court of Appeal in Ouagadougou ordered that Plaintiff should be kept in detention. She thus invoked the violation of her rights as a citizen, and a denial of justice.

LEGAL ISSUES

Can Plaintiff validly invoke the violation of her fundamental human rights, whereas she was under an international warrant of arrest, and a committal order issued against her, pursuant to the instant laws of Burkina Faso?

DECISION OF THE COURT

In its judgment, the Court declared as admissible the human right violation case brought against the Defendant State, but held that Plaintiff was not detained arbitrarily, because her detention was pursuant to the legal texts in vogue, and that there was no violation of the right to the presumption of innocence, since Plaintiff exercised her right to effective appeal.

JUDGMENT OF THE COURT

1. By application received at the Registry of the Court on 14 July 2011, Mrs. Ida BATIONO Ida Fleur Pelagie, president of the NGO "Support for the Development of the Rural World" (ADR), having represented by Mr Issa H. Diallo, Lawyer registered at the Bar of Burkina Faso; sued the State of Burkina Faso for the violation of her human rights.

Facts

The facts according to Applicant

2. Mrs. Bationo Ida Fleur said she was being prosecuted for fraud and incarcerated at the Ouagadougou prisons following purchases made by her on behalf of her NGO.

3. She states that the record of the proceedings against her was sent to two investigation offices, that based on the provisions of the penal code and the criminal procedure code of Burkina Faso, she sought in vain for her provisional release on 29 March 2010 and 12 April 2010, even though she was placed in custody since 30 April 2009, without being heard on the merit.

4. The Applicant adds that the Indictment Division of the Court of Appeal of Ouagadougou confirmed on 28 April 2010 the two orders rejecting her application for bail; and till the time of her application to this Court, that three other orders rejecting her release which she appealed are yet to reach the Indictment Division for lack of diligence on the part of Courts of her country.

5. She states that no decision of a higher court intervened for the past seven months, and that this constitutes an abuse and arbitrary detention against her; that the failure to adjudicate on her appeal for seven months constitutes a fault of the Indictment Division engaging the responsibility of the State of Burkina Faso, who by failing to call its Agent, has failed to protect its citizens' rights.

Arguments of the Applicant

6. Mrs Bationo relies on Article 3 paragraph 2 of the Constitution of Burkina Faso; 6 and 3, paragraph 2, 5 and 7 of the African Charter on Human Rights and Peoples.

7. The Applicant contends that by refusing to adjudicate on her application' for bail for seven months, even though she was not heard on the merits, the State of Burkina Faso, through its courts, did not comply with the above-mentioned texts, and therefore violated her human rights.

8. The Applicant also argues that the State of Burkina Faso subjected her to mental torture and violated her right to dignity, when its courts refused to proceed with the trial of her case or concede to her application for bail; she cites in this regard Article 5 of the African Charter on Human and Peoples' Rights as well as Article 7 of the Charter; and argues that the trial of her case was only, even though the judge has a duty to try prosecution and defence. Mrs Bationo solicits for her release based on the abovementioned arguments.

The facts as exposed by the Defendant

9. The State of Burkina Faso on its part stated that Mrs. Bationo Ida Fleur Pelagie was arrested in 2009 in Brazzaville, Republic of Congo, following a complaint filed against her for fraud, and in the execution of an international arrest warrant issued against her.

10. The Defendant therefore stated that the Applicant was incarcerated at the Ouagadougou prisons pursuant to a detention order issued against her by the Trial Judge in charge of the proceedings against her.

11. That on 29 March and 12 April 2010, she submitted two applications for bail which resulted in rejection orders made by the Trial Judge respectively on 08 and 20 April 2010;

    - That concerning her appeals, the Indictment Division of the Court of Appeal of Ouagadougou confirmed the orders rejecting her applications for release.

    - That, however, on 4 October 2010, the Applicant again submitted to the trial judge three new applications for release, all of which were dismissed by orders dated 11 October 2010 which were also appealed.

12. The State of Burkina Faso said that all application for release by the Applicant were considered by the competent Courts, and were subject of decisions, and that the appeal process is underway as regards her last appeals.

The arguments of Defendant

13. As such, the State of Burkina Faso refutes accusations of violations of human rights claimed by Mrs. Bationo; against it and states, first, that the

Applicant was not unduly detained or arbitrarily, and secondly that the presumption of innocence and the right to be heard by an independent tribunal was not been violated with regard to her. Indeed:

Concerning allegations of abusive and arbitrary detention

14. The State of Burkina Faso believes that the allegations of abusive and arbitrary detention sustained by the Applicant are unfounded; it claims that the provisions of Article 2 paragraph 3 of the Constitution of Burkina Faso, Articles 2 and 6 of the African Charter on Human and Peoples' Rights, relied on by the Applicant in support of her claims cannot be applied in the present case.

15. The Defendant explains that detention can only be described as arbitrary if it is contrary to the standards set out in the Universal Declaration of Human Rights or international treaties ratified by the State of Burkina Faso, and adds arbitrary detention implies:

    - The inability to invoke any legal basis whatsoever to justify the deprivation of liberty;

    - The inability of the person concerned to exercise the rights and freedoms proclaimed by Articles 7, 13, 14, 18, 19, 20, 21 of the Universal Declaration of Human Rights, and as far as the States concerned are parties to the International Covenant on Civil and Political Rights;

    - The total or partial non-observance of standards concerning the right to a fair hearing set out in the Universal Declaration of Human Rights and in international instruments accepted by the States concerned.

16. The State of Burkina Faso stated that contrary to the allegations of the Applicant, she was prosecuted and detained in the context of judicial proceedings and on the basis of criminal law of Burkina Faso, including the Penal Code and the Code of Criminal Procedure; and concludes that none of the above mentioned criteria are established, the Applicant cannot validly invoke the provisions of the African Charter on Human and Peoples' Rights and those of the Constitution of Burkina Faso to support that she is in arbitrary detention and that her right to liberty was violated.

Concerning the violation of the principle of the presumption of innocence and the right to be heard by a court:

17. The Applicant accused the State of Burkina Faso for having violated her right to presumption of innocence and to be heard by a court due to repeated extension of her detention.

18. The State of Burkina Faso disagreed with Mrs. Bationo saying that she was regularly heard by competent courts that ruled on her case, and she even had the opportunity to appeal decisions rendered against her.

19. The Defendant added that it scrupulously observed the principle of the independence of the judiciary *vis-a-vis* the executive refraining from interfering in the proceedings against the Applicant.

20. And the Judge's refusal to grant bail to a prisoner cannot be likened to a violation of the person's right to be heard; he said that if texts imposing a delay to the Indictment Division to rule on appeals against orders of refusal to release by the trial judge, the time taken by the Indictment Chamber for the review of appeals by applicant against orders rejecting his release cannot be compared to a denial of justice.

21. The defendant therefore concludes that the allegations of violations of the right to be heard and the presumption of innocence raised by Mrs. Bationo are unfounded.

Analysis by the court

As to Formal Presentation

22. The application filed by Mrs. Bationo against the State of Burkina Faso complies with the requirements of Articles 9, paragraph 4, and 10 (d) of Supplementary Protocol on the Court; it should also be declared admissible.

As to the Merit of the case

23. First, the Applicant alleged that her detention was abusive and arbitrary, and secondly that her rights to be heard and the presumption of innocence were violated.

Concerning allegations of abusive and arbitrary detention

24. Mrs. Bationo Ida Fleur Pelagie maintains that her detention was arbitrary and abusive, to support this claim she cites both the provisions of the Constitution of Burkina Faso and the African Charter on Human and Peoples' Rights.

25. On the contrary, the State of Burkina Faso considers that the allegations of the Applicant are unfounded because her detention was carried out in accordance with the laws in force in Burkina Faso.

26. The Court notes that Mrs. Bationo Ida Fleur Pelagie Was arrested following a complaint filed against her for fraud, and the execution of an international arrest warrant issued against her by a court of Burkina Faso.

27. The Court notes that after her arrest, a warrant issued against the Applicant by the trial Judge of Chamber No. 2 of the High Court of Ouagadougou, led to her incarceration at the Ouagadougou prisons.

28. The Court also notes that Mrs. Bationo appointed a lawyer, and that this lawyer addressed several application for release for his client on which the Judge ruled by rejection orders; he also appealed against these rejection orders, some of which have already been confirmed by the Indictment Division of the Court of Appeal of Ouagadougou.

29. All things considered, the Court found that the arrest and detention of the Applicant had a legal basis; and that the procedure against her conforms to the criminal legislation in force in Burkina Faso and applicable to anyone who may find themselves in its singular situation.

30. The Court concludes from the foregoing that the international instruments cited by the Applicant, in particular Article 3 paragraph 2 of the African Charter on Human and Peoples' Rights which states that **"Every individual shall be entitled to equal protection of the law"**; and Article 5 of the Charter reads **".... Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"**; were not violated by the State of Burkina Faso, and accordingly considers that the detention of Mrs. Bationo is not arbitrary and that her right to equal protection before the law was not violated either.

On the alleged violations of the right to the presumption of innocence and the right to be heard by a court.

31. Mrs Bationo accuses the State of Burkina Faso for having violated her right to presumption of innocence and to be heard because the Indictment Division of the Court of Appeal of Ouagadougou has not ruled on her appeal initiated for over seven months by a rejected order of release by the trial judge; it

cites in support of Article 7, paragraph 1b of the African Charter on Human and Peoples' Rights, which states:

a) **"Every individual shall have the right to have his cause heard. This right includes:**

b) **The right to be presumed innocent until proved guilty by a competent court or tribunal".**

32. The Court observes that the presumption of innocence implies that every person is supposed to be innocent as long as a competent court has not decided on his guilt and has not been convicted of the offense that he is charged with; it prohibits all statements, all events, attitudes or behaviour likely to believe that a person is guilty before that person is declared as such by the competent court in the context of a judicial proceedings.

As for the right to be heard, it imposes on the State the obligation to ensure a fair hearing for anyone suspected of reprehensible acts.

33. By comparing these rights enshrined in international instruments protecting human rights, especially the above-cited Charter, facts of the present case, the Court recalls that sometimes the Indictment Division ruled on several appeals filed by Mrs. Bationo against the orders of the trial judge rejecting her release but also that the law did not set a specific time limit for this appeal court to rule on the appeals brought before it.

34. The Court also recalled noting that the proceedings against the Applicant has a legal basis and is applicable to any person who would be in her unique situation, but also that the Applicant appointed a lawyer and that this lawyer has filed appeals on her behalf against the orders of the judge refusing her release and most of which have led to judgments by the Indictment Division.

35. The Court inferred from the foregoing that the courts of Burkina Faso heard the case of the Applicant, and that therefore the Defendant has not violated her right to presumption of innocence.

36. All things considered, the Court found that the allegations of violations of the right to be heard and the right to presumption of innocence made by Mrs. Bationo are unfounded and should be rejected.

For These Reasons,

The Court, ruling publicly, contradictorily, in terms of human rights, first and last instance;

As to Formal Presentation,

- **Declares** admissible the application for human rights violation filed against the State of Burkina Faso by Mrs. Bationo Ida Fleur Pelagie,

As to the Merit of the case

Considering that Mrs. BATIONO Ida Fleur Pelagie alleged that the State of Burkina Faso has wrongfully arrested and detained her arbitrarily and violated her right to be heard and her right to the presumption of innocence;

Considering that the Applicant was arrested and detained under an international warrant and a committal order issued against her by the Court of Burkina Faso in accordance with existing regulations;

- Whereas the Applicant was presented before the competent courts, appointed a lawyer has exercised her right of appeal;

The Court finds:

1) the detention of Mrs Bationo Ida Fleur Pelagie was not arbitrary;

2) the right to be heard of Madame Bationo Ida Fleur Pelagie was not violated by the State of Burkina Faso;

3) that Madame Bationo Ida Fleur Pelagie's right to presumption of innocence of was not violated by the State of Burkina Faso:

Therefore the Court rejects all allegations of violations of human rights claimed by Mrs Bationo Ida Fleur Pelagie against the State of Burkina Faso.

The Court allows each party to bear the cost.

Thus adjudged and delivered in open Court in Abuja by the Community Court of Justice, ECOWAS, on the day, month and year mentioned above.

Signed:

Hon. Justice Awa NANA DABOYA - *President*
Hon. Justice Clotilde Medegan NOUGBODE - *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 THURSDAY, THE 1ST DAY OF NOVEMBER, 2012

SUIT N^{O}: ECW/CCJ/APP/29/11
RULING N^{O}: ECW/CCJ/RUL/16/12

BETWEEN
R.S.M. AUDU DAFFI (R.T.D.) - *APPLICANT*
V.
FEDERAL REPUBLIC OF NIGERIA - *DEFENDANTS*

COMPOSITION OF THE COURT
1. **HON. JUSTICE M. B. RAMOS** - *PRESIDING*
2. **HON. JUSTICE C. N. MEDEGAN** - *MEMBER*
3. **HON. JUSTICE E. M. POTEY** - *MEMBER*

ASSISTED BY
ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES
1. *APPLICANT NOT REPRESENTED*
2. **SUNDAY A. OKOH (ESQ.)** - *FOR THE DEFENDANT*

Want of Diligent Prosecution -Withdrawal of Suit.

