COMMUNITY COURT OF JUSTICE, ECOWAS

(2013)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

COMMUNITY COURT OF JUSTICE, ECOWAS

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10. **HON. JUSTICE ELIAM MONSEDJOUENI POTEY**

MR. TONY ANENE-MAIDOH
Chief Registrar

EDITORIAL BOARD FOR THE ECOWAS LAW REPORT

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

HOLDEN AT ABUJA, NIGERIA

THIS 11TH DAY OF FEBRUARY, 2013

SUIT N^{O}: ECW/CCJ/APP/15/11
JUDGMENT N^{O}: ECW/CCJ/JUD/01/13

BETWEEN

DR. ROSE MBATOMON AKO - *PLAINTIFF*

AND

1. **WEST AFRICAN MONETARY AGENCY**
2. **THE DIRECTOR GENERAL, WAMA**
3. **THE PRESIDENT, ECOWAS COMMISSION**
4. **THE CHAIRMAN, COMMITTEE OF GOVERNORS OF ECOWAS MEMBER CENTRAL BANKS**
5. **ATTORNEY-GENERAL OF THE REPUBLIC OF SIERRA LEONE**
6. **THE REPUBLIC OF SIERRA LEONE -**

} *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

ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **KASIE OGBUANOA** - *FOR THE PLAINTIFF*
2. **L.M. FARMAH & OSMAN KANU** - *FOR THE DEFENDANTS*

Unlawful termination of appointment -Violations of rights -Compensation for violations of rights by employers.

SUMMARY OF FACTS

The Plaintiff, an economic and financial management consultant and community citizen was employed as Director of Research and Operations at WAMA, the 1st Defendant.

Thereafter, her employment was unexpectedly terminated by the 2nd Defendant on the 26th day of February, 2009 contrary to the 1st Defendant's condition of service for professional staff and the ECOWAS Staff Regulations. The Plaintiff stated that she was treated in dehumanizing manner by several actions of the Defendants.

LEGAL ISSUES

- *Unlawful termination of appointment.*
- *Violations of Rights.*
- *Whether compensation results from unlawful termination of a statutory term of employment or an employment of statutory flavour by an employer.*

DECISION OF THE COURT

The Court held:

- *That the Director General failed to comply with Article 42 of the provisions of the Condition of Service for Professional Staff.*

- *Having not followed due process in severing the Plaintiff's employment from the services of the 1st Defendant, the Court holds that there was violation of her rights as duly stated in the ECOWAS Staff Regulations and the Rules of WAMA.*

- *The Court would compensate a party whose rights have been violated by the employer, either by not following due process in terminating the appointment of an employee who is under a statutory term of employment or an employment of statutory flavour.*

JUDGMENT OF THE COURT

SUMMARY OF THE FACTS BY THE PLAINTIFF

1. The Plaintiff, a community citizen was gainfully employed as an economic and financial management consultant and also a senior lecturer in Nassarawa State University, Keffi, Nigeria on grade level 14 Step 4, saw an advert on the 7th of August 2002 published by the first Defendant for series of positions for employment, in a Nigerian Newspaper specifically at pg 40 of This day Newspaper Vol. 8 number 2263. She applied for the position of the director of research and operation as stated in the Advert.

2. Having met all the required conditions, she was employed at that position of Director of Research and operation and received her letter of appointment through a DHL Courier Service with a specified date of resumption, a probation period and enjoined to provide personal documents on arrival. After her resumption of duty she noticed that the letter of appointment contained no stated salary for the position she accepted and also no accompanied copy of conditions of service and rules and regulations, no rules and regulations attached therein to give her the necessary information about the decision she took to accept the appointment. When she made enquires about the omission, she was informed that the conditions of service and salary structure at WAMA, the 1st Defendant was undergoing a review.

3. She stated further that she was employed based on the credentials she submitted to the 1st Defendant and realized that the highest standard of efficiency and technical competence were required and her credentials supported same. She gave a highlight of her credentials as follows:

   A Doctorate degree in Economics majoring in financial, industrial and development economics with a history of excellence: Her primary school results also showed that she passed through that phase of education in a 1st position class with an academic record of excellence in Secondary School.

   She also had proven competence in several field including, banking business, academics, publishing several books and professional articles in several journals, teaching university students at undergraduate and graduate levels, served as a professional consultant to key sectors of the Nigerian economy and business, including the Capital market, the Security

and exchange Commission and the Central Bank of Nigeria; served on several national assignments in the Federal Government of Nigeria.

4. She states that with these credentials she was appointed for that post and accepted same. She was given a one year probation period after which her appointment was made permanent. She stated that by her own estimation she worked efficiently with proficiency and competence in her assignment as the Director of Research and Operation.

5. She further stated that the 2nd Defendant served her an unexpected termination letter dated the 26th day of February 2009. The Plaintiff stated that her appointment was unlawfully terminated without any notice and without due process vide a letter dated 26th February 2009 signed by the 2nd Defendant, Professor Mohammed Ben Omar Ndiaye which was delivered to her at the close of business on Friday, the 27th day of February 2009. The letter indicated that the termination was with immediate effect and viewed same as contrary to the provisions of Articles 40 to 44, 47 to 49 of WAMA Conditions of Service for Professional Staff and Articles 69 of ECOWAS Staff Regulations.

6. She also mentioned that the 2nd Defendant who summoned her to his office for a terminal meeting confessed to her in the presence of a senior administrator and finance officer one SAFO and Mr. Sigismond Mba-Offor that he had been under intense pressure both verbally and in writing to terminate her appointment since he became the Director of WAMA eight months to that date. She also stated that her letter of termination indicated that the pressure and approval for her severance of appointment came from the Governors of the Central Bank of Nigeria, Bank of Guinea and Bank of Sierra Leone.

7. Her main stance in stating the unlawfulness of the termination was the fact that she was not given fair hearing at any time about her short comings in performance of her duties prior to the said termination and contrary to the applicable conditions of service for professional Staff of WAMA and that the universal principles of natural justice, equity and good conscience was not observed. She further indicated that she was never summoned by any duly constituted panel or commission of enquiry to answer allegations of her incompetence before the termination.

8. Plaintiff also stated that the process adopted by the 2nd Defendant neither satisfied WAMA Regulations nor the ECOWAS Staff Regulations which

enjoined the 1st Defendant to treat staff disputes speedily. Furthermore that the remote cause of her disagreement with the 2nd Defendant arose as a result of her request made to the 1st Defendant, the Committee of Governors for Justice on the persistent maladministration, humiliation and threats by the then Director General, which were completely ignored for over 2 years since 2006 without an acknowledgement of receipt of her request which later became the reasons cited in paragraph 1 page 2 of the termination letter of February 2009 as grounds of terminating her appointment without due process. She further stated that after receiving the letter of the said unlawful termination of appointment she protested to the authorities of WAMA to follow due procedure as spelt out in the conditions of service and to ensure payment of all her outstanding entitlements and benefits. She was surprised that instead of adherence to the said conditions of service and request for due process to be followed, the 2nd Defendant ordered her to clear her office of personal effects within one week and her official residence within one month with no attempt to address the issue of her entitlement, benefits, and the immediate stoppage of her salaries.

9. She said she sought protection by petitioning the chairman of ECOWAS head of States seeking administrative intervention, but no positive response resulted from the said petition. She said having been unemployed and without salary in a foreign land, the 2nd Defendant in June notified her through a letter specified selected entitlement mainly her contributory providence fund that had been credited to her bank account. She was served with another letter to vacate the official residence, with no mention of her remaining entitlement and no funds provided to enable her move the said properties by repatriation, to relocate her personal effect after six years in service with the 1st Defendant.

10. After the letter asking her to vacate her apartment, she was summoned to the Chief Magistrate Court twice in succession by the Director of Protocol of the Sierra Leone Foreign Ministry on behalf of the 1st Defendant in a matter of speedy ejection from her apartment which she successfully defended in the court in Sierra Leone and the matter was struck out. In the course of the process on the issue of ejection notice she was deprived of the use of the documents in her office.

11. She further stated that she was treated in a dehumanizing manner when further to this the electricity and water in her apartment was disconnected and she was left in total darkness without the means of water. She stated

the fact that she had always paid her monthly deductions from her salary up to February 2009 when her last salary was paid to her. She said she was finally locked out of her official residence by the 1st and 2nd Defendant on the 1st of August 2009 through the use of thugs when her final entitlement were yet to be paid and in so doing she was not given adequate opportunity to remove any of her considerable personal effects from the apartment and reported the incident to the Sierra Leone police Lumley Station. When it was not possible to convince the Defendants to rescind their actions she sought redress at the appropriate Court of Law in Sierra Leone through a Counsel she engaged for the purpose.

12. While the case was pending in Sierra Leone she was forced to seek temporary shelter in Bintumani Hotel in Freetown on the 1st of August 2009 with no property but the cloths she wore when the incident happened. She emphasized that she was greatly traumatized physically, mentally and psychologically by the violations meted on her by the 1st and 2nd Defendants, even when the decision was in her favor the 1st Defendant denied her the fulfillments of the proceeds of the judgment which made her to borrow money to relocate to stay in hotel rooms in Abuja Nigeria from 2010, as it was the period when seeking redress in this Court commenced.

13. She further stated that she was summoned twice and publicly arrested on the road in her car, on account of the 1st and 2nd Defendant filing claims against her at a Criminal Investigation Police department that she was criminally impersonating a diplomat in Freetown by the use of diplomatic car plate. The Sierra Leone Police investigated the allegations against her and found no case against her and notified the 1st and 2nd Defendants accordingly.

14. She mentioned that all the orders of the High Court of Sierra Leone in her favor were ignored by the Defendant even the award of $370,661.00 were unpaid. She raised the issue that the 3rd Defendant permitted the 1st Defendant to ignore the principles of Staff Employment as defined by Economic Community of West African States (ECOWAS) Article 10, Sub 3 (f) Revised Treaty. In respect of the course of action against the 5th and 6th Defendant she mentioned that they failed in their responsibilities to abide or honor the Headquarters agreement to protect staff within their country by allowing the 1st, 2nd and 4th Defendants to take unlawful actions and commit gross abuse of her human rights which are now before this Court.

15. She gave particulars for special damages including some admitted by the Defendant to a grand total of $1,136,510.10 which she sought for. These specified items were made part of her pleadings and there were no reactions by the Defendants to some of them. On this basis she asked the court to grant all the reliefs sought for.

SUMMARY OF STATEMENT OF DEFENCE ON BEHALF OF THE DEFENDANTS

16. The 2nd Defendant conceded to all the facts pertaining to the appointment of the Plaintiff in the 1st Defendant's organization and her subsequent termination of the said appointment. The 2nd Defendant stated the grounds for the termination of Plaintiff's appointment which was particularized in their statement of defense as incompetence and inefficiency. He elaborated on the said grounds that led to the termination of the appointments on the fact that the Plaintiffs first intellectual contribution was a working document the Plaintiff prepared in May 2004 titled "Harmonization of exchange rate policies in ECOWAS" which he said embarrassed the 2nd Defendant as a result it was withdrawn from circuit and was hastily assigned to one of the professionals in the Plaintiffs department to produce an alternative document for the meeting of the Committee of Governors in June 2004 at Dakar- Senegal.

17. He further stated that the Plaintiffs contribution to the study of Liberalization of the capital and financial account in ECOWAS was also a total failure on her part towards technical competence as the work was distributed among the Plaintiffs professional colleagues, the Plaintiff redrafted the portion relating to the Capital Market in Nigeria. The Plaintiffs professional colleagues having considered the conceptual and analytical limits of the paper, alerted the 2nd Defendant who ordered the said portion produced by the Plaintiff to be redrafted before it was presented to the meeting of the Committee of Governors in January, 2005.

18. The 2nd Defendant further stated that in June, 2006 he requested the Plaintiff to prepare a paper for contribution on restructuring of WAMA and the same result occurred as the previous work done by the Plaintiff relating to inefficient analysis and inconsistencies.

19. The 2nd Defendant further elaborated on the issue of incompetence and inefficiency of the Plaintiff to state that even a sister external institution

such as WAMI (West African Monetary Institute) discovered the lack of competence and efficiency of the Plaintiff in her analysis. He also highlighted this point of her lack of competence and efficiency even where the 2nd Defendant disapproved the Plaintiff undertook moves to publish an Article on "Harmonization of Exchange Rates Mechanism in May 2004" he stated that this Article was rejected by WAMI Journal Editorial Board. The reason for the rejection was contained in the Reviewer's comment on the paper submitted for publication in WAMI's Journal which was communicated to the Plaintiff by letter Ref No. WAJMEI-COMMENTS/YTW/001-06-02 dated 20th February, 2007.

20. He stated that the concern towards the Plaintiff was her unethical, unprofessional and negative social behavior towards colleagues at times in conferences and meetings held with guests from other institutions. He made reference to instances recorded in WAMA'S Memorandum on the Plaintiff's addressed to Dr. Paul A. Acquah, Chairman, Committee of Governors of the Central Bank ECOWAS Member States. He gave no highlight of such unsocial misbehaviour. He conceded that the Plaintiff was confirmed after her probationary period based on the presumption that the Plaintiff would improve her technical output and behaviour towards colleagues. However the Plaintiff continued to unveil higher level of inefficiency in the institutional work and relationship with colleagues.

21. He stated that the 2nd Defendant consequently issued series of query letters and at each instance the response was a ground for another and highlighted three of such queries dated 8th June 2005 with heading "WARNING" the second dated 21st March, 2007 with heading "SUSPENSION FOR 8 WORKING DAYS" and the third was dated 16th April, 2007 with heading "QUERY-REQUEST FOR EXPLANATION".

22. He stated that during the Plaintiffs tenure of office as Director of Research and Operations, three Director-Generals including an Interim Director General, each of whom had expressed dissatisfaction on the incompetence, inefficiency or bad social behaviour of the Plaintiff. He stated that the substantive director 2004 to 2006 prepared an internal memo on the Plaintiff which gave detailed reports on the Plaintiffs incompetence and inefficiency of the Plaintiffs social character. He stated that when he assumed office in 2004 the Plaintiff brought her incompetence in clear terms when she performed her function with gross disregard for authority and disrespect for other colleagues. Which lead to her services to the 1st Defendant to be terminated by letter dated 26th February, 2009.

23. He stated that the termination of the Plaintiffs appointment was provided for in Article 47 (b) of WAMA Condition of Service for Professional Staff. The Plaintiff was informed that all benefits payable to her will be paid and processed and paid in due course, as a result of that letter the Plaintiff became uncompromised with the 1st and 2nd Defendants that she refused to collaborate with the 2nd Defendant to hand over the property, including the official space she occupied.

24. The Defendant further averred that the benefits accruing to the Plaintiff at the end of her service with the 1st Defendant were a providence fund amounting to $61,101.52 (Sixty-one Thousand one Hundred and One United State Dollars and Fifty two cents), three months salary in lieu of notice amounting to $16,437.74 (Sixteen Thousand Four Hundred and thirty Seven United States Dollars and Seventy four Cents) and outstanding leave converted to cash amounting to $11,207.55 (Eleven Thousand Two Hundred and Seven United State Dollars and Fifty-five Cents) and the Defendant denied the Plaintiffs allegation contained in paragraphs 27 and 56 of her narration of facts, admitting the payment of only the providence fund which she had already exhausted.

25. The 2nd Defendant stated that the total amount accrued to the Plaintiff came to $88,746.81 (Eighty Eight Thousand Seven Hundred and Forty-Six United Stated Dollars and Eighty-one Cents) which was paid to the Plaintiff, taken from their Foreign Exchange Account No. HEA8000950 held at Sierra Leone Commercial Bank Ltd. and transmitted to the Plaintiff by her Account No. 201304/2/1/0 held at the Guarantee Trust Bank as her entitlement benefit and the debit advice was sent to the 1st and 2nd Defendants attached to their pleadings and submission to this Court.

26. He stated that even after the payment of the said amount she continued to be in occupation of the apartment, Diplomatic Number Plates and Diplomatic Card among others despite that her services were no longer required by the 1st Defendant stating that the first Defendant having exhausted all means open to him, he finally informed the Ministry of Foreign Affairs in June 2009 to convince the Plaintiff to surrender office to the 1st Defendant. The 2nd Defendant stated that after all efforts failed through negotiation and mediation the Defendant took the matter to the Magistrate Court for a speedy ejection trial which the Court struck out on the grounds that the director of Ministry of Foreign Affairs was absent from Court or from want of diligent prosecution.

27. It was at this point in time that the Plaintiff quickly instituted an action in the High Court of Sierra Leone stating loss of use of property, recovery of personal properties locked up and detained at her official residence, termination benefits, including medical bills outstanding since 2006, to salary difference between grade level D1 and D2 (official WAMA Director Grade), from 1st December until judgment; outstanding acting allowance as director general of WAMA, between the period of December 2005 and January 2006; salary for the period of June 2009 until judgment; damages for unlawful termination of employment with interest and costs.

28. The 2nd Defendant stated that the matter is still pending in the high Court of Sierra Leone and the present status is that it has been adjourned for ruling. He stated that the order made by the High Court of Sierra Leone is for the Plaintiff to enter and recover her personal effects and the Defendants made no move to hinder the effectiveness of the order. The 2nd Defendant averred that the Plaintiffs refusal to move her belongings from the former resident had deprived the 1st and 2nd Defendants from the use of the premises, contrary to Plaintiffs narration that the Defendant prevented her from moving her belongings from the premises. That no force was used to evict the Plaintiff as stated but proper legal procedure was followed to recover the said premises upon the termination of the contract of employment and the payment of entitlements and benefits to the Plaintiff.

    He further stated that the Plaintiffs service was terminated in accordance with the Terms and Conditions of Professional Staff Monetary Agency(WAMA).

29. He further expressed his concern that despite the payment of $88,746.81 USD (Eighty Eight Thousand Seven Hundred and Forty-Six United Stated Dollars and Eighty-one Cents) to the Plaintiff she refused to surrender the Diplomatic Number Plate which belonged to the 1st Defendant and can only be used by employees of the 1st Defendant. He finally relied on Article 2 of the Protocol (A/P.1/7/93) relating to West African Monetary Agency, the Headquarter's Agreement between the Government of Sierra Leone and WAMA, Article 47 of WAMA Conditions of Service for Professional Staff Chapter 6 on Termination of Professional Staff.

30. He urged the Court to dismiss the case of the Plaintiff because all her entitlements had been transmitted to her through payment of same into her account in Guarantee Trust Bank.

ANALYSIS AND DETERMINATION OF THE COURT

31. The Plaintiff relied on these head of claims as summarized from the reliefs sought:

    i) A Declaration that the purported termination of the Plaintiff's contract of Employment with the 1st Defendant by the Director General of the 1st Defendant and statutory Appointee of the 3rd Defendant via a letter dated 26th of February 2009, at the instance of the chairman of the 4th Defendant, without complying with due process; is wrongful, irregular, illegal, invalid, inconsequential, null and void and of no effect whatsoever as such an act is a fundamental breach of contract of employment existing between the Plaintiff and the 1st Defendant herein.

    ii) A Declaration that the conducts of the Defendants in this case amounts to a gross violation of the Plaintiffs right to fair hearing, fair treatment; equal protection of law; respect for her life and the integrity of her person; respect for her dignity and recognition of her legal status; liberty and security of her person; property; work under equitable and satisfactory conditions; enjoyment of mental and physical health; under Articles 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 18(3), 24, 25, 27 and 28 of the African Charter on Human and Peoples Rights and gross violation of Article 4(g, h, & i) and in implementation of the application of Article 10(3) (f) of the Revised Treaty of ECOWAS and the protocol on observance of Law and Justice.

    iii) An Order compelling the 1st, 2nd, 3rd and 4th Defendants herein to immediately pay over to the Plaintiff, jointly and severally as special damages for the injuries suffered as a result of the actions of the Defendants towards the Plaintiff; including her arrears of salaries and allowances of about $5,240.91 (WAUA 3,248) monthly, loss of use of premises, recovery of personal properties, breach of contract etc from the 1st Day of June, 2009 until date of judgment and estimated as at the end of June 2011 to total one Million, one thirty six Thousand, five hundred and ten United States Dollars, Ten Cents($1,136,510.10)

    iv) An Order compelling the Defendants to jointly and severally pay over to the Plaintiff the sum Fifty Million United States Dollars ($50,000,000.00) as general damages for the great pain, physical

suffering, emotional trauma, impairment of mental and physical suffering, since August 2009 to date, loss of time, loss property, loss of ways and means to make a living, loss of enjoyment of life, loss of reputation of the Plaintiff, inhuman and degrading treatment the Plaintiff was subjected to by the Defendant contrary to Articles 4(g, h & i) of the Revised Treaty of ECOWAS and Articles 1, 2, 3A, 5, 6, 7, 14, 15, 16, 18(3), 24, 25, 27 and 28 of the African Charter on Human and Peoples Rights.

v) An Order of this Honourable Court compelling Defendants herein to jointly and severally pay over to the Plaintiff the sum of Five Million United States Dollars ($5,000,000.00) as general damages for the defamation of the Plaintiffs character when the 1st and 2nd Defendants officially wrote false reports to the criminal investigation department of the Sierra Leone police, the Sierra Leone Telecommunications (Sierratel) and Road Transport Authority (SLRTA) amongst others, falsely claiming and/or alleging the Plaintiff is a criminal impersonator, incompetent, dishonest etc; to attack and denigrate the Plaintiffs character and honor, to irreparably malign her hard earned good name and reputation and to cause the Plaintiff and/or her properties to be severally and publicly arrested and/or detained by the officials of the 6th Defendant.

vi) An Order of Mandatory Injunction compelling the Defendants, their agents, servants Assigns, Privies, or whomsoever to immediately release the entire Plaintiffs properties (household, electronic, educational, documentary communication etc.) and those of International Charity Jewels of God International Ministry held in trust by the Plaintiff at her residence situate at No. 2A Scan Drive, off Spur Road, Freetown unlawfully being detained and held by the Defendants

vii) An Order of Perpetual Injunction restraining the Defendants, their agents, servants, Assigns, Privies, or however called from further harassing, molesting, intimidating, arresting and/or detaining the Plaintiff.

viii) An Order of Mandatory Injunction compelling the Defendants to put up a widely read publication/advertorial in the internet and a newspaper that enjoys wide readership in the Republic of Sierra Leone and the Federal Republic of Nigeria apologizing to the Plaintiff

for violating her human rights to fair hearing; far treatment equal protection of law; respect for her life and the integrity of her person; respect for her dignity and recognition of her legal status; liberty and security of her person; property; work under equitable and satisfactory conditions; enjoyment of mental and physical health; protection against women discrimination.

ix) Interest on (c) above at 10% per annum

x) Interest on (d) and (e) above at 25% per annum

x) Declaration that the Plaintiff is entitled to the cost of One Hundred and Fifty Thousand United States Dollars ($ 150,000.00) against each of the Defendants jointly and severally.

32. It is a trite principle of law that a party who alleges wrongful termination of his contract of employment is bound to show or prove that he indeed had an employment with the Defendant. He must plead or show by giving credible evidence that he had an employment that was terminated by the Defendant.

33. Once this burden is discharged by the Plaintiff in keeping with the principle of law that he who asserts must prove, the Plaintiff is further required by law both in his pleadings and by credible evidence to show how the Defendant wrongfully terminated his appointment. At the complete discharge of this burden by the Plaintiff the burden of proof shifts to the Defendant to disproof the assertion of the Plaintiff and also show by credible evidence that due process was followed in the termination of the Plaintiffs employment, as parties to a contract of employment are bound by the terms of their contract especially where it is reduced in writing. The Court therefore would not interfere with the terms of contract agreed by parties to the contract neither would a third party be allowed to interfere with same in keeping with the principle of privity of contract.

UNLAWFUL TERMINATION OF APPOINTMENT

34. In line with this principle of law it is the finding of the Court that the Plaintiff has discharged the burden of proving that she was a staff of the 1st Defendant See Exhibit RMA 2 (the letter of appointment of the Plaintiff by the Defendant on the 6th day of August 2003 to the position of Director of Research). It was not in dispute neither was it contested by the Defendant that the Plaintiff was a staff of the 1st Defendant; therefore

facts not contested are admitted and need no further proof. While Exhibit A3, the letter of termination shows that she had not delivered on her job as expected of her under the observation of the current Director General Prof Mohammed Ben Omar Ndiaye, whereby he invoked Article 47 (b) of the relevant condition of employment to terminate the appointment and by Exhibit A3, the Plaintiff was notified that her employment with the West African Monetary Agency (WAMA) is terminated with effect from February 28, 2009 with payment of three months salary in lieu of notice.

35. Article 47(b) of Conditions of Service to Staff of WAMA, provides that **"the contract of any staff can be terminated by the Director General if the Staffs service is found to be unsatisfactory"**.

36. In this regard, Articles xvii of the Articles of Agreement of the West African Monetary Agency (WAMA) provides as follows:

> **"The Agency, being an institution of the community, shall be accorded the status, privileges and immunities of the Economic Community of West African States dated 22 April, 1978".**

37. It must be stated without hesitation that the termination of appointment under Regulations of any institution of ECOWAS including West African Monetary Agency is under statutory obligation to follow the Regulations for terminating employment of Staff. It is apparent from the above provisions that the ECOWAS Staff Regulations is inapplicable to the circumstances of this case, since the Regulations of WAMA provides for procedure and measures for general conditions of employment and set forth the rights, obligations and privileges of its staff.

38. Articles 40, 41, 44 of WAMA conditions of Service which is applicable herein state that there shall be a Disciplinary Committee which shall investigate and recommend its findings to the Director General before action is taken against the employee of the Director General. It is stated that the Director-General takes the action to terminate the appointment of staff member after the exhaustion of the conditions in Articles 40 and 41 upon the disciplinary committee's advice.

39. In the instant case, there was no such committee set up and the measures that preceded the termination were hazy and unclear. While it is apparent that the Defendant in this case failed to follow the above procedure in

terminating the Plaintiffs appointment, apart from Exhibit DG3A, a WARNING letter issued on the Plaintiff on her gross incompetence in writing an article on conceptualizing an appropriate Exchange Rate Mechanism for the Economic Community of West African States (ECOWAS), however Exhibit DG3A was an unsigned document which goes to no issue.

40. It is found by the Court that Exhibit DG2 was duly signed which was a report by the Director General of the 1st Defendant, Yacouba Nabassoua to the Chairman, Committee of Governors of Central Bank of ECOWAS Member States on the insubordination of the Plaintiff. However the Court is unable to find the query issued by the Committee of Governors of Central Bank of ECOWAS Member States in respect of the allegations levied on the Plaintiff by the Director General of the 1st Defendant before reaching a decision.

41. Exhibit DG3B headed "SUSPENSION FOR 8 WORKING DAYS" and dated 21st March, 2007 has nothing to do with competence but rather a complaint by the 1st Defendant of gross insubordination by the Plaintiff for which she was suspended for eight working days without pay or salary, in accordance with Article 40 of WAMA Regulations and Conditions of Service.

42. The Director-General failed to comply with Article 42 of the provisions of WAMA. However, where action has been taken wrongly or rightly, the entitlement of the employee involved, the applicant, where reinstatement is not the answer, all entitlements are to be made payable to the Applicant as stated in the provisions of WAMA. Having not followed due process in severing her employment from the services of the 1st Defendant, the court holds that there was violation of her rights as duly stated in the ECOWAS Staff Regulations and the Rules of WAMA.

43. It must be mentioned that a master has the right to determine the employment of his servant for good or bad cause or for no cause at all. Where there is such a wrongful dismissal or termination of appointment of service, legal authorities are numerous that the only remedy is a claim for damages for that wrongful dismissal or termination. This has always been based on the notion that no servant however willing, can be imposed by the court, on an unwilling master, even where the master's behavior is wrong except in exceptional circumstances as mentioned earlier. The employer is only liable for his wrongful act in damages and nothing more.

44. It follows that a Court would compensate a party whose rights have been violated by the employer, either by not following due process in terminating the appointment of an employee who is under a statutory term of employment or an employment of statutory flavor. In this regard what should be the nature of this compensation or measure of damages in the instant case? The Plaintiff has claimed various items which does not tie to the breach of contract of employment in question but are also for breaches for other violations of rights connected with the employment that was truncated by the Defendants, the employers. Do these other claims flow from such a breach of the terms of employment? Are such claims legitimate?

45. The claims that flow directly from the termination of the contract and covered by the provisions of the WAMA Regulations are legitimate but where the claims are not within the flow of damages as a result of the termination, it cannot be said that they are claimable. This Court thinks that all those items specified by the Plaintiff if proved and within the compass of claimable subject matter in a contract of this nature should be adequate compensation. However the Defendants justified the fact that part of this claim by the Plaintiff had been paid to the Plaintiff through her GTB account in the sum of $88,746.74 United States Dollars. The Plaintiff claims a total sum of $1,136,510.10 United States Dollars as Special Damages stated below:

PARTICULARS OF SPECIAL DAMAGES CLAIMED BY THE PLAINTIFF:

SCHEDULE LISTING PERTINENT ITEMS WITH CONCOMITANT ENTITLEMENTS

CLAIMS AND COSTS AS AT JUNE 2011

NOTES

1. International Monetary Fund (IMF) Exchange Rates @June 7, 2011
   (i) West African Unit of Account (WAUA) = IMF special Drawing Rights (SDR) = $1.6135.80
   (ii) £ = $1.6430.00
2. Monthly Salary for 2003 - 2008 = WAUA 2, 763.96 = $4,459.87
3. Monthly Salary from 2009 = WAUA 3,248.00 = $5,240.91

4.	**ITEMS#**	**DESCRIPTION**	**AMOUNT**	**USD EQUAVALENT**
1.	**With Respect To Termination Benefits:**			
(a)	(i)	2006 Outstanding Medical Bills (in Dollars)		= $1,669.77

(ii) 2006 Outstanding Medical Bill (in British Pounds) £1, 265.82 = $2,079.74

(b) Salary Difference b/w grade level D1 & D2 @WAUA 216.5/month from Dec. '03 till judgment (= 91 months @ June '11) WAUA 19,701.50 = $31,789.95

(c) 2006 Outstanding Acting Allowance WAUA 1,140.50 = $1,840.29

(d) (i) Salary June '09-June '11 @ WAUA 3,248.00/month WAUA 81,200.00 = $131,022.7

(ii) 20% Provident Fund '09-June '11 @ WAUA 464.00/mo WAUA 11,600.00 = $ 18,717.53

(e) 2009 Home Leave - Return ticket to Abuja-Nigeria $1,200 = $1,200

(ii) 2009 Home Leave-4 day travelling per diem @$287, 5/day $1,150 = $1,150

(f) (i) Resettlement Allowance $56,201 = $56,201

(ii) Repatriation of Personal Belongings & ticket to Abuja $15,700 = $15,700

Subtotal (i): = **$261,370.98**

(g) 10% interest on Total Termination Benefits = $26,137 .1

Subtotal (ii): = **$287,508.1**

2. With Respect To Unlawful Termination:

(a) Per Diem @ 287 dollars per day from Mar.' 09 till judgment (= 852 days @June '11) = $244,950.0

(b) Replaced Provident Fund = $81,000.0

Subtotal: = **$325,950.0**

3. With Respect To Unlawful Ejection and Loss of Use of Premises:

(a) Initial Displacement Hostel stay @$73 for 124 days $9,052 = $9,052

(b) Displacement Rent on furnished apartment after hotel in '09 $16,500 = $16,500

(c) Renewed Displacement Rent on furnished apartment in 2010 $15,000 = $15,000

Sub total: = **$40,552**

4. With Respect to Recovery of Personal Properties:

(a) ** Security and Legal Documents for Landed Properties, Investments and Bank Deposits

(b)	** Professional, Educational, Ministerial and Other Certificates and Documents	
(c)	Books Library (Professional Books in Economics, Finance, Mgt, Pastoral etc	=$25,000
(d)	Tape Library (Languages Training, Mgt Training, Pastoral Homilies, Music etc)	=$10,000
(e)	Comprehensive Sets of ISOM Video Bible School Materials and Documents	=$11,000
(f)	Computer, Printers and Accessories	=$5,000
(g)	Assorted Office Equipments and other Consumables	=$2,000
(h)	19 Pieces Sets of Metal Office Furniture Donated by UNOISL to INGO-Jewels of God	=$15, 5000
(i)	Over 50 Pieces Sets of Chairs & Tables Furniture for the ISOM Bible School	=$4,000
(j)	Other Settee Chairs and Table	=$3,000
(k)	Room A/C Cooling Systems and Fans	=$4,500
(I)	Brand New Giant Refrigerator/Freezer, Hot/Cold Water Foundations & Bottles	=$3,500
(m)	4 Burner Gas Cooker/Over, 2 Microwave Ovens & 4 Gas Cylinders	=$2,000
(n)	Several Sets of Assorted Kitchen Utensils & Chinaware	=$4,000
(0)	Various Sets of Electronics & Electricals (TV Sets, Musical Sets, Cameras etc)	=$5,000
(p)	Mounted and Installed Communication Gadgets (Receivers, Dishes, Antennas etc)	=$4,000
(q)	10k VA Generator & Accessories Mounted and installed	=$7,000
(r)	New Power Saw & Accessories	=$2,000
(s)	Home Exercise Equipment & Household Maintenance Equip.	=$2,500
(t)	Two Beds with Mattresses	=$1,500
(u)	Various Sets of Beddings, Cosmetics and Toiletries	=$2,500
(v)	Prescription Glasses, Accessories & Other Medications	=$1,500
(w)	About 20 Suitcases	=$5,000
(x)	Extensive Wardrobe (Formal, Informal & Traditional Wears & Accessories)	=$70,000
(y)	Various Sets of Jewelry (Gold, Silver, Pearls Beads etc)	=$50,000

(z)	Various Foodstuffs-Bags of Rice, Beans, Yam, Flour, Dried/Frozen Fish/Meat	=$1,000
(aa)	Various Paintings, Pictures, Artwork and Decorations	=$2,500
(ab)	Cash at Hand	=$3,500
(ac)	Table and Cell Phones	=$2,000
(ad)	Loss of Investments	=$60,000
	Sub total:	$309,000

Note**Items Beyond Monetary Value Claims

5. With Respect to Costs:

(a)	Initial Legal Costs in Sierra Leone in 2009	=$3,500
(b)	Legal Costs in Nigeria @ the Community Court in 2010	=$50,000
(c)	Two visits to the ECOWAS Chairman's Office in Nigeria for Admin intervention and to try to forestall Legal Resolution in '09 (Air Tickets etc)	=$5,000
(d)	Visits to the Community Court for Judicial Resolution (Air Tickets etc)	=$15,000
(e)	Logistics	=$100,000
	Subtotal	**= $173,500**
	Grand Total	**= $1,136,510.10**

46. However it must be emphasized that the court should not only look at those items specified by the Plaintiff but also whether the defense had responded to them as to water down the claim or make them doubtful. It is not in doubt that every material point canvassed in the Plaintiffs brief not countered in the Respondent's defence is deemed to have been conceded to the Plaintiff. In this regard, the Court will consider whether the defense in their pleading and evidence show that the Plaintiff had been adequately compensated even in the face of the breach and what is contained in the document marked Exhibit DG8 and titled payment of provident fund and other entitlements dated 15 June, 2009 with clarity.

47. The contents of Exhibit DG8 are as follows:

ROSE MBATOMON AKO 01/12/2003-28/02/2009

A. ENTITLEMENTS

1.	Provident Fund: 01/12/2003 to 31/12/2008	**= $58,990.01**
-	January 2009	= 1,068.54
-	February 2009	= 1,042.92
		= $61,101.52
2.	Three (3) months salary in lieu of notice:	
	Total salary per month	= WAUA3, 248.00
	Plus employer's contribution of 20% of basic	= WAUA 464.00
		= WAUA 3,712.00
	X3 months = WAUA11, 136 @ $1.47609	**= $16,437.74**
3.	Outstanding Leave Days converted to cash:	
	-2007 leave outstanding = 10 days ; -2008 leave outstanding = 30 days	
	- 2009 leave prorated = 5 days	= **45 days**
	Therefore, 3712/Average of 22 working Days x 45 days	
	= WAUA = $11,207.55 7,592.73 @ $1.47609	**= $88,746.81**

B. REPATRIATION COST

1. One-way air ticket to Abuja (registered domicile) to be provided
2. Excess baggage allowance of 80kg up to Abuja @ $5 per kg = $400.00
3. Air freight of 1000kg of personal effects to Abuja to be provided = $10,000.00

TOTAL CASH (A + B) $99,146.81

C. OBLIGATIONS

Submission of all WAMA property including Diplomatic card, Diplomatic Laissez Passer, Diplomatic Car plate number, and other office and house hold assets, as well as handing over of the official residence.

48. We have examined Exhibit DG8 by the defence and found that even though the amount of $99.146.81 was stated in exhibit DG8 by the

Defendant, only paid $88,746.81 as stated in the same exhibit DG8 and dated 15 June 2009 as transferred to the Plaintiff.

49. Having considered the said defense in terms of what was accrued to the Plaintiff and the payments made to the Plaintiff's account, we found as of fact that the Plaintiff claimed more than was admittedly paid by the Defendant.

50. Under the particulars of special damages pleaded and claimed by the Plaintiff as at June 2011, we found under item 1, certain items on the Plaintiffs list of special damages which were absent from Defendants Exhibit DG8 titled payment of provident fund and entitlement of Dr. Rose Mbatomon Ako. Items such as outstanding medical bills since 2006, salary difference (Grade D1 and D2), acting allowance, salary June 2009 - June 2011, 20% providence fund June 2009, 2009 home leave, return ticket to Abuja, *per diem* from March 2009 till judgment, Resettlement Allowance, Repatriation of Personal Belonging, Replaced Provident Fund, hotel bills incurred as a result of ejection, rent on furnished apartment, with respect of recovery of personal properties and costs. Are these claims recognized and claimable where contract of service like in the instant case is terminated?

51. On the other claims made by the Plaintiff after the contract was terminated and examined by the Court against the background of conditions of service of WAMA, the following claims were so identified:

a) Salary June '09 till '11 @ WAUA 3,248.00 month WAUA 81,200.00 USD equivalent = **$131,022.70**

b) 20% Provident fund June '09 till '11 @ WAUA 464.00/mo WAUA11, 600.00 USD equivalent = **$18,717.53**

c) 2009 Home Leave Return ticket to Abuja Nigeria = **$1,200.00**

d) 2009 Home Leave 4 day traveling per diem @ $287.5/day USD equivalent = **$1,150.00**

e) Per Diem @ $287.5 day from March 09 till judgment (=852 days @ June (11) = **$244,950.00**

f) With respect to Unlawful Ejection and Loss of the Use of Premises: initial Displacement Hotel stay @ $73 for 124 days at $9,052, Displacement Rent on furnished apartment after hotel in '09 at $16,500, Renewed Displacement Rent on Furnished apartment in 2010 at $15,000 summed at: = **$40,552.00**

g) With Respect to Costs; Initial legal cost in Sierra Leone in 2009 at $3,500, Legal cost in Nigeria @ the Community Court in 2010 at $50,000, Two Visits to the ECOWAS Chairman's Office in Nigeria for Admin intervention and to try to forestall Legal Resolution in '09 (Air Ticket, Hotel Bills etc) at $5,000, Visits to the Community Court for Judicial Resolution (Air Tickets etc) at $15,000, Logistics $100,000 summed **=$173,500**.

52. The above claims have been found to be outside the service period and therefore extraneous to the claims allowable in a contract of service after such contract had been terminated by the employer as in the instant case. We in line with trite law on such contracts disallow all the claims stated above in paragraph 54 therein and hold that the claims failed to succeed.

53. In respect of the repatriation cost and allowance, it is shown in the pleadings of the Plaintiff the following claims to wit, the sum of $15,700 as against the $10,400 admitted by the Defendant since the Plaintiff did not show how she arrived at $15,700 it suffices to state that the Plaintiffs assertions remain unproved and the sum conceded by the Defendant stands as $10,400 and this Court holds that the amount as stated is proved for the Plaintiff against the Defendant.

As for the claims for Medicals and Resettlement allowance, we find proper justification or proof *vis a vis* the Condition of Service of WAMA for the Plaintiff for the said head of claim to wit:

(a) (i) 2006 Outstanding Medical Bills (in Dollars) = **$1,669.77**

(ii) 2006 Outstanding Medical Bill (in British Pounds) £1, 265.82 = **$2,079.74**

(b) Salary Difference b/w grade level D1 & D2 @ WAUA 216.5/month from Dec. 2003 till judgment (= 91 months @ June 2011) WAUA 19,701.50 but this Court found that this claim cannot be calculated till judgment but till June 2009 when the Plaintiff was paid her entitlements and the computation came to December 2003 to June 2009 - (67) months = **$28,995.80**

c) 2006 Outstanding Acting Allowance WAUA 1,140.50 = **$1,840.29**

54. Where claims for medicals were incurred during the subsistence of the contract of service, same would be payable even after the termination of the contract. This Court therefore holds therein that the Plaintiff having proved those heads of claims, they stand as proved to the tune of **$42,741.16 US Dollars**.

55. For the hiring or renting hotel expenses after the termination, this Court is of the opinion that such claims being outside the claimable claims, where a contract of service is terminated, the Plaintiff cannot succeed and we disallow same.

56. Under head II of particulars of special damages, the Court notes with particular reference to per diem at $287.5 per day claimed by the Plaintiff from March 2009 till judgment that per diem are only earned by staff who travelled outside the host country of the 1st Defendant on an approved official assignment and cannot be earned outside the termination of appointment of the Plaintiff so therefore the claims stand as unproved.

57. On the Issue of Replaced Provident Fund, it is unknown to the system, as it is shown in evidence that the provident fund allowable and earned by an employee was already paid to the Plaintiff by the Defendant as shown in this case. We find no proof as to the replaced provident fund claimed by the Plaintiff and the Court holds that the said head of claim also fails.

58. Having considered the said defense in terms of what was accrued to the Plaintiff and the payments made to the Plaintiffs account we found as of fact that the Plaintiff claimed more than was admittedly paid to her by the Defendant under the particulars of special damages pleaded by the Plaintiff.

59. It must be stated clearly that principles of pleadings all over the world is that matters pleaded by the Plaintiff and not in dispute or disputed by the Defendants, stand as proven. Where such is the case as in the instant case, no evidence is required in terms of proving special damages since the defence did not traverse same. The guiding principle is that it must be proved specially therefore an averment not specifically proved by the Plaintiff cannot hold any weight.

60. CLAIM FOR DEFAMATION.

On the claim for an Order of this Honorable Court compelling Defendants herein to jointly and severally pay over to the Plaintiff the sum of **Five**

Million United States Dollars ($5,000,000.00) as **general damages** for the defamation of the Plaintiffs character when the 1st and 2nd Defendants officially wrote false reports to the criminal investigation department of the Sierra Leone police, the Sierra Leone Telecommunications (Sierratel) and Road Transport Authority (SLRTA) amongst others, falsely claiming and/or alleging the Plaintiff is a criminal impersonator, incompetent, dishonest etc; to attack and denigrate the Plaintiffs character and honor, to irreparably malign her hard earned good name and reputation and to cause the Plaintiff and/or her properties to be severally and publicly arrested and/or detained by the officials of the 6th Defendant, failed to meet the requirement of proof of same. A claim for defamation of character in that the Defendant portrayed the Plaintiff as incompetent and that she was reported as a criminal at the police office in Sierra Leone was defamation of character was not sufficiently proved. No evidence was adduced as to allegation and the proof thereof before this Court. The said claim therefore failed in its material particular.

61. We noticed that the Applicant's employment with the Defendant WAMA was terminated on 26th February 2009, but her entitlement in connection with the termination was paid into her GTB accounts on the 17th June 2009, the latter date being after 15th of that month would legally pass for a full month. When the months from the date of termination to the date of payment are calculated we found that the Defendants left the Plaintiff stranded for five months. Consequently, equity demands that the Applicant should be compensated for the four months (February 2009 to June 2009). She was left to suffer without salary of three months in lieu of notice until in June 2009 and subsequent lack of salary. We therefore hold that the entitlement of US$88746.81 awarded herein to the Plaintiff was inadequate and less the said four months' salary from February 2009 to June 2009 at $1068.54 totaling $28,995.8 US Dollars

GENERAL DAMAGES

62. The Plaintiff claimed general damages of the sum of Fifty Million United States Dollars ($50,000,000.00) as general damages for the great pain, physical suffering, emotional trauma, impairment of mental and physical suffering, since August 2009 to date, loss of time, loss property, loss of ways and means to make a living, loss of enjoyment of life, loss of reputation of the Plaintiff, inhuman and degrading treatment the Plaintiff was subjected to by the Defendant contrary to Articles 4 (g, h, & i) of the Revised Treaty of ECOWAS and Articles 1, 2, 3, 4, 5, 6, 7, 14, 15, 16,

18(3), 24, 25, 27 and 28 of the African Charter on Human and Peoples Rights. The Defendants made no challenge to the claim in their pleadings but we found same to be exorbitant, even though we are of the view that the Plaintiff suffered from the unlawful manner her appointment was terminated and assessed same herein in the sum of $30,000 US Dollars as general damages.

DECISION

63. The Court has read and considered the facts of the case and all the issues raised therein by both Learned Counsel to the parties in this case. In effect the total award, the Applicant was paid by the Defendants was $88,746.81; In addition to the above sum, the Plaintiff is entitled to four months' salary amounting to US$ to $28,995.8 US Dollars, other claims relating to medicals bills to the tune of $42,741.16 US Dollars, and general damages amounting to $30,000 US Dollars, totaling the sum of US$101736.96. Given that the Defendants have already paid the sum of US$88,746.81 to the Plaintiff, this Court decides that the sum of $101,736.96 US Dollars is due to the Plaintiff from the Defendants jointly and severally for the unlawful termination of the contract and other claims accrued to the Plaintiff during the pendency of the contract.

64. The Court noted that these claims were stated in the Plaintiffs pleadings and the Defendants did not counter them. Therefore they were taken as proved.

65. All other claims by the Plaintiff fell outside her entitlements after the termination of her appointment except the above stated amounts.

66. As for the award by the Court in Sierra Leone of US$243,500.00 (Two Hundred and Forty-Three Thousand, Five Hundred United State Dollars) in respect of the claim therein, we find such claim as extraneous matter and outside the claimable issues before this Court as same is outside the components of our jurisdiction.

67. On the whole, this Court awards compensation for the Plaintiff against the Defendants jointly and severally in the sum of US$101,736.96 Dollars, accordingly.

Community Court for Judicial Resolution in 2009 (Air tickets etc) at $15,000. However, after examination of the various cost, we find that the sums are either unjustified or/unreasonable and outside the competence

of this Court. In the circumstance, the Court adjudges that the Plaintiff is entitled to the costs of this Application to be borne by the Defendant in accordance with Article 66 of the Rules of this Court and awards the sum of US$ 15,000.00.

The Judgment Read in Public in accordance with the Rules of this Court on this 11th February, 2013 at Abuja the Seat of the Court.

HON. JUSTICE HANSINE N. DONLI- *PRESIDING JUDGE*
HON. JUSTICE M. BENFEITO RAMOS - *MEMBER*
HON. JUSTICE ELIAM M. POTEY- *MEMBER*

Assisted by **ATHANASE ATANNON** - *REGISTRAR*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

THURSDAY, 21ST DAY OF FEBRUARY 2013

SUIT N^{O}: ECW/CCJ/APP/13/12
JUDGMENT N^{O}: ECW/CCJ/JUG/02/13

BETWEEN
CARMEL MAX-SAVI - *PLAINTIFF*

AND
REPUBLIC OF TOGO - *DEFENDANT*

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
MAITRE ABOUBACAR DIAKITÉ - *REGISTRAR*

REPRESENTATION OF THE PARTIES:

1. MAÎTRE JIL-BENOIT AFANGBEDJI, AFANGBEDJI KOSSI - *FOR THE PLAINTIFF*
2. N'DJELLE ABBY EDAH - *FOR THE DEFENDANT*

-Human rights violation -Psychological and mental torture
-Arbitrary arrest and detention -
Violation of privacy and correspondence secret.

SUMMARY OF FACTS

Mr. Max Savi Carmel, managing editor of the Tribune d'Afrique newspaper, arrested and interrogated at the Gendarmerie sued the Republic of Togo before this Court, the Ministry of Safety and Civil Protection and the National Police for violation of his human rights by Application dated 13 September 2012. Mr. Max Savi considers to be the victim of arrest and arbitrary detention and that during his arrest he suffered psychological and mental torture, that his privacy is violated as well as the confidentiality of correspondence. For the Republic of Togo, the arrest and detention of the Plaintiff by the Gendarmerie was made in the framework of its powers of judicial police and the gendarmerie has complied with the Constitution of Togo, the Code of Criminal Procedure of Togo and all international standards to which the country has subscribed.

LEGAL ISSUES

- *Is the arrest of the Plaintiff by the police legal?*
- *Was the arrest of the Plaintiff arbitrary, and was the right to freedom violated?*
- *Was the Plaintiff a victim of moral and psychological torture and the violation of privacy and correspondence secret?*

DECISION OF THE COURT

- *The arrest was legal to the extent that the police acted within the legal and regulatory framework.*
- *The Arbitrary arrest and violation of the right to liberty of the Plaintiff are unfounded.*
- *The Plaintiff was unable to prove that he was a victim of moral and psychological torture and the violation of privacy and correspondence secret, so these violations are unfounded.*
- *Accordingly, the Court finds that the Republic of Togolese did not violate the rights of Mr. Max Savi Carmel.*

DELIVERS THE FOLLOWING JUDGMENT:

PROCEDURE

1. By Application received at the Registry of the Community Court on 13 September 2012, Mr. Carmel Max-Savi, Director of Publication for the *Tribune d'Afrique Journal*, domiciled at Lomé Adidoandin (Republic of Togo), whose Counsel is Maître Jil-Benoit Afangbedji, Lawyer registered with the Bar Association of Togo, and whose address is at 99, rue de I'OCAM, sued the Republic of Togo, the Ministry of Security and Civil Defence, and the National Gendarmerie of Togo before the Honourable Court for violation of his human rights.

2. The Applicant requested the Court to ask the Republic of Togo to pay to him the sums of Two Hundred Million CFA Francs (CFA F 200,000,000) and One Hundred Million CFA Francs (CFA F 100,000,000) in reparation for the harms done him as a result of the alleged violation of his human rights.

THE FACTS OF THE CASE

The facts of the case as narrated by the Applicant

3. Mr. Carmel Max-Savi contended that in the exercise of his profession as a journalist, he was carrying out an investigation which was destined to be published as an article in the *Tribune d'Afrique* journal. That he was called on 9 February 2012 by an unknown person who told him that he had some useful pieces of information for him in connection with the investigation he was undertaking; that the person in question fixed an appointment with him in front of the premises of the Ministry of Posts and Telecommunications, supposedly to hand over the said information to him. That on arrival at the venue, four (4) gendarmes in plain clothes rushed on him and took him away by force without an arrest warrant, and sent him to the camp of the National Gendarmerie of Togo, more precisely to the Research and Investigations Department (SRI), and into a dark room.

4. The Applicant contended that against his will, he was held in that place and questioned unceasingly from 1 p.m. to 7.30 p.m., i.e. for more than 6 hours, without exercising his right to eat and rest, before he was released.

5. Mr. Carmel Max-Savi further submitted that although the gendarmes who were questioning him were made aware of his state of health and the fact

that he was under treatment, they refused to give him the opportunity to take his drugs.

The Applicant affirmed that the investigators searched and read through the contents of his mobile telephone and took down some of the telephone numbers they found there. That upon being released, he realised that his official USB drive containing top priority information, including information relating to the investigation he was undertaking, had disappeared from his car; and his computer, which was also in the car, had been switched on, whereas before he was arrested, that same computer had been turned off.

The facts of the case as narrated by the Defendants

6. The Republic of Togo contended that in the month of February 2012, the President of the National Assembly of Togo was informed by a journalist named Prosper Akpobi that his colleague, Carmel Max-Savi, was carrying out inquiries into the private life of the President of the National Assembly of Togo. The President of the National Assembly therefore invited the Applicant for a meeting, through the agency of the Parliamentarian Eric Kpade, the Applicant's uncle. The meeting took place in the office of the President of the National Assembly, in the presence of several witnesses, and at that occasion, Mr. Carmel Max-Savi admitted that he was in the process of writing an article on facts brought to his knowledge by certain young girls whose names he did not disclose.

7. The Republic of Togo further submitted that the President of the National Assembly requested the Gendarmerie to ask Mr. Carmel Max-Savi to report for questioning, but he did not. That on 9 February 2012, the Applicant was spotted in front of the Ministry of Foreign Affairs by a team of three (3) gendarmes, who, after disclosing their identity to him, asked him to follow them to the camp of the National Gendarmerie, and without putting up any resistance, he did so and was heard at the National Gendarmerie, and upon his own request, his statements were written down in the presence of Honourable Eric Kpade, his uncle, and Member of Parliament of the National Assembly of Togo.

8. The Republic of Togo stated that in the course of the interrogation, and upon the request of the Applicant, he was served with tea. That it was suggested to him that the interrogation process be halted temporarily to enable him take his meals, but he declined the offer.

9. The Defendant further submitted that throughout the time the Applicant spent at the Gendarmerie, he never made mention of any health problem; that his mobile telephone remained permanently placed on a table within his reach and sight; and that before leaving the Gendarmerie, he was asked to check properly through all his belongings to ensure that they were all intact, and he never made any complaint as to loss of property or his computer having been switched on.

PLEAS-IN-LAW ADVANCED BY THE APPLICANT

10. To buttress his allegations of human rights violations, the Applicant notably affirms that he was subjected to psychological and mental torture, arbitrary arrest and detention, and violation of the privacy of his life and his correspondence, and cited Articles 13(1), 21(2), 28(3) and 29(2) of the Constitution of Togo, Articles 3, 5, 9 and 12 of the Universal Declaration of Human Rights, Articles 5 and 6 of the African Charter on Human and Peoples' Rights, Articles 7, 9(1) and 17 (1) of the International Covenant on Civil and Political Rights, and Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

PLEAS-IN-LAW ADVANCED BY THE DEFENDANTS

11. The Republic of Togo maintains that the Gendarmerie acted within the ambit of the powers conferred on it as a criminal investigation body, and in line with the Constitution of Togo and in conformity with all the international norms subscribed to by Togo, and notably cites Article 51 of the Code of Criminal Procedure of Togo, which provides that: "A ***criminal investigations police officer may summon for questioning, all persons likely to furnish information on the facts of a case, or on objects or documents seized. Persons summoned by him shall appear and make a deposition. Where persons so summoned by the criminal investigations police officer do not comply with such summons, notice shall b*e *served on the Public Prosecutor to that effect and the latter may use statutory State force to compel such persons to appear."***

12. The Defendant avers that this law does not compel the criminal investigation police to produce an arrest warrant before interrogating a person who is in a position to provide information on criminal matters made known to him. The Republic of Togo equally submits that in addition to the Applicant, the Parliamentarian Eric Kpadé, who is the Applicant's uncle, was also heard in connection with the same inquiry.

ANALYSIS OF THE COURT

As regards formal presentation

13. The Court notes that Mr. Carmel Max-Savi's Application is simultaneously filed against the Republic of Togo, the Ministry of Security and Civil Defence, and the National Gendarmerie of Togo, the latter being agents of the Defendant State.

14. The Court observes that in regard to Article 9(4) of its Supplementary Protocol, Member States of ECOWAS may be sued before the, Court for human rights violation. The Court must indicate however, that the agents of a State whose acts naturally entail State responsibility in the exercise of their functions, may be cited alongside that State as State Agents, where necessary, as pertains to the instant case.

15. Besides, since the instant Application is in conformity with the prescriptions of Articles 9(4) and 10(d) of the Supplementary Protocol on the Court, the Court is of the view that the Application, as brought against the Republic of Togo, must be declared admissible.

As regards merits

16. The Court finds that the summoning of Mr. Carmel Max-Savi by the National Gendarmerie of Togo on 9 February 2012, at Lomé, which led to the Applicant being sent to the Research and Investigations Department (SRI), was carried out pursuant to Article 51 of the of the Code of Criminal Procedure of Togo; that the legal and regulatory framework within which the National Gendarmerie of Togo acted in the instant case is identical to that of States practising democracy and subscribing to the international instruments on human rights protection and individual liberty.

17. Again, the Court declares that the arbitrary arrest and violation of individual liberty being complained of by the Applicant are ill founded; and the Court makes the same declaration in respect of the claim by the Applicant that he was held for questioning on the premises of the National Gendarmerie of Togo, a police investigation body, in connection with inquiry on offences he was suspected of having committed.

18. As regards mental and psychological torture, and violation of right to private life and private correspondence, as claimed by the Applicant, the Court observes that Mr. Eric Kpade, Mr. Carmel Max-Savi's uncle, was present

at the Gendarmerie, and the Applicant does not contest that it was upon his express request that the Gendarmerie brought his uncle into the investigation process; the Court equally observes that the Applicant does not contest the fact that he was always served with tea in the course of his interrogation, whenever he requested for it. The Court deduces thereby that the other allegations of human rights violations made by Mr. Carmel Max-Savi, for which he again brings no evidence, are also ill founded.

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, after hearing both Parties on matters of human rights violation, and in last resort;

As to formal presentation,

- **Adjudges** that the Ministry of Security and Civil Defence and the National Gendarmerie of Togo are agents of the Republic of Togo, cited alongside the Republic of Togo in their capacity as State agents;

- **Declares** that the Application for human rights violation filed by Mr. Carmel Max-Savi against the Republic of Togo, a Member State of ECOWAS, is admissible.

As to merits,

- **Finds** that the summoning of Mr. Carmel Max-Savi on 9 February 2012 to Lomé and the despatch of the same Mr. Carmel Max-Savi for interrogation at the camp of the Research and Investigations Department (SRI) occurred with the legal framework of the execution of a mandate assigned by authority to a criminal investigations police vested with the powers to do so, and therefore this does not constitute an arbitrary arrest and detention.

- **Equally finds** that the other allegations concerning violation of his human rights, as brought by Mr. Carmel Max-Savi, are ill founded.

- **Finds**, thus, that the Republic of Togo did not violate the human rights of Mr. Carmel Max-Savi.

- **Asks** each Party to bear its charges.

Thus made, declared and pronounced in a public hearing, in the Federal Republic of Nigeria, on the day, month and year stated above.

And the following hereby append their signatures:

Hon. Justice Awa NANA DABOYA - *Presiding*

Hon. Justice Anthony A. BENIN - *Member*

Hon. Justice Eliam M. POTEY - *Member*

Assisted by **Maitre Aboubacar 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 ON FRIDAY, THE 22ND DAY OF FEBRUARY, 2013

SUIT N^{O}: ECW/CCJ/APP/18/11
JUDGMENT N^{O}: ECW/CCJ/JUD/03/13

IN THE CASE,

BETWEEN
SIMONE EHIVET & MICHEL GBAGBO - *PLAINTIFFS*

AND
THE 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 C. MEDEGAN NOUGBODE** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **CIRE CLEDOR LY (ESQ.)**
   FRANCOIS SERRES (ESQ.)
   JEAN CHARLES TCHIKAYA (ESQ.) - *FOR THE PLAINTIFFS*
2. **JEAN CHRYSOSTOME BLESSY (ESQ.)**- *FOR THE DEFENDANT*

Violation of human rights - Right to human dignity - Arrest and detention - Freedom of movement and choice of residence Right to health - Parliamentary immunity - Incompetence - Inadmissible - Article 9.4 of the Protocol of 19 January 2005 on the Court - Expedited procedure - Rule 59 of the Rules of Court.

SUMMARY OF THE FACTS

Mrs Simone Ehivet Gbagbo and Mr Michel Gbagbo came before the Court with a joint Application filed at the Registry of the Court on 25 July 2011 against the Republic of Côte d'Ivoire for violation of human rights as enshrined in the African Charter on Human and Peoples' Rights of 27 June 1981, the International Covenant on Civil and Political Rights of December 1966, the Universal Declaration of Human Rights of 10 December 1948, the ECOWAS Revised Treaty of July 1993, and the Ivorian Constitution of 2000.

The Applicants complain that the Defendant infringed their right to freedom of movement, the right to choose their residence, the right to moral health and the legal recognition of their personality. Mrs Simone Gbagbo also contests the lack of knowledge of her inherent political rights, privileges and parliamentary immunities related to her position as a Member of Parliament. The Applicant's counsel submits that the international arrest warrant issued by the International Criminal Court against the client was not brought to her notice and that her arbitrary detention should be ended.

The Defendant made no observations on this point but raised "in limine litis" the Court's preliminary objection of lack of jurisdiction to order the release of persons charged by the national courts. It considers that any application for provisional release must be presented to the trial judge. Moreover, that the Applicants could obviously challenge the administrative measures of house arrest undertaken for reason of an objective situation of political crisis before the administrative judge.

LEGAL ISSUES

- *Whether the right to an effective remedy of the Applicants before the national courts has been infringed upon by the Defendant?*

DECISION OF THE COURT

In its decision, the Court found that the Applicants did not have an effective remedy before the national courts, which establishes the violation of this right as enshrined in Article 7.1 of the African Charter on Human and Peoples Rights. Accordingly, the Court has ordered the stay of the case against Mrs Simone Gbagbo in the proceedings before the International Criminal Court, and states that arrest and house arrest are unlawful, arbitrary and violate Article 6 of the African Charter on Human and Peoples' Rights.

THE COURT THUS CONSTITUTED DELIVERS THE FOLLOWING RULING

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, Cire Cledor Ly (Esq.), Francois Serres (Esq.) and Jean Charles Tchikaya, Lawyers registered with the Bar, and who are licensed to appear before the Bar in Cote d'Ivoire, brought a complaint before the Court, against the Republic of Cote d'Ivoire, on the violation of their human rights and, specifically, the political rights of Mrs. Simone Ehivet Gbagbo. They invoke the violations of Articles 2, 5, 6, 7 (1), 12, 23 of the African Charter on Human and Peoples' Rights (ACHP), Articles 9, 12, 14 and 23 of the International Covenant on Civil and Political Rights (ICCPR), Articles 3, 5, 6, 7, 8, 9, 13 and 16 (3) of the Universal Declaration of Human Rights (UDHR), Articles 4 (g) and 1 (h) of the Revised ECOWAS Treaty, the Preamble and Articles 2, 22 (1) of the Constitution of Cote d'Ivoire.

2. The State of Cote d'Ivoire filed its Memorial in Defence at the Court on 2 November 2011, to which Applicants replied on 14 December 2011. The State of Cote d'Ivoire thereafter sent in a Rejoinder on 19 December 2011.

3. Upon request by Applicants, and after hearing both parties, at its sitting of 22 November 2011 at Porto - Novo, Benin Republic, the Court decided to admit the case to an expedited procedure, pursuant to Article 59 of its Rules of Procedure.

4. Upon request from Mr. Michel Gbagbo, in which he argued that there was threat to his life, especially his deteriorating health, the Court, in an interim Ruling, made an Order dated 23 March 2012, enjoining the Republic of Cote d'Ivoire, to take all necessary and appropriate measures to safeguard the life and physical health of Mr. Michel Gbagbo.