SUMMARY OF FACTS

The Applicant lodged an Application on the 14th of November, 2011 against the Defendant for alleged violation of Articles 4, 5 and 6 of the African Charter on Human :and Peoples' Rights, The case was fixed for hearing on 3rd October, 2012 and the Applicant was absent while the Defendant was represented on the said date, The Court was however, informed by the Registry that the Applicant intends to withdraw the suit There was also an oral application by the Defendant Counsel to strike out the suit.

LEGAL ISSUES

Whether the suit can be struck out for want of diligent prosecutions

DECISION OF THE COURT

The Court observed the absence of the Plaintiff on two occasions without any reason, and also takes into account that, once a citizen comes to the Court to seek justice, he has to take his application seriously, In the circumstance, the Court holds that the absence of the Applicant and lack of representation for the second time, has left the Court to assume that he is not interested in the continuation of the case. Consequently, the Court strikes out the case from the Cause list.

RULING OF THE COURT

1. The Applicant herein, R.S.M Audu Daffi (Rtd) lodged an Application at the Registry of the Community Court of Justice, ECOWAS, on the 14th day of November, 2011, against the Defendant, The Federal Republic of Nigeria.

2. The Application is for alleged failure of the Defendant to protect the Applicant as contemplated and provided for by *Article* 6 *of the African Charter on Human and Peoples' Rights.* The Applicant also alleged that the Defendant grossly violated his right to life as enshrined under *Article* 4, 5 *and 6 of the African Charter on Human and Peoples' Rights.*

3. This case was fixed for hearing on the 3rd day of October, 2012. On the said date, the Applicant was not represented in Court while the Defendant was represented by Mustapha Nana (Miss) and Ngosoo Uchegbu (Mrs). The Court was informed by the Registry that, the Applicant's Counsel has indicated his intention to withdraw the matter. Counsel for the Defendant, Mustapha Nana (Miss) made an oral application for the Court to *suo motu* strike out the matter.

4. The Court observed the need for proper procedure of withdrawing the matter, and adjourned to the 1st of November, 2012 for the Applicant to file proper application for withdrawal.

5. On the 1st of November, 2012, the Applicant was not represented again. The Registry further confirmed the intention of the Applicant to discontinue the matter. The Defendant, through its Counsel, Sunday A. Okoh, Esq., made an oral application for adjournment to enable the Applicant file proper application for withdrawal.

6. The Court observed the absence of the Plaintiff on two occasions without any reason, and also takes into account that, once a citizen comes to the Court to seek justice, he has to take his application seriously. In the circumstance, the Court hereby rejects the Defendant's Application for further adjournment, and holds that the absence of the Applicant and lack of representation for the second time, has left the Court to assume that he is not interested in the continuation of this case. Consequently, the Court hereby strikes out this case from the Cause list accordingly.

7. Pursuant to Article 66 (11) of the Rules, parties shall bear their own cost.

This Ruling has been delivered in public sitting of the Court at Abuja on 1st November, 2012 in the presence of their Lordships,

Hon. Justice M. B. RAMOS - *Presiding*
Hon. Justice C. N. MEDEGAN - *Member*
Hon. Justice E. M. POTEY- *Member*

Assisted by Athanase Atannon- *Registrar*

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

HOLDEN AT ABUJA, NIGERIA
ON THE 7TH DAY OF DECEMBER, 2012

SUIT N°: ECW/CCJ/APP/27/11
JUDGMENT N°: ECW/CCJ/RUL/17/12

BETWEEN
THE REGISTERED TRUSTEES
OF JAMA'A FOUNDATION & 5 ORS - ***APPLICANTS***
V.
1. **THE FEDERAL REPUBLIC OF NIGERIA**
2. **ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE**

} ***DEFENDANTS***

COMPOSITION OF THE COURT
1. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *PRESIDING*
2. **HON. JUSTICE C. MEDEGAN NOUGBOBE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY
TONY ANENE-MAIDOH - CHIEF REGISTRAR

REPRESENTATION TO THE PARTIES
1. **ABDULFATAH A. BELLO (ESQ.)** - *FOR THE PLAINTIFFS*
2. **DAFE AKPEDEYE, SAN** - *FOR THE DEFENDANTS*

Jurisdiction – Exhaustion of local remedy – Inadmissibility

SUMMARY OF FACTS

The applicants are residents/indigents of Kaduna State, Nigeria. The defendant is a Member State of ECOWAS. The applicants brought an action against the defendant for the alleged sustained violation of the right to life, security and integrity of person, equal protection of the law and basic enjoyment of economic and social rights of the people of Zonkwa, Maysirga and Kafanchan and the indifferent attitude of the defendant to effectively investigate the atrocities committed.

The applicant is seeking the Court's order directing the defendant, their agents, servants and privies to ensure the right to life, sanctity, dignity, security of person be safeguarded timeously and to bring to justice those suspected to have been responsible for the mayhem. Also that the defendant should provide adequate remedy for the atrocities perpetuated and to forthwith establish a military base in the Kafanchan / Zonkwa Area.

In response, the defendant raised a preliminary objection as to the jurisdiction of the Court to entertain this matter and furthermore, raised the issue of non-exhaustion of local remedy on the part of the applicant.

LEGAL ISSUES

- *Whether or not the Court has jurisdiction to entertain the matter.*
- *Whether the exhaustion of local remedies before bringing an action before this Court is a condition precedent.*
- *Whether or not the application was inadmissible considering the timeframe.*

DECISION OF THE COURT

The Court held

- *That it has no jurisdiction to adjudicate on the alleged violation of right to life, security and integrity of human person, equal protection of the law and basic enjoyment of economic and social rights.*
- *The non-exhaustion of local remedies is not a condition precedent for bringing an application before the ECOWAS Court of Justice.*
- *That in respect to the time-frame, the application was premature at the moment and therefore inadmissible.*

RULING OF THE COURT

1. This action was filed on 01/09/11 by an Application dated 8/8/11, pursuant to Articles 1, 2, 3, 4 and 5 of the African Charter on Human and Peoples' Rights, Articles 2, 3, 6 and 26 of ICESCR by the applicants against the Defendants alleging a sustained violation of Applicants' rights to life, security and integrity of human person, equal protection of the law and basic enjoyment of economic and social rights.

1. FACTS

The Applicants

2. The applicants' case is that they have been living in the Southern part of Kaduna from time immemorial. That up to the 18th April, 2011 election, there has been an ominous sign of danger in the polity and when the security chiefs were informed of various inciting utterances, they merely assured the community that they had in place security measures.

3. That on the 18th of April 2011 the Nigeria Police in Zonkwa called an emergency meeting indicative of pending mayhem by the indigenous youths of the community. That all efforts to dissuade the youths from fomenting trouble failed. That the first incident was the vandalisation of a commercial lorry loaded with food stuff that ran into the Zonkwa mosque for refuge and the subsequent torching of the mosque by the irritated indigenous youths.

4. That subsequently the violence escalated into the random burning of Muslim shops, killing of people, and raping of women.

5. That when the violence spread to a neighbouring village, Mastsirga, one Sule Saidu called the Divisional Police Officer (DPO) Kafanchan to come to their aid but the DPO failed to come.

6. That when the Arch Bishop of Kafanchan was called the first time he came and appealed to the youths to stop the mayhem and they suspended the action.

7. That when the mayhem started again and the Arch Bishop was called, he came and instead of appealing to the youths to stop, he merely greeted them and left.

8. That this act of killing Muslims and Hausa/Fulanis in southern Kaduna is the result of deep rooted mistrust among the citizenry that has been going on for a long time.

9. That since nobody has ever been found guilty and penalised, the people are emboldened to commit more atrocities.

10. That the law enforcement agents are never there when needed, leaving the impression of tacit acquiescence to the acts. That though Matsirga and Kafanchan towns have about 90% Hausa/Fulanis population, all known Hausa/Fulanis houses and Mosques in these town were burnt.

11. The indigenous people reside in communities outside but surrounding Kafanchan and Matsirga, which made it easy to carry out the violence against the Hausa/Fulanis, who found themselves

12. That the Governor of Kaduna State was indifferent to the plight of the Muslims and did nothing to help despite the text message by the Director of Research and Documentation, comrade Sanusi Maikudi.

13. That another attack was carried out on 11th of June 2011 by soldiers.

14. That the 1st Defendant set up a Presidential Judicial Panel of Inquiry and the Kaduna State Government set up a Judicial Commission of Inquiry to look into the riot that engulfed parts of the country after the presidential election of 16th April 2011 but the applicants believe that their grievances will not be addressed by the Panels.

15. That most of the applicants are now refugees having been rendered homeless, and have no means of livelihood.

16. That the refusal of the respondents to effectively investigate these atrocities amounts to a denial of the Applicant victims' rights to a fair and effective justice.

17. That the Government is unwilling or unable to promptly and effectively investigate and prosecute the perpetrators of the atrocities and this is a violation of the applicants' right to life and equal protection of the law.

18. That the preventable death of their bread winners has undermined the applicants' ability to enjoy their economic and social rights.

19. Whereupon, the applicants brought this action asking for the following reliefs contained in their application:

    a) A **Declaration** that the failure of the respondents, their servants, agents and privies to provide timely security for the applicants lives and properties before, during and after the April 2011 Presidential Election

is unlawful as it constitutes a violation of Nigeria's international Human Rights obligations and commitments to respect, promote and ensure the right to life, as guaranteed under the African Charter on Human and People' Rights and the UN International Covenant on Civil and Political Rights to which Nigeria is a State party.

b). A **Declaration** that the failure by the Respondents, their servants, agents and privies to promptly and effectively investigate and bring to justice those suspected to have been responsible for the mayhem that led to violence which led to the brutal killing of over 800 (Eight Hundred) members of the community and displacement of over 60, 000 (Sixty Thousand) others is unlawful as it violates the right to life, right to security, right to dignity of human persons and equal protection under the law as guaranteed under the African Charter on Human and Peoples' Rights; the UN International Covenant on Civil and Political Rights and UN International Covenant on Economic, Social and Culture Rights to which Nigeria is a state party.

c). A **Declaration** that the applicants have National and International right to effective and adequate remedy for the atrocities perpetuated against them while the respondents, their servants, agents and privies abdicated their duty to promptly and effectively investigate and bring to justice those suspected to have been responsible, as recongnised by the African Charter on Human and people' Rights, the International Covenant on Civil and Politician Rights and the International Covenant on Economic, Social and Cultural Rights.

d). An **Order** directing the respondents, their servants, agents and privies to respect, promote, fulfil and ensure the right of the applicants and all members of their community to life and sanctity of human person; to dignity and security of the human person; and other internationally recognised human rights.

e). An **Order** directing the respondents to establish forthwith in the Kafanchan/Zonkwa Area a military base to complement a well and full equipped police base, with sufficient service personnel to forestall further occurrence of similar wanton destruction of lives and properties in the community.

f). An **Order** directing the respondents and/or their servants, agents or privies to pay adequate monetary compensation as chronicled in Exhibits attached herewith, the summary of which are: N105,066,204,016.00 (One Hundred and five Billion, Sixty Six Million, Two Hundred and Four Thousand, Sixteen Naira) only.

The Defendants

As to incompetence of the Court

20. According to the Federal Republic of Nigeria, the ECOWAS Court of Justice lacks jurisdiction to entertain the case. While recalling that the Court was created pursuant to the ECOWAS Revised Treaty and that its jurisdiction is as defined under the Supplementary Protocol of January 19th, 2005, it adds that although the Treaty referred to was ratified, it is not binding on Nigeria.

21. To support this argument, Defendant relies on Article 12 (1) of its Constitution, which provides that:

    "No Treaty signed between the Federal Republic of Nigeria and any other country shall be binding on Nigeria, except a law relating to such a Treaty is promulgated by its National Assembly."

22. Under these circumstances, Defendant claims that the ECOWAS Revised Treaty is neither binding on it nor on its citizens. That moreover, Article 6 (5) of Nigerian Constitution does not recognise the Community Court of Justice, ECOWAS, for the fact that the National Assembly of Nigeria has not promulgated a law on the creation of the said Court.

23. Defendant claims that apart from the African Charter on Human and Peoples' Rights, all other Treaties, Conventions upon which Applicants rely are not incorporated into the internal laws of Nigeria, thus, they are not binding on Nigeria.

24. Defendants raised an objection as to this Court's lack of jurisdiction to adjudicate on the instant case.

25. The Federal Republic of Nigeria even considers the case brought by Applicants as having to do with international criminal law. Thus, issues bordering on crimes against humanity, genocides and aggression fall squarely within the jurisdiction of the International Criminal Court.

26. The Federal Republic of Nigeria draws the attention of the Court to the fact that the subject matter of the case is already being investigated. Indeed it claims that the following day after the electoral violence, an investigating committee was inaugurated to, among other things, get to the roots of the violence and bring the perpetrators before the Nigerian courts. It further claims that the instant case was filed while the said committee is yet to finish its assignment.

As to non-exhaustion of local remedy.

27. Defendants claim that any Nigerian citizen who alleges a violation of his rights as guaranteed in the African Charter on Human and Peoples' Rights can seek for reparation before Nigerian Courts. The case could be brought before the instant Court, only after local remedy must have been exhausted.

28. From this angle, they claim that Applicants have not exhausted local remedy available to them, as guaranteed under Nigerian Laws.

29. The Applicants reacted to the preliminary objection raised by the Defendants on 24/11/11 and raised three issues for determination by the Court. They submit that the protection of Human Rights by international mechanism is not subject to the principle of exhaustion of local remedies.