5. After hearing both parties on the preliminary objections *in limine litis,* raised by the Republic of Cote d'Ivoire, on 20 December 2011, the Court gave an interim Ruling dated 31 October 2012, wherein it decided that the objection was not preliminary in nature, and reserved its decision on that plea from the Defendant, to the final judgment on the merit of the case. The Court heard both parties, on the merit of the case, at the same

sitting. It further heard them at its out-of-seat sitting at Ibadan on 12 December 2012, on the situation of Mrs. Simone Ehivet Gbagbo, in relation to the warrant of arrest issued against her by the ICC.

SUMMARY OF FACTS

i) The facts as presented by Applicants.

6. Applicants relate that following the proclamation of the final results of the second round of the Presidential elections in Cote d'Ivoire, on 28 November 2011, a post -election violence engulfed the whole country, where supporters of the former President Laurent Gbagbo were opposed to those of Mr. Alassane Ouatara.

7. In these circumstances, the Presidential Villa came under attack from armed men supported by the French Forces in Cote d'Ivoire (Licorne), thereby dislodging its occupants, notably Mr. and Mrs. Laurent and Ehivet Gbagbo, their son, Mr. Michel Gbagbo, as well as his close collaborators.

8. Applicants declare that during their arrest, Mrs. Ehivet Gbagbo was beaten up, violence was meted out on her, and her hairs were pulled off, by men of the armed forces. Equally, violence was visited on their son, Michel Gbagbo, by the men of the armed forces. The whole family was abducted from the Presidential Villa, in the first instance, taken to Hotel du Golfe, and was separated thereafter.

9. They add that Mrs. Ehivet Gbagbo was taken to Ondienne, separated from her husband. As for their son, he was sent to Bouna.

10. They claim that, in violation of the legislative Texts of Cote d'Ivoire, no judicial or administrative writ, containing charges, was notified to them, concerning their arrest, deportation and/or sequestration.

11. They further claim that on 27 May 2011, during a penal proceeding, both Mrs. Simone Gbagbo and Mr. Michel Gbagbo were heard by the Prosecutor of the Republic of Cote d'Ivoire. Moreover, on 30 June 2011, the Minister of Justice of Cote d'Ivoire stated in a press conference that court proceedings shall be initiated against them, by the Republic of Cote d'Ivoire.

ii) The facts and claims as presented by Defendant.

12. Counsels to the Republic of Cote d'lvoire relate that, following the second round of the Presidential Elections, which took place on 28 November 2010, a crisis engulfed the State Institutions that were saddled with the responsibility of announcing the results of the elections. This crisis then opposed the two candidates who went for the second round, that is, Mr. Laurent Gbagbo, the outgoing President and Mr. Alassane Ouatara. They claim that the totality of the Comity of nations and credible international organisations have recognised the victory of candidate Alassane Ouatara, and they have called on the defeated candidate, Mr. Laurent Gbagbo, to respect the outcome of the elections, From there, various missions of mediation were sent to Cote d'Ivoire, to prevail on Mr. Laurent Gbagbo, and enjoin him to see reason, and relinquish power to Mr. Alassane Dramane Ouatara, his opponent. While these missions were going on, the violence against the civilian population has reached a critical level where it *could* not be allowed to continue any further. They explain that in the neighbourhoods of Abidjan, majorly populated by the supporters of candidate Gbagbo, the supporters and sympathisers of the ***"Rassemblement des Houphouetistes pour la Democratic et la Paix",*** a coalition of political groupings that called on the electorate to vote for Mr. Alassane Ouatara were chased, met with violence, beaten or burnt alive with petrol and burnt tyres. For months, the civilian population of Abobo, Adjame, Yopougon, Koumassi and Port-Bouet were thus harassed, assassinated, burnt alive, tortured and compelled to flee their usual places of residence in order to seek refuge in other localities in the country, and even outside Coted'lvoire ;

13. They submit that, with a resolve not to remain insensitive to the massacre of the people who elected him, by an overwhelming majority, the elected President created, by **Order No. 2011 - 33 of 17 March 2011, The Republican Armed Forces of Cote d'lvoire.** This Force comprises *of* the soldiers of the erstwhile Armed Forces, who chose to remain republican, and assigned to them, the mission of liberating Cote d'Ivoire from the militias and mercenaries of Mr. Laurent Gbagbo, in order to save the civilian population. They add that the international community also decided to support the newly elected President in this regard.

14. They submit that, in order to secure the whole country, The Republican Armed Forces of Coted'Ivoire little by little, took total control of the city of Abidjan, till the doorstep of the Mr. Lament Gbagbo's residence, which

they finally took over on 11 April 2011. It was in these circumstances that they succeeded in dislodging Mr. Laurent Gbagbo, as well as many other personalities, among whom are his wife, Mrs. Simone Ehivet Gbagbo, their son; Mr. Michel Gbagbo; they add that Mr. Laurent Gbagbo and the Applicants were taken, first of all, to Hotel du Golfe, then to different localities in Cote d'Ivoire, namely, Korhogo for Mr. Laurent Gbagbo, Ondienne for his wife and Bouna for their son.

15. Counsels for Defendant explain that, with the arrest of Mr. Laurent Gbagbo, an effective end was put to a crisis which was unnecessarily imposed on the Ivorian populace, by the wish of a sole individual, Mr. Laurent Gbagbo, to confiscate power, which he nonetheless lost effectively at the polls.

THE RELIEFS SOUGHT BY PARTIES

i) Reliefs sought by Applicants.

16. Mrs. Simone Ehivet Gbagbo and Mr. Michel Gbagbo seek from the Court; to declare and adjudge that:

- Their arrest and detention are arbitrary;
- Their right to effective appeal is violated;
- Their rights to free movement, and the choice of their residence are violated;
- Their rights to moral health of the family, and the legal recognition of their persons are violated;

Mrs. Simone Ehivet Gbagbo's Parliamentary immunity is violated;

17. They further plead with the Court:

- To make an order compelling the State of Cote d'Ivoire to respect the parliamentary privileges and immunity of Mrs. Simone Ehivet Gbagbo, pursuant to the domestic laws of Cote d'Ivoire, as well as Community laws;
- To make an order compelling the State of Cote d'Ivoire to immediately release Mrs. Simone Gbagbo and Mr. Michel Gbagbo;
- To enjoin the State of Cote d'Ivoire not to initiate any legal proceeding against Member of Parliament Simone Ehivet Gbagbo, in violation of her parliamentary immunity;

- To make an order compelling the State of Cote d'lvoire, to release, with immediate effect, all persons, associates and friends of the Applicants, who have been placed under house arrest, on no administrative or judicial basis.
- To make an order compelling the State of Cote d'Ivoire to bear all the costs.

ii) Reliefs sought by the State of Cote d'Ivoire.

18. The Republic of Cote d'Ivoire seeks from the Court:
    - To note that the Applicants were regularly and legally arrested and detained;
    - To declare and adjudge that there was no arbitrary detention, meted on Applicants and that their human rights are not violated;
    - To declare and adjudge that Mrs. Simone Ehivet Gbagbo's political rights are not violated;
    - To declare and adjudge that there is neither an illicit trouble, nor any urgency that could justify their release;
    - To order that Applicants should bear all the costs.

AS TO LAW

A ON MRS. SIMONE EHIVET GBAGBO'S SITUATION FOLLOWING THE WARRANT OF ARREST ISSUED AGAINST HER BY THE ICC.

19. Counsel to Applicant claims that the international warrant of arrest issued against his client by the ICC was not served on her, and that the Republic of Cote d'Ivoire can proceed to serve her only if the investigation chamber gives a favourable opinion. He further claims that there is every likelihood that the Republic of Cote d'Ivoire does not wish to notify her, and that, in any case, with the uncertainty that surrounds Mrs. Ehivet Simone Gbagbo's transfer to the Hague, it behoves the Court, as a matter of priority, to order an end to her arbitrary detention, which has been on for the past eighteen months, thus adjudicating on the case that she brought before this Honourable Court.

20. The Republic of Cote d'Ivoire did not make any observation on this claim.

Analysis by the Court

21. The Court notes that in the facts exposed before it, Applicants, as well as Counsel to Defendant refer to the incidents that occurred in Cote d'Ivoire, during the post - election crisis, following the second round of the elections that were supposed to pave the way for that country, to get back on track.

22. The Court points out that, through its representatives, especially through the declarations of Mr. Mamadou Bamba, Minister of State, and Minister of Foreign Affairs of Cote d'Ivoire, on 18 April 2003, as well as Mr. Alassane Ouatara, on 3 May 2011, the Republic of Cote d'Ivoire has recognised the jurisdiction of the Court, over the crimes committed on the Ivorian territory since 19 September 2002, and invited the Prosecutor to carry out, on the Ivorian territory, *"impartial and independent investigations on the most heinous crimes committed"* with a view to ensuring that *"those who carry upon themselves the grievous criminal responsibilities be identified, brought to justice and tried by the ICC."* The Republic of Cote d'Ivoire has indicated and reiterated severally, its readiness to comply with Chapter IX of the Rome Statute, hence, to fully cooperate with the ICC. upon request from its Prosecutor, the Preliminary Chamber III of the said Court ordered an investigation into the crimes recognised by the Rome Statutes, which could have been committed, in the two camps, in Cote d'Ivoire, since 28 November 2010, as well as those that were likely to be committed in future, within the framework of the same circumstances; the Court adds that on 22 February 2012, the said Chamber decided to widen the scope of its order, to cover the crimes that were likely committed between 19 September 2002 and 28 November 2010.

23. It was within the framework of this understanding, and upon request from its Prosecutor that the Preliminary Chamber HI of the said Court ordered an investigation into the crimes recognised by the Rome Statutes, which could have been committed, in the two camps, in Cote d'Ivoire, since 28 November 2010, as well as those that were likely to be committed in future, within the framework of the same circumstances; the Court adds that on 22 February 2012, the said Chamber decided to widen the scope of its order, to cover the crimes that were likely committed between 19 September 2002 and 28 November 2010.

24. The Court recalls that while examining a case brought before it by Mr. Laurent Gbagbo, in relation to the events described above, and while

considering his transfer to the ICC, sequel to the warrant of arrest issued against him by the Preliminary Chamber III of the ICC, it gave an Interim Ruling dated 23 March 2012.

25. The Court notes that the case concerning Mrs. Simone Ehivet Gbagbo was equally taken before the ICC, and that owing to a warrant of arrest issued against her, her situation is likened to that of Mr. Laurent Gbagbo, which formed ground for the Court to declare in the interim Ruling referred to above that Mr. Laurent Gbagbo's transfer to the ICC presented a ***"change of circumstances"***, which requests that ***"in the interest of justice"***, there should be a stay of proceedings until the end of the case pending before the ICC. [Judgment dated 23 March 2012 in the **Laurent Gbagbo v. the Republic of Cote d'Ivoire** case§33.]

26. Thus, the Court declares that, in the instant case, there is no ground for it to deviate from its earlier position. Consequently, the Court declares that there is need to order a stay of proceedings in the case concerning Mrs. Simone Ehivet Gbagbo, pending the determination of the proceedings initiated against her at the ICC.

27. After deciding the case concerning Mrs. Simone Ehivet Gbagbo, the Court shall now examine the human rights violations as alleged by Mr. Michel Gbagbo.

B. ON THE ALLEGED HUMAN RIGHTS VIOLATIONS

Arguments made by Mr. Michel Gbagbo

28. On the arbitrary arrest and detention, Applicant argues that his detention is purely a political one, and that his arrest has never been followed by the notification of any justification, and that since the day he was deported, and kept in isolation, no administrative or judicial writ was served on him, to justify this measure of prejudicial safety against his person and his liberty, as this violates the provisions of *Law no. 63-4 of 17January 1963*, together with its enforcement *Decree no. 63-48, of 9 February 1963*, upon which the Authorities of Cote d'Ivoire are justifying their action. He adds that the measure thus applied against his person is discriminatory, as it deprives him, of all protection under the law.

29. He then submits that, pursuant to the provision of Article of Law no. 63-4 of 17 January 1963, which stipulates that: "*Every individual, whose action is prejudicial to the promotion of the economic or social well*

being of the Nation **shall be put under house arrest, by decree»,** and that Article 26 (1) of its enforcement Decree provides that: « *copy of the Decree on House Arrest* shall **be served** *on the* **arrested person,** *either by the Gendarmerie or the Police, together with an Individual Note Book* (...).» He further argues that, in his own case, there is high presumption of the inexistence of the alleged or supposed Administrative Writ, since there is no trace of it being published in any Official Gazette, or any service whatsoever, and that all requests for this service made to the competent Authorities have remained without any answer. He further adds that his arrest and detention are equally contrary to the provisions of Articles 27 and 28 of the same Decree, which provide respectively thus:

> **Article 27:** "*When the arrested person neither is domiciled, nor has a residence in the locality of his arrest, his accommodation and means of livelihood are the responsibility of the Authorities of that Prefecture."*
>
> **Article 28:** "*Occasional and temporary permission to leave the locality of the house arrest may be issued, by the Authorities of the Prefecture, who shall mention the destination, the duration of absence, as well as the special measures of control of the destination. A report shall immediately be forwarded to the Minister of Internal Affairs on this."*

30. He holds that considering all the above facts, the Republic of Cote d'Ivoire violates Articles 3, 5, 7 and 9 of the Universal Declaration of Human Rights, Articles 2 and 6 of the African Charter on Human and Peoples' Rights, Article 4 (1) (g) of the Revised ECOWAS Treaty, Article 1 (h) of the Protocol on Democracy and Good Governance.

31. On the violation of the right to free movement and choice of residence, Applicant (Mr. Michel Gbagbo) claims that since he own residences wherein all the conditions of comfort and security, which allow for moral and intellectual blossoming, and which are conducive for the upholding of the dignity of man, and having expressed his desire to the Authorities, to choose his residence in a town in Cote d'Ivoire, the Republic of Cote d'Ivoire comforts its wish to violate, with total silence, Articles 12 of the African Charter on Human and Peoples' Rights,13 of the Universal Declaration of Human Rights, and 12 of the International Covenant on Civil and Political Rights.

32. On the violation of the right to effective appeal, Applicant argues that the absence of service on him, of any administrative or judicial writ, which could enable him to take his case before a competent national court, the restrictions decreed against his lawyers from having access to him, while he has been cut out from the outside world, the decreed detention without limit, by the Ivorian authorities, and on no judicial or administrative basis, the security measures taken out of prohibitions, which infringe on; human rights and the dignity of the human person, and, lastly, the presumption of culpability erected against him, infringe on his right to effective appeal, before a court of competent jurisdiction, to stop the illegality that the Republic of Cote d'Ivoire continues to commit. He claims that in these circumstances, the Republic of Cote d'Ivoire is violating Article 7 (1) of the African Charter on Human and Peoples' Rights, Article 9 (4) and 14 of the International Covenant on Civil and Political Rights, and Article 8 of the Universal Declaration of Human Rights.

33. On the violation of the rights to moral health of the family and the right to the legal recognition of their persons, Applicants claim that, by separating family members, for an undetermined period of time, and by creating a division between that family, through an absolute prohibition on visits and communication between parents, and especially with their children, the Republic of Cote d'Ivoire has disrespected and infringed upon the right to legal recognition for the persons in that family, on the one hand, as guaranteed under Article 6 of the Universal Declaration of Human Rights and Article 5 of the African Charter on Human and Peoples' Rights, and, on the other hand, the right to moral well-being of their family, as guaranteed under-Article 16 (3) of the Universal Declaration of Human Rights, Article 23 of the African Charter on Human and Peoples' Rights, and Article 23 of the International Covenant on Civil and Political Rights.

The claims by the Republic of Cote d'Ivoire.

34. In reacting .to the allegations of arbitrary arrest and detention, the Republic of Cote d'Ivoire backs its actions on the exceptional situation that was prevailing in the country, when the arrest and detention of Applicant was effected.

35. In this regard, the Republic of Cote d'Ivoire refers to Article 48 (1) of its Constitution, which provides thus:

"When the State Institutions, the independence of the Nation, its territorial integrity, or the enforcement of its international

obligations is immediately threatened, and in a serious manner, and the normal functioning of constitutional public offices is interrupted, the President shall take exceptional measures dictated by such circumstances after necessary consultation with both the President of the National Assembly and that of the Constitutional Council..."

36. The Republic of Cote d'Ivoire recalls that, at the height of the crisis, neither the President of the Constitutional Council nor that of the National Assembly were on the Ivorian territory; they caught refuge in neighbouring Ghana. When it became impossible to consult with them: pursuant to the provisions of the Constitution, the President of Cote d'Ivoire took exceptional measures imposed by the then prevailing circumstances, which were later adjudged to be in consonance with the provisions of the Constitution, by the Constitutional Council in its Decision no. 2011 - EP - 036 dated 4 May 2011, in its Article 3 (1), which provides that: *"Owing to the prevailing exceptional circumstances, .the Constitutional Council notes the Decisions taken by President Alassane Ouatara, and declares that they are validly taken."*

37. Defendant claims that, for refusing to give himself up, Applicant was arrested, and put under house arrest, pursuant to two valid Decrees, which are: *Law no. 63-4 of 17 January 1963, relating to the taking care of disturbing individuals, in order to ensure the social and economic well being of the Nation,* and the above mentioned Decision no. 2011 -EP- 36 dated 4 May 2011 by the Constitutional Council declared that; the said Decree promulgated on 19 April 2011 was renewed on 13 July 2011, for another period of three months.

38. On the allegation of the presumption of inexistence of the litigated acts, owing to the non notification and publication in an official gazette, the Republic of Cote d'Ivoire claims that, as a general rule, once they are signed, Decrees have been assigned legal value, thus they become valid and have binding effect; and that once this situation is attained, the absence of their publicity does not, in any way affect their validity, and moreover, the absence of service on the accused person cannot make them illegal. To this effect, the Republic of Cote d'Ivoire alleges that one of the consequences of war and systematic destruction of government properties is that the office of Government Gazette, which is saddled with the responsibility to gazette official and legal information have become non functional.

39. Defendant argues that, the administrative jurisprudence guarantees that, for reasons of the defence of the Nation, there is justification for an increase in the powers of Government. It adds that since public order is not the same in times of peace and war, and that to defend the territorial integrity of the Nation, and promote its socio-economic wellbeing, the arrest and detention of Applicant are justified. It further submits that in the face of an exceptional legality, the measures that could easily be termed illegal in normal time, are, during the time of war, perfectly valid, justified by the exceptional circumstances, where the law seems to be, not as -an end in itself, but a means to an end: that of safeguarding national interest, and ensuring peace and security in the country.

40. Thus, the Republic of Cote d'Ivoire claims that, owing to the *res judicata,* which is attached to the Decisions of the Constitutional Council, the Decree confirming the house arrest of Mr. Michel Gbagbo does not violate the Constitution of the Republic of Cote d'Ivoire, because, as it Claims, Government has acted in the highest interest of the Nation.

41. Defendant State points out that Mr. Michel Gbagbo was found guilty of charges of group armed robbery, committed with violence, siphoning of public funds, misappropriation of funds, dilapidating national economy, plundering and looting, and complicity in committing the said charges; that in the enforcement of the said committal order issued against him, within the framework of that procedure, he was put in preventive detention in Bouma.

42. Finally, Defendant claims that the Republic of Cote d'Ivoire cannot be accused of violating the provisions of the Protocol on Democracy and Good Governance, which it did not ratify, hence it is not signatory to it.

43. Thus, the Republic of Cote d'Ivoire concludes that the allegations of arbitrariness of both the arrest and detention of Applicant are not founded, and pleads with the Court to adjudicate in this regard.

44. On the violation of the right to effective appeal, the Republic of Cote d'Ivoire claims that, as an individual Administrative Writ of grievance, the Decree confirming the house arrest, even when signed in exceptional circumstances, is of a nature that highly likely gives the person on whom it was served, according to the usual administrative jurisprudence, the right to effective appeal, for an abuse of power, immediately service is done onto Applicant, or as soon as he was made to be aware of it. It

further states that the Decree confirming the house arrest of Mr. Michel Gbagbo effectively became law, and was enforced on him by both the National Police and the Gendarmerie. The Republic of Cote d'Ivoire claims that Applicant was made to be aware of this situation one way or the other, since he is now bearing the consequences, and was at liberty to attack the acts under reference before the Administrative Judge. Defendant therefore concludes that Applicant cannot claim a "violation of his right to effective appeal before the national courts, and, consequently, it behoves the Court to reject any claim drawn from this grievance.

45. On the violation of the rights to moral health of the family, and of the legal recognition of person, the Republic of Cote d'Ivoire claims that Mr. Laurent Gbagbo, the former President, his wife, Mrs. Simone Ehivet Gbagbo and their son Mr. Michel Gbagbo were all arrested sequel to the post -electoral crisis which erupted in Cote d'Ivoire, and they were put under house arrest, not only for the crimes that they are presumed to have ordered their committal, but also to prevent any infringement on the physical integrity of their persons. It submits that in circumstances where infringement on persons physical integrity could be caused, or public order could be disturbed, Government has the right-to approve or to ban certain behaviours, in a way as these behaviours could restrain some liberties.

46. Nevertheless, Defendant adds that the situation has shifted from a time when no visit was allowed - during the early days after the arrest -to a time when the three persons have been receiving visits from members of their families and relations, pursuant to the provisions of Article 118 of Decree" no. 189 of 14 May 1969. However, Defendant emphasises that Mr. and Mrs. Gbagbo's children are all based abroad, and do not think they would come back home soonest, because they believe their security is not guaranteed.

47. Finally, the Republic of Cote d'Ivoire pleads with the Court to reject the allegation of the alleged violation of the rights made by Applicant.

48. The Republic of Cote d'Ivoire has not developed any argument in relation to the allegation on the violation of the right to free movement and free choice of residence.

Legal analysis by the Court.

49. The Court notes that in the instant case, Mr. Michel Gbagbo alleges the violations of his rights as guaranteed under the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights-and the Protocol on Democracy and Good Governance. For all this, he relies on the facts exposed above.

50. On the contrary, the Republic of Cote d'Ivoire, even though, does not contest these facts, employs a line of defence relating to the exceptional circumstances, and the paralysis of State Institutions that prevailed during the period under reference, and claims, in addition that, since it is not a State -Party to the Protocol on Democracy and Good Governance, the provisions of this legal instrument cannot apply to it. Moreover, Defendant claims that Mr. Michel Gbagbo was put under house arrest, pursuant to a Decree churned out on 22 April 2011 that is, ten days after this arrest and that this measure was renewed on 13 July 2011, for another period of three months, before this house arrest measure henceforth becomes a continuous thing, in the enforcement of a committal order issued by the prosecutor on 5 August 2011, within the framework of a court proceeding.

51. As the Court points it out in paragraph 1 above, while considering all the instruments invoked, with the exception of the Protocol on Democracy and Good Governance, Mr. Michel Gbagbo alleges the violations of 16 Articles. In these circumstances, it behoves the Court to limit the consideration of the litigation to its essential aspects, only on allegations, which, with regard to the facts and the circumstances of the case, seem to centre around the violations.

52. The Court notes that in their concluding writs, Counsels to Mr. Michel Gbagbo limited themselves to arbitrary arrest and detention (Articles 9 of the UDHR, 9 of the ICCPR, and 6 of the ACHPR), the violation of the right to free movement, and the choice of residence (Articles 13.1 of the UDHR, 12.1 of the ICCPR, 12.1 &12.2 of the ACHPR), the violation of the right to effective appeal (Articles 8 of the UDHR, 9.4 of the ICCPR, 7.1 of the ACHPR), the violation of the right to moral health of the family (Articles 16.3 of the UDHR, 23.1 of the ICCPR and 18.1 of the ACHPR), and the violation of the right to the recognition of the legal status of his person (Articles 6 of the UDHR, 16 of the ICCPR, and 5 of the ACHPR.)

53. When the various international instruments, to which the accused State is signatory, guarantee the same rights, the Court considers them to be equivalent, and, in its function as guarantor of human rights protection; the Court shall ensure compatibility in all international obligations of the said State-Party.

54. The Court further notes that Articles 4 and 12 (3) of the ICCPR provide, respectively that:

Article 4:

" *(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

(2) No derogation from articles 6, 7, 8 *(paragraphs 1 and* 2), 11, 15, 16 *and* 18 *may be made under this provision.*

(3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant; through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation".

Article 12.3:

"*The above-mentioned rights (free movement, free choice of residence, freedom to move from one country to the other) shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant."*

55. The Court further notes that Articles 6 and 12 (1) (2) of the Charter provide that:

Article 6:

"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".

Article 12 (1) (2):

"*1. Every individual shall have the right to freedom of movement and 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. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

56. Thus, pursuant to the provisions of ICCPR, derogations or restrictions are authorised, regarding the rights that are guaranteed under this instrument. These derogations, which are justified by circumstances, must be necessary and legitimate. By virtue of the principle of equivalence and the need to ensure compatibility of all the international obligations of State Parties, to the various instruments on human rights, this principle, as enshrined under Article 4 of the ICCPR, can apply to other human rights instruments, even if they do not so expressly mention same.

57. Nevertheless, there cannot be derogation for certain rights, pursuant to the provisions of ICCPR; namely, the right to life, the ban on torture, and other cruel degrading and inhuman treatments, and scientific or medical experiment conducted without the consent of the persons concerned; the ban on slavery and servitude; the ban to imprison a person for failure to carry out a contractual obligation; the legality of crimes as well as retroactivity *in mitus;* freedom of thoughts, conscience and of religion.

58. Moreover, pursuant to the African Charter and the ICCPR, the need to protect national security, public order, public or moral health can justify, in itself, the restriction on free movement, **all in accordance with the law.**

59. However, the ICCPR states the conditions for the implementation of the regimes for derogation, or exception. Pursuant to Article 4 (1), the State must proclaim the exceptional circumstances by publishing same in an official gazette, and observe the principle of proportionality in the limitations that it approves for the recognised rights. Furthermore, the State must fulfil the conditions stated under paragraph 3 of Article 4.

60. Notwithstanding, the UN Human Rights Committee, while adopting the General Observation no. 29, concerning Article 4 (Derogations during state of emergency) of the ICCPR, at its 72nd session, states as follows:

> **" 1. Article 4 of the Covenant is of paramount importance for the system of protection of human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards (...)"**
>
> **2. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers (...)**

61. To this end, Article 48 of the Constitution of Cote d'Ivoire, invoked by the Defendant State -Party expressly provides that:

> "*When the State Institutions, the independence of the Nation, its territorial integrity, or the enforcement of its international obligations are immediately threatened, and in a serious manner, and the normal functioning of constitutional public offices is interrupted,* ***the President shall take exceptional measures dictated by such circumstances after necessary consultation with***

both the President of the National Assembly and that of the Constitutional Council. He thereafter informs the whole Nation through a message. *The National Assembly shall convene, as of right*".

62. Thus, pursuant to the Ivorian Laws in use at the time of the incident, the exceptional measures shall be taken, after a compulsory consultation, and publicity is done, through a State address that the Head of State makes to the whole nation.

63. The Court notes that, in his concluding writs, Counsel to the Republic of Cote d'Ivoire claims that the compulsory consultation was not possible, because of the non-functioning of State Institutions without demonstrating concretely how such a situation prevented Defendant from consulting with both the President of the Constitutional Council and that of the National Parliament. This is because, pursuant to the provisions of the Ivorian Constitution, it is not consultation with State Institutions that is required, rather, consultation with their respective leaders. Furthermore, Counsel to Defendant does not show proof that the Head of State of Cote d'Ivoire, at the time of the arrest of Applicant, informed the whole Nation, through message, on the existence of exceptional circumstances, at any time after he took over power. Furthermore, he does not point out that, pursuant to the provisions of Article 4 (3) of the ICCPR, the Republic of Cote d'Ivoire has informed the other State - Parties, through the UN Secretary General, the provisions that it applied derogations to, and the grounds upon which such derogations were applied.

64. For all that, the Court notes that less than one month after the arrest of Applicant, by taking its Decision no. 2011 -EP -036, dated 4 May 2011, the Constitutional Council has again become operational. All said and done, the alleged non functionality of State Institutions lasted only for a relatively little period, and the Ivorian Authorities were, at a point in time, able to act entirely pursuant to the provisions of the Constitution of Cote d'Ivoire, which has ever remained in vogue.

65. The Court wishes to emphasize that it is a principle which is solidly established in international law (Conventions and international jurisprudence) that, even during exceptional circumstances, when the State -Party can unilaterally apply derogations to the human rights recognised by international treaties, these rights continue to be accorded some guarantees. It goes without saying that the approval for derogations

does not carry as consequences that the decisions taken by the authorities under these circumstances are exempt from being challenged before a law court.

66. The European Court on Human Rights has severally examined cases resulting from state of emergency. It duly takes into consideration that derogations have been applied, pursuant to Article 15 (3) of its Convention, which provides that: « ***Any High Contracting Party that applies derogations shall keep the Secretary General of the Council of Europe duly informed on the measures taken, and the grounds for taking such measures. It shall also inform the Secretary General on the terminal date of the measures, and the provisions of the convention thereafter fully apply anew.*** » The ECHR equally ensured the control of the legitimacy and proportionality of the derogation measures, as can be cited from the following cases.

> [ECHR, the **Lawless *v.* Rep. of Ireland** Case of 01.07./1961; the **Rep. of Ireland *v.* United Kingdom** Case of 18.01.1978; the **Branningan & McBride *v.* United Kingdom** Case of 26.05.1993; the **Aksov *v.* Turkey** Case of 18.12.1996; the **A & oers. *v.* United Kingdom** Case of 19.02.2009]

67. Equally, the ECHR has examined allegations of the violations of the Convention on the Safeguard of the Human Rights and Fundamental Liberties of the Council of Europe, which were made by persons detained within the framework of the fight against terrorism, as can be cited from the following cases:

> [ECHR, the **Martinez Sala *v.* Spain Case** of 02.11.2004 (Article 3 of the Convention); the **Ocalan *v.* Turkey** Case of 12.05.2005 (Article 3, 5.4, 5.3, 6.1, 6.3 (b) (c) of the Convention); the **Ramirez Sanchez *v.* France** Case of 04.07.2006 (Article 3, 13 of the Convention)]

68. At other times, the ECHR had to examine Applications filed against expulsion measures taken against presumed terrorists. Examples are as in the following cases:

> [ECHR, the **Chahal, C *v.* United Kingdom** Case of 15.11.1996; the **Chamaiey & oers. *v.* Georgia & Russia** Case of 12.04.2005; **the Saadi *v.* Italy** Case of 28.02.2008; the **Mamatkulov & Askaroy *v.* Turkey** Case of 04.02.2005]

69. As for arrests, the ECHR had to examine grievances bothering on the violations of the right of any person arrested or detained, and who is to be "immediately" taken before a Judge or a Magistrate, who is empowered by law, to exercise judicial functions.

Thus, the ECHR had the opportunity to declare, in the ***Brogan & oers v. United Kingdom*** *Case* 29.11.1988, as follows:

> *"(...) the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody, falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 (art 5-3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his* arrest. *The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).* » §62

70. In the light of these principles, the Court is of a strong opinion that, even as it invokes exceptional circumstances, the Republic of Cote d'Ivoire did not act, pursuant to the provisions of Articles 4 of the ICCPR and 48 of the Ivorian Constitution.

71. Consequently, the exceptional circumstances invoked, to justify the house arrest of Applicant must be rejected.

72. The Court shall now examine if the allegation of arbitrary arrest and detention made by Mr. Michel Gbagbo is founded.

73. To this effect, the Court notes that apart from exceptional circumstances, the Republic of Cote d'Ivoire also invokes the legally valid Decree

confirming the house arrest, as well as special powers of Government in times of war, as justification for the arrest and detention of Mr. Michel Gbagbo.

74. The Court notes that in its argument, Defendant recognises, despite all, the existence of the rule of law, even if infinite, at the time of the incidents; this is because Defendant was conscious of the fact that its actions are to be carried out, within the ambit of the laws and judicial principles that it invokes, as the grounds for the Decree confirming the house arrest that was promulgated.