30. That Article 4(g) of the Revised Treaty of ECOWAS affirms the recognition, promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights and the first Defendant is a signatory to the Revised Treaty and the Protocol A/P.1/7/91 and has also domesticated the African Charter.

31. That the Defendants need not set up another panel of enquiry in this case but only need to implement the recommendations of the previous panels over past incidents.

32. That the competence of this Court is as contained in Articles 9 and 10 of the Supplementary Protocol which allows it to adjudicate on cases of abuse of human rights.

33. They finally urge the Court to hold that the Defendants' objections lack merit.

11. Analysis of the Court.

1) On the objection as to lack of jurisdiction of the Court.

34. It is a constant point of jurisprudence that, in order to determine the jurisdiction of a Court of law, we must try and see if the examination of the case brought before it falls within the jurisdiction of such a Court. Indeed, a Court of law exercises the powers conferred on it, pursuant to statutory rules and conventions.

35. The ECOWAS Court of Justice has always relied on this fundamental rule, to determine its jurisdiction. In its Preliminary Ruling of 14 May 2010 in the

case between Hissen Habre and the Republic of Senegal, the Court affirmed that, in order to determine its jurisdiction, it behoves on it ***"to see if it has been conferred with the power to adjudicate on a particular case."***

36. Consequently, **"the examination of the preliminary objection as to its jurisdiction leads us to a level where, without considering the case on its merit, we are to determine whether the Court is manifestly empowered to examine and adjudicate on a particular case that is brought before it".**

37. By referring to Article 9 (4) of the Supplementary Protocol of 2005, the Community Court of Justice, ECOWAS lays emphasis on the criteria which enables it to determine its jurisdiction. In fact these are *rationae materiae* and *rationae loci* criteria.

38. On the one hand, the Court views that it is examining whether the issue brought for determination relates to a right as guaranteed for the human person, which falls within the international and community obligations of the accused State as human rights to be promoted, to be respected, to be protected and satisfied, whose violation is alleged.

39. The Court also checks whether the subject matter of the case, as contained in the allegations and claims of both parties, falls within the body of human rights. Apart from this, the Court also ensures that these recognised rights are binding upon the accused State.

40. On the other hand, the Court examines whether the alleged violations have taken place on the territory of a Member State of the Community.

41. The Court reiterated this line of action in its Preliminary Rulings of 15th March, 2012 in the case between Alhaji Mohamed Ibrahim Hassan and Gombe State and Federal Republic of Nigeria *(see § 38)*; 12th June 2012 in the case between Aliyu Tasheku and Federal Republic of Nigeria *(see § 8)*.

42. All this taken into consideration, and brought into the instant case, the Federal Republic of Nigeria is now contesting the jurisdiction of the ECOWAS Court while relying on its constitutional law.

43. The Court is not in doubt that the Federal Republic of Nigeria is a Member State of ECOWAS. To this end, Nigeria accepts and respects the rules and judicial principles of the Community. From this point of view, the Court is not concerned with the existing norms in the hierarchy of the national judicial order.

44. The national judicial order, especially the constitution of a country cannot inhibit the application of Treaties and Protocols that Nigeria has ratified or signed. A Member State cannot rely on its constitution to fail in carrying out obligations imposed by international law or treaties that are binding on it.

45. Within the realm of Community Law, the primacy of Community Norms is explicitly assured, pursuant to the European Court of Justice Judgment of 17th December 1970.

46. In that case, **11/70 Internationale Handelgeshellshaft rec. 1970, p. 1125; 13th December 1979**, Case **44/79, Hauer, rec. 1979, p. 3727**, the European Court of Justice holds that:

> ***"relying on the invocation of the infringement brought either to the fundamental rights, such as contained in the constitution of a Member state, or to the principles of the national constitutional structure, cannot affect the validity of a Community Act or its effect on the territory of such Member State".***

47. The Community Court of Justice, ECOWAS does not refer to the Constitutional provisions or the internal legislation of a Member State before it determines its jurisdiction. As already specified, it relies on the provisions of Article 9 (4) of the Supplementary Protocol of 19 January 2005, which grants it jurisdiction.

48. In the instant case, while examining the preliminary objection raised by the Federal Republic of Nigeria, the Court notes that:

- The case brought before it by the applicants relates to human rights violations,
- As ECOWAS Member State, the Federal Republic of Nigeria is bound to respect the provisions of ECOWAS texts,
- The alleged violations occurred in the Nigerian territory.

49. Consequently, without trying to examine the arguments on merits, which went beyond the limit of the incident for which consideration is solicited, the Court declares that it has jurisdiction over the case brought by Applicants.

2) On the non-exhaustion of local remedy.

50. According to the Federal Republic of Nigeria, Applicants did not exhaust local remedy before bringing the case before the ECOWAS Court of Justice.

It gives the condition of admissibility before the case could be brought before the Court.

51. It should be noted that in the area of human rights violations, the new Article 10 of the Protocol on the Court gives two cumulative conditions to be met for the admissibility of victims' Applications.

52. Pursuant to Article 10 (d) victims of human rights violations can seize the Court on the double condition that such an Application shall not be anonymous and the Application should not have been taken before another competent international Court for adjudication.

53. While relying on this Article, the Court always declares that it does not make the exhaustion of local remedy a condition for admissibility of Applications.

54. In paragraph 40 of its Judgment dated 28th October 2008, in the case of Hadidjatou Mani Koraou against the Republic of Niger, the Court notes that the ECOWAS lawmaker did not make the exhaustion of local remedy a condition for admissibility of Applications before the Community Court; it now behoves on every ECOWAS Member State to respect this reality.

55. The Federal Republic of Nigeria notes that even before bringing the instant case before the Community Court, a Commission of Inquiry was put up to examine the human rights violations, and therefore, being part of the procedure, the Federal Republic of Nigeria is opposed to the Court exercising its jurisdiction over the case at this stage.

56. While taking this argument, which is not contested by Applicant into consideration, the Court notes that, with respect to the facts, as contained in the instant case, it is true that the Federal Republic of Nigeria has put in place a Commission of Inquiry, with the responsibility of unravelling the causes of the violence, and charge the perpetrators before Nigerian Courts.

57. Although exhaustion of local remedy does not constitute a condition of admissibility for cases brought before it, the Court is of the opinion that an Application on human rights violations brought before a Community or International Court must, as a condition, have an international character.

58. It must manifestly be seen that the minimum conditions, for the respect of the international obligations, as contained in international instruments, are not met by the concerned State Party.

59. Such conditions include, but are not limited to the following: inaction, negligence, and failure to act, or lack of legislative, administrative or other measures to protect the recognised rights.

60. The Applicants allegation in this case is the unwillingness and lack of diligence on the part of the Defendant to investigate and hold accountable the perpetrators of the violence complained of. On the other hand, the Applicants admitted that the Defendants had set up a commission of Inquiry, which is still sitting but however declare lack of confidence in the outcome of the enquiry.

61. It is not in dispute that the Federal Republic of Nigeria is under international obligation to investigate, seriously and diligently, human rights violation alleged by the Plaintiffs and to bring to Justice those responsible for those crimes. However, considering the number of victims allegedly killed, 800 (eight hundred) and the enormity of displaced persons, 60, 000 (sixty thousand), this Court is of the view that for an act of such magnitude reasonable time is required to carry out a thorough investigation and come up with proper findings.

62. It should be noted that the alleged violations of human rights invoked by the Plaintiffs, took place in April and June 2011 and that the complaint to obtain the condemnation of the Federal Republic of Nigeria for omission to investigate the events and bring the perpetrators to Justice was filed at the Community Court on 1st September, 2011, five months after the events.

63. Under these circumstances, the Court believes that bringing the instant case before it, while the investigations are still on-going within a reasonable time-frame, was premature and therefore declares the case inadmissible at the moment.

DECISION

On these grounds

64. The Court, adjudicating in a public session, after hearing both parties and after deliberation, in a preliminary ruling:

- **Declares** that it has jurisdiction over the case;
- **Declares** that the case is at the moment inadmissible;

AS TO COSTS

65. Each party shall bear its own costs.

Thus made, adjudged and pronounced, in a public hearing at the seat of the Court at Abuja, on the day and month mentioned above.

66. **AND THE FOLLOWING APPEND THEIR SIGNATURES:**

Hon. Justice Benfeito Mosso Ramos - *Presiding*
Hon. Justice Clotilde Nougbobe-Medegan - *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 IBADAN, OYO STATE, FEDERAL REPUBLIC OF NIGERIA

ON THURSDAY 13TH DECEMBER, 2012

SUIT NO: ECW/CCJ/APP/30/11
JUDGMENT NO: ECW/CCJ/RUL/19/12

BETWEEN
DEYDA HYDARA & 2 ORS - ***APPLICANTS***
V
REPUBLIC OF THE GAMBIA - ***RESPONDENT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE ANTHONY A. BENIN** - *PRESIDING*
2. **HON. JUSTICE AWA NANA DABOYA** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY
TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **NO REPRESENTATION** - *FOR THE APPLICANT*
2. **D. O. KURO** - *FOR THE RESPONDENT*

-Cause of action -Right of access to Court - Statute-bar - Non-retrospectivity - Vicarious liability

SUMMARY OF FACTS

The Applicants averred that the late Deyda Hydara was the co-founder, publisher and editor of The Point Newspaper in The Gambia. The applicants allege that he was murdered in a drive-by shooting incident in Banjul, The Gambia on 16th December, 2004 by unknown gun men riding in an old Mercedes Benz taxi cab. They also averred that on the day of his murder, he was under constant surveillance by persons suspected to be members of The Gambian Security Services and had received several death threats because of his publications in the course of his work as a journalist. The Applicants filed this action because of the continued failure of the Defendant to conduct effective investigations into the killing of the deceased which is a violation of his rights guaranteed by Articles 1, 4 and 9 of the African Charter on Human and Peoples' Rights (ACHPR). The Defendant argued that the Applicants filed this suit more than three years after the cause of action arose and that there was no right of access to this Court when the deceased was allegedly murdered. The Defendant sought for an order dismissing the suit for lack of jurisdiction.

LEGAL ISSUES

1. *Whether the claim of the Applicants is statute-barred.*

2. *Whether individuals can sue for the violation of human rights which occurred before the Supplementary Protocol of the Court came into force and whether the Defendant is vicariously liable for acts of unknown persons.*

DECISION OF THE COURT

1. *In these circumstances, the Court considers that the Applicants acted reasonably and were within the statutory period of three years when they mounted this action because as at June 2009 the investigations had not been closed.*

2. *The question of non-retroactivity of the Supplementary Protocol is irrelevant in view of the decision that the cause of action did not arise before the said protocol came into force. The question of liability of the State is not a matter for the preliminary decision, but a substantive one to be determined on merits, if it becomes necessary.*

RULING OF THE COURT

Parties and Representation

1. The first and second applicants are Community citizens by virtue of their Gambian citizenship, and are the children of the late Deyda Hydara. The third Applicant is an NGO and the African Chapter of the International Federation of Journalists, registered under the laws of the Republic of Senegal. The Respondent is a Member State of the Economic Community of West African States (ECOWAS).

Facts of the Case

2. The brief facts of the case are as follows. The applicants averred that the late Deyda Hydara was the Co-founder, publisher and editor of The Point newspaper in The Gambia and a distinguished journalist. The averments continued that the late Hydara was murdered in a drive-by shooting incident in Banjul on 16th December 2004 by unknown gunmen riding in an old Mercedes Benz taxi cab. Applicants also stated that persons suspected to be Gambian Security Services operatives appeared to have kept the late Hydara under constant surveillance on the day of his murder. The late Hydara also received multiple death threats related to his journalism work in the months immediately preceding his death.

3. The applicants filed this action citing the continued failure of the Respondent to conduct effective investigations into the killing of Deyda Hydara in violation of his right to life, freedom of expression and press freedom guaranteed by Articles 1, 4 and 9 of the African Charter on Human and Peoples' Rights ("African Charter");

   Article 66 of the Revised Treaty of ECOWAS; Article 10 of the Protocol on the Court (A/P.1/7/91) and Article 33 of the Rules of this Court. The applicants sought the following reliefs:

   A. A **Declaration** that the respondent's failure to effectively investigate, and hold accountable those responsible for the assassination of Deyda Hydara, father of the first two applicants, is a violation of his right to life as guaranteed by Articles 1 and 4 of the African Charter.

   B. A **Declaration** that the Respondent is in contravention of Articles 1 and 4 of the African Charter, by virtue of creating and tolerating a state of systematic impunity in The Gambia for violent attacks against media practitioners and other government critics.

C. A **Declaration** that the respondent's failure to effectively investigate the unlawful killing of Deyda Hydara is in violation of his rights to freedom of expression and the press guaranteed by Article 9 of the African Charter and Article 66 of the Revised Treaty.

D. General and special damages for pecuniary and non-pecuniary loss to be paid to the first two applicants, and other heirs to Mr. Hydara, as compensation for the violation of their father's human rights to life and freedom of expression, to be quantified at the appropriate stage in the proceedings.

E. An **Order** that the Respondent pay the Applicants' costs of this action, in accordance with Article 66 of the Court's Rules of Procedure.

Preliminary Procedure

4. Upon being served with the initiating application, the Respondent raised a preliminary objection against the jurisdiction of the Court. Learned counsel to the Respondent argued that the application was filed more than three years after the cause of action arose, in contravention of Article 9(3) of the Supplementary Protocol on the Court (A/SP.1/01/05) and therefore the application is statute barred and incompetent.