75. In the instant case, the Court notes that the copy of the said Decree tendered before it does not carry the signature of its initiator. Yet, the signature of the author is one of the substantial conditions for the validity of a legal document so much so that, when such a document lacks the signature, there is every evidence to believe that it does not have any legal value.

76. Moreover, Applicant claims that he was not notified of the said Decree; the Republic of Cote d'Ivoire does not contest such an allegation, but, at least, it claims that **notification was done to Applicant verbally.**

77. The Court is of the strong opinion that this accumulation of evidence, which is solidly established, highly convinces it to conclude that the copy of the Decree tendered by the Republic of Cote d'Ivoire, cannot, in any case be admitted as the true legal instrument promulgated, and upon which are founded the acts invoked, and which aim to produce the legal effects, which Defendant is relying on; such non-existent legal instruments cannot later be validated by the Constitutional Council of Cote d'Ivoire, because an-inexistent legal instrument can never be tendered as legally valid, that is, an existing one. In these circumstances, the argument by Defendant that the Constitutional Council of Cote d'Ivoire, in its Decision no. 2011 -EP-036 dated 4 May 2011 ***"(took) note of the decisions taken by President Alassane Ouatara, and (declared them) valid"*** cannot prosper.

78. Moreover, the Court believes that the Republic of Cote d'Ivoire does not prove that, by conforming itself to legality, it would not achieve the legitimate political objective that the management of a political crisis of that magnitude imposes on her, which is: safeguarding the national interest, and returning peace and security to Cote d'Ivoire. Indeed, even within the framework of exceptional circumstances, the softening of the principle

of legality is done within the respect for national laws; notwithstanding, pursuant to Article 6 of the Charter, since the ban on arbitrary arrest and detention is absolute, the Republic of Cote d'Ivoire cannot detain a citizen in an arbitrary manner. Consequently, the argument bothering on the increase in special powers for Government put forward by the Republic of Cote d'Ivoire cannot be favourably, accepted. Thus the Court declares that the arrest and detention of Mr. Michel Gbagbo, which were carried out, without any legal justification, are illegal and arbitrary.

79. Concerning the right to free movement and free choice of residence, Articles 12 (1), of the Charter, 13 (1) of the UDHR and 12 (1) of the ICHPR provide respectively thus:

Article 12 (1) of the Charter: *"Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the Law."*

Article 13 (1) of UDHR: *"Everyone has the right to freedom of movement and residence within the borders of each State."*

Article 12 (l) of the ICHPR: *"Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."*

80. In the light of these provisions, the Court believes that the measure of house arrest, which already constitutes a curtailment of the right to free movement in itself, becomes worse when it is carried out in an arbitrary and illegal manner. Equally, in carrying out such measure of house arrest, the Ivorian authorities failed to give an answer to the request made by Applicant, to be kept in an area, where ***"he owns personal houses wherein the conditions of comfort and security leading to intellectual and moral blossoming that gives way to the preservation of the dignity of the human person."*** The Court declares that by acting arbitrarily in such a manner, the Republic of Cote d'Ivoire failed to comply with Articles 27 and 28 of the Enforcement Decree No. 63-48 of 9th February 1963 on Law No. 63-4 of 17 January 1963 (Cf. § 28-29) and has thus infringed upon the right to free movement and free choice of residence of Mr. Michel Gbagbo.

81. Concerning the right to the moral health of family, Article 18 (1) of the Charter provides that: *"The family shall be the natural unit and basis*

of society. It shall be protected by the State which shall take care of its physical health and moral". The Court holds that an infringement upon the right to the moral health of family is understood to be any act by which the moral equilibrium of the family is put under, or any situation in which all or any member of that family is made to face difficulties in enjoying affective and emotional interactions, or that natural business that people who are knit by family links carry out among themselves, as enshrined in any human society by long time cultural traditions.

82. In the instant case, the court considers the separation created between Applicant and his family, for an endless period of time, without any concrete hope of reuniting with it, in any foreseeable time, the ban imposed on him from receiving visitors and communicating with the members of his family at least at the beginning of the house arrest [as the Republic of Cote d'Ivoire itself recognises this fact cf. § 46] all constitute steps taken, which have infringed upon the moral health of his family.

83. Consequently, pursuant to Article 9 (4) new, of the Protocol on the Court, as amended by the Supplementary Protocol of 19 January 2005, which provides that **"the Court has jurisdiction over cases of human rights violations that occur in any Member State"**, the Court declares that Applicant's right to the moral health of family, as guaranteed under Article 18 (1) of the African Charter on Human and Peoples' Rights is violated.

84. Concerning the allegation on the violation of the right to effective appeal, Articles 8 of the UDHR, 9(4) of the ICCPR and 7(1) of the ACHPR provide respectively:

Article 8 of the UDHR: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Article 9 (4) of the ICCPR: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

Article 7 (1) of the ACHPR: "Every individual shall have the right to have his cause heard. This comprises: the right to an appeal to competent national organs against acts of violating his fundamental

rights as recognized and guaranteed by conventions, laws, regulations and customs in force (...).”

85. While examining together all these provisions, the Court is of the opinion that effective appeal is to be understood to the ability to bring one’s case before the national courts.

86. In interpreting Article 13 of the Convention for the Safeguard of Human rights and Fundamental Liberties of the Council of Europe, which guarantees *mutatis mutandis* the same right as Articles 8 of the UDHR, 9 (4) of the ICCPR and 7 (1) (a) of the ACHPR cited above, the European Court on Human Rights in its Judgment dated 20 January 2011, in the **Payet *v.* France *case*** as follows:

> ***“Article13 of the Convention guarantees the existence of the right to effective appeal, in the internal law, which enables Applicant to enjoy the rights and liberties enshrined in the Convention; thus, this provisions carries the consequence of insisting on exercising the right to effective appeal before the national court, which must examine the content of a “defendable grievance” based on the provisions of the Convention, and offer settlement. The weight of the obligation that Article 13 puts on the High Contracting Parties varies according to the nature of Applicant’s grievance,’ however, the appeal that Article 13 insists on shall be both “effective” in law and in practice. In the understanding of Article 13, the “effectiveness” of an “appeal” does not depend on the certainty of a favourable outcome for the Applicant. Furthermore, all the cases that the internal law allows to be taken before the national courts can satisfy the exigencies of Article 13, even when one of them does not totally satisfy these exigencies in itself (...)” [§ 127].***

87. Thus, in order to examine the violation of such a right, this Honourable Court shall try to see if the appeal before the national court existed, if it was effective and prompt.

88. In the instant case, Applicant does not complain of the inexistence of appeal before the national courts. Rather, he alleges that he was not notified of the judicial writ confirming the house arrest, and that, at that time, since he did not have access to his counsels, he was not able to come before the Administrative Judge that is, exercising any available

right to effective appeal. Yet, the Republic of Cote d'Ivoire claims that Applicant was in an objective situation and that, even in the absence of notification, he still had the opportunity to seize the Administrative Judge; because the measure of house arrest constituted for him "fact". The State of Cote d'Ivoire claims that Applicant failed to exercise an available right to effective appeal, and cannot, consequently claim the violation of his right to effective appeal.

89. The Court holds that the situation emanating from the political crisis, during which Applicant was arrested, placed under house arrest, combined with the impossibility for him to have access to his lawyers, in the early days of the house arrest - a fact that the Republic of Cote d'Ivoire does not deny - constitute indices which are of nature to presume that, even if an appeal before the national courts was available, Applicant was not able to exercise that right. In these specific circumstances, one wonders the freedom that Applicant had, to initiate by himself, a case, and communicate same to a competent judge, since he did not have at his disposal, assistance from his counsels. In the opinion of the Court, the arguments put forward by the Republic of Cote d'Ivoire do not show that Applicant was really able to bring any likely complaint before a competent judge, through the appropriate channels.

90. In these circumstances, the Court is of the strong opinion that Applicant's right to effective appeal before the national courts of Cote d'Ivoire was curtailed, and as such, the right to effective appeal of Applicant, as guaranteed under Article 7 (1) of the African Charter on Human and Peoples' Rights is violated.

91. The Court declares that there is no need to examine the other alleged violations.

C. ON THE REPARATIONS SOUGHT BY PLAINTIFF.

92. Applicant pleads with the Court:

- To order his immediate release;
- To order the immediate release of all persons - close associates and friends - who have been placed under house arrest, on no administrative nor judicial basis;
- To order the Republic of Cote d'Ivoire to bear all the costs.

93. In its Ruling in the **Badini Salfo** *v.* **Republic of Burkina Faso** case, the Court points out:

> ***"The final aim of the measures that (it) orders (…), when it notes human rights violations, are geared towards the cessation of the said violations and reparation. To this effect, the Court takes into consideration, the circumstances of each of the "cases, in order to make appropriate orders. The Court is guided by the principles of legitimacy of the orders, and their chance of being achieved. When it examines a case still pending before the Court in a Member State, the decisions of the Court are not aimed at interfering with those that the courts in the Member State are likely going to take. The Court cannot give orders, whose enforcement would tend to weaken or make nonsense of the authority and the independence of the National Judge, in the examination of the case that was brought before him. »*** *(§ 59 of the Ruling).*

94. In the instant case, the Court notes that the Republic of Cote d'Ivoire initiated on 5 August 2011, various criminal proceedings against Plaintiff, who was placed in preventive detention (cf. Communication No. RI 01/ 11 dated 7 February 2012 from the investigating judge in the 10th Chamber of the Abidjan - Plateau Tribunal.) Thus, the Court believes that an end was brought to the house arrest. The Court equally notes that the subject-matter of the litigation that was brought before it does not relate to these criminal procedures, rather to human rights violations, resulting from his arrest and being placed under house arrest. Consequently, the Court holds that the orders that it would give, regarding reparations should be situated within the purview of this litigation, and should not interfere with the various procedures initiated after the instant case was brought before it, and against which, in any case, this Court did not receive any complaint.

95. It is constant that the Court adjudges that Mr. Michel Gbagbo was a subject of arbitrary arrest and detention, owing to the measure of house arrest taken against him, and further that his right to free movement and his choice of residence, his right to the moral health of family as well as his right to effective appeal were violated; and as such, Applicant is well founded in law to seek the invoked reparation.

96. However, the Court notes that, following his house arrest, charges were brought against Mr. Michel Gbagbo, by an investigating judge, and he

was detained for other causes, within the framework of a judicial procedure initiated before the national courts; pursuant to its constant jurisprudence, the Court holds that it cannot adjudicate on the said measures; consequently, the Court rejects the request for the release of Mr. Michel Gbagbo.

97. Furthermore, the Court cannot order the release of close associates of Plaintiff, who are under house arrest, since those anonymous persons are not parties to the instant case, and do not conform to the provisions of Article 33 of the Rules of Procedure of the Court; consequently, the Court rejects this request.

98. Equally, Applicant solicits that the, Court should order the Republic of Cote d'Ivoire to bear the entire costs. Pursuant to the provisions of Article 66 (2) of its Rules of Procedure: ***"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings."*** In the instant case, the Court notes that both Applicant and Defendant have applied for costs; furthermore, the Republic of Cote d'Ivoire has failed on all the grievances examined by the Court. In these circumstances, the Court orders that the Republic of Cote d'Ivoire bears all the costs.

DECISION

On these grounds,

99. The Court, sitting in a public hearing, after hearing both parties, and having deliberated, hereby:

With regard to Mrs. Simone Ehivet Gbagbo

- ***In a preliminary Ruling***
  - **Orders** stay of proceedings concerning Mrs. Simone Ehivet Gbagbo, until the end of the proceedings initiated against her at the International Criminal Court at the Hague;

With regard to Mr. Michel Gbagbo

- **As to merit,**

i) On the violations

- **Declares** that Mr. Michel Gbagbo's arrest and detention, which were effected, within the framework of the order on house

arrest, are illegal and arbitrary, and constitute a violation of Article 6 of the African Charter on Human and Peoples' Rights;

- **Declares** that Mr. Michel Gbagbo's right to free movement and choice of his residence is violated;

- **Declares** that Mr. Michel Gbagbo's right to the moral health of family is violated

- **Declares** that Mr. Michel Gbagbo's right to effective appeal is violated;

ii) On the reparations sought

- **Declares** that, having been found guilty, and detained, before the national courts, for other causes, the Court cannot adjudicate on his request for release;

COSTS

100. Pursuant to the provisions of Article 66 (2) of its Rules of Procedure, the Court orders the Republic of Cote d'Ivoire to bear all the costs.

Thus made, declared and delivered in French, being the language of deliberations, in a public sitting at Abuja, by the Court of Justice of the Economic Community of West African States on the day, month and year stated above.

101. **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 A. BENIN - *Member*
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 THE 4TH DAY OF FEBRUARY 2013

SUIT NO: ECW/CCJ/APP/22/12
INTERIM RULING NO : ECW/CCJ/RUL/03/13

CASE BETWEEN
MESSRS. ABDOULAYE BALDE, ELHADJI OUSMANE ALIOUNE N'GORN, MADICKE NIANG, OURNAR SARR, SAMUEL AMETE SARR, KARIM MEISSA WADE, *ALL FORMER MINISTERS OF SENEGAL.* } *PLAINTIFFS*

AND
THE REPUBLIC OF SENEGAL - *DEFENDANT*

INTERIM RULING
(PRELIMINARY OBJECTIONS)

COMPOSITION OF THE COURT

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

ASSISTED BY
MR. ABOUBACAR DIAKITE - REGISTRAR

REPRESENTATION TO THE PARTIES:

1. **MAITRES CIRE CLEDOR LY,**
2. **DEMBA CIRE BATHILY &**
3. **MOHAMMED SEYDOU DIAGNE,**
   (ALL LAWYERS REGISTERED WITH THE BAR ASSOCIATION OF DAKAR, SENEGAL) *- FOR THE PLAINTIFF*

1. **MR. ABDOULAYE DIANKO,**
   STATE JUDICIAL OFFICE *- FOR THE DEFENDANT*

Human rights violation -Preliminary Objections -Address for service -Legitimacy -Application of Articles 28, 33(2) and 33 of the Rules of the Court -Jurisdiction -Admissibility

SUMMARY OF FACTS

On 27 December 2012, the Applicants brought their case before the Court for the purposes of asking the Court to find that their human rights are violated, as a result of the fact that the President of the Republic of Senegal, newly elected, decided to re-invoke the provisions of Law 81-53 of 19 July 1981 relating to the fight against illegally acquired wealth, and Law 81-54 of 19 July 1981 creating a court for combating illegally acquired wealth, contending that those legal provisions had become obsolete. They complained of violation of presumption of innocence, fair trial and the fundamental principles governing the rule of law. They alleged that they were brought before authorities incompetent to hear them, as former Ministers of Senegal, and that they were illegally debarred from going out of the national territory. To that end, they asked the Court for expedited procedure and an interim ruling on their case, which was granted them in a Ruling made on 22 January 2013.

In response, Senegal averred that the Court lacks jurisdiction to adjudicate on the case, since the matter was already pending before the Supreme Court of Senegal, and contended that the Application is inadmissible owing to the fact that certain lawyers did not fulfil the conditions laid down by Articles 28 and 33(2) of the Rules of the Court regarding legitimacy and qualification to plead before a court of law in an ECOWAS Member State; and that there was a default in the indication of their address for service at the seat of the Court. These Preliminary Objections were countered by the Applicants on the ground that they were not made by a separate document, in accordance with Article 87 of the Rules of the Court.

LEGAL ISSUES

The Court was asked to make a pronouncement on two issues:

- *Is the Court competent to adjudicate on a case when the matter is already referred before the Supreme Court of Senegal, and the latter*

has already made a pronouncement on an initial application, with a second application still pending before same court?

- *Is a default in the indication of the lawyers' address for service at the Court and their legitimacy to practice in their domestic courts a condition for the admissibility of the Applicant's request?*

DECISION OF THE COURT

With respect to the first question, the Court recalled its consistently held case law and adjudged that simply invoking human rights violation in a case suffices to establish the Court's jurisdiction over that matter. Therefore, the argument of the Republic of Senegal, that the matter was partly resolved and partly pending before the domestic courts, and that the situation was thus akin to non-exhaustion of local remedies, could not succeed.

As to the admissibility of the Application, the Court ruled, firstly, that the Applicants adhered to Article33(3) of the Rules of the Court, which grants that lawyers may indicate alternative addresses for service at the seat of the Court Secondly, the Court ruled that the lawyers were all registered with the Bar of Dakar (Senegal) and that some of them had already pleaded cases before the Court, and had already fulfilled the requirements for doing so.

Thus, the Court dismissed the Preliminary Objections raised by the Republic of Senegal and ordered that the procedure be pursued further.

RULING OF THE COURT

FACTS AND PROCEDURE

1. By Initiating Application dated 24 December 2012, registered at the Registry of the Court on 27 December 2012, Messrs. Abdoulaye Balde, Elhadji Ousmane Alioune N'Gom, Madicke Niang, Oumar Sarr, Samuel Amete Sarr, Karim Meissa Wade brought their case before the Honourable Court for human rights violation. They equally submitted before the Court two separate applications, also dated 24 December 2012, by which they asked the Court for expedited procedure and an interim ruling on the case. They averred as follows:

2. That the President of the Republic of Senegal, newly elected, decided to re-invoke the provisions of Law 81-53 of 19 July 1981 relating to the fight against illegally acquired wealth, and Law 81-54 of 19 July 1981 which created a court for combating illegally acquired wealth; That the provisions of that law were applied for a short spell of time in 1982 and 1983 only;

3. That the anti illegal-wealth court was finally removed from the judicial framework of Senegal by Law 84-19 of 2 February 1984 establishing the judicial framework of Senegal; and that the law on illicit wealth was repealed, at any rate impliedly, since that time, no more members were appointed to the Court.

4. That the current Senegalese President adopted Decree No. 2012-502 of 10 March 2012 on appointment of the members of the anti illegal-wealth court, whereas that court had disappeared from the organisational structure of the Senegalese court system.

5. That Decree No. 2012-502 of 10 May 2012 , on appointment of members of the anti illegal-wealth court, was adopted in violation of Decree No. 92-918 of 17 June 1992, relating to modalities for the appointment of members of the Court and the functioning mechanism of the *Conseil Superieur de la Magistrature*. This is because the said *Conseil* was not consulted before hand.

6. That the Republic of Senegal thus put in place an illegal court as far as Senegalese law is concerned, so as to satisfy its plan, which, under the

pretext of fighting against ill-gotten wealth, is intended to persecute the opponents of the new political regime in place, through the use of the judicial apparatus.

7. That the persons targeted, namely Karim Wade, Ousmane N'Gom, Oumar Sarr, Samuel Amete Sarr, Madicke Niang and Abdoulaye Balde, all former Ministers of the Republic of Senegal, have been subjected to discrimination and acts of persecution on a daily basis by way of threats of prosecution and fortuitous accusations originating from the highest echelon of the Republic of Senegal, in manifest violation of their rights to presumption of innocence, fair trial, and the fundamental principles governing the rule of law.

8. The Applicants were either frequently summoned for questioning by agencies of the Criminal Investigations Department which are not qualified to do so and have no authority to hear the Ministers, or else, they were forbidden from going outside the national territory, without any legal basis or court decision.

9. That is why the Applicants asked the Court for an expedited procedure and an interim ruling. As regards the request for expedited procedure, the Court, in its ruling of 22 January 2013, granted the request made by the Applicants; and as to the procedure for interim ruling, the Court intends to make a pronouncement thereon after exhaustively addressing the two Preliminary Objections raised by the Republic of Senegal in regard to the jurisdiction of the Court and in respect of the admissibility of the Application.

ARGUMENTS ADVANCED AS PRELIMINARY OBJECTIONS

10. The Defendant State (Senegal) raised two Preliminary Objections on lack of jurisdiction of the Court and on inadmissibility of the Application.

11. As to lack of jurisdiction of the Court

The Defendant asserted that the same facts brought before the ECOWAS Court are equally before the domestic court of Senegal, contending notably, that the Applicants had filed the matter before the Supreme Court of Senegal, and the Administrative Chamber of the Supreme Court had already made a pronouncement on the first Application, with the second

application still pending before the same Supreme Court. Therefore, on that ground, and in line with the case law of the ECOWAS Court of Justice, the latter has no jurisdiction to adjudicate in a case on which a judgment has already been rendered by a national court.

12. Secondly, the Republic of Senegal contended that the Applicants have filed a case seeking annulment of a decree, in which they raised an objection on the unconstitutionality of the legal texts on the basis of which the State made a case against them, and that on that ground, since the case is still pending before the domestic courts, the Honourable Court cannot intervene in the matter, as dictated by its own time-honoured case law.

13. As to inadmissibility of the Application

The Defendant State argued on two grounds:

Inadmissibility arising from disregard of the provisions of Article 33(2) and Article 28 of the Rules of Procedure of the Court, all of which prescribe obligations for agents, advisers and lawyers, as to lodging at the Registry of the ECOWAS Court of Justice, a certificate of authorisation enabling one to practice before a Court in a Member State, and the indication of an address for service in the place where the Court has its seat.

14. For all these points thus argued, the Defendant State asked the Court to dismiss the action brought by the Applicants. In response to the fore going, and in regard to the Preliminary Objections raised against them, the Applicants commended as follows:

As to jurisdiction,

15. That the matter brought concerns human rights violation, that the harm done to them, in terms of acts of discrimination and persecution on a daily basis; threats of prosecution and fortuitous accusations in disregard for their rights to presumption of innocence, fair trial, and the right to the fundamental principles governing the rule of law; and forbidding them from going outside the national territory without a court decision thereof, constitute concrete examples of actual and potential violations of their human rights, which warrant the exercise of the Court's jurisdiction.

16. As to inadmissibility

The Applicants argued against the Defendant State on the same ground and asked that the Defendant's pleas be dismissed for non-observance of Article 87 of the Rules of Procedure of the Court, because the said article places the Republic of Senegal under an obligation to file its Preliminary Objection by a separate document; and that since the requirement in question was not fulfilled, the Applicants asked that all the Preliminary Objections be dismissed.

17. ANALYSIS OF THE COURT

Regarding jurisdiction of the Court

The Court cannot recall enough its own consistently held case law which is derived from the provisions of Article 9(4) of the 2005 Supplementary Protocol, which states thus: ***"The Court has jurisdiction to determine cases of violation of human rights that occurring any Member State."***

18. Whereas on the basis of these provisions, there exists abundant case law in the form of Judgments on the cases concerning Moussa Leo Keita, Hadijatou Mani Koraou, Mamadou Tandja and Bakary Sarre, in which the Court has established a clear jurisprudence by stating that within the meaning of Article 9(4) of the Supplementary Protocol A/SP/1/01/05, the mere citing of a human rights violation which falls within the competence of the Court, suffices to establish the jurisdiction of the Court.

19. Consequently, the Republic of Senegal's argument that the action filed by the Applicants is partly settled and partly pending before the local courts, is rather akin to non-exhaustion of local remedies, and cannot succeed.

Whereas indeed, if the Supreme Court has already delivered its first judgment in the matter, while it still remains seised with the other application, the Court is of the view that the judgment is not final, and that since the exhaustion of local remedies is not a condition to be fulfilled before one can bring a case before the ECOWAS Court, the argument of the Republic of Senegal fails.

20. As to admissibility

While asserting that in the terms of Article 28(3) and 33(2) of the Rules of the Court, the Applicants have failed to fulfil the obligations imposed on them, the Republic of Senegal raised the issue of formal presentation and non-conformity of the Application to the above-cited provisions. On their part, however, the Applicants, through their Counsel, equally raised the issue of formality as prescribed by Article 87 (1) of the Rules of Procedure. Reciprocally, each of the two Parties, through their arguments, sought a declaration from the Court to dismiss the other Party's pleas.

21. In respect of this very point above Article 33(3) is thus worded: ***"In addition to, or instead of, specifying an address for service as referred to in the first subparagraph; the application may state that the lawyer or agent agrees that service is to be effected on him by telefax or other technical means of communication,"*** The Court considers, in terms of this point, that as far as indicating an address for service is concerned, the Applicants have adhered to the provisions of Article 33(3), an alternative provided by the Rules of the Court.

22. As to lodgement of a certificate of authorisation to practise

The Defendant State maintained that in the file transmitted to the Republic of Senegal, there is no "certificate of authorisation" to practise before the courts, the document required by Article 28 of the Rules of the Court.

23. Article 28(3) of the Rules of the Court provides: ***"The lawyer acting for a party must lodge at the Registry a certificate that he is authorised to practise before a Court of a Member State or of another State, which is a party to the Treaty".***

24. Since this Court is a Regional Court, the lawyers who come to plead their case before it, and who are from the Member States, are required to produce the said certificate of authorisation which enables the Court to verify whether the lawyers are truly registered with the Bar Association of a Member State, and whether the lawyers are indeed qualified to practise their profession in the courts.

So far as the three Lawyers of the Applicants are all registered members of the Bar Association of Dakar (Senegal), and some of them, like Maitre

Cire Cledor Ly, having already pleaded before this Court, thus fulfilling that condition, such argument cannot succeed.

From the foregoing;

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, after hearing both Parties, on Preliminary Objections;

- **Adjudges** that it has jurisdiction to adjudicate on the Application brought for human rights violation;

- **Adjudges** that the said Application is admissible, upon the grounds of the reasons set out in the body of this Judgment;

- **Dismisses** the objections raised against the Defendant State;

- **Orders** therefore that the proceedings be pursued further;

- **Reserves** costs,

Thus made, adjudged, and delivered in a public hearing at Abuja by the Community Court of Justice, ECOWAS, on the day, month and year mentioned above,

And the following hereby append their signatures:

HON. JUSTICE AWA NANA DABOYA - *Presiding*

HON. JUSTICE HANSINE N. DONLI - *Member*

HON. JUSTICE ANTHONY A. BENIN - *Member*

ASSISTED BY **ABOUBACAR 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 FRIDAY, THE 22ND DAY OF FEBRUARY 2013

SUIT N°: ECW/CCJ/APP/22/12
RULING N°: ECW/CCJ/JUG/04/13

CASE BETWEEN

1. MESSRS. ABDOULAYE BALDÉ
2. ELHADJI OUSMANE ALIOUNE N'GOM
3. MADLCKÉ NIANG
4. OUMAR SARR
5. SAMUEL AMETE SARR
6. KARIM MEISSA WADE
ALL FORMER MINISTERS OF THE REPUBLIC OF SENEGAL } *PLAINTIFFS*

AND

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 ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY

MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MAÎTRES CIRE CLEDOR LY,**
2. **DEMBA CIRE BATHILY,**
3. **MOHAMED SEYDOU DIAGNE,**
4. **M. MICHEL DE GUILLENCHMIDT** - *FOR THE PLAINTIFFS*

1. **M. ABDOULAYE DIANKO,**
2. **FELIX MOUSSA SOW,**
3. **MAÎTRE FADEL N'DIAGNE,** - *FOR THE DEFENDANT*

Human rights violation -Preliminary inquiry -Jurisdiction -Functional immunity -Privilege of exemption from prosecution -Ban from going out of the national territory -Freedom of movement -Presumption of innocence -Right to fair trial -Effective remedy -Equality of citizens before the law and before the Courts -Principle of separation of powers -Principles of constitutional convergence -Examining the domestic laws of the Member States -Court orders sought -Illegality

THE FACTS OF THE CASE

Following the Interim Ruling of 22 January 2013, the Court granted the Applicants' request for expedited procedure, and by Interim Judgment of 4 February 2013, the Court dismissed the Preliminary Objections raised by the Defendant and ordered that the proceedings be pursued further. The Applicants therefore asked for an interim decision. They claimed that the Republic of Senegal committed violations against them and so asked the Court: to declare that their political and civil rights have been violated by the Republic of Senegal, and that the Republic of Senegal must cease the said violations; to prevail upon and order the Republic of Senegal to adhere to the laws, regulations, and international legal instruments in force, by ceasing the said violations; to declare null and void the inquiries conducted by the Research Section of the National Gendarmerie and the Special Prosecutor at the Anti Illegal-Wealth Court; and, to enjoin the Republic of Senegal not to carry out any act that could lead to their arrest or trial, that such an act will violate their immunity from prosecution (as acquired from their status as former Ministers) and also violate their parliamentary immunity.

The Republic of Senegal opposed those requests on the ground that there is no imminence of a serious and irreparable harm. The Republic of Senegal maintained that nothing justifies the request for interim measures, since the case was only at a preliminary inquiry stage, and also that the Court shall not interfere with the procedure of a preliminary inquiry which has already begun and is following its normal course before a domestic court of a Member State.

LEGAL ISSUES

The Court was asked to respond to the following questions:

Does the interrogation of the Applicants by the Republic of Senegal at the preliminary inquiry stage in connection with illicit wealth, and the proceedings instituted against them, affect their privileges and functional immunity from court prosecution arising from their status as former Ministers or Parliamentarians, as dictated by the Constitution of Senegal and other legal texts and derived regulatory instruments?

In resuscitating the Anti Illegal-Wealth Court, considered by the Applicants as no more forming part of the judicial set-up of Senegal, does the Republic of Senegal violate the principle of separation of powers and constitutional convergence as laid down in the ECOWAS Protocol on Democracy and Good Governance?

Are the Applicants arbitrarily denied their rights to: free movement, go outside the national territory, presumption of innocence, fair trial, effective remedy, and equality of citizens before the law and before the courts of justice?

DECISION OF THE COURT

The Court declared the Applicant' requests admissible.

Referring to Articles 101(2) of the Constitution of Senegal and Article 7 of Law 81-53 on Illicit Wealth, the Court notes that the Applicants' rights to privileges and immunities, as at that stage of the preliminary inquiry, were not compromised nor violated by the Republic of Senegal.

Regarding violation of the principles of separation of powers and constitutional convergence, the Court held that however long a law remains unapplied does not imply that it has gone out of existence, and that the reactivation of the law on illegal wealth by the President of Senegal, does not violate the principle of separation of powers.

As regards the ban imposed on the Applicants to prevent them from going outside the national territory, the Court ruled that all the texts cited by Senegal do not require the imposition of such travel ban and cannot justify the restrictions placed on free movement, which have no legal

basis. Consequently, the Court ordered the removal of the ban imposed on the Applicants restraining them from moving beyond the national territory.

Furthermore, the Court, referring to a press conference organised by the Special Prosecutor of the Anti Illegal-Wealth Court, adjudged that the Republic of Senegal violated the Applicants' right to presumption of innocence, and that the Applicants are required to be tried by the Haute Cour de Justice.

Concerning the Applicants' right to fair trial and presumption of innocence, the Court recalled its own case law in the Judgment of 27 October 2008, Hadijatou Moni Koraou v. Republic of Niger, paragraph 60, and adjudged thereby, that the dispute between the Parties in regard to violation of the right to fair trial cannot compel the Court to examine the domestic laws of the Republic of Senegal as to illegal wealth.

The Court adjudged that it has no jurisdiction to examine the lawfulness or otherwise of the reactivation of Law 81-53 of 19 July 1981 relating to the Combat of Illegal-Wealth, and of Law 81-54 creating the Anti Illegal-Wealth Court.

On the right to effective remedy, the Court adjudged that the Applicants have had the possibility of coming before the competent courts to claim their rights in proceedings for effective remedy, and on that ground, it concluded that the Applicants' right to effective remedy was not violated by the Republic of Senegal.

As to violation of the principle of equality of citizens before the law and the law courts, the Court adjudged that at the stage of the procedure where the Applicants were under, there was no evidence of breach of equality of citizens before the law and before the courts, and that as a result, the said principle was not violated by the Republic of Senegal.

Regarding court orders sought by the Applicant, the Court adjudged that it has no jurisdiction to make orders of injunction to the Republic of Senegal in respect of its domestic laws and internal procedures.

The Court dismissed the other requests brought by the Applicants as inoperative.

JUDGMENT OF THE COURT

FACTS AND PROCEDURE

1. By Initiating Application dated 24 December 2012, registered at the Registry of the Court on 27 December 2012, **Messrs. Abdoulaye Balde, Elhadji Ousmane Alioune N'Gom, Madicke Niang, Oumar Sarr, SamuelAmete Sarr, and Karim Meissa Wade**; whose Counsel is: **Maitre CireCledor Ly**(Barrister-at-Law), with his address at Parcelles Assainies, Unite 15, Villa 004/A, Dakar, Senegal, **Maitre Demba Clre Bathily** (Barrister-at-Law), with his address at Mermoz Dakar, Senegal and **Maitre Mohamed Seydou Diagne**(Lawyer registered with the Cour de Dakar), with his address at rue Jacques Bugnicourt, 1er Etage a Droite, Dakar, Senegal; brought their case before the Honourable Court for human rights violation. They equally submitted before the Court two separate applications, also dated 24 December 2012, by which they asked the Court for expedited procedure and an interim ruling in their favour. They averred as follows:

2. That the President of the Republic of Senegal, newly elected, decided to re-invoke the provisions of Law 81-53 of 19 July 1981 relating to the combat of illegally acquired wealth, and Law 81-54 at 19 July 1981 which created a court for fighting against illegally acquired wealth;

3. That the provisions of that law were applied for a short spell in 1982 and 1983 only;

4. That the anti illegal-wealth court was finally removed from the judicial set-up of Senegal by Law 84-19 of 2 February 1984 establishing the judicial framework of Senegal; and that the law on illicit wealth was repealed, at any rate, impliedly, because since that time, no more members were appointed to the court. The Applicants further averred:

5. That the current Senegalese President adopted Decree No. 2012 - 502 of 10 March 2012 on appointment of members of the anti illegal-wealth court, whereas that Court had disappeared from the organisational structure of the Senegalese court system.

6. That Decree No. 2012-502 of 10 May 2012, on appointment of members of the anti illegal-wealth court, was adopted in violation of Decree No. 92-918 of 17 June 1992 relating to modalities for the appointment of

members of the court and the functioning mechanism of the *Conseil Superieut de la Magistrature,* in that the said *Conseil Supetieur de la Magistrature* was not consulted beforehand. The Applicants asserted:

7. That the Republic of Senegal thus put in place an illegal court, as far as Senegalese law is concerned, so as to fulfil its own plan, which, under the pretext of fighting against ill-gotten wealth, was to persecute the opponents of the new political regime in place, by employing the judicial apparatus.

8. That the persons targeted, namely Karim Wade, Ousrnane N'Gom, Oumar Sarr, Samuel Amete Sarr, Madicke Niang and Abdoulaye Balde, all former Ministers of the Republic of Senegal, have been subjected to discrimination and acts of persecution on a daily basis by way of threats of prosecution and fortuitous accusations originating from the highest echelon of the Republic of Senegal, in manifest violation of their rights to presumption of innocence, fair trial, and the fundamental principle governing the rule of law.

9. That they were either frequently summoned for questioning by agencies of the Criminal Investigations Department, not qualified to do so, and having no authority to hear Ministers; or else, they were forbidden from going outside the national territory, without any legal basis or court decision.

Therefore, that was the reason why they asked the Court for an expedited procedure and a ruling on various interim measures.

10. The Republic of Senegal countered these claims on the ground that there is no imminence of a serious and irreparable harm.

11. By Interim Ruling of 22 January 2013, the Court granted the Applicants' request for expedited procedure;

Before the Interim Ruling, the Republic of Senegal raised two Preliminary Objections: one on lack of jurisdiction of the Court, and the other on inadmissibility of the Application;

By Interim Judgment of 4 February 2013, the Court dismissed the Preliminary Objections raised by the Defendant and ordered that the proceedings be pursued further.

12. The Applicants therefore asked for an interim decision, praying the Court for the following:

- *A declaration that their political and human rights have been violated by the Republic of Senegal, a Member State of the Economic Community of West African States, and that the Republic of Senegal must cease the said violations;*

- *To prevail upon and order the Republic of Senegal* to *adhere* to *the laws and regulations, as well as the international legal instruments in force, by ceasing the said violations forthwith;*

- *To declare null and void the inquiries conducted by the Research Section of the National Gendarmerie and by the Special Prosecutor at the Anti Illegal-Wealth Court in violation of Law 81-53 of 19 July 1981 relating to the combat of illegally acquired wealth and Decree No. 81-839 of 18 August 1981 relating to the creation and organisation of Special Brigades for tracking illicit wealth, and to annul all the acts arising from the violations thus committed;*

- *To enjoin the Republic of Senegal not to carry out any legal act that could lead to the arrest of the Applicants or to their trial, in violation of their immunity from prosecution as acquired from their status as formerMinisters, and in violation of their parliamentary immunity.*

13. The Republic of Senegal, Defendant, opposed all the applications for those interim measures. Relying on the 9 July 1986 Order made by the Court of Justice of the European Union (*Case concerning* ***Kingdom of Spain v. Council and Commission of the European Communities****),* it maintained that the interim -measures sought cannot be granted unless the following three cumulative conditions are met:

    - The instrument complained of must affect the legal constituency of the Applicant;

    - The substantive application must appear grounded *prima facie;*

    - There must be a serious and irreparable imminence of danger.

14. For these reasons, and for the fact that one was only at a preliminary inquiry stage, which may end in a definitive discontinuation of the inquiry or else in a subsequent institution of a judicial procedure after a one-

month house arrest, the Defendant State considered that nothing justifies the request for interim measures. Moreover, the Defendant State emphasised that the Applicants are intending to ask the Court to meddle in matters already dealt with by decisions of the domestic courts, and to interfere with the procedure of a preliminary inquiry already begun and following its normal course in a domestic court; and that action by the Applicants cannot succeed.

At this stage of the procedure

15. After hearing the Parties, and considering that the request for interim measures as filed and the orders sought by the Applicants were related, and in, accordance with Article 87(5) of the Rules of Procedure of the Court, which foresees and provides for that situation, the Court joined the proceedings on the preliminary procedure to that on the merits of the case, so as to adjudicate on the issues therein and deliver one and a single judgment.

16. Consequently, the Court decided to hear the Parties on the merits of the case,

AS TO THE MERITS OF THE CASE

IN TERMS OF THE APPLICANTS' SUBMISSION

Since the pleading of the facts of the case had already been done by the Applicants, they made the following pleas in law:

I. VIOLATION OF THE APPLICANTS' POLITICAL RIGHTS

17. The Applicants stressed that the violation of their political rights arises from the fact that they were summoned for hearing in court and that proceedings were instituted against them, in disregard for the political rights they are entitled to as former Ministers, for some of them, and as Parliamentarians, for others, to, wit, that there is violation of their functional immunity and their privilege of exemption from prosecution, as enshrined in the Constitution of Senegal, which is the source law for the *Haute Cour de Justice* and the Rules of Procedure of the National Assembly of Senegal. They also pleaded that there is violation of the principles of constitutional convergence.

Regarding violation of the Applicants' privileges and immunity from being sued to court and from prosecution

18. The Applicants averred that charges have been brought against them on the basis of Law No. 81-53 of 10 July 1981 relating to the Combat of Illegal-Wealth.

    That they had all exercised the functions of Minister of the Republic of Senegal under the former regime.

19. That Article 101 of the Constitution of Senegal confers on them immunity from prosecution and debars the institution of proceedings against persons criminally liable for offences committed during the exercise of their ministerial functions, or in an instance of the performance of such function. Their written pleading stated thus:

    "That the Prime Minister and the other Members of Government shall be criminally liable for acts engaged in while exercising their functions and such acts shall be deemed as crimes or offences at the time they are committed. They shall be tried by the Haute Cour de Justice."

20. That Article 7 of Law No. 81-53 states that:

    "When charges on illegal wealth are brought against a person entitled to immunity or privilege from prosecution, the Special Prosecutor shall transmit the case-file to the competent authorities, for the purposes of prosecution."

21. For the Applicants therefore, in refusing to transmit the case-file to the competent authorities and by proceeding to conduct the inquiries himself via the Research and Gendarmerie Section, instead of via the Special Brigade for Research on Illegal Wealth, the Special Prosecutor violated their rights.

22. The Applicants cite in support of their argument, the case-law of the European Court of Human Rights in the case concerning ***Kloss* v. *Germany***, which, according to them, best illustrates their situation; that in that case-law, it was decided that: ***"It did not suffice for an applicant to claim that the mere existence of a law violated his rights under the convention. The law must have been applied to his detriment".***

23. That by proceeding to bring proceedings against them, and in bringing them before incompetent authorities for a hearing (whereas it is only a trial commission by the *Haute Cour de Justice* that is competent to hear them), the Republic of Senegal violated their rights. They indicate: that among those treated in that manner were Parliamentarians of the National Assembly of Senegal, and that they were entitled to immunities provided under Article 61 of the Constitution of Senegal and Article 51 of the Rules of Procedure of the National Assembly, which provide as follows:

24. **Article 61: "No Member of Parliament may, outside the sessions, be sued to Court or be arrested on criminal charges, except with authorisation from the National Assembly he is a member of."**

Article 51: "A Member of Parliament may not, outside the sessions, be arrested, except with the authorisation of the Bureau of the Assembly he is a member of, save in case of flagrant crime or offence as provided for under the preceding paragraph herein above, or in case of a final criminal sentence."

25. For the Applicants, the proceedings instituted against them in violation of the immunities and privileges recounted above shall enable the Honourable Court to find *in concreto,* that their human rights are violated and they ask the Court to order any appropriate measure it may deem expedient, by granting their requests.

Regarding violation of the principle of separation of powers and the principles of constitutional convergence

26. The Applicants cite the ECOWAS Protocol on Democracy and Good Governance, which enshrines separation of the powers of the Executive, the Legislature and the Judiciary, as principles of constitutional convergence shared by all the Member States of ECOWAS.

27. They affirm that the Republic of Senegal brought back to life, the Anti Illegal-Wealth Court, which no more formed part of the judicial set-up of Senegal, the last vestige of the court being law No 84-19 of 2 February 1984 setting out the structural framework of the Judiciary of Senegal; that the sole objective of resuscitating the court was to neutralise and persecute the principal political opponents of the new power in place.

28. They emphasise that the Defendant State is simply bent on harassing former Ministers and supporters of the former President of the Republic of Senegal, in violation of the provisions of Article 10 of the Protocol on Democracy and good Governance, which provides that: *"All* ***holders of power at all levels shall refrain from acts of intimidation or harassment against defeated candidates or their supporters."***

II. VIOLATION OF THE APPLICANTS' HUMAN RIGHTS

29. For the Applicants, what is at stake in the instant case is violation of the principle of free movement of persons and goods, violation of the principle of equality of citizens before the law and before the courts, as well as violation of the right to fair trial.

As regards right to freedom of movement

30. The Applicants maintain that the Public Prosecutor of Dakar decided to ban them from going out of the national territory, without any legal basis and on no grounds. They maintain that this natural law regarding freedom of movement is provided for and guaranteed by various international instruments such as the 1789 Declaration of the Rights of Man and of the Citizen, the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the June 1981 African Charter on Human and Peoples' Rights, and the Constitution of Senegal in its Articles 8(2), 14, and 9.

31. They further assert that it is only a judge, as a custodian of freedoms, who may impose restrictions on freedom of movement, and that even in that regard, he is not absolutely free to make any decision whatsoever: the judge's decision shall not only be legally based but must be reasoned; that as such, the decision made by the Special Prosecutor amounts to a serious violation of the freedom of movement since there was no legal basis upon which that measure was adopted against them, debarring them from going out of national territory;

As regards equality of citizens before the law and before the courts

32. The Applicants aver that they are victims of breach of equality before the law and before the Courts, and they cite several international instruments as well as the Constitution of Senegal, all of which emphasise equality of persons before the law and before the Courts.

They further assert that the principle of equality before the courts is violated because the said measure of banning them from leaving the country was adopted solely on the ground of their status as former Ministers (of the out-going regime).

As regards right to fair trial

33. The Applicants maintain that Senegal disregarded the following principles of law endorsed by national and international norms:

The right to have a say in one's own case and not be coerced to testify against oneself, notably the right to bring counter evidence during trial;

- The right to presumption of innocence;
- The right to be tried by an independent and impartial court;
- The right to effective remedy;
- The right to appeal in case of imposition of sentence;

The right to equality of judicial means and resource between the defence and the prosecution.

34. It is for the reasons outlined above that the Applicants ask the Court to find that their rights to freedom of movement and to travel without hindrance, are violated by the Republic of Senegal;

That having been denied their rights as to travelling outside the national territory, presumption of innocence, fair trial, equality of citizens before the law and before the courts, by the Republic of Senegal, they ask the Court:

To adjudge and declare:

- That the proceedings instituted against the Applicants were discriminatory and selective;
- That the measure of ban from going out of the national territory as decided by the incompetent authorities was made without any legal basis, in the absence of any notification, and therefore arbitrary;
- That the said violations of their human rights must cease; and furthermore,

***To find**:*

- That there is violation of their immunity from being sued to court and from prosecution, as well as violation of their privileges deriving from their status as former Ministers of the Republic of Senegal;

- That there is violation lcf the principle of separation of powers, causing them prejudice;

- That there is violation of the constitutional principles applicable in matters pertaining to justice, the principles of constitutional convergence and good governance, thus causing prejudice to their human and political rights;

- That Law No. 81-53 of 10 July 1981 relating to the Combat of Illegal-Wealth does not provide safeguards for fair trial.

35. Consequently:

- To ORDER the Republic of Senegal to annul all the procedures initiated by virtue of Law No. 81-53 of 10 July 1981 and Law 81-51 of 10 July 1981 relating to the Fight Against Illegal Wealth;

- To ORDER the Republic of Senegal to abide by its domestic law under the Constitution and Law No. 84-19 of 2 February 1984;

- To DECLARE as non-existent the inquiries conducted without legal basis, by the incompetent authorities, notably by the authorities of the Criminal Investigations Department of the Research Section, in violation of Article 7 of Law 81-53 of 10 July 1981;

- To ORDER, thereby, the immediate cessation of the illegalities and proceedings initiated against the Applicants;

- To ENJOIN the Republic of Senegal to refrain from undertaking any judicial step that could lead to the arrest of the Applicants or their trial, in violation of their immunity from being sued before court and from prosecution, deriving from their status as former Ministers of State;

- To ADJUDGE, as a result, that the Republic of Senegal must respect the rights and principles recalled above and terminate all proceedings

or actions instituted against Messrs. Karim Meissa Wade, Oumar Sarr, Madicke Niang, Ousmane N'Gom, Samuel Amete Sarr, and Abdoulaye Balde.

- To ask the Republic of Senegal to pay to them a token sum of money as damages.

IN TERMS OF THE DEFENDANT'S SUBMISSION

AS TO FACTS

36. The Defendant maintains that the advent of the coming to power of President Macky Sall gave rise to immense hope on the part of Senegalese, who expected a return to the rules of good governance.

That the efficient management of public affairs became the creed of the new regime, resolved to put in place a new administration based on the rules of professional code of ethics and standard -norms.

That in the final analysis, the new political power intended to *convey* an accurate picture of the state of affairs at the given time, to enable the Government carry out its envisaged economic policies.

That this was the reason why the mechanism for combating corruption and misappropriation of funds was strengthened further by the setting up of one Anti Illegal-Wealth Court, through Presidential Decree N0: 2012-502 of 10 May 2012.

AS TO PLEAS-IN-LAW

Regarding the relevance of the Anti Illegal-Wealth Court

37. For the Republic of Senegal, the re-invigoration of the Anti Illegal-Wealth Court arises from its international commitments in the fight against corruption and related offences, namely in regard to: the United Nations Convention Against Corruption ratified by Senegal on 16 November 2005) the African Union Convention on Preventing and Combating Corruption) the Preamble of 'the African Charter on Democracy) Elections and Good Governance. It pleads further that all the above-cited instruments are in accord in providing a basis for the existence of the said Anti Illegal-Wealth Court.

Regarding violation of the Applicants' privileges and immunities from being sued before court and from prosecution

38. The Defendant State affirms that it was carrying out a preliminary inquiry, and that none of the Applicants were remanded or held in custody. That at the preliminary phase of the said inquiry, there is no question whatsoever of privileges or immunities from being sued to court or from prosecution; and that it is only when the Applicants are brought under house arrest that a judicial procedure may commence. That at that stage, i.e. of a preliminary enquiry, if the justifications brought by the Applicants are sufficient, the Special Prosecutor shall definitively strike out the case, whereas it is only in the contrary case, that the Special Prosecutor shall transmit the case-file to the competent authority for legal proceedings to be instituted.

Regarding violation of the principles of separation of powers and of constitutional convergence

39. The Defendant State stresses that the Applicants do not demonstrate to the Court that Senegal violated the principle of separation of powers. They plead before the Court that the Anti lllegal-Wealth Court was never scrapped; that the President of the Republic only made a Decree appointing members to the court; that the Decree did not create a new court since the said court was never removed from existence.

40. As to the alleged harassment claimed by the Applicants, the Defendant State affirms that the Applicants are under obligation to give account of the management of the ministerial portfolios assigned them and the utilisation of public moneys thereof, in line with the tenets of all forms of good governance.

Regarding violation of the right to freedom of movement

41. The Defendant State affirms that regardless of the wide scope of application of this right, it still comes under numerous exceptions, chief among them being restrictions relating to the safeguarding of public order, public safety and public health. Relying on Article 12(1) and (2) of the African Charter on Human and Peoples' Rights, the Republic of Senegal justifies the measures of restriction regarding leaving the national territory, as adopted against the Applicants, and equally argues that Article 33 of

the Code of Criminal Procedure settles the issue in the following terms: "The Public Prosecutor shall carry out or have carried out all the necessary measures required for investigating and trying all violations of the criminal law."

In that regard, the Republic of Senegal avers that the ban placed on the Applicants to prevent them from going outside the country falls under the framework of interim measures adopted as part of the criminal procedure.

As regards violation of equality of citizens before the law and before the courts,

The Republic of Senegal argues that this plea in law cannot thrive because it is not buttressed on any ground which may enable the Court to examine that claim.

Regarding violation of presumption of innocence

42. The Republic of Senegal maintains that the press conference organised by the Special Prosecutor, and the provisions of Law 81-53 and 53, do not violate the principle of presumption of innocence; they further aver that,

The Special Prosecutor never affirmed that the Applicants were guilty of acquiring illicit wealth, and that as for the Republic of Senegal, in taking every step, it strictly abides by the definition of "illicit wealth" as given by the United Nations Convention Against Corruption, and by the African Union Convention on Preventing and Combating Corruption.

As regards violation of the two-tier system of courts and of the right toeffective remedy

43. In relation to this point, the Defendant, State cites Article17 of the Law relating to the Fight Against Illegal Wealth, which makes provision for the filing of appeal as an avenue for quashing decisions of lower courts; and the Defendant invokes the 16 December 1966 International Covenant on Civil and Political Rights, which provides guarantees for protection.

44. Regarding the right to effective remedy, the Defendant emphasises that such right is guaranteed in the instant case by the channel laid down for filing appeals before the Supreme Court, as provided for in the Law on Illicit Wealth.

For all these reasons, the Republic of Senegal contends that the Court must declare the Application filed by the Applicants as ill founded and thereby dismiss same.

ANALYSIS OF THE COURT

In proceeding to examine the various claims brought by either Party, and in considering their respective legal arguments, the Court decides as follows:

REGARDING VIOLATION OF THE APPLICANTS' POLITICAL RIGHTS

45. The Applicants allege, on the issue, that the Defendant State violated their rights to privileges and immunities from prosecution, and as well, it violated the principles of separation of powers and constitutional convergence.

A. In terms of violation of the right to privileges and immunities from prosecution

46. The Applicants insist on their status as former Ministers, and as Parliamentarians of the National Assembly of Senegal, and on the immunity attached to that status as well as the privilege of exemption from prosecution, as stipulated in domestic legal texts such as the Constitution of Senegal, the law creating the *Haute Cour de Justice Senegalaise,* and the Rules of Procedure of the National Assembly. They base their arguments on Articles 61 and 101(2) of the Constitution of Senegal, notably on Article 7, which deals with illegal wealth, the matter upon which they are being heard in the instant case and in a preliminary inquiry.

Indeed, Article 7 provides as follows:

> **"When the facts ... concerning a person entitled to immunity or privilege from prosecution the Special Prosecutor shall transmit the case file to the competent Authority, for the purposes of prosecution."**

47. The Court notes, on this point, that the Applicants were summoned and heard by organs of the criminal investigation police, even if frequently; that the Defendant State admits and affirms that it was a matter of preliminary inquiry, and that none of the Applicants were remanded or held in custody.

48. The Court equally emphasises that Article 101(2) of the Constitution of Senegal, which confers the privilege of immunity from prosecution on the Applicants, talks of "criminal liability", and Article 7 of Law 81-53 on Illicit Wealth, for which the Applicants are being heard, talks of "proceedings" (judicial hearing). Understood as such, all the texts conferring those rights of privileges and immunities on the Applicants do not intend the use of a preliminary inquiry as a starting point for judicial proceedings.

49. The Court recalls that a preliminary inquiry in any procedure may or may not result in a phase of judicial proceedings; and since in the words of the Defendant State, the said judicial proceedings shall be preceded by a house arrest, it will be too early to talk of violation of the Applicants' privileges.

50. The Court is of the view that the Applicants' rights to privileges and immunities, as at the current stage of the preliminary inquiry are not compromised; that those rights are due where judicial proceedings are set in motion; that since a preliminary inquiry may not necessarily end up in judicial proceedings, in that the facts being investigated may not amount to the offence being sought after in the investigative process, the Court concludes on this issue by stating that the Applicants' rights to privileges and immunities from prosecution are not violated.

B. In terms of violation of the principles of separation of powers **and constitutional convergence**

51. This principle is set out in the ECOWAS Protocol on Democracy and Good Governance, in its Article 1, which states that: ***"The following shall be declared as constitutional principles shared by all the Member States: a, b, c, etc."***

52. The Republic of Senegal maintains that natural persons do not come under those principles, particularly because they cannot be dissociated from the States' obligations to promote democracy, good governance and rule of law on their territory.

53. On this issue, the Court is of the view that the grand principles of separation of powers, democracy, good governance and constitutional convergence, etc., as stated in the Protocol, are principles enunciated in the constitutional

texts of the States, and the Court holds that in as much as disregarding any of said principles does not violate any specific human right, it would be difficult to assess the extent to which the States observe those principles. In the instant case, the decree which consolidates the law against illegal wealth and the appointment of judges to the anti illegal-wealth court does not amount to violation of any specific human right.

54. The Applicants consider that since the anti illegal-wealth court was inoperative for several years and no mention was made any more of the court within the structural organisation of the judicial system of Senegal, it could be considered as no more existent in the Senegalese judicial set-up, and therefore its re-invigoration by Presidential Decree, and the re-appointment of members to the court by the Head of State, constitute a violation of the principle of separation of powers, potentially targeted at violation of their rights.

On the other hand, the Defendant State maintains that the anti illegal-wealth court was never scrapped, nor was the law creating it abrogated; that the decree made by the President of the Republic only appointed members to the court, it did not create a new one.

55. The Court finds, on this issue, that the Applicants talked of the re-invigoration of a law 'which had not been applied for several years a law which had gone in to disuse', without stating whether the law had been 'repealed'. On this point, the Court is of the view that however long a law remains unapplied does not imply that it has gone out of existence (it remains an Act of Parliament), and the reactivation of a law in fallow or sleep mode by due process, in this case a Presidential Decree, does not violate the principle of separation of powers.

REGARDING VIOLATION OF THE RIGHT TO FREE MOVEMENT

56. The right to free movement is sanctioned by various international and regional instruments of human rights protection such as Article 4 of the 1789 Universal Declaration of Human and Citizens' Rights, Article 13 of the 1948 Universal Declaration of Human Rights, Article 12(2) of the 1966 International Covenant on Civil and Political Rights, and Article 12(2) of the 1981 African Charter on Human and Peoples' Rights.

Indeed, Article 12(2) of the African Charter on Human and Peoples' Rights states that: ***"Every individual shall have the right to leave any country including his own and to return to his country."***

57. As regards this Article, the Republic of Senegal emphasises the restrictions provided to the last paragraph of Article 12(2) thus: ***"This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."***

58. The Court holds, however, that this provision cannot concern the Applicants because they are neither sued to court nor charged with an offence by a competent judicial authority. At any rate, nothing justifies the measure of a ban from going outside the national territory because the Applicants are not disrupting public order or national security, much less, public health or morality. On this issue, the Court holds that even if the said measure were to prove necessary, it shall be adopted within the dictates of the law or in compliance with a court decision. Even so, the measure must not be disproportionate in terms of the objective pursued. Now, in the instant case, it is imperative to note that being banned from going out of the national territory was not based on any court decision, but rather on a mere police information; which is contrary to the spirit and letter of the above-cited provision.

59. Moreover, the Court is of the view that neither Law No. 811-53 of 19 July 1981 nor the Code of Criminal Procedure, to a less extent, provides for a ban on going outside the national territory at the preliminary stage of an inquiry or where the persons concerned are suspects. Since criminal law is interpreted according to strict rules, Article 33 of the Code of Criminal Procedure invoked by the Republic of Senegal cannot be applied to the Applicants.

60. Besides, the Court notes that various provisions of the Code of Criminal Procedure were invoked by the Republic of Senegal, namely Articles 12, 33, 53, 59, so as to justify the measures adopted by the Prosecutor. But the Court notes that those Articles are related, respectively, to the functioning of the criminal investigations police, and to the role that the officers of the Criminal Investigations Department (CID) are expected to play in instances of flagrant commission of offences, and in cases of abuse in the application of measures for keeping persons in custody; the said Articles do not ban on the Applicants from going outside the national territory.

61. The Court simply holds, in regard to this issue, that: the Republic of Senegal, while declaring that the restrictions placed on the Applicants were justified by a necessity to ensure national security, public order, public-health or public morality, and yet failing to bring evidence to that effect in banning the Applicants from going outside the national territory, violates their right to free movement.

REGARDING VIOLATION OF EQUALITY OF CITIZENS BEFORE THE LAW AND BEFORE THE COURTS

62. The Applicants cite breach of equality before the law and consider that they are singled out, as former Ministers of the outgoing regime and as Parliamentarians, for harassment. As far as that extent of suspicion is *concerned the Court has no point upon which* to *rely* to examine whether *there is violation of equality of citizens before* the law, *since* one *still finds* oneself at a preliminary-inquiry phase; but the Applicants cite and rely on Article 10 of the Universal Declaration of Human Rights, Articles 14(1) and 26 of the International Covenant on Civil and Political Rights, Article 3 of the African Charter on Human and Peoples' Rights, and Article 7(4) of the Constitution of Senegal.

63. They maintain that in the terms of the provisions of the afore-mentioned international instruments, all human beings are equal before the law without distinction and that on that ground, they are entitled to equal protection by the law and that consequently, they are equal before the courts.

64. They contend however that the proceedings instituted against them by the Republic of Senegal breached equality of citizens before the law and before the courts, by conducting inquiries on illegal wealth against them alone, as functionaries of the Democratic Party of Senegal; therefore, the Republic of Senegal carried out selective justice against them, in violation of their fundamental rights.

65. The Court recalls that the principle of equality of citizens before the law implies that citizens are made to go through the same mode of application of the law by a particular judicial institution, in the sense that citizens coming before the courts to seek justice and finding themselves in the same situation shall be tried by the same court or tribunal and according to the same legal rules of procedure.

66. Now, in the instant case, the Court holds that at the stage of the procedure under which the Applicants are brought, there is no evidence of breach of equality of citizens before the law and before the courts. Consequently, this argument is not founded.

REGARDING VIOLATION OF THE RIGHT TO FAIR TRIAL AND PRESUMPTION OF INNOCENCE

67. The Court finds that presumption of innocence as provided for by Article 7(1)-b of the African Charter on Human and Peoples' Rights was disregarded, in that without any prior establishment of guilt against the Applicants, the Special Prosecutor portrayed them in his press conference as **guilty** of embezzlement, and actually made the following statement:

> ***"We are hunting for Billions of CFA Francs. As far as I know, X is blamed for misplacing an amount of* 100 *Million CFA Francs; but our attention is focused on those who have embezzled Billions of CFA Francs."***

68. The Court equally notes that the Applicants were not legally assisted by their Counsel during their interrogation by the Police. But the European Court of Human Rights in its judgment of 27 November 2008 in case concerning **Salduz v. Turkey**, held that for the right to effective remedy to remain sufficiently effective and concrete, as a general rule, from the very first interrogation of a **suspect,** access to a lawyer must be arranged by the police, unless compelling reasons exist, by virtue of the specific circumstances of the case, to withhold such right.

69. Consequently, the Court holds that the Applicants' right to presumption of innocence was violated.

70. When the Republic of Senegal affirms that the Applicants cannot blame it for observing its international commitments and when it declares that the acquisition of illicit wealth is an offence and it prescribes a special procedure for trying such an offence, and also states that in that respect, it cannot be blamed for violation of any of the Applicants' rights to fair trial, the Court holds that the dispute between the Parties in regard to violation of the right to fair trial cannot compel the Court to examine the domestic laws of the Republic of Senegal as to illegal wealth.

71. Indeed, with reference to paragraphs 60 and 61 of its Judgment of 27 October 2008, **Hadijatou Mani Koraou v. Republic of Niger**, the Court affirms that:

> ***"It does not have the mandate to examine the laws of Member States of the Community in abstracto, but rather, to ensure the protection of the rights of individuals whenever such individuals are victims of the violation of those rights which are recognised as theirs, and the Court does so by examining concrete cases brought before it ... the Court declares that it cannot overstep the bounds of its core jurisdiction, which is that of entertaining concrete cases of human rights violation and sanctioning such where necessary,"***

EQUALLY, REGARDING VIOLATION OF THE PRINCIPLE OF THE TWO-TIER SYSTEM OF COURTS

72. On this point, the Court recalls its consistently held case law that it has no mandate to examine the national laws of Member States or to review decisions made by the domestic courts of Member States.

REGARDING VIOLATION OF THE RIGHT TO EFFECTIVE REMEDY

73. The Court holds that the right to effective remedy is guaranteed by the international mechanisms of human rights protection. Hindrances which make it impossible to obtain effective remedy before a national judicial body, for human rights violation, where those judicial bodies are mandated by the international instruments to ensure human rights protection, constitute a breach of those instruments and such breaches are triable in court. In the instant case, the Republic of Senegal maintains that the right to effective remedy is guaranteed by its laws, and as an illustration, it states that a case may be quashed before the Supreme Court, as provided for in its law regarding illicit wealth.

74. The Republic of Senegal further contends that on two occasions, the Applicants have had the opportunity to bring complaints before the Supreme Court and that those complaints are the issues which have been referred today before the Honourable Court. The Republic of Senegal stated that the Applicants took their case before the Supreme Court for preliminary determination, but without success; they sought to annul the

instructions of the State Attorney at the Court of Appeal of Dakar and of the Public Prosecutor at the *Tribunal Regional Hors Classe,* in connection with implementation of Law No.81-54 of 19 July 1981 on illicit wealth, when they were summoned for hearing through the intermediary of the gendarmerie; that the application filed for a stay of execution of the said Law was dismissed by the Supreme Court.

75. The Court indeed holds, on this issue, that the Supreme Court of Senegal was also seised with an application seeking annulment of Decree No. 2012-679 on Appointment of Members of the Anti Illegal-Wealth Court dated 9 October 2012, as brought by Mr. Cheikh Tidiane Sy, former Minister of Justice and Garde des Sceaux (Keeper of the Seals) and others.