5. Learned counsel to the Respondent further argued that as at December 16, 2004 when Deyda Hydara was allegedly assassinated, individuals had no right of access to this Court and could not sue or be sued. Counsel also contended that Protocol A/SP.1/10/05 which permits individual's access to this Honourable Court came into force on the 19th January 2005 and there is no clause in the Protocol permitting or directing its retrospective application. Learned counsel also argued that the principle of vicarious liability can only be invoked in circumstances where the perpetrator of the tort is known to be the servant of the Respondent and therefore not applicable under the circumstances of the case. The Respondent sought for an order dismissing the suit for lack of jurisdiction and any other Orders the honourable Court may deem fit to make in the circumstances.

6. The applicants opposed the preliminary objection filed by the Respondent on all grounds and urged the Court to dismiss it and determine the case on its merits. The applicants contended that the three year time bar is not applicable in the present case because the violation of Mr. Hydara's rights is ongoing. The applicants contended further that the preliminary objection is founded on a misunderstanding of the applicants' case as the case is not based on the murder of Mr. Hydara as the Respondent claims but on the

failure by the Respondent to effectively investigate that murder in the years that followed.

Further Arguments

7. Statute-barred - Counsel to the Respondent argued that the orders sought by the applicants in their application are premised on the breaches of the rights to life and freedom of expression of Deyda Hydara following his assassination on the 16 December 2004. He continued that this application was filed on 23 November 2011, more than six (6) years after the cause of action arose on 16 December 2004.

   He submitted that under Article 9(3) of the Protocol of the Court as amended by the Supplementary Protocol of 2005, actions against a Member State of the Community shall be statute barred after three years from the date when the right of action arose. She continued that it is clear on the face of the application that the action is grossly incompetent, having been filed outside the prescribed three year period. She concluded that the law is clear that no matter how meritorious the claim of the Applicant, once it is statute barred, it cannot be submitted to Court for adjudication and urged this Court to dismiss the action.

8. In opposing this ground of the preliminary objection, counsel to the applicants contended that the application was primarily based on the failure of the Respondent to effectively investigate the murder of Mr. Hydara, an obligation which is a continuing one and the cause of action does not arise on the date of the killing. He continued that the cause of action arose only when The Gambian authorities concluded their investigation or it became clear that the investigation is ineffective. Counsel contended that they were entitled to believe that the Government was still investigating the case until at least June 2009 when President Jammeh announced that the investigation was ongoing and had not been closed. Indeed, there was no point in time that the Government indicated that the investigation had been concluded. Learned counsel concluded that when this application was filed on 23 November 2011, it was less than three years from 6 June 2009 and therefore filed within the statutory three year period.

9. Learned counsel to the Respondent argued that the action was already statute barred on 6 June 2009 when President Jammeh is alleged to have made the comment that investigations were still ongoing. Counsel contended that this statement was made more than three (3) years after the death of Hydara on the 16 December, 2004 and that the statement could not confer any legal

rights on the Applicant as time had already lapsed. Further, counsel contended that even if such a statement was made at a time when the right of action of the applicants had not lapsed, it could not have the effect of stopping time from running for the purposes of calculating time for statute bar. It is so because political statements and even negotiations between parties cannot stop time from running for purposes of judicial proceedings.

10. Non Retrospectivity - learned counsel to the Respondent contended that the jurisdiction or powers of a Court to adjudicate on disputes are determined by the statutes that created it and this Court is no exception. Counsel argued that the right of individuals to sue before this Court was conferred on it on 19 January 2005 through the 2005 Supplementary Protocol and it was never intended to be applied retrospectively. Counsel continued that the law applicable to a cause / right of action is the law in force at the time the cause of action arose. Learned counsel further argued that the cause of action arose on 16 December 2004 when Mr. Hydara was murdered. Since the Supplementary Protocol does not expressly permit its retrospective application, it cannot be applied to the applicants' cause of action which arose before the coming into force of the Supplementary Protocol.

11. Learned counsel to the applicants, on the other hand, argued that the Respondent's preliminary objection is fundamentally based on a misconception of the applicants' case before the Court. Learned counsel stated that the applicants' case is not based on the responsibility for the murder of Mr. Hydara but on the failure of the Respondent and her agents to effectively investigate the murder in the years following. Thus, counsel contended that the cause of action did not arise on the day of Mr. Hydara's death but a reasonable time after when the Respondent should have completed investigations or when it became clear that the investigations have been ineffective. Counsel contended that since the Supplementary Protocol came into force only one month after Mr. Hydara's death, the cause of action arose when the Supplementary Protocol was in force and individuals had a right of access to this Court. Finally, counsel argued that the law governing a cause/right of action is the law in force at the time the cause of action arose whilst the law that determines jurisdiction of a Court is the law in force at the time the action is instituted. Counsel concluded that at the time this action was instituted, this Court had jurisdiction to entertain actions by individuals.

12. Further, learned counsel to the applicants contended that The Gambia had long ratified the Revised Treaty of ECOWAS and had thus accepted an obligation to protect the human rights of her citizens. Counsel submitted

that the subsequent adoption of the Supplementary Protocol is just a procedural mechanism for the vindication of those rights and does not prohibit a Court from reviewing compliance with pre-existing obligations.

13. Vicarious liability of State Parties. Learned counsel to the Respondent argued that at common law, a man can only be held vicariously liable for the acts or omissions of a known servant arising in the course of his duties. Counsel contended that the Respondent cannot be held liable for the acts of unknown persons committed within her territory. Counsel concluded that it is an affront to the Common Law principle of vicarious liability and the Supplementary Protocol to hold Respondent liable for the death of Mr. Hydara.

14. In response, learned counsel to the applicants argued that the submission of learned counsel to the Respondent is not valid. Counsel to the applicants continued that the contention of counsel to the Respondent is still predicated on the wrong assumption that the applicants' case is based on the responsibility for the murder of Mr. Hydara when it is in fact premised on the failure of the Respondent to carry out effective investigation into the murder. Counsel continued that the National Intelligence Agency of The Gambia and The Gambian Police are both constitutional bodies created under The Gambian Constitution and unquestionably agents of the Respondent. Thus, the Respondent is clearly liable for their failure to carry out effective investigation into the killing of Mr. Hydara, violating his rights in the process.

Consideration by the Court

15. On the question whether or not the claim is statute-barred, there was a key disagreement between the parties as to when the cause of action arose. The respondent's application to dismiss the action is premised on the fact that the cause of action arose on the day that Deyda Hydara was killed in December 2004. Going by that date the action became statute-barred in December 2007. Besides, as at December 2004, access to this Court was not open to individuals.

16. On their part, the applicants argued that their claim is not founded on the death of Deyda Hydara, but on the lack of effective investigation into his death by the Respondent, who they claim bears that responsibility. In their view their cause of action accrued either when the Defendant closed the investigation or when it became apparent the investigation had become ineffective after a reasonable length of time.

17. The cause of action is determined by the claim and the nature of reliefs sought, and not by the nature of the defence. Even a cursory reading of the claim and reliefs sought as set out above, per paragraph 3, clearly shows that the applicants do not base their claim on the death of Deyda Hydara, but on the failure of the Respondent to conduct effective investigation into his death. For that reason the Court considers that the cause of action did not arise the day Deyda Hydara was killed in 2004.

18. The answer to this issue whether or not the claim is statute-barred can be found if the Court is able to accept on the facts, as presently constituted, albeit prima facie, that the investigation was concluded, as was decided by this Court in the case of **Valentine Ayika v. Republic of Liberia; Case no ECW/CCJ/APP/07/11 dated 19th December 2011;** or the applicants had reasonable cause to believe that the investigation was otherwise rendered ineffective by the state party, as at the time the action was instituted, See the case **of Velasquez Rodriguez v. Honduras,** Judgment of Inter-American Court of Human Rights, dated **July 29, 1988, Ser. C No. 4 paragraph 177**.

19. The report of the investigations, Exhibit 10, concluded that the investigations would still proceed when it was stated therein that "the investigation be allowed to continue rather than be completely closed". That was in June 2005. The record does not indicate that since then the state investigating agencies had closed the investigations. If anything at all, the record further shows that the President of the country publicly stated that the investigation was not closed into the killing. That was on 8th June 2009. At least it showed that at the highest level of government the matter was receiving attention. It goes to confirm that the investigation was still ongoing as at June 2009. Thereafter the applicants waited over two years before concluding that in their view the investigation had become ineffective. In these circumstances the Court considers that the applicants acted reasonably and were within the statutory period of three years when they mounted this action. Under Article 9(3) of the Court's Protocol, as amended by the Supplementary Protocol of 2005, an action against a Member State becomes statute-barred from the date the cause of action arose. As to whether the investigation was ineffective or not, is a matter to be determined on merits.

20. In respect of the ancillary issues like non -retroactivity of the Supplementary Protocol and also vicarious liability of states for acts of unknown persons, these are not relevant to the conclusion reached whether or not the action is statute-barred. The question of non-retroactivity of the Supplementary Protocol is irrelevant in view of the decision that the cause of action did not

arise before the said Protocol came into force. The question of liability of the State is not a matter for preliminary decision, but a substantive one to be determined on merits, if it becomes necessary.

21. For the foregoing reasons, the case will proceed to hearing on merits as the preliminary objection is dismissed.

22. Costs shall abide the event.

This ruling has been delivered by the Community Court of Justice, ECOWAS, at its public sitting in the city of Ibadan, Oyo State of the Federal Republic of Nigeria, this 13th day of December 2012.

BEFORE THEIR LORDSHIPS
Hon. Justice Anthony A. Benin - *Presiding*
Hon. Justice Awa Nana Daboya - *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 IBADAN, OYO STATE, NIGERIA

THIS 14TH DAY OF DECEMBER, 2012

SUIT N^O^: ECW/CCJ/APP/12/11
JUDGMENT N^O^: ECW/CCJ/JUD/17/12

BETWEEN
SA'ADATU UMAR ***- APPLICANT***
V
THE FEDERAL REPUBLIC OF NIGERIA ***- DEFENDANT***

COMPOSITION OF THE COURT

1. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE M. NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM POTEY** - *MEMBER*

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

REPRESENTATION TO THE PARTIES

1. **CHINO EDMUND OBIAGWU (ESQ.) -** *FOR THE PLAINTIFF*

2. **YUSUF BADO MOK (ESQ.)** - *FOR THE DEFENDANT*

- Jurisdiction - Admissibility of new evidence

SUMMARY OF FACTS

The Plaintiff is a Community Citizen and the Defendant is a Member State of ECOWAS. By an application dated 10thJune, 2011, the Plaintiff brought an action before the Court for the alleged violation of her rights by the Defendant. In her application she alleged that she was unlawfully arrested by the Plaintiff and that during the arbitrary arrest she suffered physical and mental torture which amounts to the infringement of her right to dignity and human person in line with the provisions of Articles 2, 4, 6, 12 (1) and (2) of the African Charter on Human and Peoples' Rights. The Defendant raised a preliminary objection as to the jurisdiction of the Court to entertain the Suit. The Court ruled that it had jurisdiction to entertain the case and ordered the continuation of the proceedings. On the merits of the case, Defendant's counsel informed the Court that there was a judgment already given by a Nigerian Court on the same case and the Court Ordered the Defendant to produce it and she did but counsel to the Plaintiff failed to react or make any observations.

LEGAL ISSUES

- *Whether document tendered during the course of proceedings, constitutes a new evidence.*
- *Whether the Order made at the High Court is admissible.*
- *Whether the subject matter filed before the High Court and the Community Court of Justice by the Plaintiff are the same.*

DECISION OF THE COURT

The Court held:

- *That the Order made by the Federal High Court, Abuja, and which was tendered during the course of the proceedings, constitutes a new evidence;*
- *That this new evidence is admissible, and so admits it.*
- *That the instant case is essentially the same as the one that was earlier adjudicated upon in the Nigerian Court; consequently, the Court declared that there was no need to consider the case brought before it by the Plaintiff on its merit.*

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Judgment.

PROCEDURE

1. By Application dated 10 June 2011, and filed at the Registry of the Court on 13 June 2011, through her Counsel, Chino Edmund Obiagwu (Esq.), Lawyer registered with the Bar in Nigeria, Mrs. Sa'adatu Umar came before the Court with a complaint against the Federal Republic of Nigeria, for her unlawful, arbitrary, illegal and illicit arrest, physical and mental torture, the infringement upon the dignity of the human person that she suffered, all this in violation of the provisions of Articles 2, 4, 6, 12 (1) (2) of the African Charter on Human and People's' Rights.

2. She pleads with the Court:

   i) To declare as arbitrary, illegal and illicit, her arrest and detention, together with her three children, among whom is a baby that she is still breastfeeding, without any charges being brought against her, for, they constitute a violation of Articles 6 and 12 of the Charter;

   ii) To declare that the curtailing of her freedom, resulting from her provisional detention, whereas she is a nursing mother, and in the company of her three children, is a form of physical and moral torture, thus constituting a violation of the provisions of Articles 4 and 6 of the Charter;

   iii) To order the Federal Republic of Nigeria to set her free, with immediate effect;

   iv) To order the Federal Republic of Nigeria to pay her the sum of ten million (10,000,000.00) Naira as reparation for the prejudice suffered.

3. The Federal Republic of Nigeria, having raised a preliminary objection, the Court, after hearing both parties, gave an interim ruling ECW/CCJ/RUL/12/12 dated 12 June 2012, in which it declared, not only its jurisdiction to entertain the case, but also favourably admitted the case, and, consequently, ordered the continuation of proceedings.