76. The Court finds that the-foregoing facts as alleged by the Defendant are not contested by the Applicants. The Court therefore concludes that the Applicants have had the possibility of coming before the competent courts to claim their rights in proceedings for effective remedy; and on that ground, the Court concludes that the Applicants' right to effective remedy was not violated.

FOR THESE REASONS

77. **The Court**,

Adjudicating in a public hearing, after hearing both Parties, in a matter on human rights violation, and joining the preliminary procedures to the merits of the case, in last resort;

- **Admits** the various requests brought by the Applicants in their Application;

- **Adjudges** that the ban imposed on the Applicants by the Public Prosecutor and the Special Prosecutor of the Anti Illegal-Wealth Court, to prevent them from going outside the national territory, is unlawful because it has no legal basis;

- **Adjudges** that the Republic of Senegal violated the right to presumption of innocence; the declarations of its Special Prosecutor, in violation of Article 7 of Law 81-53 of 10 July 1981, were unlawful: the *Haute Court de Justice* was invested with the mandate to institute the proceedings;

- **Adjudges** that it has no jurisdiction to examine the lawfulness or otherwise of the reactivation of Law 81-53 of 19 July 1981 relating to the Combat of Illegal-Wealth, and of Law 81-54 creating the Anti Illegal-Wealth Court;

- **Adjudges** that the Court has no jurisdiction to make orders of injunction to the Republic of Senegal in respect of its domestic laws and internal procedures;

- **Consequently**, the Court simply orders the removal of the legally unfounded ban imposed on the Applicants, which restrains them from going outside the national territory;

- **Adjudges** that the Applicants, privilege of immunity from prosecution may not be invoked in the course of an ordinary preliminary inquiry;

- **Dismisses** the other requests brought by the Applicants as inoperative;

- **Orders** in general terms, that the Republic of Senegal must scrupulously respect the international instruments and internal laws, within the limits of the observance the rights of its citizens;

- **Asks** the Republic of Senegal to bear the costs.

Thus made, adjudged and pronounced in public hearing, in the Federal Republic of Nigeria, on the day, month and year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES

HON. JUSTICE AWA NANA DABOYA - *Presiding*

HON. JUSTICE HANSINE N. DONLI - *Member*

HON. JUSTICE ANTHONY A. BENIN - *Member*

ASSISTED BY ATANNON ATHANASE - *Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 5TH DAY OF FEBRUARY, 2013

SUIT N^{O}: ECW/CCJ/APP/11/12
RULING N^{O}: ECW/CCJ/RUL/02/13

BETWEEN

1. THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP)
2. MICHEAL IFUNANYA
3. STANLEY AGBAEZE - } *PLAINTIFFS*

AND

REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT

1. HON. JUSTICE ANTHONY A. BENIN - PRESIDING
2. HON. JUSTICE AWA NANA DABOYA -MEMBER
3. HON. JUSTICE M. BENFEITO RAMOS -MEMBER

ASSISTED BY

TONY ANENE-MAIDOH -CHIEF REGISTRAR

REPRESENTATION TO THE PARTIES:

1. O.K. SALAWU - *FOR THE PLAINTIFFS*

2. HON. JUSTICE BASHIRU, V. P. MAHONEY. D.O. KULO, *DIRECTOR FOR SPECIAL LITIGATION IN THE ATTORNEY GENERAL'S CHAMBERS* - *FOR THE DEFENDANT*

Jurisdiction -Violations of Rights -Abuse of court process.

SUMMARY OF FACTS

The 1st Plaintiff is a non-governmental organization registered under the laws of the Federal Republic of Nigeria, whilst the 2nd & 3rd Plaintiffs are Nigerian citizens currently sentenced to death in the Republic of the Gambia, the Defendant and Member State of the ECOWAS.

The 2nd & 3rd Plaintiffs are among forty eight (48) persons on death row in The Gambia and without exhausting their appeal processes, the Defendant has threatened to execute them and other persons on death row on or about 15 August, 2012. The 2nd and 3rd Plaintiffs stated that their trial did not meet due process requirement as laid down by the African Charter on Human and People's Rights and internationally accepted standards.

They contend that their appeals are pending and therefore the Defendant's threat to execute them, amounts to a violation of their Rights to life, due process of law, access to justice, fair hearing and effective remedy.

LEGAL ISSUES

1. *Lack of jurisdiction to entertain this suit as it has no appellate jurisdiction over decisions of national courts of ECOWAS Member states.*

2. *Abuse of Court processes.*

DECISION OF THE COURT

1. *The Application raises questions of human rights violation or threatened violation of human rights, which is civil in nature and it is entirely different from the case before The Gambian Courts, which is criminal. Moreover, the Application before this Court does not seek a review of any Decision by the Courts in The Gambia, hence there is no question of this Court sitting on appeal over the Courts in The Gambia.*

2. *The fact that the 2nd and 3rd Plaintiffs have their appeals pending before the Defendant's Court of Appeal cannot oust the jurisdiction of this Court, in respect of this Application which is founded on human rights.*

RULING OF THE COURT

PARTIES AND REPRESENTATION

1. The first Plaintiff is a non-governmental organization registered under the Laws of the Federal Republic of Nigeria whilst the second and third Plaintiffs are Nigerian citizens currently sentenced to death in the Republic of The Gambia. The Defendant is a Member State of the Economic Community of West African States (ECOWAS). The Plaintiffs were represented by O.K. Salawu whilst D.O. Kulo, Director for Special Litigation in the Attorney General's Chambers represented the Defendant.

SUMMARY OF THE FACTS

2. The Plaintiffs averred that the 2nd and 3rd Plaintiffs are among forty eight (48) persons on death row in The Gambia and without exhausting their appeal processes, the Defendant threatened to execute them and other persons on death row on or about 15 August 2012. The Plaintiffs posited that the trial of the 2nd and 3rd Plaintiffs did not meet due process requirements as laid down by the African Charter on Human and Peoples' Rights (African Charter) and internationally accepted standards. They continued that the Defendant secretly executed nine of the death row inmates in August 2012 despite repeated appeals made to them by the African Commission on Human and Peoples' Rights (African Commission) and other organizations.

3. Further, Plaintiffs averred that the Defendant threatened to secretly and illegally execute the 2nd and 3rd Plaintiffs and other death row inmates in September 2012 contrary to Section 81 of Defendant's Constitution which requires that her Parliament pass a memorandum endorsing executions before they are carried out, The Plaintiffs stated that 2nd and 3rd Plaintiffs' Appeals are pending and therefore Defendant's threat to execute them amounts to a violation of their rights to life, due process of law, access to justice, fair hearing and effective remedy.

4. The Plaintiffs also alleged that the Defendant's action violates Resolutions adopted by both the African Commission and the UN General Assembly. Those Resolutions required countries with death penalty to fully comply with their obligations under the African Charter with respect to affording persons accused of crime which attracts capital punishment a fair trial and adopt a moratorium on execution of the death penalty. They concluded that

unless the reliefs sought are granted, Defendant will continue to be in breach of the country's Constitution, her international human rights obligations and execute the 2nd and 3rd Plaintiffs.

5. The Plaintiffs therefore filed this Application seeking the following reliefs:

   a. A DECLARATION that the consistent and continued denial of the right to fair trial to the 2nd and 3rd Plaintiffs and the dehumanizing and harsh conditions in the prison in The Gambia where they are detained violates Articles 1, 2, 3, 4, 5, 6, 7 and 26 of the African Charter.

   b. A DECLARATION that the threat by the Defendant to secretly execute the 2nd and 3rd Plaintiffs amounts to violating their right to life under Article 4 of the African Charter and the Resolutions on executions adopted recently by both the African Commission and the UN General Assembly.

   c. A DECLARATION that the threat by the Defendant to secretly execute the 2nd and 3rd Plaintiffs amounts to deliberate and willful disregard of the request by the African Commission to African countries, including The Gambia, that retained the death penalty to comply with their obligations under the African Charter and guarantee every person accused of a crime which attracts capital punishment a fair trial.

   d. An ORDER of perpetual injunction restraining the Defendant and/or her agents from carrying out the threat to secretly execute the 2nd and 3rd Plaintiffs and other persons on death row in The Gambia.

   e. An ORDER directing the Defendants to faithfully and fully implement her obligations under her own Constitution and the African Charter as well as Resolutions on executions adopted recently by both the African Commission and the Third Committee of the UN General Assembly.

PRELIMINARY PROCEDURE

6. The Defendant raised a preliminary objection when Plaintiffs Application was served on her. The objection is predicated upon the following grounds:

   a. This Court lacks jurisdiction to entertain this matter as it has no appellate jurisdiction over the decisions of the national courts of ECOWAS Member States.

   b. The simultaneous pursuit of this application and the appeal lodged by the 2nd and 3rd Applicants at The Gambia Court of Appeal constitutes a gross violation of the processes of this Court.

7. With respect to the issue of jurisdiction, learned counsel to the Defendant argued that the jurisdiction of any court of law is determined by the statute establishing same, Counsel continued that Articles 6(1) and 15(1) of the Revised Treaty of ECOWAS established this Court and Article 15(2) of same provided that the ***"The status, composition, powers, procedure and other issues concerning the Court of Justice shall be set out in a Protocol thereto."*** Accordingly Protocol A/P.1/7/91 was adopted, spelling its jurisdiction clearly by Article 9(1) - (4) and complemented by the provisions of Article 76 of the Revised Treaty.

8. Learned counsel argued that law courts do not expand but guard their jurisdictions jealously and supported his argument with the decision in the case of **Emueze** *v.* **V.C. University of Benin**(2006) 16 NWLR (pt 1006) p. 608. Counsel submitted that jurisdiction is so fundamental that in its absence the proceedings are a nullity no matter how well conducted. Counsel relied on the case of **P.E. Ltd.** *v.* **Leventis Trading Co. Ltd**. (1992) 5 NWLR (pt 244) P 675 at 693 where it was held that ***"Jurisdiction is the very basis on which any tribunal tries a case, it is the lifeline of all trials"***. A trials without jurisdiction to a nullity.

   Learned Counsel concluded his argument on this point by submitting that there is no provision of the Revised Treaty of ECOWAS and all its Supplementary Protocols which empowers this Court to act in an appellate capacity over the decisions of national courts of ECOWAS Member States. He urged the Court to act within the limits of the powers conferred on it and decline jurisdiction in this matter.

9. With respect to the issue of abuse of the process of this honourable Court, Learned Counsel to the Defendant argued that section 130 of the 1997 Constitution of The Gambia provides that ***"An appeal shall lie as of right to the Court of Appeal from any judgment, decree or order of the High Court".*** Counsel submitted that section 251 of the Criminal Procedure Code Cap 10 - 02 together with section 5 of The Gambia Court of Appeal Act Cap 6 - 02 provides the rules with respect to appeals from the High Court to the Court of Appeal. It also provides expressly that the Court of Appeal can overturn a conviction verdict of the High Court and set same aside on the ground that it is unreasonable or cannot be supported by the available evidence or that there was a miscarriage of justice.

10. Counsel argued that the Plaintiffs in this case have exercised their constitutional right of appeal by filing a Notice of Appeal against their convictions and sentence to The Gambia Court of Appeal and these appeals

have not been withdrawn or finally determined. Counsel concluded that this is a classic case of forum shopping as the Applicants have not pursued their appeal to its logical conclusion. Counsel relied on the case of **Okafor** *v.* **Attorney General & Commissioner for Justice**(1991) 7 SCNJ (pt.2) p. 345 at 363 where it was held that:

> **"*An abuse of the process of the Court is only possible by the improper use or issue of the judicial processes already issued to the irritation and annoyance of the opponent ...*"**

Counsel humbly urged the Court to hold that Plaintiffs' Application is frivolous and constitutes an abuse of the process of this Court and accordingly strike out same.

11. In response, learned counsel to the Plaintiffs argued that by virtue of Article 9 of the Supplementary Protocol, the Court is competent to adjudicate and determine cases of violation of human rights that occur in any Member State. Counsel contended that in the case of **Hissein Habre** *v.* **Republic of Senegal** (Suit no. ECW/CCJ/APP/07/08 with judgment number ECW/CCJ/JUD/06/10), this Court dismissed the preliminary objection filed by the Defendant and stated that since the Application pertained to the alleged violation of the Plaintiffs freedom of movement and right to fair hearing it was seized of the matter by virtue of Articles 9(4) and 10(d) of the Protocol on the Court as amended by the 2005 Supplementary Protocol. Counsel submitted that the suit is for the enforcement of the Plaintiffs' fundamental right to life as guaranteed by Article 4 of the African Charter and thus clothes the Court with jurisdiction.

12. On the issue of abuse of the process of this Court, counsel to the Plaintiffs submitted that it is a settled principle of law that the subject matter and the reliefs sought should be considered in making a determination. Counsel argued that this action differed materially from the criminal charge upon which the 2nd and 3rd Plaintiffs were tried and convicted in the High Court of The Gambia. Counsel urged the Court to disregard the objection raised by the Defendant and order a hearing of the substantive suit.

CONSIDERATIONS BY THE COURT

ISSUE I. JURISDICTION OF THE COURT

13. Learned counsel to the Defendant submitted that Plaintiffs' action amounts to appealing against the decision of The Gambia High Court and this Court lacks the jurisdiction to hear appeals from domestic courts of ECOWAS

Member States. Learned Counsel to the Plaintiff concedes that this Court lacks jurisdiction to hear appeals from courts of Member States but contends that this is not an appeal from the decision of The Gambia High Court as this is a civil case and the other criminal. Counsel to the Plaintiff submitted that this Court has jurisdiction over human rights violations that occur within Member States by virtue of Articles 9(4) and 10(d) of the Protocol of the Court as amended. Counsel submitted that this application is for the enforcement of the 2nd and 3rd Plaintiffs' fundamental right to life and fair hearing, issues that this Court clearly has jurisdiction over.

14. The Plaintiffs' claims can only be sustained if their human rights have been breached or threatened by the Defendant. The Plaintiffs' claim is essentially based on Articles 4 and 7 of the African Charter. They provide thus:

> ***"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."***

Article 7

I. Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

15. Plaintiffs also relied on Articles 1, 2, 3, 5 and 6 of the African Charter but hardly did Plaintiffs' counsel say anything about them in the course of his arguments against this preliminary objection.

16. The effect of Articles 4 and 7 of the African Charter is that everyone shall be entitled to respect for his life and the integrity of his person and this right cannot be arbitrarily curtailed. A person found guilty must have the right to appeal to competent national organs. The question before this Court is whether from the facts and the pleas-in-law relied upon by the Plaintiffs there is a *prima facie* case of human rights violations against the 2nd and 3rd Plaintiffs so as to empower them to invoke the jurisdiction of this Court under Articles 9(4) and 10 (d) of the Protocol of the Court as amended.

17. The Plaintiffs' claim is that there is a threatened breach of the rights of 2nd and 3rd Plaintiffs as guaranteed under Articles 4 and 7 of the African Charter

because the Defendant has publicly threatened that she will execute them before the determination of their appeals pending before the Court of Appeal. Plaintiffs allege that this threat is real because the Defendant has already secretly and illegally executed nine death row inmates in August 2012.

18. At the preliminary proceedings stage, the Court is only concerned with whether the culmination of facts and law relied on by the Plaintiffs raises a prima facie case of human rights jurisdiction as the Court does not go into the merits of the claim. In other words, the Court's objective at this stage is to ascertain whether there is a claim in human rights having regard to the facts pleaded by the Plaintiffs, in the light of the pleas in law upon which the application is based, Plaintiffs claim is that the 2nd and 3rd Plaintiffs' right would be violated if the Defendant goes ahead to execute them before the determination of their appeals pending before Defendant's Court of Appeal.

19. The record before us clearly indicates that the 2nd and 3rd Plaintiffs were arrested and charged with murder before the High Court of the Defendant. They were tried and convicted and sentenced to death. The Defendant's law gives them a right of appeal to the Court of Appeal, which right they have exercised by filing their appeals. The appeals of the 2nd and 3rd Plaintiffs are still pending as they have not been withdrawn or finally determined by the Court of Appeal. These facts stand uncontroverted by either party. If 2nd and 3rd Plaintiff have threatened with execution before the determination of their appeals, that raises a *prima facie* case of violation of the letter and spirit of Articles 4 and 7 of the African Charter which clearly demand respect to life and integrity of people, and that people are granted their rights to appeal.

20. This Court has held in a plethora of cases that once there is prima facie case of human rights violation, the jurisdiction of the Court would be invoked under Articles 9(4) and 10(d) of the Protocol on the Court as amended, *See* **Hissein Habre** *v.* **Republic of Senegal** (Suit no. ECW/CCJ/APP/07/08 and judgment no. ECW/CCJ/JUD/06/10), **Mamadou Tandja** *v.* **General Salou Djibo & Anor**(suit no. ECW/CCJ/APP/05/09 and judgment No. ECW/CCJ/JUD/05/10).

21. 1t is pertinent to state unequivocally at this point that the jurisdiction of this Court is governed by the Revised Treaty of ECOWAS and the Protocol on the Court as amended by the various Supplementary Protocols on the Court.

Access to this Court is governed by the provisions of Article 10 of the Protocol on the Court, as amended. Article 10 provides as follows:

> ***Access to the Court is open to the following:***
>
> ***d) individuals on application for relief for violation of their human rights; the submission of application for which shall:***
>
> ***i) nor be anonymous; nor***
>
> ***ii) be made whilst the same matter has been instituted before another International Court for adjudication.***

22. The Court's view is that the application raises questions of human rights violation or threatened violation of human rights, which is civil in nature, and it is entirely different from the case before The Gambia courts, which is criminal. Moreover, the application before this court does not seek a review of any decision by the courts in The Gambia; hence there is no question of this Court sitting on appeal over the Courts in The Gambia.

23. The Court further takes the position that the facts presented in the Application suffice to raise a *prima facie* case of human rights violation occurring in the territory of the Defendant, a Member State of the Community for which reason the Court's jurisdiction is appropriately invoked.

ISSUE 2. ABUSE OF PROCESS

24. Learned Counsel to the Defendant argued that the Application filed by the Plaintiffs amounts to the abuse of the process of this Court because the appeals filed by the 2nd and 3rd Plaintiffs against their conviction and sentence by the High Court is still pending before the Court of Appeal so they should not be allowed to go forum shopping. Learned Counsel to the Plaintiffs in opposition contended that the suit filed herein is essentially different from that pending before the Appeal Court of the Defendant because the subject matter and the reliefs sought are materially different. Further, counsel to the Plaintiffs argued that whilst the case before the Defendant's courts is criminal in nature, the suit herein is civil.

25. The Court has already stated in paragraph 22 above, that the issues before the Court in The Gambia and those before this court are entirely dissimilar. Hence it is not legitimate to accuse the Plaintiffs of forum shopping.

26. Besides, this Court has held that the fact that a case is pending before domestic courts of ECOWAS Member States does not oust the human rights jurisdiction of this Court. In order to oust the human rights jurisdiction of this Court, the matter in question should be pending before another International Court for adjudication, *see* Article 10(d) of the Protocol quoted above.

27. Thirdly, this Court has consistently held that the exhaustion of local remedies is not a condition precedent to the exercise of its human rights jurisdiction. See: **Ocean King Nigeria Ltd.** *v.* **Republic of Senegal**. Suit No. ECW/CCJ/APP/05/08 delivered on 8th July 2011, **Valentine Ayika** *v.* **Republic of Liberia**, Suit no. ECW/CCJ/APP/07/11 delivered on 19th December 2011.

28. Therefore, the fact that 2nd and 3rd Plaintiffs have their appeals pending before Defendant's Court of Appeal cannot oust the jurisdiction of this Court, in respect of this Application which is founded on human rights.

DECISION

29. Consequently, for the reasons explained already that the issue before this Court is one founded on human rights violation which is entirely different from the criminal case pending in the Court in The Gambia; that the Court has jurisdiction despite the pendency of the appeal before the Defendant's domestic Court since exhaustion of local remedies is not a requirement in this Court; the Court decides that it has jurisdiction to hear and determine this case on merits.

Accordingly the Court rejects the Preliminary Objection.

Costs will abide the event.

This Ruling has been delivered in public at the Community Court of Justice, ECOWAS holden at Abuja on the 5th Day of February, 2013.

BEFORE THEIR LORDSHIPS

Hon. Justice Anthony A. BENIN - *Presiding*
Hon. Justice Awa Nana DABOYA - *Member*
Hon. Justice Benfeito M. RAMOS - *Member*

Assisted by: **Tony ANENE-MAIDOH (Esq.)** - *Chief Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY THE 5TH DAY OF FEBRUARY, 2013

SUIT NO: ECW/CCJ/APP/08/12
RULING NO: ECW/CCJ/RUL/03/13

BETWEEN
FEMI FALANA - ***PLAINTIFF***

AND
ECOWAS COMMISSION - ***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. **A. K. SALAWU** - *FOR THE PLAINTIFF*
2. **OBII ONUOHA** -*FOR THE DEFENDANT*

Right to fair hearing -Locus standi -Cause of action -Enforcement of the directive of the Council of ministers

SUMMARY OF FACTS

The Plaintiff a Nigerian National a Legal practitioner representing many clients in a number of cases before the Community Court of Justice ECOWAS, filed an application alleging that at the 35th Ordinary Session of the Council of Ministers of ECOWAS which was held in June 2005, it was decided that an appellate division of the Court be established and the defendant was mandated to carry feasibility studies in collaboration with the management of the Court in order to implement this Decision of the Council.

However when the defendant failed to carry out the Councils' directive, after seven years, he wrote a petition requesting that the directive be implemented. Thus when the defendant failed he instituted this action alleging that he and his clients have been dissatisfied with some of the Judgments of this Court but have been unable to appeal against same as a result of the non-existence of an appellate division of the Court which is a violation of his human rights to fair hearing and urged the Court to grant the following reliefs:

a. A Declaration that the defendants' failure or refusal to establish an appellate division is illegal as it violates his right to fair hearing guaranteed by Article 7 of the African Charter on Human and peoples' Rights.

b. An Order directing the defendant to establish the appellate division of the Court within three months of the Judgments of this Court.

In response, the defendant filed a preliminary objection on grounds that the suit discloses no cause of action and the Plaintiff lacks locus standi to institute the action.

LEGAL ISSUES

1. Whether or not the Plaintiff has a cause of action.

2. *Whether or not the failure or refusal of the defendant to carry out the Directive of Council has resulted in the violation of his human rights.*

3. *Whether or not the Directive of the council of Ministers on the establishment of an appellate division of the Community Court of Justice, ECOWAS can be enforced.*

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

DECISION OF THE COURT

The Court while dismissing the Plaintiffs' application held that:

1. *An individual or corporate body does not have access to this Court for the purpose of seeking enforcement of a directive from one Community Institution of ECOWAS unless such Directive violates or threatens to violate the right of the individual or corporate body.*

2. *The Plaintiff an individual only has access to this Court in respect of cases falling within the purview of the provision of Article 10 (c) and (d) of the Supplementary Protocol and this application does not fall within because his claim is not against an action or inaction of a Community official but against an Institution of the Community. There is no cause of action and the Plaintiff lacks locus standi to institute this action.*

RULING OF THE COURT

1. The Plaintiff is a Community citizen by virtue of his Nigerian nationality and a human rights lawyer based in Lagos, Nigeria whilst the Defendant is an institution of the Economic Community of West African States (ECOWAS). The Plaintiff was represented by O.K. Salawu whilst the Defendant was represented by Obii Onuoha.

SUMMARY OF THE FACTS

2. The Plaintiff averred that he is a legal practitioner representing many clients in a number of cases either decided or pending before the Community Court of Justice, ECOWAS (the Court). He continued that at the 35th Ordinary Session of the Council of Ministers of *ECOV\T.A.S* (the Council) which was held in June 2005 at Abuja, it was decided that an appellate division of the Court be established. Further, he stated that the Defendant herein was mandated to carry out feasibility studies in collaboration with the management of the Court in order to implement this decision of the Council.

3. Plaintiff further averred that when he found that the Defendant had not carried out the directive of the Council after seven years, he petitioned the Defendant via a letter and requested that the decision of Council be implemented. When Defendant refused to heed to Plaintiff's request, he instituted this suit because his clients and himself have been dissatisfied with some of the judgments of the Court but have been unable to appeal against them because of the non-existence of an appellate division of the Court. Plaintiff stated that this amounts to a violation of his human right to fair hearing.

4. The Plaintiff seeks the following reliefs:

   a. A DECLARATION that the failure or refusal of the Defendant to establish the appellate division of the Court is illegal as it violates the Plaintiff's human right to fair hearing guaranteed by Article 7 of the African Charter on Human and Peoples' Rights.

   b. An ORDER directing the Defendant to establish the appellate division of the Court within three months of the judgment of this Court.

PRELIMINARY PROCEDURE

5. Upon service of the initiating Application on the Defendant; it raised a preliminary objection against the jurisdiction of the Court on two grounds.

The objection was predicated upon Articles 87 and 88 of the Rules of Procedure of this Court. The grounds of objection are as follows:

a. That the Suit/Application before this Court does not disclose any cause of action.

b. That the Plaintiff/Respondent lacks the *locus standi* to bring this action.

6. In respect of the cause of action, learned counsel to the Defendant contended that a Plaintiff must show that he has a cause of action which is sustainable at law and where no such cause of action exists as it is in this case, the suit should be struck out. Counsel argued that the Defendant in 2009 engaged a consultant to conduct a study on the establishment of an appellate division of the Court and that this process is ongoing. It is therefore erroneous for the Plaintiff to state that the Defendant has neglected or failed to establish an appellate jurisdiction for the Court in line with the decision of the Council.

7. On the issue of *locus standi*, counsel to the Defendant argued that the Plaintiff lacks the *locus standi* to prosecute this case. Counsel contended that to have a *locus standi* to sue, the Plaintiff must show that he has sufficient interest and establish that his interest has been violated or suffered real injury or will suffer such injury if his claims are not granted. Learned counsel to the Defendant submitted that this is the position where the Plaintiff is seeking declaratory reliefs. Counsel relied on the case of **Josiah Karode Owodunni *v* Registered Trustees of Celestial Church of Christ & Ors NWLR 2000 parts 674-676 page 315 to 388** to support the position taken by the Defendant that the action of Plaintiff ought to be dismissed without going into the merits.

8. Learned counsel to the Defendant also relied on Articles 17 and 18 of the ECOWAS Revised Treaty as amended by Supplementary Protocol A/S.P/1/06/06 on the transformation from Executive Secretariat to a Commission, Article 87 of the Rules of the Community Court of Justice, Article 10 of Supplementary Protocol A/SP.1/01/05 amending the Protocol relating to the Community Court of Justice as well as internal memorandum file on the study for an Appellate Court to support the preliminary objection raised by the Defendant.

9. Learned counsel to the Plaintiff in response to the preliminary objection filed by the Defendant contended that the grounds of objection are misconceived and should be dismissed by the Court. In respect of the issue of the Plaintiff s case disclosing no cause of action, learned counsel argued that the argument canvassed by learned counsel to the Defendant is misconceived in every material particular.

10. Counsel to the Plaintiff argued that Plaintiff's suit is predicated upon the fact that Defendant has refused to create an appellate division of the Court as officially directed by the Council at its 35th Ordinary Session, an allegation which was not denied by the Defendant. In fact, counsel submitted that the fact that the appellate division of the Court has not been established was expressly admitted by the Defendant in its affidavit in support of the preliminary objection. Counsel also submitted that it is a fact that the Plaintiff has been unable to appeal against decisions of the Court which his clients are not satisfied with but that has become impossible because of the non-existence of an appellate division of the Court.

11. Further, counsel argued that the lack of appellate division of the Court is clearly a breach of the provision of Article 7 of the African Charter on Human and Peoples' Rights as the right to fair hearing includes the right to appeal. Counsel also submitted that it is settled law that once a reasonable cause of action exists, a justiciable right is enforceable at law. He relied on the case of **Bello *v* A. G Oyo State (1986) 5 NWLR (pt.45) 828 at 876**. Learned Counsel concluded that a reasonable cause of action has arisen for determination in this suit.

12. On the issue of *locus standi*, learned counsel to the Plaintiff submitted that the line of argument canvassed by learned defence counsel is erroneous in law. He argued that there has been a progressive dimension with respect to the issue of *locus standi* which has whittled down the conservative approach to standing which required personal interest of a Plaintiff for him to succeed. That notwithstanding, counsel argued that the Plaintiff s fundamental right to fair hearing has been violated because he has lost a number of cases in the Court which he has not been able to appeal against because of the non-existence of an appellate division.

    Learned Counsel supported his argument on locus standi by relying on the ruling of this Court in the case **of Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP)** *v.* **Federal Republic of Nigeria and Anor (suit No. ECW/CCJ/APP/08/08)** wherein this Court stated thus:

    > **"*... in public interest litigation the Plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that matter in question is justiciable".***

13. Learned Counsel to the Plaintiff submitted that under the modern approach to the interpretation of the doctrine of standing, a Plaintiff need not disclose

any personal interest before instituting an action, Counsel argued that the Plaintiff in the present proceedings has shown that he has been adversely affected by the failure of the Defendant to establish the appellate division of the Court and thus has the required standing to institute and maintain this action. He urged the Court to hold that the Plaintiff has the *locus standi* to sue in this case.

CONSIDERATIONS BY THE COURT

ISSUE 1: CAUSE OF ACTION

14. Learned counsel to the Defendant contends that the Plaintiffs claim discloses no cause of action but learned counsel to the Plaintiff vehemently opposed that. Counsel to the Defendant argued that for the Plaintiff's case to be sustained, he has to show that he has a cause of action which is sustainable at law. Counsel to the Plaintiff argued that the Plaintiff has a case sustainable at law and that his case is predicated upon the failure of the Defendant to establish an appellate division of the Court contrary to the decision of the Council to so do. Learned counsel to the Plaintiff contends that the failure of the Defendant to carry out the directive of the Council has resulted in the infringement of his right to fair hearing as the right to appeal is an important component of the said right.

15. From the pleadings of the Plaintiff, it is clear that the basis of his claim is the decision of the Council which he alleges directed the Defendant to establish an appellate chamber of the Court, Therefore, the success or otherwise of Plaintiff's case depends on the content of the said decision. It is a cardinal principle of law that a party who makes an allegations bears the burden of proving same. Therefore the Plaintiff bore the burden of making available to the Court the document upon which his claim is based. However, the Plaintiff failed to annex the said decision of the Council to his pleadings, as required by Article 32(4) of the Court's Rules of Procedure.

16. During the hearing of the preliminary objection, the Plaintiff was requested by the Court to make the said decision available to the Court as that document forms the very basis of his case. However, the Plaintiff has failed to furnish the Court with that document. This second opportunity was given to the Plaintiff to produce the document by virtue of Article 16 of the 1991 Protocol on the Court which provides that ***'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'.*** The Court cannot go into an expedition exercise in looking for documents and/or evidence to substantiate a party's case.

17. It is clear that whether the Plaintiff's claim discloses any cause of action is dependent on the contents of the document which he has failed to make available to the Court. This document provides the factual basis of Plaintiff s case. Since the document is not before the Court, it cannot be taken into consideration by the Court in arriving at its decision. The fact that Plaintiff has made written and oral submissions with respect to the contents of that document does not help his case in any way. The contents of a document which is not before the Court cannot be admitted in evidence as the Court cannot determine the accuracy of the contents.

18. This Court has already decided that a party bears the burden of proving his case and will therefore succeed or fall having regard to what he presents to it. The case in point is **Starcrest Investment Ltd. V President, ECOWAS Commission & Ors. Suit No. ECW/CCJ/APP/01/08** with Judgment **No. ECW/CCJ/JUD/06/11.** In paragraph 11 of the judgment, the Court stated thus:

> ***" ...It follows that where the application does not state the plea- in-law, or where the application is founded on a non-existing law, the entire application is flawed as being without a legal justification. Where a party has chosen to rely on some portions of an enactment, the Court cannot decide the case on other portions of that enactment; in this Court the party will suceed or fall having regard to the plea in law he has chosen."***

Though the issue in the Starcrest Case above dealt with the plea in law whilst the issue in this case deals with the factual basis of Plaintiff's claim, by parity of reasoning, the underlying reasoning is valid and applicable to this case. Thus where the sole document upon which the Plaintiff's application is based is not before the Court, the whole application is flawed as being without any factual justification. Therefore, the Court is left with no choice than to hold that the Plaintiff's case discloses no cause of action.