4. At the Court hearing of 5 July 2012, on the merit of the case, Counsel to Federal Republic of Nigeria brought to the attention of the Court that Lawyer to Applicant informed him of the existence of a Judgment given by the

Federal High Court, Abuja (a Nigerian Court), in favour of Applicant. Upon passionate plea from Counsel to Federal Republic of Nigeria, the Court ordered the production of the said Judgment before any further pleading could be made on the merit of the case.

5. Thus, on 11 July 2012, the Defendant produced before the Court, the Order given by the Federal High Court, Abuja, on a case earlier filed by Mrs. Sa'adatu Umar against the Nigerian Police Authorities. Applicant was notified of the said Order on 1st November 2012.

6. At the Court hearing of 1st November 2012, which was mainly for taking pleas, on the production of the said exhibit, and on the merit of the case, Counsel to Applicant, who had been duly notified, failed to appear, but rather, was represented by a colleague.

LEGAL ANALYSIS BY THE COURT

7. The Court observes that the issue of the existence of the Order given by the Federal High Court, Abuja (a Nigerian Court) was not raised until the interim ruling that it gave on 12 June 2012, and when both parties were invited to enter pleas on the merit of the case. This fact was thus raised during the proceedings, and Counsel to Federal Republic of Nigeria now relies on the said Order, to raise an objection as to admissibility of the Application brought by Mrs. Sa'adatu Umar.

8. The Court considers the production of the Order made by the Federal High Court, Abuja, to be new evidence, which relates to the situation referred to under Article 37 of its Rules of Procedure, which provides that:

"1. In reply or rejoinder, a party may offer further evidence. The party must, however, give reasons for the delay in offering it.

2. No new Plea-in-law may be introduced during the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

3. If in the course of the procedure, one of the parties puts forward a new plea-in-law which is so based, the President may, even after the expiry of the procedural time-limits, acting on a report of the Judge - Rapporteur and after hearing the parties, allow the other party to answer on that plea.

4. The decision on the admissibility of the plea shall be reserved for the final judgment,"

9. The Court recalls that since the production of copy of the said Order, Counsel to Applicant was duly served and had the opportunity to react to this new evidence at the hearing of 1st November 2012, which he did not attend, and failed to make any observation thereto.

10. The Court also recalls that parties filed in their final writs, on the merit of the case, before the present Judgment; it therefore considers that the conditions stated under Article 37 (2) and (3) of its Rules are met, and that, pursuant to paragraph 4 of the said Article, it can now examine the admissibility or otherwise, of the new evidence.

i) As to admissibility of the Order made by the Federal High Court, Abuja

11. The Court wishes to note that the existence of an Order made by the Federal High Court, Abuja, constitutes very crucial information, for a just consideration of the litigation, which ought to have been revealed in the initiating Application, or at best, by Counsel to Federal Republic of Nigeria.

12. To this end, the Court would like the Counsels and the parties, to remember that they have an obligation to contribute to the manifestation of the truth, and must assist the Court in the establishment of the facts, and the discovery of the other elements, for the correct examination of each one of them; also, Counsels to the parties have the obligation to cooperate with it, in all good faith and loyalty, in the administration of justice, and in the interest of the parties to the case. They must particularly inform the Court on all proceedings initiated, or which are effectively settled, at the national courts, in cases that are brought before it.

13. The Court recalls that in a similar case, for human rights violations, where the *res judicata* was relied upon, as the basis for objection to admissibility, it held that such an argument can only hold, if ***"it is established that the case brought before it (...) is essentially the same as another case which has already been satisfactorily adjudicated upon, by a competent national Court"****[see § 13* of the Judgment in the **Aliyu Tasheku v. Federal Republic of Nigeria**, dated 12 June 2012].

14. The new evidence produced in the instant case, is likely to have a decisive influence on the examination of this case, on its merit, if it is established that the case brought before it by Mrs. Sa'adatu Umar is essentially the same as the one adjudicated upon by the Federal High Court, Abuja.

15. Indeed, in such an eventuality, the Court could, even at this stage of proceedings, decide to declare the instant case inadmissible *[see § 19 and*

20 of the Judgment in the **Aliyu Tasheku v. Federal Republic of Nigeria**, dated 12 June 2012.] Consequently, the Court declares the Order made by the Federal High Court, Abuja as new evidence.

ii) Consideration of the new evidence.

16. The Court notes that Mrs. Sa'adatu Umar took a case before the Judge at the Federal High Court, Abuja, in which she sought the following reliefs:

    i) "A declaration that the arrest and detention of Applicant, a nursing mother, with her three children at Bauchi Police Station, Bauchi State, and Area 10 Police Station, Abuja, respectively from 20 March to date without arraignment in a Court of Law, by the Respondents is arbitrary, illegal, unlawful and constitutes a gross violation of the Applicant's fundamental rights to personal liberty and freedom of movement as guaranteed under Section 9 of the Child Rights Act, Cap 50, 2003; Sections 35 (1) (4) (5b) and 41 of the 1999 Constitution of the Federal Republic of Nigeria; and Articles 6 and 12 of the African Charter on human and Peoples' Rights (Ratification and Enforcement) Act, Cap. J0 laws of the Federation of Nigeria 1990, therefore illegal and unconstitutional;

    ii) A declaration that the arrest and detention of Applicant, a nursing mother, with her three children at Area 10 Police Station, Abuja, from 22 March 2011 to date by the Respondents is arbitrary, illegal, unlawful and contrary to Section 222 (4) of the Child Rights Act, Cap 50, 2003 and therefore constitutes a gross violation of the Applicant's fundamental rights to personal liberty and freedom of movement as guaranteed under Sections 35 (1) (4) (5b) and 41 of the 1999 Constitution of the Federal Republic of Nigeria,' and Articles 6 and 12 of the African Charter on human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 laws of the Federation of Nigeria 1990, therefore illegal and unconstitutional;

    iii) A declaration that the starvation of the Applicant, a nursing mother, with her three children at Area 10 Police Station Officers action for or on behalf of or as agents of the Respondents amounts to physical and mental torture, contrary to Section AA of the Child Rights Act, Cap 50, 2003 and therefore constitutes gross violations of the Applicant's fundamental rights to dignity of human person, as guaranteed under Section 35 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria; and Article 6 of the African Charter on hum an and Peoples' Rights (Ratification and Enforcement)

Act, Cap. 10 laws of the Federation of Nigeria 1990, therefore illegal and unconstitutional;

iv) An order compelling the Respondents forthwith to tender an apology to the Applicant by publishing the said letter of apology in two national dailies;

v) An order compelling the Respondents forthwith to release the Applicant with her three children or detain them in any Special Mother's Centre in Abuja;

vi) An order that the Respondents pay the Applicant the sum of N10,000,000.00 (ten million Naira only) being the compensation for the aforesaid unlawful, illegal and unconstitutional violations of the Applicant's fundamental rights."

17. The Court also notes that the Judge in the national Court did justice to all her reliefs sought, by making an Order in which he adjudged that:

i) " It is hereby declared that the arrest and detention of the Applicant, a nursing mother, with her three children at Bauchi Police Station, Bauchi State, and Area 10 Police Station, Abuja, respectively from 20 March to date without arraignment in a Court of Law, by the Respondents is arbitrary, illegal, unlawful and constitutes a gross violation of the Applicant's fundamental rights to personal liberty and freedom of movement as guaranteed under Section 9 of the Child Rights Act, Cap 50, 2003; and Sections 35 (1) (4) (5b) and 41 of the 1999 Constitution of the Federal Republic of Nigeria; and Articles 6 and 12 of the African Charter on human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 laws of the Federation of Nigeria 1990, therefore illegal and unconstitutional;

ii) It is hereby declared that the arrest and detention of the Applicant, a nursing mother, with her three children at Area 10 Police Station, Abuja, from 22 March 2011 to date by the Respondents is arbitrary, illegal, unlawful and contrary to Section 222 (4) of the Child Rights A et, Cap 50, 2003 and therefore constitutes a gross violation of the Applicant's fundamental rights to personal liberty and freedom of movement as guaranteed under Sections 35 (1) (4) (5b) and 41 of the 1999 Constitution of the Federal Republic of Nigeria; and Articles 6 and 12 of the African Charter on human and Peoples' Rights (Ratification and Enforcement) A et, Cap. 10 laws of the Federation of Nigeria 1990, therefore illegal and unconstitutional;

iii) ***It is hereby declared that the starvation of the Applicant, a nursing mother, with her three children in Police detention at Area 10 Police Station Officers action for or on behalf of or as agents of the Respondents amounts to physical and mental torture, contrary to Section AA of the Child Rights Act, Cap 50, 2003 and therefore constitutes gross violations of the Applicant's fundamental rights to dignity of human person, as guaranteed under Section 35 (1) (a) of the 1999 Constitution of the Federal Republic of Nigeria; and Article 6 of the African Charter on human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 laws of the Federation of Nigeria 1990, therefore illegal and unconstitutional;***

iv) ***The Respondents, that is the Inspector General of Police and the Commissioner of Police FCT Abu]a are hereby ordered to release the Applicant with her three children or detain them in any Special Mother's Centre in Abuja; (...)***

v) ***The sum of 1,000,000.00 Naira is granted the Applicant and her three children for unlawful detention without arraignment from March, 2011 to date against the Respondents, the Inspector General of Police and the Commissioner of Police FCT Abuja."***

18. It could be deduced from paragraphs 16 and 17 above that , the Nigerian Judge, before whom the same facts, as those in the instant case were exposed, Mrs. Sa'adatu Umar invoked the violation of Article 4 (*mutatis mutandi* Articles 34 and 35 of the Constitution of the Federal Republic of Nigeria), 6 (*mutatis mutandi* Articles 34 and 35 of the Constitution of the Federal Republic of Nigeria) and 12 (*mutatis mutandi* Article 41 of the Constitution of the Federal Republic of Nigeria) of the African Charter on human and Peoples' Rights and sought for symbolic and monetary reparations, as well as her release or detention in a special centre. The Judge in the National Court noticed all the alleged violations, set aside the relief bordering on the symbolic reparation, but awarded the sum of 1,000,000.00 Naira in favour of Mrs. Sa'adatu Umar, and ordered her release or detention in a special centre for nursing mothers.

19. Thus, the Court notes that the facts, which constitute the subject - matter of the case that was taken before the Judge in the National Court **are essentially the same** as those contained in the instant case; the violations of Articles 4, 6 and 12 of the African Charter on human and Peoples' Rights invoked before the National Judge **are essentially the same** as the violations of Articles 2, 4, 6 and 12 of the same Charter that Mrs. Sa'adatu Umar invokes in the instant case. Moreover, the Court also notes that the reliefs

sought in the instant case, which relate to her release and the award for reparation a**re essentially the same** as those sought in the case that was previously taken before the Judge in the National Court, and to which that Judge did justice.

20. The Court therefore concludes that, the instant case brought before it, **is essentiall**y the same as the one earlier taken before the Nigerian Judge, which was adjudicated upon, and whose settlement, if unsatisfactory, could have led Applicant to file an appeal; but, this was not the case.

21. Consequently, and pursuant to its established jurisprudence, the Court declares that it does not re- consider a matter that had already been adjudicated upon in a National Court of a Member State, and against which there has not been any appeal, and pursuant to the sacred principle of the *res judicata*, there is no need to consider the instant case on its merit.

DECISION

On these grounds,

22. The Court, sitting in a public hearing, after hearing both parties, and having deliberated:

    - **Declares** that the Order made by the Federal High Court, Abuja, and which was tendered during the course of the proceedings, constitutes a new evidence;

    - **Declares** that this new evidence is admissible, and so admits it;

    - **Declares** that, the instant case is essentially the same as the one that was earlier adjudicated upon in the Nigerian Court;

    - **Consequently, the Court declares** that there is no need to consider the case brought before it by Mrs. Sa'adatu Umar on its merit;

COST

23. Pursuant to Article 66 (11) of its Rules of Procedure, the Court orders that each party bears the costs.

Thus made, declared and delivered in English, the language of procedure, in a public sitting at Ibadan, Oyo State, in the Federal Republic of Nigeria, by the Court of Justice of the Economic Community of West African States on the day, month and year stated above.

24. And the following have appended their signatures:

1. **Hon. Justice Benfeito Mosso Ramos** - *Presiding*
2. **Hon. Justice Clotilde Medegan Nougbode** - *Member*
3. **Hon. Justice Eliam Potey -** *Member*

25. *Assisted by* **Tony Anene-Maidoh** - *Chief Registrar*

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

HOLDEN AT IBADAN, IN NIGERIA

ON THIS 14 DAY OF DECEMBER, 2012

SUIT N^O: ECW/CCJ/JUD/08/09
JUDGMENT N^O: ECW/CCJ/JUD/18/12

SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) - *PLAINTIFF*
V.
FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE BENFEITO MOSSO RAMOS -** *PRESIDING*
2. **HON. JUSTICE HANSINE DONLI**- *MEMBER*
3. **HON. JUSTICE ANTHONY ALFRED BENIN**- *MEMBER*
4. **HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ** - *MEMBER*
5. **HON. JUSTICE ELIAM POTEY**- *MEMBER*

ASSISTED BY

TONY ANENE-MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **A. A. MUMUNI**
2. **SOLA EGBEYINKA** - *FOR THE PLAINTIFF*

1. **T. A. GAZALI** - *FOR THE DEFENDANT*

-Jurisdiction-Locus standi-Admissibility-

SUMMARY OF FACTS

The Plaintiff is a Non-Governmental Organization registered in Nigeria. The 1st Ddefendant is a Member State of ECOWAS and the 2nd Defendant is a Chief Law Officer of the Federation.

The Plaintiff brought an action against the Defendants for the alleged violation of the rights to health, adequate standard of living and rights to economic and social development of the people of the Niger Delta, also failure on the part of the Defendant to enforce law and regulations to protect the environment and prevent pollution. The Plaintiff is seeking the Court to make an order directing the Defendants to ensure the full enjoyment of the Niger Delta to an adequate standard of living, including adequate access to food, healthcare, clean water, clean and healthy environment, socio and economic development, and the right to life and human security and dignity.

In response, the 3rd and 9th Defendants raised a preliminary objection as to the jurisdiction of the Court. The Court ruled on this and held that it had no jurisdiction over the 3rd and 9th Defendants who are corporations and thereby struck out their names from the suit. Consequently, the Plaintiff sought the leave of the Court to amend its Application to rename the Defendants.

After parties had exchanged pleadings, the Plaintiff attached a copy of the Amnesty International report to its address and the Defendant objected to the admissibility of same on the ground that it was too late and not in accordance with the Rules of the Court. The Defendants further contended that the Plaintiff has no locus standi to institute this action and urged the Court to dismiss it.

LEGAL ISSUES:

- *Whether or not the Court has jurisdiction to entertain the matter.*
- *Whether SERAP has locus standi in the matter.*
- *Whether the Report by Amnesty International is admissible.*
- *Whether the Defendants violated the rights of the plaintiff.*

DECISION OF THE COURT

The Court held:

- *That it has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;*

- *That SERAP has locus standi in the instant case;*

- *That the report by Amnesty International is admissible;*

- *That the Federal Republic of Nigeria has violated Article 1 and 24 of the African Charter on Human and Peoples' Rights.*

- *That the Federal Republic of Nigeria should maintain a general satisfactory environment favourable for development*

JUDGMENT OF THE COURT

PARTIES

1. The Plaintiff, the Socio-Economic Rights and Accountability Project, SERAP, is a non-governmental organization registered in Nigeria with Office at 4 Akintoye Shogunle Street, Off Awolowo Way Ikeja, Lagos, Nigeria, The Plaintiff is represented by Mr. A. A. Mumuni with Sola Egbeyinka.

2. The First Defendant is the Federal Republic of Nigeria while the Second Defendant is the Attorney General of the Federation and the Chief Law Officer of the Federation, The First and the Second Defendants are represented by Mr. T. A. Gazali.

PROCEDURE

3. This case originated from a complaint brought on 23 July 2009 by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) pursuant to Article 10 of the Supplementary Protocol A/SP.1/01/05 against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC Total Nigeria PLC and Exxon Mobil.

4. The Plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution.

5. The Application was served on the Defendants in line with the provisions of Articles 34 of the Rules of Procedure of this Court.

6. Upon receipt of the Application, the 3rd to 9th Defendants raised Preliminary Objections to the jurisdiction of this Court to entertain the application on various grounds.

7. After careful consideration of the issues raised in the Preliminary Objections, the Court, in Ruling No. ECW/CCJ/APP/07/10 delivered on 10 October 2010, ruled that the Plaintiff is a legal person and has the *locus standi* to institute this action.

8. The Court also held that it has no jurisdiction over the 3rd to 9th Defendants who are corporations and struck out their names in the suit.

9. Consequently, the Plaintiff on the 11th of March 2011 filed with the leave of Court an amended application against the President of the Federal Republic of Nigeria and The Attorney General of the Federation.

10. On the 10th day of March 2011, the Defendants filed a joint statement of defence to the suit to which the Plaintiff replied on the 8th of July 2011.

11. Both parties subsequently filed and exchanged written addresses of counsel. The Plaintiff for the first time attached a copy of the Amnesty International report to its address and the Defendant objected to the admissibility of that report on the ground that it is too late and not in accordance with the rules. The Court then asked both parties to address it on the admissibility of the report and reserved its ruling for judgment.

THE FACTS OF THE CASE

12. The Plaintiff contended that Niger Delta has an enormously rich endowment in the form of land, water, forest and fauna which have been subjected to extreme degradation due to oil prospecting.

13. It averred that Niger Delta has suffered for decades from oil spills, which destroy crops and damage the quality and productivity of soil that communities use for farming, and contaminates water that people use for fishing, drinking and other domestic and economic purposes. That these spills which result from poor maintenance or infrastructure, human error and consequence of deliberate vandalism or theft of oil have pushed many people deeper into poverty and deprivation, fuelled conflict and led to a pervasive sense of powerlessness and frustration.

14. It further contended that the devastating activities of the oil industries in the Niger Delta continue to damage the health and livelihoods of the people of the area who are denied basic necessities of life such as adequate access to clean water, education, healthcare, food and a clean and healthy environment.

15. The Plaintiff submitted that although Nigerian government regulations require the swift and effective clean- up of oil spills this is never done timorously and is always inadequate and that the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills.

16. It admitted that though some companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families received payments, these were inadequate.

17. It submitted that government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards.

18. It averred specifically that:

- In 1995 SPDC Petroleum, admitted that its infrastructure needed work and that the corrosion was responsible for 50 per cent of oil spills.

- On 28 August 2008, a fault in the Trans-Niger pipe line resulted in a significant oil spill into Bodo Creek in Ogoniland. The oil poured into the swamp and creeks for weeks, covering the area in a thick slick of oil and killing the fish that people depend on for food and for livelihood. The oil spill has resulted in death or damage to a number of species of fish that provide the protein needs in the local community. Video footage of the site shows widespread damage, including to mangroves which are an important fish breeding ground. The pipe that burst is the responsibility of the Shell Petroleum Development Company (SPDC). SPDC has reportedly stated that the spill was only reported to them on 5 October of that year. Rivers State Ministry of Environment was informed of the leak and its devastating consequences on 12 October. A Ministry official is reported to have visited the site on 15 October. However, the leak was not stopped until 7 November.

- On 25 June 2001 residents of Ogbobo in Rivers State heard a loud explosion from a pipeline, which had ruptured. Crude oil from the pipe spilled over the surrounding land and waterways. The community notified Shell Petroleum Development Company (SPDC) the following day; however, it was not until several days later that a contractor working for SPDC came to the site to deal with the oil spill. The oil subsequently caught fire: Some 42 communities were affected as the oil moved through the water system. The communities' water supply, which came from the local waterway, was contaminated. SPDC brought ten 500-litre plastic tanks of water to Ogbodo, but only after several days. Although SPDC refilled the tank every two to three days. 10 tanks are insufficient for their needs, and are emptied within hours of refilling.

- People in the area complained of numerous symptoms, including respiratory problems. The situation was so dire that some families reportedly evacuated the area, but most had no means of leaving.

- Though companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families have received payments however, some of the development projects and compensations have been criticize as inadequate and poorly executed.

- Hundreds of thousands of people are affected, particularly the poorest and other most vulnerable sectors of the population, and those who rely on traditional livelihoods such as fishing and agriculture.

ORDERS SOUGHT BEFORE THE COURT

19. The Plaintiff prays the Court to make the following orders:

    a) A **Declaration** that everyone in the Niger Delta is entitled to the internationally recognised human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to social and economic development; and the right to life and human security and dignity.

    b) A **Declaration** that the failure and/or complicity and negligence of the Defendants to effectively and adequately clean up and remediate contaminated land and water; and to address the impact of oil-related pollution and environmental damage on agriculture and fisheries is unlawful and a breach of international human rights obligations and commitments as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

    c) A **Declaration** that the failure of the Defendants to establish any adequate monitoring of the human impacts of oil-related pollution despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterised by high levels of poverty and vulnerability, is unlawful as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.

    d) A **Declaration** that the systematic denial of access to information to the people of the Niger Delta about how oil exploration and production will affect them, is unlawful as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and cultural Rights, and the African Charter on Human and Peoples' Rights.

e) An **Order** directing the Defendants to ensure the full enjoyment of the people of Niger Delta to an adequate standard of living, including adequate access to food, to health care, to clean water, to clean and healthy environment; to socio and economic development; and the right to life and human security and dignity.

f) An **Order** directing the Defendants to hold the oil companies operating in the Niger Delta responsible for their complicity in the continuing serious human rights violations in the Niger Delta.

g) An **Order** compelling the Defendants to solicit the views of the people of the area throughout the process of planning and policy-making on the Niger Delta.

h) An **Order** directing the government of Nigeria to establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean-up and prevent pollution and damage to human rights.

i) An **Order** directing the government of Nigeria to carry out a transparent and effective investigation into the activities of oil companies in the Niger Delta and to bring to justice those suspected to be involved and/ or complicit in the violation of human rights highlighted above.

j) An **Order** directing the Defendants individually and/ or collectively to pay adequate monetary compensation of 1 Billion Dollars (USD) ($1 billion) to the victims of human rights violations in the Niger Delta, and other forms of reparation that the Honourable Court may deem fit to grant.

20. The Federal Republic of Nigeria maintains that the Court has no jurisdiction to examine the alleged violations of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It equally asks the Court to make a declaration that it is not competent to sit on the case, for, as it contends, the Plaintiff failed to annex to its Application, the report by Amnesty International; in so doing, it violates the provisions of the Rules of the Court and deliberately infringes on the rights of the Defendant. It adds that if in any extraordinary manner, the Court holds that it has jurisdiction to examine the case, it will nevertheless have to conclude that the report adduced by the Plaintiff does not meet the universally accepted criteria for it to be admitted in evidence.

21. Besides, the Federal Republic of Nigeria affirms that the Plaintiff does not have *locus standi* to bring the instant action and maintains, moreover, that

by virtue of the provisions of the new Article 9(3) of the Protocol on the Court as amended by the 19 January 2005 Protocol, certain facts brought by the Plaintiff have come under the three-year statute bar, and therefore its action is foreclosed.

22. The Federal Republic of Nigeria therefore concludes that the Plaintiff's Application is not founded and must be dismissed.

IN LAW

23. The Court considers that certain issues raised by the Federal Republic of Nigeria, notably - (1) that the Court lacks jurisdiction to examine the alleged violations of the said Covenants; (2) lack of *locus standi* on the part of the Plaintiff; (3) the Plaintiffs failure to produce the Amnesty International report at the time of Judgment of the substantive application; and (4) that certain facts pleaded by the Plaintiff have come under a three-year statute bar. These questions present a preliminary aspect which touches on the jurisdiction of the Court and the admissibility of the Application. The Court therefore intends to analyse them before any analysis is made on the merits of the case.

1. PRELIMINARY QUESTIONS

(i) Whether the Court lacks jurisdiction to examine the alleged violations of the said Covenants

24. The Federal Republic of Nigeria argues notably, that the Constitution of Nigeria only recognises the jurisdiction of the domestic courts of Nigeria, as far as competence to examine violation of the rights contained in the ICCPR is concerned, and that ICESCR did not provide that the rights contained in the said instrument were justiciable. The Federal Republic of Nigeria added that the Court has jurisdiction to adjudicate only in Cases regarding the treaties, conventions and protocols of the Economic Community of West African States.

25. The new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides: ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State".***

26. This provision, which gives jurisdiction to the Court to adjudicate on cases of human rights violation, results from an amendment made to the 6 July 1991 Protocol A/P.1/7/91 on the Community Court of Justice. The raison

d'être of this amendment is Article 39 of the 21 December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, which provides: ***"Protocol A/ P1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights...".***

27. When the Member States were adopting the said Protocol, the human rights they had in view were those contained in the International instruments, with no exception whatsoever, and they were all signatory to those instruments, Thus attests the preamble of the said Protocol as well as paragraph (h) of its Article 1, which stipulates the principles of constitutional convergence common to the member States} which provides: ***"The rights set up in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States ; each individual or organisation shall be free to have recourse to the common or civil law courts, a Court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights".***

28. Thus, even though ECOWAS may not have adopted a specific instrument recognising human rights, the Courts human rights protection mandate is exercised with regard to all the International instruments, including the African Charter on Human and Peoples Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which the Member States of ECOWAS are parties.

29. That these instruments may be invoked before the Court reposes essentially on the fact that all the Member States parties to the Revised Treaty of ECOWAS ***have renewed their allegiance to the said texts, within the framework of ECOWAS***. Consequently by establishing the jurisdiction of the Court, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to.

30. This reality is consistently held in the Court's case law *[See Judgment of 17 December 2009*, **Amouzou Henri v. Republic of Côte d'Ivoire** ***§ 57 to 62; Judgment of 12 June 2012***, **Aliyu Tasheku v. Federal Republic of Nigeria** ***§16]***.

31. As to the justiciability or enforceability of the economic, social and cultural rights, this Court is of the view that instead of a generalistic approach

recognizing or denying their enforceability, the appropriate way to deal with that issue is to analyse each right in concrete terms, try to determine which specific obligation it imposes on the States and Public Authorities, and whether that obligation can be enforced by the Courts.

32. Indeed there are situations in which the enjoyment of the economic, social and cultural rights depends on the availability of State resources. In those situations, it is legitimate to raise the issue of enforceability of the concerned right. But there are others in which the only obligation required from the State to satisfy such rights is the exercise of its authority to enforce the law that recognises such rights and prevent powerful entities from precluding the most vulnerable from enjoying the right granted to them.