ISSUE 2: LOCUS STANDI OF PLAINTIFF

19. The learned counsel to the Defendant argued that the Plaintiff lacks *locus standi* to institute and maintain the present action. Learned counsel to the Plaintiff contends the position taken by the Defendant is erroneous in law. It is trite learning that for a Plaintiff to successfully invoke the jurisdiction of a court, he must establish that the court has jurisdiction over the subject matter and he has access to the Court on the specific issue he puts before the court. This Court's jurisdiction over human rights violations that occur within Member States of ECOWAS is well known and settled. Therefore, the issue before the Court is whether the Plaintiff has access to the Court

with respect to the subject matter of his claim which is the enforcement of a directive from one ECOWAS Institution to another. In other words, has the Plaintiff access to sue for the enforcement of a directive from the Council to the Defendant?

20. The issue of access to this Court is governed by Article 10 of the Protocol on the Court (A/P.1/7/91) as amended by the Supplementary Protocol (A/SP.1/01/05). By the provisions of the said Article, individuals have access to this Court on two grounds. Article 10 provides as follows:

Access to the Court is open to the following:

(c) individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individual or corporate bodies;

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

i) not be anonymous; nor

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

21. Thus, the Plaintiff, an individual only has access to this Court in respect of cases falling within the purview of the provisions above. The question is whether the Plaintiff's case falls within any of those two.

Plaintiffs claim clearly does not fall within Article 10 (c) of the Protocol as amended because his claim is not against an action or inaction of a Community Official but against an Institution of the Community. A Community Official is clearly distinguishable from an Institution of the Community.

22. Plaintiffs case seems to have some correlation to Article 10 (d) as he alleged the violation of his rights as a result of the failure or neglect of the Defendant to establish an appellate division of the Court. However, whether Plaintiff's claim falls appropriately under it or not can be determined by carefully considering the basis of Plaintiff s claim as well as the reliefs sought by him.

23. The Plaintiff argues that the failure of the Defendant to carry out the said directive of Council has resulted in the violation of his human rights. What is the thrust of Plaintiff's application? Is it the violation of his human rights or the enforcement of the decision of Council? The Plaintiff is essentially

saying that his rights would not have been violated if the Defendant had carried out the directive of Council.

24. It seems clear that the Plaintiff's application is essentially to seek the enforcement of a decision or directive of the Council and not the ventilation of a violation of human rights. A look at the reliefs sought for by the Plaintiff in his application clearly shows that the enforcement or non enforcement of the decision by Council is the object and the basis of his claim. He sought two reliefs as stated above, see paragraph 4. The first is a declaration that the failure or refusal of the Defendant to carry out the directive of Council has resulted in the violation of his human rights whilst the second is an order directing the Defendant to establish an appellate division of the Court within three months of the judgment of the Court.

25. From the provisions of Article 10 (c) and (d) of the Protocol, an individual or corporate body does not have access to this Court for the purpose of seeking enforcement of a directive from one Community Institution of ECOWAS to another, unless such directive violates or threatens to violate the rights of the individual or corporate body. However, in this case the Plaintiff does not complain that whatever directive was given by the Council to the Defendant to facilitate the establishment of an appellate division has violated his rights. So the order sought to compel the Defendant to comply with the Council's directive is erroneous.

DECISION

26. **For the reasons** explained in the previous paragraphs, namely that there is no cause of action, and that the Plaintiff lacks *locus standi*, the court decides to uphold the preliminary objection and dismiss the application.

There is no order as to costs.

This Ruling has been delivered in public at the Community Court of Justice, ECOWAS Holden at Abuja on the 5th Day of February 2013.

HON. JUSTICE HANSINE N. DONLI - *Presiding*

HON. JUSTICE AWA NANA DABOYA - *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 TUESDAY, THIS 11TH DAY OF JUNE 2013

SUIT N^{O}: ECW/CCJ/APP/19/12
JUDGMENT N^{O}: ECW/CCJ/JUD/05/13

BETWEEN
SOW BERTIN AGBA - APPLICANT

AND
REPUBLIC OF TOGO - DEFENDANT

COMPOSITION OF THE COURT

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

ASSISTED BY
MAITRE ABOUBACAR DJIBO DIAKITE - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. MAITRE AHLIN GABRIEL KOMLAN,
2. MAITRE SYLVAIN KOFFI ATTOH-MENSAH &
3. MAITRE ATA MESSAN ZEUS AJAVON - *FOR THE PLAINTIFF*

1. MAITRE OHINI KWAO SANVEE &
2. MAITRE EDAH N'DJELLE - *FOR THE DEFENDANT*

Human rights violation -Torture -Provisional release on bail -Arbitrary detention

SUMMARY OF FACTS

Under suspicion of fraud, to the prejudice of Abass Al Youssef, a citizen of the United Arab Emirates, Agba Sow Bertin, a Togolese businessman, was arrested on 7 March 2011 by members of the National Intelligence Agency(ANR) of Togo. After 8 days in custody, in the course of which he was alleged to have been subjected to inhuman and degrading treatment and acts of torture, he was referred to the Parquet (Office of the Public Prosecutor) and placed under a committal order made by the investigating judge of Trial Chamber 4 of the Court of First Instance of Lome.

The Republic of Togo argued that Mr. Abass AI Youssef was requested by some alleged parents of the late Ivorian President Robert Guei, to help them transfer from Togo to a foreign country, a fortune of 275 Million US Dollars, which allegedly belonged to the late President Robert Guei.

Mr. Abass AI Youssef then despatched to Lome, Mr.Loik Floch-Prigent, a French national, who in turn sought the assistance of Pascal Bodjona (a Togolese Minister) and Sow Bertin Agba, and they succeeded in defrauding Mr. Abass AI Youssef of successive advance fees totalling USD 12,825,000 and subsequently extorted from Mr. Abass AI Youssef the sum of U5D5,600,000 in connection with another similar case concerning an Iraqi General.

Citing difficulties relating to fund transfer, a further sum of 33 Million US Dollars was equally extorted from Mr. Abass Al Youssef.

Mr. Abass AI Youssef eventually realised that it was all a fabrication and he filed a complaint against Mr. Sow Bertin Agba et al. for fraud, and Mr. Sow Bertin Agba was placed under a committal order.

Mr. Agba Sow Bertin applied several times for provisional release but his requests were all dismissed. Upon an appeal filed by him, the Criminal Chamber ordered his release on provisional grounds, upon the payment of a surety of CFA F 150,000,000.

The Public Prosecutor at the Court of Appeal of Lome however sought to quash the judgment delivered by the said Criminal Chamber releasing him on provisional basis.

The Supreme Court dismissed the case made by the Public Prosecutor and confirmed the judgment of the Criminal Chamber releasing Agba Sow Bertin on provisional basis, and ordered that the original judgment shall have its full effect.

On 23 July 2012, the surety of CFA F150,000,000 was paid to the finance division of the Supreme Court, and yet the Public Prosecutor refused to grant the Applicant, Agba Sow Bertin, provisional release.

Agba Sow Bertin brought the case before the ECOWAS Court of Justice, for violation of his human rights and asked the Republic of Togo to pay to him the sum of USD 1,000,000 as damages for all the prejudice suffered.

LEGAL ISSUES

- *After the judgment of the Criminal Chamber, and that of the Supreme Court of Togo ordering his release, is the detention of Agba Sow Bertin illegal?*
- *Was the Applicant subjected to torture?*
- *Is the Applicant entitled to damages for moral and material prejudice?*

DECISION OF THE COURT

The Court declared that the detention of Agba Sow Bertin is illegal and arbitrary, following the judgments delivered by the Criminal Chamber and the Supreme Court of Togo. The Court dismissed the Applicant's request for moral and material damages, on grounds of lack of proof of evidence for the award such damages.

The Court however, held that the moral harm suffered by Sow Bertin Agba is undoubted and real, and it ordered the Republic of Togo to pay to Sow Agba Bertin the sum of 15 Million CFA Francs (CFAF15,000,000) in reparation.

JUDGMENT OF THE COURT

FACTS AND PROCEDURE

The facts of the case as narrated by the Applicant

1. Mr. Sow Bertin Agba, a Togolese businessman, domiciled at Lome, was arrested on 7 March 2011 by officers of the National Intelligence Agency (ANR), under the pretext that he had committed the offence of fraud against the Emirate national, Mr. Abass AI Youssef.

2. Mr. Sow Bertin Agba was kept at the premises of the ANR for eight (8) days without access to legal assistance or a visit by a doctor or family member, and was allegedly subjected to inhuman and degrading treatment and acts of torture, before being transferred to the National Gendarmerie. On 23 March 2011, the National Gendarmerie handed him over to the Office of the Public Prosecutor at the Court of First Instance of Lome, where the Investigating Judge of Trial Chamber 4 placed him under a committal order on 25 March 2011.

3. In the complaint lodged on 10 March 2011 (i.e. 3 days after being summoned for questioning) before the Public Prosecutor, Mr. Abass AI Youssef maintained that Sow Bertin Agba together with his co-perpetrators and accomplices defrauded him of the sum of Forty-Eight Million US Dollars (USD 48,000,000) by falsely claiming that they could gain access to the hidden fortune of the late President of Cote d'Ivoire, General Robert Guei, which had been lodged at the Central Bank of Togo.

4. Before the Investigating Judge, however, Sow Bertin Agba made it clear that he was engaged in business relations with Mr. Abass AI Youssef, to assist him obtain concessions in the areas of mining, petroleum and telecommunications in several African countries and that sums of money amounting to almost USD 5,000,000 which he received in the bank accounts of his companies in Togo were commissions and advances on commissions or charges; that the transactions undertaken thereof are documented by receipts whose records can be found in the accounts statements of his bank.

5. On 22, July 2011, when the Applicant and the complainant brought their opposing claims before the Investigating Judge, the Defendant, Mr. Abass

AI Youssef, failed to bring any evidence on the allegations he had made in respect of fraudulent steps the Applicant may allegedly have taken to entice the said Mr. Abass AI Youssef to give him the sum of 48 Million US Dollars. That was why an application for provisional release was filed on 2 August 2011, but it was rejected.

6. On 16 December 2011, the Applicant filed another application for provisional release, which was again dismissed by the Investigating Judge. The Applicant appealed and the Criminal Chamber, by Judgment No. 009 of 23 January 2012, ordered that the Applicant, be released on provisional grounds, upon the payment of CFA F 150,000,000 as surety.

7. On 20 June 2012, the Supreme Court, in Judgment No. 48/12, dismissed the appeal filed by the Public Prosecutor and decided that the judgment of the Criminal Chamber shall take its full effect.

8. The surety of CFA F 150,000,000 was paid on 23rd July 2012 to the finance division of the Supreme Court, through a cheque signed by the presiding member of the Bar Association at the Court of Appeal of Lome, with whom the money was duly lodged on 25 June 2012. Despite the fact that he had complied with the judgment of the Criminal Chamber by paying the stipulated amount, the Public Prosecutor refused to issue to the Head of the Tsevie civilian prison, where the Applicant was incarcerated, the order for the provisional release of the Applicant.

9. The Applicant contended that his human rights have been violated and he invoked the following pleas-in-law:

   - Violation of Article 9 of the 10 December 1948 Universal Declaration of Human Rights;
   - Violation of Article 6 of the 27 June 1981 African Charter on Human and Peoples' Rights;
   - Violation of Article 9 of the 16 December 1966 International Covenant on Civil and Political Rights.

10. It is for all these reasons that he brought his case before the Court, asking the Court to:

    - ADJUDGE and DECLARE that the refusal to release the Applicant on provisional grounds, following the court decisions made to that

effect, constitutes an arbitrary and illegal detention in regard to the legal provisions cited above;

- To ORDER the Republic of Togo to release him provisionally, by adhering to Judgment No. 009 of the Criminal Chamber as delivered on 23 January 2012;

- To ASK the Republic of Togo to pay to him, in reparation for the harm done him, and in compliance with Article 9(5), of the International Covenant on Civil and Political Rights, the sum of USD 1,000,000 as damages for all the prejudice suffered.

11. The Applicant asked for expedited procedure on the grounds that the Republic of Togo, having adopted the Protocol on Democracy and Good Governance, violates the provisions of same legal instrument, by refusing to enforce a lawfully made court decision delivered in the Republic of Togo.

The facts of the case as narrated by the Republic of Togo

12. The Republic of Togo, in a Memorial in Defence dated 8 January 2013, maintained that Mr. Abass Al Youssef, an Emirates businessman, was requested by some alleged parents of the late Ivorian President Robert Guei, to help them transfer from Togo to a foreign country, a fortune of 275 Million US Dollars, which allegedly belonged to the late President Robert Guei. Mr. Abass AI Youssef then despatched to Lome, Mr. Loik Floch-Prigent, his partner and expert in African affairs, to establish contact with the supposed parents of President Guei, and especially, assess the genuineness of their claims. Mr. Loik Floch-Prigent reported back to Mr. Abass AI Youssef that the business was a promising one.

13. Thus, Messrs. Pascal Bodjona and Sow Bertin Agba became participants in the deal and succeeded in defrauding Mr. Abass AI Youssef of successive advance fees totalling USD 12,825,000 supposedly for removing certain hindrances; and subsequently, they concocted another business story on the transfer of certain funds belonging to-an Iraqi General, and once again, they were able to extort from Mr. Abass AI Youssef the sum of USD S,600,000.

14. Again, for the purposes of resolving difficulties in relieving certain financial obligations incurred in relation to the transfer of the entire fund in question,

other cumulated advance fees amounting to 33 Million US Dollars were paid by Mr. Abass AI Youssef to Mr. Sow Bertin Agba et al. Mr. Abass AI Youssef eventually realised that it was all a fabrication and he filed a complaint against Mr. Sow Bertin Agba et al. for fraud, involving almost 48 Million US Dollars. Mr. Sow Bertin Agba was, summoned by the Gendarmerie for questioning, and was subsequently transferred to the Court of First Instance of Lome and placed under a committal order for fraud, forgery and use of fake documents.

15. After he had been interrogated on the merits of the case, he applied for provisional release, which was rejected. A second application for provisional release was equally dismissed. Upon an appeal filed by him, the Criminal Chamber ordered that he should be released on provisional grounds, upon the payment of a surety of CFA F 150,000,000.

16. The Public Prosecutor referred the judgment of the Criminal Chamber before the Supreme Court for violation of Article 422 (2) of the Code of Criminal Procedure of Togo, since the Criminal Chamber had decided that the witness Pascal Bodjona shall be heard by the President of the said Chamber, whereas the Article invoked provides that depositions of Members of the Government shall be heard by the President of the Court of Appeal.

17. Furthermore, the Republic of Togo averred that the pending issues included non-enforcement of the international warrants of arrest issued against Mr. Loik Floch-Prigent, who is a French national; the question regarding the alleged parents of the late Ivorian President Guei: and, the hearing Mr. Pascal Bodjona, etc. The Republic of Togo argued therefore that for all those reasons, the preventive detention of the Applicant is perfectly lawful and does not violate any constitutional or legal text in force in Togo.

ANALYSIS OF THE COURT

As to the admissibility of the Application

18. The Republic of Togo states that it would rely on the wisdom of the Court in this regard.

Article 10(d) of the Supplementary Protocol A/SP.1/01/05 amending Protocol A/P.1/7/91 of the ECOWAS Court of Justice provides:

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

19. Sow Bertin Agba invokes the refusal by the Republic of Togo to release him on provisional basis, in spite of the Supreme Court decision confirming a judgment delivered by the Criminal Chamber. This is manifestly a violation of the right to liberty. It is consistently held that in any instance where an applicant alleges human rights violation on the territory of a Member State, the Court upholds its competence and declares the application admissible.

Since the Application is in conformity with the provisions of the said Article 10(d), as cited above, there are grounds for declaring same admissible.

As to the application for expedited procedure

20. In a separate application dated 8 November 2012, registered at theRegistry of the Court on 12 November 2012, the Applicant requested that his Application be brought under expedited procedure;

A request for expedited procedure is granted when the particular urgency of a case requires that the Court adjudicates within the shortest possible time. The Applicant applied for the said measure, considering, himself, that his detention is arbitrary and illegal. But as the time the Court is pronouncing judgment on this case, the detention of the Applicant has ceased, since he was released on 16 April 2013.

Therefore, the urgency which warranted the expedited procedure is no more existent; and there is no ground to adjudicate on that issue.

AS TO THE MERITS OF THE CASE

21. Regarding the refusal by the Republic of Togo to release Sow Bertin Agba on provisional grounds

22. Sow Bertin Agba was formally charged by the Investigating Judge of Trial Chamber 4 of the Court of First Instance of Lome, and on 19

December 2011, Sow Bertin Agba lodged an application for provisional release. By Order of 22nd December 2011, the Investigating Judge dismissed the Applicant's request.

23. Sow Bertin Agba appealed against that Order. The Criminal Chamber, before which the appeal against the said Order was brought, by Judgment 009/12 of 23 January 2012, ordered that Sow Bertin Agba be released on provisional grounds, upon payment of CFA F 150,000,000 as surety. Meanwhile, the Public Prosecutor had sought for a quashing of the judgment delivered by the Criminal Chamber.

24. However, it is apparent from the provisions of Article 179(1) of the Togo Code of Criminal Procedure that:

> ***"When the Criminal Chamber has adjudicated on an appeal brought against an order made by an investigating judge on a matter concerning preventive detention, whether the order is confirmed or reversed, the Criminal Chamber, in releasing the detainee or in continuing to hold him in detention, or in issuing a committal order or an arrest warrant against him, the Public Prosecutor shall instantly return the case-file to the investigating judge after having enforced the judgment."***

25. The Public Prosecutor disregarded this requirement and the argument put forth by the Republic of Togo to maintain Sow Bertin Agba in detention is that:

> ***"The Public Prosecutor had two obligations. The obligation to release the Applicant on provisional basis, but also the necessity, as demanded by the Court, to hear the Minister Pascal Bodjona beforehand ... It was under those conditions that the Applicant was maintained in detention till he was provisionally released in February 2012. The Public Prosecutor's Department wanted to avoid a collision between the Parties or the risk of shelving the testimony of a witness; it was absolutely necessary to hear one of the witnesses, in the person of Minister Bodjona, before releasing the Applicant."***

26. But, Judgment No. 009/12 of 23 January 2012 by the Criminal Chamber, while making the Order for the provisional release of Sow Bertin Agba, posed only two conditions: the payment of CFA F 150,000,000 as surety,

and also that the Applicant will be banned from going outside the territory of Togo till further notice, for the purposes of the procedure. In no instance was there a requirement that Minister Pascal Bodjona had to be heard first before the Applicant could be released.

27. Further, Judgment No. 48/12 of 20 June 2012 by the Criminal Chamber of the Supreme Court declared that the appeal brought by the Public Prosecutor attached to the Court of Appeal of Lome, on the aspect of the case dealing with the detention of Sow Bertin Agba, was inadmissible. The Supreme Court declared it is forbidden to seek to quash a decision on a matter concerning preventive detention.

28. In spite of the judgments by the Criminal Chamber and by the Supreme Court, Sow Bertin Agba was maintained in preventive detention. To justify this detention, the Republic of Togo emphasises that an order for his provisional release was received at the civilian prison of Tsevie on 12 February 2013, on charges of fraud, forgery and use of fake documents, as brought against him, but his release could not be secured because he was being held for another cause.

    However, the Court notes that the Republic of Togo fails to bring forth a relevant and convincing argumentation as to what it meant by that 'other cause' for which Sow Bertin Agba continued to kept in prison.

29. The Republic of Togo, still for the purposes of justifying the detention of the Applicant, stresses that between the time the Public Prosecutor brought the appeal and the release of Sow Bertin Agba, the matter had gone before the United Nations Working Group of Geneva. Essentially, the Working Group's opinion was that Sow Bertin Agba's release must not be conditioned on Minister Pascal Bodjona having to be heard beforehand, and that that idea helped in finding a common ground among the Parties, thus making it possible for the Public Prosecutor to order for the release of the Applicant.

30. Counsel for the Applicant responds by stating that it was Sow Bertin Agba who referred the question of preventive detention before the United Nations Working Group on Arbitrary Detention, and that the Working Group stated in its **point 1: *"That it is manifestly impossible for a State to cite any legal basis whatsoever to justify the denial of 'liberty in an instance of the preventive .detention of a person who has been***

released on the basis of a court decision that is final." That opinion, which was made on 14 December 2012, was notified on the Republic of Togo in the same month of December 2012 and the actual release of the Applicant took place only on 16 April 2013. Counsel for the Applicant further argues that the time lapse between the notification of the opinion on the Republic of Togo and the release of Sow Bertin Agba proves that the Republic of Togo did not react promptly.

31. The Republic of Togo maintains that the opinion was served on it on 23 January 2013 and that it was on 12 February 2013 that Sow Bertin Agba was released on a provisional basis.

32. The Court notes that Judgment No. 009/12 of the Criminal Chamber which ordered the provisional release of Sow Bertin Agba was made on 23 January 2012 and the surety was paid on 25 June 2012. As from the latter date, the Applicant must have been released unconditionally, but he was held in detention till 16 April 2013, the date on which his release became effective. From 25 June 2012 to 16 April 2013, the detention of Sow Bertin Agba is unjustifiable, since he had paid the required surety and had ostensibly showed no intention to evade trial.

33. In the Judgment of 8 November 2010 on case concerning **Mamadou Tandja v. General Salou Ojibo**, the Honourable Court, in demonstrating the arbitrary nature of the preventive detention at stake, referred to the definition of the United Nations Human Rights Commission. On arbitrary detention, the Working Group considered as "arbitrary", instances of denial of liberty, which for one reason or another, are contrary to the relevant international norms enunciated in the Universal Declaration of Human Rights, or instances which are so considered by the relevant international instruments ratified by the States.

    To determine the arbitrary nature of a detention, the Working Group set out three criteria, namely that:

    - It shall be manifestly impossible to invoke any legal basis whatsoever to justify the denial of liberty:

    - Denial of liberty shall be corollary to the exercise of rights ,or freedoms stipulated by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights, in as far as the States are parties to the International Covenant on Civil and Political Rights;

- Non-observance, be it total or partial, of the international norms relating to the right to fair trial, as enunciated in the Universal Declaration of Human Rights and in the international instruments ratified by the States concerned, is of such gravity as the denial of liberty is of an arbitrary nature.

34. On the whole, Sow Bertin Agba was illegally held in prison for 9 months and 21 days, aside of the fact that he was held in custody for 16 days for the purposes of the preliminary inquiry on the premises of the National Intelligence Agency (ANR) Gendarmerie.

35. Since the detention of the Applicant is not on any legal basis, it is arbitrary, and violates the provisions of the following legal instruments ratified by the Republic of Togo:

36. Article 9 of the 10 December 1948 Universal Declaration of Human Rights, which provides that: ***"No one shall be subjected to arbitrary arrest, detention or exile";***

Article 9(1) of the International Covenant on Civil and Political Rights:

> ***"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance' with such procedure as are established by law";***

Article 6 of the African Charter on Human and Peoples' Rights:

> ***"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.***"

As to damages

37. The Applicant maintains that he is a Director of several business companies incorporated in Lome and outside Togo. In Ghana for example, he states that he operates an airline. For all these reasons, Sow Bertin Agba pleads that the harms done him are of a material, moral, psychic and psychological nature and asks for the sum of One Million US Dollars (USD 1,000,000).

To buttress his claim, he invokes Article 9(5) of the International Covenant on Civil and Political Rights, which provides: ***"Anyone who has been***

the victim of unlawful arrest or detention shall have an enforceable right to compensation."

38. The Court recalls that since the US Dollar is a currency which is foreign to the ECOWAS zone, the amounts of money asked for as damages must henceforth be evaluated in the currencies of the Member States.

39. Counsel for the Applicant converted the amount requested and claimed the equivalent value of 1 Million US Dollars (i.e. the amount CFA F 500,000) in damages.

40. The Republic of Togo, the Defendant, objects to that request and maintains that the amount asked for by the Applicant has no legal basis.

41. The Court holds that Sow Bertin Agba did not file any justifying evidence to losses he incurred or in respect of any revenues he would have had to earn during the period of his detention. He did not lodge any medical certificate to attest to torture, inhuman or degrading treatment which he claims to have suffered on the premises of the National Intelligence Agency (ANR).

In the absence of proof of evidence, the Court is not in a position to award damages for material damage. But the Court finds that having been subjected to illegal detention from 25 June 2012 to 16 April 2013, for 9 months and 21 days plus 16 days in police custody, the Applicant suffered undoubted moral harm; whereas it shall be appropriate to award him damages in reparation thereof.

FOR THESE REASONS

42. ***In terms of formal presentation***

The Court,

- DECLARES that the Application of Sow Bertin Agba is admissible;
- DECLARES that there is no ground for adjudication on the application for expedited procedure.

43. ***In terms of merits***

As regards the Application for the provisional release of Sow Bertin Agba

Since the Applicant was released on provisional grounds in the course of the adjudication by the instant Court, there is no ground for adjudication on that matter.

As regards the detention of Sow Bertin Agba

Declares that the detention of Sow Bertin Agba, after the judgments delivered by the Criminal Chamber and by the Supreme Court of Togo, is illegal and arbitrary.

As regards damages

Since the Applicant did not lodge any pleading to justify losses he incurred or in respect of any revenues he would have had to earn during the period of his detention, or a medical certificate proving the torture suffered on the premises of the ANR, the Court has no proof of evidence to rely on to award the material damages asked for. Consequently, that request is dismissed.

Conversely; the moral harm suffered by Sow Bertin Agba is undoubted and real.

The Court orders the Republic of Togo to pay to Sow Agba Bertin the sum of 8 Million CFA Francs (CFA F 8,000,000) in reparation for the harm done him.

As to costs

The Court asks the Republic of Togo to bear the costs.

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

And the following hereby append their signatures:

Hon. Justice Awa Nana DABOYA - *Presiding*
Hon. Justice Hansine N. DONLI - *Member*
Hon. Justice Anthony Alfred BENIN - *Member*

Assisted by **Maitre Aboubacar Djibo DIAKITE** - *Registrar*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN IN ABUJA, IN NIGERIA
ON TUESDAY THE 11TH DAY OF JUNE, 2013

SUIT N^{O}: ECW/CCJ/APP/04/11
RULING N^{O}: ECW/CCJ/RUL/08/13

BETWEEN
ORGANISATION FORUM INTER-SERVICES
AFRIQUE (OFIS AFRIQUE) - *PLAINTIFF*

AND
ECOWAS COMMISSION - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE C. MEDEGAN NOUGBODE** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **IGNACE W. TUGMA (ESQ.)** *LAWYER REGISTERED WITH THE BAR IN BURKINA FASO* - *FOR THE PLAINTIFF*

2. **M. LAGO DANIEL,** *JURIST IN THE LEGAL DIVISION OF ECOWAS COMMISSION* - *FOR THE DEFENDANT*

Default by a contracting party -Amicable settlement -Endorsement of agreement made between parties -Removal of a case from the cause list

SUMMARY OF FACTS

The Director General of Organisation Forum Inter-Services Afrique asserted that he was contacted by an officer from the ECOWAS Commission, who requested a training session from his organisation for seven (7) of his colleagues, on the theme ***"Leadership and motivation for optimal performance in organisations"****. Attached to the application was a list of the participants for training session, and this was confirmed by an electronic mail of 24 September 2008.*

That same day, O.F.I.S. Afrique agreed to organise the training, which was scheduled to take place from 29 September to 4 October 2008 at Niamey, Niger.

On the agreed date, no officer from the ECOWAS Commission went to Niamey, and no explanation was provided within those circumstances to O.F.I.S. Afrique.

After several fruitless mails, O.F.I.S. Afrique brought the matter before the ECOWAS Court of Justice. In the meantime, an amicable settlement was made between the two parties and that settlement was sanctioned by Order No. ECW/CCJ/RUL/08/13, the instant Order of the Court.

LEGAL ISSUE

Where an amicable settlement is reached among parties, can the Court, previously seised with the same case, stay the proceedings and endorse a settlement reached by the parties on that same matter?

DECISION OF THE COURT

Relying on Article 72 of its Rules of Procedure, the Court endorsed the terms of the amicable settlement of the dispute reached between the parties. Article 2 of the terms of the agreement provides that: ***"The ECOWAS***

Commission undertakes to pay to O.F.I.S. Afrique, and O.F.I.S. Afrique agrees to accept, the sum of CFA F 5,000,000 representing cost of training, transport cost, legal fees and all other ancillary costs incurred towards the 28 September 2008 training scheduled for Niamey. Prompt payment of the said sum frees the ECOWAS Commission from every obligation arising from the instant dispute."

Consequently, finding that the agreement between the two parties had become conclusive, the Court ordered that the case be removed from the general list.

RULING OF THE COURT

The Court,

1. Having regard for the Revised ECOWAS Treaty of 7 July 1993;

2. Having regard for Protocol A/P.1/7/91 on the Court as amended by Protocol A/SP/01/05 of 19 January 2005;

3. Having regard for the Rules of Procedure of the Court dated 3 June 2002, especially under its pertinent Articles;

4. Having regard for the correspondence dated 25 November 2011, signed by Souleimane Drabo, Managing Director, of OFIS AFRIQUE SARL, forwarded to the Court, wherein it was claimed that OFIS - AFRIQUE SARL received a telephone call from one Liman Barrage, a staff of ECOWAS Commission; that by that telephone call, whose date was not specified, the said staff of the Commission requested that a training programme be mounted for seven of his colleagues, by OFIS - AFRIQUE SARI; that that request for training was later confirmed by an e-mail sent to the organisers, on 24 September, 2008 by one Albert SIAW BOATENG, Principal Officer, Performance and Development, in the-Human Resources Division of the ECOWAS Commission, with the list of the participants attached thereto; that OFIS AFRIQUE SARL, through an e-mail dated the same day, acknowledged receipt of the earlier mail, and acquiesced to mount the training programme, with effect from 24 September 2008 to 4 October 2008, in Niamey, Republic of Niger;

5. Having regard for the relevant documents showing the electronic messages that OFIS - AFRIQUE SARL and ECOWAS Commission exchanged, which were attached to the initiating Application filed by OFIS - AFRIQUE SARL; these are the only documents that can represent the contract signed between the two parties;

6. Having regard for the Memorial in Defence filed by the ECOWAS Commission dated 12 March 2012, wherein the Commission recognises the fact that OFIS ; AFRIQUE SARL incurred expenses for the said training programme, and that the Commission proposed to OFIS - AFRIQUE SARL, the payment of the sum of 1,000,000 CFA Francs, as reparation for all prejudices suffered;

7. Having regard for the rejoinder dated 3 May 2012, filed at the Registry of the Court by OFIS - AFRIQUE SARL, in which it requested the payment of the sum of nine million (9,000,000) CFA Francs;

8. Whereas, at the Court hearing of 3 March 2012, the Representative of the Commission informed the Court that the two parties have agreed to settle out of court;

9. Whereas Article 72 of the Rules of the Court provides that:

> **"If, before the Court has given its decision, the parties reach a settlement of their dispute and intimate to the Court the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs (...), having regard to any proposals made by the parties on the matter".**

10. Whereas the Registry of the Court received, from the President of the Commission, a Minutes of the deliberations showing the Exchanges between the two parties; that this Minutes indicates that the two parties have reached an agreement, on the following main conditions:

- The ECOWAS Commission has resolved to pay OFIS - AFRIQUE SARL, during the month that shall follow the signing of the agreement, the sum of five million (5,000,000) CFA Francs, representing the cost of training, transportation, the Lawyers' honorarium, as well as other costs engaged, for the training at Niamey, from 24 September 2008 to 4 October 2008 (the subject-matter of the case);

- OFIS - AFRIQUE SARL shall organise the said training, at a date agreed upon by the two parties, during the first two months following the effective payment of the five million CFAFrancs;

11. Whereas under Article 4 of the said Minute of Deliberations, it is stated that: **"Parties have resolved, to finally and irrevocably re..."**

12. Whereas Article 2 (2) of the aforesaid Agreement provides that:

> **« *OFIS - AFRIQUE SARL shall renounce any other claims, especially those expenses incurred, with effect from the date it filed the instant case at the ECOWAS Court.***

13. Whereas the Agreement reached by the two parties is a genuine one, and it behoves the Court to acknowledge same, and approve it as binding on the parties, pursuant to the provisions of Article 72 of its Rules;

ON THESE GROUNDS

The Court approves the Agreement reached by parties,

ORDERS

14. The case to be removed from the register.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon. Justice Awa NANA Daboya - *President*

Assisted by **Aboubacar 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 THIS 3RD DAY OF JULY 2013

SUIT N$^{O:}$ ECW/CCJ/APP/19/11
JUDGMENT N$^{O:}$ ECW/CCJ/JUD/06/13

BETWEEN
MR. KPATCHA GNASSINGBE AND ORS - *PLAINTIFFS*

AND
REPUBLIC OF TOGO - *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 C. MÉDÉGAN NOUGBODÉ** - *MEMBER*
5. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES :

1. **MAITRE ATA MESSAN ZEUS AJAVON** - *FOR THE PLAINTIFFS*
2. **MAITRE GABRIEL ARCHANGE DOSSOU, MAITRE OHINI KWAO SANVEE, EDAH N'DJELLE** -*FOR THE DEFENDANT*

Human rights violation -Article 9.4 and 10 of 2005 Supplementary Protocol of the Court -Reparation -Lack of jurisdiction -Inadmissibility -Rejection of the subject.