33. In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region.

34. The Court notes that behind the thesis developed by the Federal Republic of Nigeria is the principle contained in its own Constitution that the economic, social and cultural rights, being mere policy directives, are not justiciable or enforceable.

35. But it should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

36. As held by the jurisprudence of this Court, in the Ruling of 27 October 2009, **SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission**, once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.

37. This view is consistent with paragraph 2, Article 5 of the International Covenant on Economic, Social and Cultural Rights which Nigeria is party

to by adhesion since 29 July 1993 which provides:

> ***"No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them* to *a lesser extent".***

38. In these circumstances invoking lack of justiciability of the concerned right, to justify non accountability before this Court, is completely baseless.

39. It is thus evident that the Federal Republic of Nigeria cannot invoke the non justiciability or enforceability of ICESCR as a means for shirking its responsibility in ensuring protection and guarantee for its citizens within the framework of commitments it has made *vis-a-vis* the Economic Community of West African States and the Charter.

40. The Court adjudges that it has jurisdiction to *examine* matters in which Applicants *invoke* ICCPR *and* ICESCR.

ii) That the Plaintiff lacks locus standi

Argument advanced by the Federal Republic of Nigeria

41. The Federal Republic of Nigeria maintained that SERAP has no *locus standi* because its Application was filed without the prior information, accord and interest of the People of Niger Delta, and that SERAP acts in its own name, with no proof that it is acting on behalf of the people of Niger Delta.

Argument advanced by the Plaintiff

42. The Plaintiff countered this plea-in-law by citing **Ruling No: ECW/CCJ/APP/07/10** delivered by the Court on 10 December, 2010 on the preliminary objections raised by the oil companies who were summoned to appear in Court.

Analysis of the Court

43. The Court recalls that this issue has already been examined in the above-cited ruling among the numerous preliminary objections raised by the oil companies and it concluded that the NGO known as SERAP has *locus standi* in the instant case *(see §62 of the Ruling)*.

44. However, the Court notes that the Federal Republic of Nigeria did not take part in the proceedings relating to the said objections. But, by virtue of the relative effect of the decisions of the Court, the 10 December 2010 Decision affect only the parties who pleaded their cases during that hearing. The authority of that decision cannot therefore be applied to the Federal Republic of Nigeria. Consequently, the Court declares that this argument advanced by the Federal Republic of Nigeria is admissible.

45. Nevertheless, the Court does not find in the arguments advanced by the Federal Republic of Nigeria any determining factor capable of compelling it to set aside the previous decision. Consequently, the Court adjudges that SERAP, in the instant case, has *locus standi*.

iii) ***As*** **to** ***the admissibility of the report by Amnesty International***

Argument advanced by the Federal Republic of Nigeria

46. The Federal Republic of Nigeria maintained that at the time of lodgment of the initial application, and even the amended application, the Plaintiff did not produce the report by Amnesty International, which it had listed among the annexed schedule of exhibits. By acting in such manner, and deliberately so, the Plaintiff violated the provisions of Article 32 of the Rules of Procedure particularly paragraphs 1, 4, 5 and 6 - which it was bound to respect, and thus violated its right to defence. It added that the Plaintiff thus contributed to a systematic denial of fair hearing in the suit.

Argument advanced by the Applicant

47. Plaintiff counsel maintained that the admissibility of the document is at the discretion of the Court, and urged the Court to discountenance the argument brought by the Defendant, which falls under technicality, to the detriment of substantial justice. Moreover, the Plaintiff argued that the report is a piece of evidence he intended to rely on. He added that the failure to produce the report is due to an omission on the part of counsel to the Plaintiff, which should not result in injury to the Plaintiff. He prayed the Court to admit the said document.

Analysis of the Court

48. Paragraphs 1, 4, 5 and 6 of Article 32 of the Rules of Procedure of the Court provides:

    1. The original of every pleading must be signed by the party's agent or lawyer. The original, accompanied by all annexes referred to

therein, shall be lodged together with five copies for the Court and a copy for every other party to the proceedings. The party lodging them in accordance with Article 11 of the Protocol shall certify copies.

4. ***To every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them.***

5. ***Where in view of the length of a document only extracts from it are annexed to a pleading, the whole document or a full copy of it shall be lodged at the Registry.***

6. ***Without prejudice to the provisions of paragraphs 1 to 5; the date on which a copy of the signed original of a pleading; including the schedule of documents referred to in paragraph 4, is received at the Registry by telefax or any other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than ten days thereafter.***

49. The Court recalls that it is not for the parties to indicate the procedure to be followed by the Court and that parties are required to abide by the provisions of the Court's Protocol and Rules of Procedure. The lawyers and counsels are under obligation to assist the parties with all the diligence and professionalism required.

50. The Court is of the view that failure to produce an exhibit in evidence is akin to the situation provided for in paragraph 6, Article 33 of the Rules of Procedure thus:

> ***"If the application does not comply with the requirements set out in paragraphs 1 to 4 of this Article, the Chief Registrar shall prescribe a period not more than thirty days within which the Applicant is to comply with them whether by putting the application itself in order or by producing any of the above mentioned documents. If the Applicant fails to put the Application in order or to produce the required documents within the time prescribed, the Court shall, after hearing the Judge Rapporteur, decide whether the non-compliance with these conditions renders the application formally inadmissible."***

51. Thus, the sanctioning of any failure to comply with the provisions of Article 32 of the Rules of Procedure comes under the discretionary power of the Court and the latter exercises that power in accordance with the provisions of the texts of the Court and the dictates of an efficient administration of justice.

52. In that regard, paragraph 1 of the new Article 15 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol A/SP1/01/05, and Articles 51 and 57(1) of the Rules of the Court provide respectively as follows:

    Article 15.1: "*At any time, the Court may request the parties to produce any documents and provide any information or explanation which it may deem useful. Formal note shall be taken of any refusal.*"

    Article 51: "*The Court may request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars as they may consider relevant. The information and/or documents provided shall be communicated to the other parties.*"

    Article 57(1): "*The Court may at any time, in accordance with these rules, after hearing the parties, order any measure of inquiry* to *be taken or that a previous inquiry be repeated or expanded.*"

53. The Court recalls that as *soon* as it noticed that the Amnesty International report was produced along with the Plaintiff's final written submission and that *an* objection had been raised by *the* Defendant, it decided to reopen the oral procedure, under Article 58 of its Rules of Procedure, to allow the Parties to address that issue.

54. After receiving oral and written submissions of the Parties *on* the admissibility and context of that report, the Court reserved its decision for the judgment

55. Consequently, the Court concludes that even if Plaintiff Counsel failed to produce the report initially, he made up for that omission in accordance with the Rules of the Court, and that in the instant case, it cannot be successfully maintained that there has been infringement on the Defendant's rights to fair hearing. The Court adjudges, without prejudice to the authenticity of the report, that the Amnesty International report, as produced by the Plaintiff, is admissible.

iv) That certain facts brought by the Plaintiff have come under a three-year statute bar

Argument advanced by the Federal Republic of Nigeria

56. The Federal Republic of Nigeria maintained that the facts which *occurred* before 1990, in 1995, on 25 June 2001 (oil spill in Ogbodo), on 3 December 2003 (oil spill in Rukpokwu, Rivers State), in June 2005 (oil spill in Oruma, Bayelsa State), on 28 August 2008 and on 2 February 2009 (oil spills in Bodo, Ogoniland), have come under a three-year statute bar in line with the new paragraph 3, Article 9 of the 19 January 2005 Supplementary Protocol A/SP.1/01/05 which provides:

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

Argument advanced by the Plaintiff

57. Conversely, the Plaintiff affirmed that *"the Defendants arguments are fundamentally flawed, based on outdated or mistaken principles of law and cannot be sustained having regard to sound legal reasoning established by the ECOWAS Court's own jurisprudence, and other national and international legal jurisprudence"*. The Plaintiff argued that the position of the Federal Republic of Nigeria conceals the cumulative effect of the various causes of pollution experienced by the Niger Delta region for decades. It stressed that there is a considerable difference between an isolated event of pollution or of environmental damage and the continuous and repeated occurrence of the same event in the same region for years. It further contended that in regard to the facts it is relying on, notably the recent report by Amnesty International (2009) the Federal Republic of Nigeria cannot validly argue that the current events and situation have come under a three-year statute bar. It is the view of the Plaintiff that the violations are still continuing as a result of the unceasing nature of the oil spills and the damage done to the environment. The Plaintiff concluded that Article 9(3) does not apply to the instant case.

Analysis of the Court

58. In the instant case, the issue of statute of limitation raised by the Defendants based on facts that took place more than three years before the complaint was filed with the Court may be analysed in line with the date of the enactment of the ECOWAS 2005 Protocol which entrusted the Community Court of Justice with jurisdiction to entertain cases of human rights violation.

59. The facts that occurred before the Protocol of 2005 came into force cannot be taken into consideration in this case for the simple reason that the said Protocol cannot be applied retroactively.

60. As for the facts that occurred after the enactment of that instrument, their subjection to the statute of limitation depends on their characterisation as an isolated act or as a persistent and continuous omission that lasted until the date the complaint was filed with the Court.

61. Indeed, in the application lodged by the Plaintiff, the Federal Republic of Nigeria is faulted for omission over the years in taking measures to prevent environmental damage and making accountable those who caused the damage to the environment in the Niger Delta Region.

62. It is trite law that in situations of continued illicit behaviour, the statute of limitation shall only begin to run from the time when such unlawful conduct or omission ceases. Therefore, the acts which occurred after the 2005 Protocol came into force, in relation to which the Federal Republic of Nigeria had a conduct considered as omissive, are not statute barred.

II-CONSIDERATION OF THE ALLEGED VIOLATIONS

63. The Plaintiff alleged violation of Articles 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 21, 22, 23 and 24 of the Charter, Articles 1, 2, 6, 9, 10, 11, 12.1, 12.2, 12.2(b) of the International Covenant on Economic, Social and Cultural Rights, Articles 1, 2, 6, 7 and 26 of the International Covenant on Civil and Political Rights, Article 15 of the Universal Declaration of Human Rights. The Plaintiff particularly brings claims in respect of violation of the right to an adequate standard of living including adequate food and the violation of the right to economic and social development.

Argument advanced by the Plaintiff

64. Plaintiff argues that Article 11 of the International Covenant on Economic Social and Cultural Rights establishes ***"the right of everyone to an adequate standard of living… including adequate food"*** The right to adequate food requires States to ensure the availability and accessibility of food. Availability includes being able to feed oneself directly from productive land or other natural resources, They submit that the Nigerian government has clearly failed to protect the natural resource upon which people depend for food in the Niger Delta, and has contravened its obligation to ensure the availability of food in that thousands of oil spills and other environmental damage to fisheries, farmland and crops have occurred over decades without adequate

clean-up, They referred to African Commission's decision in the Ogoni case to the effect that Nigeria had violated the right to food by allowing private oil companies to destroy food sources and submitted that several years after this decision, the government of Nigeria has continued to violate its obligations under the Covenant and the African Charter by failing to take effective measures to enforce laws to prevent contamination and pollution of the food sources (both crops and fish) by private oil companies in the Niger Delta.

65. They submit that Article 6 of the ICESCR obliges State Parties to recognize the right of everyone to the opportunity to earn their living by work and as such the Government of Nigeria is obliged to take all necessary measures to prevent infringements of the right to earn a living through work by third parties.

66. On the right of everyone to an adequate standard of living they submit that it is linked with the rights to food and housing, as well as the right to gain a living by work and to the right to health.

67. On the right to health they refer to Articles 16 and 24 of the African Charter and Article 12.1 of the ICESCR and submit that the government of Nigeria has failed to promote conditions in which people can lead a healthy life due to its failure to prevent widespread pollution as a consequence of the oil industry which has directly led to the deterioration of the living situation for affected communities in the oil producing areas of the Niger Delta.

68. Frequent oil spills are a serious problem in the Niger Delta. The failure of the oil companies and regulators to deal with them swiftly and the lack of effective clean up greatly exacerbates the human rights and environmental impacts of such spills.

69. Clean-up of oil pollution in the Niger Delta is frequently both slow and inadequate, leaving people to cope with the ongoing impacts of the pollution on their livelihoods and health.

70. There has been no effective monitoring by the Defendants of the volumes of oil related pollutants entering the water system, or of their impacts on water quality, fisheries or health.

71. The Federal Government is yet to put in place modalities and logistics for the protection of the Niger Delta people as well as laws that will regulate activities in the Niger Delta and has not acted with due diligence to ensure that foreign companies operating in the Niger Delta do not violate human rights.

72. Plaintiff submits that by failing to deal adequately with corporate actions that harm human rights and the environment, the government of Nigeria has not only compounded the problem but has aided and abetted the oil companies operating in the Niger Delta in the violation of human rights.

Argument advanced by the Federal Republic of Nigeria

73. The Defendants deny all the material allegations of fact put forward by the Plaintiff and required the strictest proof of the averments contained therein.

74. In denying the allegation that the oil spill led to poverty in the area, the Defendants contend that the oil exploration has no direct relation with poverty in the region and that the allegations thereof are speculative.

75. The Defendants; while admitting oil spillage, aver that most of the spillage is caused by the errant youths of the Niger Delta who vandalise the oil pipelines and kidnap expatriates and oil workers thereby making it difficult for the government to function there.

76. Defendants deny the allegation of avoidance to pay compensation by the oil companies and state that these companies had on many occasions paid compensation to identified victims of leakages and pollution on account of Court orders or out of Court settlements.

77. The Defendants further aver that compensation had always been paid to victims and any delays in the payments are brought about by internal disagreement among claimants.

78. While denying the Plaintiff's allegation of neglect, Defendants aver that by the provisions of the Constitution of the Federal Republic of Nigeria, 13% of the oil revenue goes to the oil producing areas.

79. They also aver that the Federal Government established OMPADEC (Oil Minerals Producing Area Development Commission) which later crystallised into NDDC (Niger Delta Development Commission) with the responsibilities among others to ***formulate policies implement projects and programmes, liaise with the various oil mineral producing companies on all matters of pollution prevention and control, tackle ecological and environmental problems that arise from the exploration of oil mineral and advise the Federal Government on the prevention and control of oil spillages, gas flaring and environmental pollution of the Niger-Delta area.***

80. The Federal Ministry of works also issues contracts for the construction of roads, bridges and other essentials of life in the Niger Delta.

81. The Federal Government established the Ministry of Niger Delta saddled with the responsibility of catering for the basic needs of the people of the Niger Delta and has put in place necessary legal tools for the protection of the Niger Delta Region as well as avenues for compensation to any inevitable victim of oil spill or pollution through various legislations which include the Oil Pipeline Act 1956, Petroleum Regulation Act 1967,Oil in Navigable Waters Regulation 1968, Petroleum Act 1969, Petroleum (drilling and production) Regulations 1969, Federal Environmental Protection Act 1988, Impact Assessment Act 1992, Oil and Gas Pipeline Regulations, 1995, Environmental Standards and Regulation Enforcement Agency (Establishment) Act 2006, The Environmental Guidelines and Standards for the Petroleum industry 2002, National Oil Spill Detection and Response Agency (Establishment) Act 2006, Harmful Waste Special Criminal Provision Act 1990 among others.

82. That it is the responsibility of a holder of a licence to take all reasonable steps to avoid damage and to pay compensation to victims of oil pollution or spill and any delays in payment of compensation are on account of challenges in courts as to who are rightly entitled to compensation.

83. They conclude that the Plaintiff has not established any of the allegations levelled against them as they are not in breach of any of their international obligations.

84. The Defendants also deny all the allegations by the Plaintiff on Defendant's lack of concerted effort to check the effect of pollution and recounted the legal frameworks put in place for the enforcement of rights by persons injured, regulation of the activities of oil prospectors and of sanctioning defaulters all in an effort to ensure a safe environment.

85. They point out that the Environmental Impact Assessment Act 1992 was adopted and applied towards assessing the possible impact of any planned activity before embarking on it. They referred to section 20 of the Nigerian Constitution which provides for the protection of the environment and submit that Defendants have put in place adequate legislative framework.

86. They submit that Article 2(1) of ICESCR lays down the basis for determining States' non-compliance with the provisions of the Covenant. In that regard, the Defendant by virtue of section 13 of the Constitution adopted policies aimed at implementation of the provisions of the Covenant. That through the instrumentality of the Niger Delta Development Commission, the people

of Niger Delta have been enjoying the rights contained in the Covenant and that the Defendants have discharged their obligations under the Covenant.

87. They refer to Plaintiff's allegation of violations of Article 16 of the African Charter and Article 12(1) of ICCPR and submit that in so far as Plaintiff made no prayers on them and led no evidence in proof, they are deemed abandoned.

88. On Plaintiff allegation of pollution, they submit that the existence of pollution needs to be proved by expert evidence or at least evidence of people affected supported by medical report; that having failed to so prove the Plaintiff's averments remain mere allegations.

89. They admit oil spillage but aver that as admitted by the Plaintiff, the spills are mainly as a result of vandalisation of pipelines and sabotage by youths of Niger Delta.

90. They refer to the Land Use Act which vests ownership of land in the Federal Government and submit that the issue of infringement of Article 14 of the African Charter does not therefore arise.

Analysis of the Court on the merits

91. The Court notes that the Plaintiff alleges violation of several articles of the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Court finds that considering all the instruments invoked, including the Universal Declaration of Human Rights, 29 Articles were alleged to have been violated.

92. The success of an application for human rights protection does not depend on the number of provisions or international instruments the Applicant invokes as violated. When various articles of different instruments sanction the same rights, the said instruments may as far as those specific rights are concerned, be considered equivalent, It suffices therefore to cite the one which affords more, effective protection to the right allegedly violated.

93. At any rate, it is incumbent upon the Court to shape out the dispute along its essential lines and examine no more than the violations which, in regard to the facts and circumstances of the suit, appear to it to constitute the heart of the grievances brought.

94. For the Court, the heart of the grievances is to be looked for in relation to the facts of the case it considers as established. In that light, although the

report produced by Amnesty International may be in the public domain and may contain well known facts reported by other numerous sources (international organisations, the media, etc.), the Court is of the view that this report cannot on its own, alone, be considered as conclusive evidence, The report, as well as other well known facts, constitutes for the Court a kaleidoscope of elements and indices that may specifically help enlighten it on the actual existence and scope of the problem. In the instant case, the Court upholds as decisive and convincing the facts on which there is agreement among the parties *or* those on which one, of the parties does not raise objection while in a position to do so,

95. From the submissions of both Parties, it has emerged that the Niger Delta is endowed with arable land and water which the communities use for their social and economic needs; several multinational and Nigerian companies have carried along oil prospection as well as oil exploitation which caused and continue to cause damage to the quality and productivity of the soil and water; the oil spillage, which is the result of various factors including pipeline corrosion, *vandalisation,* bunkering, etc. appears for both sides as the major source and cause of ecological pollution in the region. It is a key point that the Federal Republic of Nigeria has admitted that there has been in Niger Delta occurrences of oil spillage with devastating impact on the environment and the livelihood of the population throughout the time.

96. Though the Defendant's contention is that the, Plaintiff allegations are mere conjectures, this Court highlights and takes into account the fact that it is public knowledge that oil spills pollute water, destroy aquatic life and soil fertility with resultant adverse effect on the health and means of livelihood of people in its vicinity. Thus in so far as there is consensus by both parties on the occurrence of oil spills in the region, we have to presume that in the normal cause of events in such a situation, to wit, consequential environmental pollution exist there. [Cf Torrey Canyon (1967), Amoco Cadiz (1978), Exxon Valdez (1989), Erika (1999), Prestige (2002) Deep water Horizon (avril 2010)].

97. In the face of this finding, the question as to the causes or liability of the spills is *not* in issue in the instant case. What is being canvassed is the attitude or behaviour of the Defendant, as ECOWAS Member State and party to the African Charter. Indeed, it is incumbent upon the Federal Republic of Nigeria to prevent or tackle the situation by holding accountable those who caused the situation and to ensure that adequate reparation is provided for the victims.

98. As such, the heart of the dispute is to determine whether in the circumstances referred to, the attitude of the Federal Republic of Nigeria, as a party to the African Charter on Human and Peoples' Rights, is in conformity with the obligations subscribed to in the terms of Article 24 of the said instrument, which provides: ***"All peoples shall have the right to a general satisfactory environment favourable*** **to** ***their development."***

99. The scope of such a provision must be looked for in relation to Article 1 of the Charter, which provides: ***"The Member States of the Organization of African Unity, parties*** **to** ***the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."***

100. Thus, the duty assigned by Article 24 to each State Party to *the* Charter is both an obligation of attitude and an obligation of result. The environment, as emphasised by the International Court of Justice, ***"is not an abstraction but represents the living space; the quality of life and the very health of human beings, including generations unborn(Legality of the threat or use*** **of** ***nuclear arms, ICJ Advisory Opinion of 8 July 2006, paragraph 28)***. It must be considered as an indivisible whole, comprising the ***"biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors"***(International Law Institute, Resolution of 4 September 1997, Article 1). The environment is essential to every human being. The quality of human life depends on the quality of the environment.

101. Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.

102. In its defence, the Federal Republic of Nigeria exhaustively lists a series of measures it has taken to respond to the environmental situation in the Niger Delta and to ensure a balanced development of this region.

103. Among these measures, the Court takes note of the numerous laws passed to regulate the extractive oil and gas industry and safeguard their effects on

the environment, the creation of agencies to ensure the implementation of the legislation, and the allocation to the region, 13% of resources produced there, to be used for its development.

104. However, compelling circumstances of this case lead the Court to recognise that all of these measures did not prevent the continued environmental degradation of the region, as evidenced by the facts abundantly proven in this case and admitted by the very same Federal Republic of Nigeria.

105. This means that the adoption of the legislation, no matter how advanced it may be or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.

106. As stated before, as a State Party to the African Charter on Human and Peoples' Rights the Federal Republic of Nigeria is under international obligation to recognise the rights duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them.

107. If notwithstanding the measures the Defendant alleges having put in place the environmental situation in the Niger Delta Region has still been of continuous degradation this Court has to conclude that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the "other" measures required by the said Article 1 of African Charter to ensure the enjoyment of the right laid down in Article 24 of the same instrument.

108. From what emerges from the evidence produced before this Court, the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.

109. Contrary to the assumption of the Federal Republic of Nigeria In its attempt to shift the responsibility on the holders of a licence of oil exploitation *(see paragraph 82)* the damage caused by the oil industry to a vital resource of such importance to all mankind such as the environment cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry.

110. It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.

111. And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities with clear expectation of impunity that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples' Rights.

112. Consequently, the Court concludes and adjudges that the Federal Republic of Nigeria by comporting itself in the way it is doing in respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples Rights and has violated Articles 1 and 24 of the said instrument.

REPARATIONS

113. In the statement of claims the Plaintiff asks for an order of the Court directing the Defendants to pay adequate monetary compensation of 1 Billion Dollars (USD) ($1,000,000,000) to the victims of human rights violations in the Niger Delta and other forms of reparation the Court may deem fit to grant.

114. The Court acknowledges that the continuous environmental degradation in the Niger Delta Region produced devastating impact on the livelihood of the population, it may have forced some people to leave their area of residence in search for better living conditions and may even have caused health problems to many, But in its application and through the whole proceedings, the Plaintiff failed to identify a single victim to whom the requested pecuniary compensation could be awarded.

115. In any case, if the pecuniary compensation was to be granted to individual victims, a serious problem could arise in terms of justice morality and equity within a very large population, what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one Billion Dollars?

116. The meaning of this set of questions *is* to leave clear the impractibility of that solution. In case of human rights violations that affect in determined number of victims or a very large population as in the instant case the compensation shall come not as an individual pecuniary advantage but as a collective benefit adequate to repair as completely as possible the collective harm that a violation of a collective right causes.

117. Based on the above reasons, the prayer for monetary compensation of one Billion US Dollars to the victims is dismissed.

118. The Court is however mindful that its function in terms of protection does not stop at taking note of human rights violation. If it were to end in merely taking note of human rights violations, the exercise of such a function would be of no practical interest for the victims who in the final analysis are to be protected and provided with relief. Now the obligation of granting relief for the violation of human rights is a universally accepted principle. The Court acts indeed within the limits of its prerogatives when it indicates for every case brought before it the reparation it deems appropriate.

119. In the instant case in making orders for reparation the Court is ensuring that measures are indicated to guide the Federal Republic of Nigeria to achieve the objectives sought by Article 24 of the Charter namely to maintain a general satisfactory environment favourable to development.

DECISION

For these reasons and without the need to adjudicate on the other alleged violations and requests.

120. **THE COURT**

Adjudicating in a public session after hearing both parties, and after deliberating:

- **Adjudges** that it has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

- **Adjudges** that SERAP has *locus standi* in the instant case;

- **Adjudges** that the report by Amnesty International is admissible;

- **Adjudges** that the Federal Republic of Nigeria has violated Articles 1 and 24 of the African Charter on Human and Peoples Rights;

CONSEQUENTLY,

121. Orders the Federal Republic of Nigeria to:

   i. Take all effective measures within the shortest possible time to ensure restoration of the environment of the Niger Delta;

   ii. Take all measures that are necessary to prevent the occurrence of damage to the environment;

   iii. Take all measures to hold the perpetrators of the environmental damage accountable;

   Since other requests asking for declarations and orders from the Court as to rights of the Plaintiff and measures to be taken by the Defendant, and listed in the subparagraphs of paragraph 19, have already been considered albeit implicitly by this decision, the Court does not have to address them specifically.

COSTS

122. The Federal Republic of Nigeria shall bear the costs.

123. The Federal Republic of Nigeria shall fully comply with and enforce this Decision of the Community Court of Justice ECOWAS in accordance with Article 15 of the Revised Treaty and Article 24 of the 2005 Supplementary Protocol on the Court.

   Thus made declared and pronounced in English the language of procedure in a public session at Ibadan by the Court of Justice of the Economic Community of West African States on the day and month above.

124. **AND THE FOLLOWING HEREBY APPEND THEIR SIGATURES:**

   Hon. Justice Benfeito Mosso Ramos - *Presiding*

   **Hon. Justice Hansine Donli - ** *Member*

   Hon. Justice Anthony Alfred Benin - *Member*

   Hon. Justice Clotilde Medegan Nougbode - *Member*

   Hon. Justice Eliam Potey - *Member*

125. ***Assisted by:*** **Tony Anene-Maidoh -** *Chief Registrar*

978-978-50385-6-9

THONIMARTINS (234) 08056666580, 08033982433