SUMMARY OF FACTS

Mr Kpatcha Gnassingbe and his co-Appellants are suing the Republic of Togo for having arbitrarily arrested and detained them, suffered (for some) torture, deprived of their rights to visits and to a fair trial, all in violation of the Constitution of the Republic of Togo, Robben Island Guidelines, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 19 December 1988, the African Charter Human and Peoples Rights of 27 June 1981, of the Universal Declaration of Human Rights of 10 December 1948 and the UN Convention against Torture and Other Cruel, inhuman or Degrading Treatment of 10 December 1984. They claim damages.

The Defendant, the Republic of Togo raised objections to lack of jurisdiction, inadmissibility and requested for the dismissal of the Applicants' claims not accepted by him in the report of the NHRC.

LEGAL ISSUES

- *Are the various human rights violations raised by the Applicants proven and what of their claim for compensation amounting to 150, 000, 000 FCFA each?*

- *What about the preliminary objections raised by the Defendant and his offer of compensation to the victims for act torture?*

DECISION OF THE COURT

The Court did not find the violations; - On parliamentary immunity, -on the arrest and arbitrary detention (hence no need to order their release), - On freedom, -health, -the fact of being judged in a reasonable time, -the right to visit. On the contrary, the Court acknowledged the violations relating to : -torture, -the right to a fair trial -the right to defence.

Also, after giving the Republic of Togo act for its offer of reparation, ordered Togo -to take the steps and measures for the cessation of the violation of the right to fair trial -to pay 20 million each to the Applicants who were victims of torture.

DELIVERS THE FOLLOWING JUDGMENT:

1. By Application received at the Registry of the ECOWAS Court of Justice on 8 August 2011, Kpatcha Gnassingbe, Kossi Lambert Adjinon, Mazalo Agnam, Poko Olivier Amah, Kao Manzoluwe Atcholi, Abi Atti, Ageiguidou Bali, Mandabouwe Baouma, Casimir Dontema, Bagoubadi Gnassingbe, Essozimma Gnassingbe, Menveidom Kamouki, Pvabalou P. Karoue, Kossi Kebera, Bit ie Lare, Eyadema Nayo, Palabamzeinani Padaro, Abalo Papali, Ougbakiti Seidou, Essodozou Sizing, Atammedec-Atcholo Tchara, Soudou Tchinguilou, Assetina Toksala, Kouma Towbeli, Juares Tcheou, whose Counsel is **Maitre Ata Messan Zeus Ajavon,** Lawyer registered with the Bar Association of Lome, with address at 113, rue Logossame, Hanoukope, Lome-Togo, brought their case before the Court, alleging that the Republic of Togo violated their fundamental human rights.

2. By another application received at the Court Registry the same date, 8 August 2011, the Applicants brought a request asking that their initiating application come under expedited procedure in accordance with Article 59 of the Rules of Procedure of the Court.

3. The Applicants justified this request on the basis of the urgency related to their incommunicado detention and the impossibility for them to meet their lawyer and their family. They also maintained that some of them were physically and psychologically tortured.

4. On 13 January 2012, the Applicants filed a supplementary application before the Court, seeking rectification in the initiating application in which the first names and surnames of certain Applicants were rectified and five others added. The Applicants concerned were Essozimma Gnassingbe, also known as Esso, Moussa Saidou, Sassou Efoue Sassouvi, Digberekou N'moilaou and Kassiki Esso. This brought the total number of Applicants to 30. They contended that their human rights were violated by the Republic of Togo.

5. The Applicants asked the Court to adjudge and declare:

   - That the arrest of the Parliamentarian Kpatcha Gnassingbe, member of the National Assembly, without the observance of the relevant legal texts, namely the legal provisions relating to the removal of his parliamentary immunity, by his peers at the National Assembly, is a violation of Article 53 paragraphs 1, 2 and 3 of the 14 October 1992 Constitution of Togo;

- That the denial of their right to visit, to defence, and to health, constitute moral torture;

- That their detention at the ANR for more than two (2) years is a violation of the right to trial in reasonable time;

They equally prayed the Court:

- To ask the Republic of Togo to ensure that the judicial procedure in force, as applicable to arrests and detention, is respected henceforth;

- To order the Republic of Togo to cease all forms of incommunicado detention against them, as required by Points 22 and 23 of the 23 October 2002 Robben Island Guidelines;

- To order the immediate release of the Applicants who are still in detention;

- To order the Republic of Togo to allow them exercise their right to fair trial;

- To order that the exercise of the afore-mentioned right must be effective and within the shortest possible time;

- To order the Republic of Togo to take urgent measures to ensure their protection against all ill treatments or intimidation;

- To order the Republic of Togo to open an immediate inquiry to determine the extent of blame that may be apportioned to the incriminated officers in respect of the matter at hand, and to institute proceedings against them;

- To order the Republic of Togo to free all the Applicants, for violation of their right to defence, violation of their right to physical and moral integrity, and violation of their right to be tried by an independent and impartial court;

- To ask the Republic of Togo to pay to each of the Applicants the sum of One Hundred and Fifty Million CFA Francs (CFA F 150,000,000) as damages.

6. The Republic of Togo, the Defendant, whose Counsel is constituted by:

Maitre Gabriel Archange Dossou, Lawyer registered with the Bar of Benin, with address at Carré No. 387, Avenue Mgr. Steinmetz, 01 BP 4959 Cotonou-Benin; **Maitre Ohini Kwao Sanvee,** Lawyer registered with the Bar of

Lome, with address at 32, Rue des Bergers, Nyekonakpoe, B.P. 62091, Lome-Togo; **Maitre Edah N'Djelle,** Lawyer registered with the Bar of Lome, with address at rue de la Gare Routiere d'Agbalepedo, near Pharmacie Lumière, BP 30225 Lome-Togo; lodged on 13 August 2012 at the Court Registry, a Memorial, wherein it claimed, firstly, that the Court lacks jurisdiction to adjudicate in the case, and secondly, that the Applicants' action before the Court is inadmissible.

7. On 13 August 2012, the Republic of Togo lodged a Memorial in Defence on the merits of the case, in which it asked the Court for the following orders:

   - That the Court declare that it has no jurisdiction to order the Republic of Togo to release the Applicants;
   - That the Court rule in favour of the Republic of Togo, that following the CNDH report, steps have been taken towards an accurate determination of the harms suffered by some of the Applicants in the course of their arrest and detention;
   - That all the requests brought by the Applicants be dismissed as ill founded;
   - That the Applicants be asked to bear all the costs.

8. At the external court hearing of 10 December 2012, when the Court sat at Ibadan, the Court, in a Ruling, dismissed the Preliminary Objections filed by the Republic of Togo, heard the Parties on the merits of the case, and adjourned the case for deliberation.

   By a second ruling, Ruling No. ECW/CCJ/ADD/07/13 of 18 April 2013, the Court suspended its deliberation, reserved its decision, and ordered a reopening of the oral procedure, by asking the Applicants and the Defendant to supply answers to a list of questions which were formed for the purposes of seeking clarification. After the two Parties had responded to that measure and deposited their corresponding written pleadings, the case was again adjourned for deliberation, towards the delivery of the judgment of this day, the 3rd day of July 2013, by the Honourable Court, which now ensues:

I. THE FACTS OF THE CASE AS NARRATED BY THE PARTIES

1. The facts according to the Applicants

9. The Applicants pleaded as follows:

- That on 12 April 2009, at 10 p.m., a group of military men belonging to the Rapid Response Unit (FIR), an elite unit of the Armed Forces of Togo (FAT), led by the Commander of the said unit, Col. Felix Abalo Kadanga, brother-in -law of Faure and Kpatcha Gnassingbe, broke into the home of Mr. Kpatcha Gnassingbe, a Parliamentarian of the National Assembly and younger brother of the President of the Republic of Togo, Faure Essozimna Gnassingbe. They attacked the said home with automatic weapons and rocket-launchers.
- That the home of the said Parliamentarian was riddled with bullets and imprints of rocket launchers; and that there was exchange of fire between the FIR operatives and Kpatcha Gnassingbe's guard.

10. That unable to repulse the attack, Kpatcha Gnassingbe succeeded in talking on telephone to one of his other brothers, Col. Rock Gnassingbe, Commander of an armoured unit of the Army of Togo, who intervened between the two parties. On 14 April 2009, the Parliamentarian Kpatcha Gnassingbe went to the Embassy of the United States of America at Lome, to seek protection.

11. That on 15 April 2009, at 7.30 a.m., the Commander of the Togo Gendarmerie, Lt-Col. Yark, arrived at the entrance of the American Embassy with an arrest warrant and the American authorities released the Parliamentarian Kpatcha Gnassingbe to the said Lt-Col. Yark.

12. That several other persons were also arrested, among whom military men, gendarmes, police officers and civilians, and thirty-two (32) of them were kept in preventive custody.

    That since their arrest, on the principal charge of attempting to violate State security, they have never benefited from the legal provisions in the Togo Code of Criminal Procedure and the international instruments signed and ratified by Togo.

    That indeed, most of the Applicants, notably the Parliamentarian Kpatcha Gnassingbe, have been detained for several months or have till date, been detained arbitrarily and incommunicado at the National Intelligence Agency (ANRL at the Gnassingbe Eyadema military camp of the Togo Inter-Arms Regiment (RIT) of Lome, and at the camp of the national gendarmerie of Lome, where they are subjected to acts of torture.

13. They affirmed that these incidents amount to violations of their rights to defence, to visits, to health, to physical integrity, and to fair trial in reasonable time.

2. The facts according to the Defendant

14. The Republic of Togo affirmed that in the course of 2008-2009, the security services of the Republic of Togo received information, confirmed by foreign intelligence services, in relation to a coup being fomented, against the internal security of the State.

15. That in the night of 12 April 2009, Kpatcha Gnassingbe and some members of his close associates were arrested upon the orders of the *Procureur de la République* (State Prosecutor) of the Lome Court of First Instance.

    That a search conducted at the home of the Applicant Kpatcha Gnassingbe resulted in the seizure of a significant cache of weapons of war.

    That further inquiries conducted by investigators and trial judges brought to light Kpatcha Gnassingbe's resolve to remove the President of the Republic, Faure Gnassingbe, from power.

16. The trial of the case was assigned to Trial Chamber 3 of the Lome Court of First Instance. In line with the privilege of trial proceedings accorded certain officers, an investigating judge was appointed, upon the instructions of the *Procureur General* (Public Prosecutor). The trial judge concluded that there was established evidence against the Applicants in regard to charges of criminal association, wilful violence and attempts to violate the internal security of the State, and by Order of 2 August 2011, the trial judge asked the Applicants to appear before the Criminal Chamber of the Supreme Court of Togo, to be tried.

17. That by Decision of 15 September 2010 of the Criminal Chamber of the Supreme Court of Togo, some of the Applicants were tried and sentenced to various terms of imprisonment.

18. But that in the course of the proceedings, certain Applicants alleged that they were subjected to acts of violence during their arrest and detention. That following those allegations, the Government of Togo brought the matter to the attention of the National Human Rights Commission (CNOH) on 16 February 2012 and the CNOH concluded that "physical and moral acts of violence of inhuman and degrading nature had indeed been committed."

19. Based on the CNOH report, the Applicants lodged at the Supreme Court of Togo, an application seeking revision and stay of execution of the 15 September 2010 Judgment. The Criminal Chamber of the Supreme Court

of Togo, by Judgment No. 55 of 19 July 2012, declared the application for revision inadmissible.

II. ARGUMENTS BY THE PARTIES

1. Arguments advanced by the Applicants

20. The Applicants affirm that the Republic of Togo, by the acts of its agents, violated the rights of the Applicants, as provided for by provisions of the Constitution of Togo, the Togo Code of Criminal Procedure, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

21. They affirm that the said violations are related to the parliamentary immunity of the Parliamentarian Kpatcha Gnassingbe, the Applicants' right to defence, their right to receive visits, their right to health, acts of torture, statements taken under duress, arbitrary detention of the Applicants, and the time-frame for preventive detention (violation of the right to fair trial in reasonable time).

22. The Applicants cite in support of their arguments, the provisions of Articles 9(4) and 10 of the Supplementary Protocol, **"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State ... Access to the Court is open to individuals on application for relief for violation of their human rights".**

23. They equally make reference to Principle 33(1) of the 19 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states that, ***"Any detained person or his counsel has the right* to *file an application or a complaint regarding the manner in which he is treated, particularly in cases of torture or other cruel, inhuman or degrading treatment ... where necessary,* to *thesupervising authorities or a competent appellate body".***

24. The Applicants conclude thereby that since human rights are inherent to human beings, they are "inalienable, timeless and sacred", and thus, cannot suffer any violation or limitation whatsoever.

25. The Applicants invoke, inter alia, in support of their Application, the provisions of: the 14 October 1992 Constitution of Togo; the 27 June 1981 African

Charter on Human and Peoples' Rights; the 16 December 1966 International Covenant on Civil and Political Rights; the 10 December 1948 Universal Declaration of Human Rights; and the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

26. Consequently, the Applicants ask the Honourable Court to find that the Republic of Togo has violated their rights, and asked the Court to order the Republic of Togo to pay to each of them the sum of One Hundred and Fifty Million CFA Francs (CFA F 150,000,000) as compensation.

2. Arguments advanced by the Defendant

27. The Republic of Togo acknowledges the acts of torture committed by its officers on the Applicants, but it refuted the other allegations of violation of their rights, notably as regards right to defence, right to visit, right to health, right to release, and right to fair trial in reasonable time.

28. The Republic of Togo maintains that as regards acts of torture, it has undertaken steps towards identifying and compensating the victims of the said violations, following the CNDH report. The Defendant further contends that since it has already begun a process towards the compensation of the victims of acts of torture, the Applicants have no ground to ask for another form of reparation before the Honourable Court.

    The Defendant refutes the other allegations of violation of the Applicants' rights and affirms that all the judicial proceedings brought against them were instituted on the basis of the legal texts in force in the Republic of Togo.

29. It concludes that it has not violated the provisions of the legal instruments cited by the Applicants and prays the Court to dismiss the requests brought by the Applicants as ill-founded.

III. ANALYSIS OF THE COURT

1. Regarding the parliamentary immunity of Kpatcha Gnassingbe

30. The Applicants, more especially Mr. Kpatcha Gnassingbe, made a case against the Republic of Togo for violating the provisions of Article 53 of the 14 October 1992 Constitution of Togo, which states that: ***"No Parliamentarian shall be sued, arrested and tried for crimes and offences unless his parliamentary immunity is removed by the National Assembly."***

They argue therefore that the arrest and detention of Kpatcha Gnassingbe violate the provisions of Article 53 cited above.

31. The Republic of Togo, on its part, maintains that the force of *res judicata* acquired through Judgment No. 59/11 of 15 September 2010, cannot be challenged, to enable the Applicant cite violation of his parliamentary immunity.

32. The Court notes, in relation to this point, that Article 53 of the 14 October 1992 Constitution of Togo states that:

> **"Parliamentarians and senators shall enjoy parliamentary immunity; ... no parliamentarian or senator shall be sued, tracked down, arrested, detained or tried for opinions or decisions made by him in the performance of his functions, even after expiration of his tenure; ... except in instances of flagrant offence, parliamentarians and senators shall not be arrested or be sued for crimes or offences unless their respective Assembly has removed their parliamentary immunity;... any proceedings for flagrant offence instituted against a parliamentarian ... shall immediately be brought to the notice of the Bureau of their Assembly.**
>
> **No parliamentarian shall be arrested outside the sessions without authorisation from the Bureau of the Assembly he belongs to."**

33. The Court is of the view that Article 53 as cited makes a clear distinction between the conditions for removing the parliamentary immunity of the Members of Parliament (MPs) and Senators, depending on whether it is a case requiring the "ordinary procedure", or one to be applied in cases of "flagrant offence" .

34. The Court equally notes that the said Article 53 of the Constitution of Togo permits the arrest and trial of MPs and Senators in instances of commission of crimes or offences ***only after*** their parliamentary immunity is removed; whereas in cases of commission of "flagrant offences", they may be arrested and tried ***before*** **or** ***after*** removal of their parliamentary immunity.

35. The Court notes that the Republic of Togo charged and arrested the Parliamentarian Kpatcha Gnassingbe on grounds of the procedure relating to the commission of a flagrant offence. In that sense, the Court holds that it is not within its remit to make a declaration on the nature of charges made against the Kpatcha Gnassingbe, nor does the Court possess the necessary

information to enable it apportion blame on the Republic of Togo in regard to the procedure used against Kpatcha Gnassingbe.

36. Furthermore, the Court declares that since the Republic of Togo relied on its own Constitutional Law to justify the procedure used against Kpatcha Gnassingbe, it is outside the mandate of the Court to examine a decision adopted by a domestic court of a Member State in accordance with the constitutional provisions of that Member State.

37. Consequently, the Court adjudges that the alleged grievance relating to violation of the parliamentary immunity of Kpatcha Gnassingbe cannot thrive, and the Court dismisses that complaint as brought against the Republic of Togo.

2. Regarding acts of torture

38. The Applicants affirm that they were tortured by agents of the Defendant State. They stated in particular that they were beaten with whips, shut in and cloistered in a dark room without window, and forced to sleep on the bare floor, and repeatedly subjected to torture sessions at the hands of the ANR officers of the Defendant State. They maintain that the said acts violate Articles 16(1) and 21(1) and (2) of the Constitution of Togo, Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

39. The Defendant State does not deny the charges of torture but does indicate that following the said allegations before the Supreme Court, the latter asked it to take urgent and necessary steps towards the conduct of an impartial inquiry into those allegations.

40. The Defendant further argues that the National Human Rights Commission (CNDH) which was designated to carry out that investigation has submitted its report, which concluded that **"acts of physical and moral violence of inhuman and degrading nature have been committed on the detainees."** That it's Government, after examining the report, took decisions towards sanctioning the perpetrators of the violent acts, and to repair the harm done against the victims.

The Defendant concludes that since it has endorsed the CNDH report, the requests before the Honourable Court in regard to the tortures have become devoid of purpose.

41. The Court notes here that the Republic of Togo does not contest the acts of torture alleged by the Applicants but affirms that steps have been taken not only to sanction those responsible, but to compensate the victims.

42. Here again, the Court upholds the acknowledgment by the Defendant State, that acts of torture were committed by its officers. The Court recalls that the Republic of Togo acknowledged that the Applicants were tortured and that a process of compensation has even been put in place. The Court concludes thereby that such acknowledgement implies that the Republic of Togo is fully and totally liable for the acts of torture and other inhuman and degrading treatment the Applicants were victims of. However, the Court is of the view that the Republic of Togo cannot cite the fact that steps have been taken towards compensating the Applicants, as a ground for maintaining that the requests brought forth by them are without purpose.

43. Indeed, even if the facts of the case do amply prove that certain Applicants were tortured, as indicated in the report of the independent inquiry conducted on the orders of the Defendant State and established by the National Human Rights Commission (CNDH), and that the Defendant State made its own doctors re-examine the victims and endorsed the said report, and offered to compensate them, the fact still remains that the same Defendant State offers to compensate the victims on a basis it proposes on its own, by using the CIMA Code, which is the formula applicable to cases of accidents and other harms different from the harms, caused by acts of torture.

44. Whereas in dealing with acts of torture and other cruel, inhuman and degrading treatments, one talks of acts of violence classified under human rights violation recognised by international legal instruments, and defined as practices which go contrary to the rights of human beings in civilized nations.

45. Whereas understood as such, any act of torture committed by a State officer on an individual necessarily violates the rights of that human being and constitutes a serious violation as stated in Article 5 of the African Charter on Human and Peoples' Rights, which provides that:

> "... ***All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."***

46. Whereas such proven violation of human rights as admitted by the Republic of Togo as having been committed by its officers suffices to uphold the jurisdiction of the Honourable Court, by virtue of Article 9(4) of its 19

January 2005 Supplementary Protocol; whereas it is appropriate therefore to adjudge and declare that the Republic of Togo, by the acts of its officers, committed acts of torture against the Applicants, as emanating from the report of the independent inquiry referred to above, and that the Republic of Togo therefore violated the Applicants' physical and moral integrity.

3. Regarding right to fair trial

47. The Court recalls that within the terms of the United Nations Convention against Torture, any trial vitiated by human rights violation, or any declaration made under the effect of torture, amounts to non-respect of the principle of fair trial.

Indeed, Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that:

> ***"Each State party shall ensure that any statement which is established* to *have been made as a result of torture shall not be invoked as evidence in any proceedings*** *... "*.

48. Whereas in the instant case, the Defendant State does not bring evidence that the declarations made by the Applicants, which were obtained under the effect of the acts of torture inflicted by the State officers during the inquiry procedure, were not used against them, the Court thereby concludes that the Applicants' right to fair trial was not observed, and hence, Article 15 of the Convention mentioned above was violated.

4. Regarding right to defence

49. The Applicants allege that they were detained incommunicado by officers from the ANR and the National Gendarmerie of Togo. They maintain that the said detention is a violation of Article 16(3) of the Constitution of Togo, Article 11(1) of the Universal Declaration of Human Rights, Article 14(3) of the International Covenant on Civil and Political Rights, and Article 7(1) of the African Charter on Human and Peoples ' Rights; and that this constitutes violation of their right to defence.

50. The Defendant State refutes this allegation made by the Applicants and indicates that Mr. Kpatcha Gnassingbe, for example, had always refused on his own to constitute counsel, for the purposes of putting up his defence, stating that he wanted to meet the Head of State, Mr. Faure Gnassingbe; and that he constituted counsel only subsequently, notably at the court hearing of 1 September 2011; that similarly, some of the Applicants refused to constitute counsel, whereas others did, and met their lawyers.

51. To back up its claims, the Defendant State affirms that Plaintiff Counsel, Maitre Atta Mensah Zeus Ajavon had provided legal assistance in person to some of the Applicants in the course of the trial proceedings, and that Maitre Atta Mensah Zeus cannot deny this fact.

52. The Defendant State thus concludes that it respected the Applicants' right to defence, and that no blame may be made against it to the effect that it prevented some of the Applicants from being assisted by counsel.

53. Ultimately, the Court recalls that the right to defence forms an integral part of fair trial, and just like the right to presumption of innocence, the right to defence is especially a fundamental requirement of every judicial procedure in the course of all its phases. Viewed from that angle, it may be considered that the right to defence does not only imply that the two parties must be heard, but also that the person sued before the Court must freely choose the person to defend him, unless there is an obligation upon him to choose his counsel from an officially established list of lawyers.

54. The Court notes that in the instant case, the Applicants blame the Defendant State for refusing to allow them freely choose the persons to defend them, whereas the Defendant State maintains that the Applicants deliberately chose to renounce constituting counsel, so as to oppose the holding of the trial or to obtain an adjournment of the proceedings to a later date.

55. The Court notes that during the hearing before this Honourable Court, the lawyers of Mr. Kpatcha Gnassingbe stated that on several occasions (during the preliminary inquiry and the trial), they requested the Togolese police and judicial authorities to help provide legal assistance to their clients, but to no avail.

56. The Court notably finds that the Defendant State contented itself with affirming that since some of the Applicants refused to constitute counsel, only those among them who accepted to be assisted were provided with legal counsel during the trial.

57. The Court recalls that the Republic of Togo cannot content itself with the affirmation that it is those Applicants who did not want to constitute counsel that did not benefit from legal counsel.

    The Court is of the view that, for such serious charges as brought against the Applicants, all of them should have benefited from the services of a legal counsel, and that the Republic of Togo had a responsibility to provide

counsel for the Applicants, not merely at a certain phase of the procedure, but throughout its entire duration.

58. The Court equally recalls that the State is under obligation to officially assign counsel to the Applicants who had none; thus, the Court adjudges that the right to defence must not merely be proclaimed, nor merely feature in the national law, but must be effectively implemented.

59. How practically effective the right to defence may have to be could be illustrated in the Judgment of 25 April 1983 of the European Court of Human Rights in the case concerning ***Pakelli v. Germany,*** where it was indicated that Article 6(3)-c of the European Convention on Human Rights is intended to secure effective protection of the rights to defence. The European Court of Human Rights found that it must be possible for an accused who cannot defend himself to have recourse to the services of a counsel of his choice.

60. In the instant case, the oral proceedings of the hearing before the Honourable Court enabled the Court to note that the Defendant State, through its police and judicial officers, did not allow the Applicants to freely choose their counsel, and even in the event of the Applicants having refused to constitute counsel, the Defendant State did not go ahead to officially assign them counsel; and the Defendant State does not, at any rate, bring any evidence to prove that it assigned counsel to the Applicants.

61. The Court adjudges from the foregoing conditions that the Republic of Togo violated the Applicants' right to defence during the holding of their trial, and denied them the services of counsel for the defence of their case.

5. Regarding arbitrary arrest and detention

62. The Applicants allege that they have been subjected to arbitrary detention, which constitutes a violation of the provisions of Article 52 of the Togo Code of Criminal Procedure, Article 6 *in fine* of the African Charter on Human and Peoples' Rights, Article 9 of the Universal Declaration of Human Rights, and Articles 9 and 10(1) of the International Covenant on Civil and Political Rights.

63. The Defendant State rejects the allegation of arbitrary detention and maintains that the Applicants were arrested, detained and tried on the basis of the offence of violation of State security. To buttress its arguments, it cites Article 9 of the International Covenant on Civil and Political Rights, which states that: ***"No one shall be deprived of his liberty except on such grounds***

and in accordance with such procedure as are established by law". The Defendant State concludes that the arrest and detention of the Applicants were therefore lawfully founded.

64. The Court finds that the legal instruments of human rights protection forbid that a person be arrested and detained arbitrarily. Thus, Article 6 *in fine* of the African Charter on Human and Peoples' Rights stipulates that ***"in particular, no one may be arbitrarily arrested or detained",*** while Article 9 of the International Covenant on Civil and Political Rights states the same thing in the following terms: ***"Everyone has the right to liberty and security of person. No one shall be subjected* to *arbitrary arrest or detention" .***

The arbitrary nature of the arrest and detention arises directly from the absence of a legal basis and a violation of the related procedures.

65. The Court recalls that arbitrary detention implies that a person has been detained without a legal basis and in violation of the relevant legal provisions. Thus, in its case law relating to **Mamadou Tandja** *v.* **Republic of Niger***,* in Judgment ECW/CCJ/JUD/05/10, the Court declared that the detention of the Applicant was arbitrary in that it had no legal basis. In the case referred to herein, the Defendant State had put in an argument on grounds of "**the political situation**".

66. Now, in the instant case, the Court notes that the Applicants were arrested upon the charge of violation of State security, after a summing up by the Prosecutor at the Court of First Instance of Lome. That they were brought before an investigating judge specifically appointed to conduct an investigative trial on the case. That at the end of his investigations, the investigating judge, upon the summing up by the Public Prosecutor, declared that the charges of criminal association, wilful violence and attempted violation of the internal security of the Republic of Togo, have been sufficiently established against the Applicants.

The Court equally notes that after the investigative inquiry, a trial was opened and the Applicants were sentenced to various terms by Judgment No. 59/ 11 of 15 September 2011, which was appealed before the Criminal Chamber of the Supreme Court.

67. The Court is of the view that the detention of the Applicants resulted from a criminal procedure instituted against them for criminal offences provided for under the criminal laws of Togo; and that the Applicants were brought before a judge, as required by the international instruments of human rights protection.

68. The Court considers, thereby, that since the detention of the Applicants had a legal basis, it cannot be described as arbitrary; Furthermore, the Court considers that it is not within its remit to adjudge whether the charges for which the Applicants were arrested and detained were established or not, so as not to run the risk of usurping the powers of the domestic courts of the Member State in question, which would be contrary to the established and consistently held case law of the Honourable Court. The jurisdiction of the Court simply lies in examining whether the detention and related arrest of the Applicants had a legal basis.

69. Consequently, the Court cannot also order the release of the Applicants, so as not to run the risk, once again, of interfering in the procedures of the domestic courts, equally established as its case law. In conclusion, the Court dismisses the pleas brought by the Applicants on arbitrary detention, and adjudges that it has no powers to release them.

6. Regarding the right to be tried in reasonable time

70. The Applicants affirm that they were detained for two (2) years without trial. That the situation is a violation of their right to be tried in reasonable time and notably a violation of the provisions of Article 19 of the Constitution of Togo, Article 7(1)-d of the African Charter on Human and Peoples' Rights, and notably Articles 9(3) and 14(3)-c of the International Covenant on Civil and Political Rights.

71. The Defendant State's response is that the two-year period of detention is not unreasonable, considering the nature of the offence and the risks of collusion and escape on the part of the Applicants. It also contends that the concept of reasonable time is not clearly defined in jurisprudence and that it is determined on a case-by-case basis by the courts.

72. The Court is of the view that a suspect or accused shall be availed reasonable time within which he shall be tried by a competent court. The Court recalls that the concept of reasonable time is not so precise as to determine clearly a period of time beyond which one may consider that an individual has not been tried in reasonable time. However, certain criteria must be taken into account for the determination of a reasonable time, namely the complexity of the case, the existence of exceptional circumstances, and the comportment of the administrative and judicial authorities. The judicial authorities must take all the necessary steps for trying suspects and accused persons expeditiously. The Applicant's comportment, particularly where it tends to obstruct or slow down the procedure, may equally influence the assessment of what reasonable time is.

73. The Court is of the view that the criteria indicated above are not cumulative; and that the existence of only one of those criteria may determine the reasonableness of the time.

74. In the instant case, the offences for which the Applicants were being tried are not only of absolute seriousness (violation of State security), but equally implicate several other persons including high-ranking State officers. The trial of a complex case cannot be done in a relatively short time.

75. Thus, the European Court of Human Rights, in its judgment on the case concerning **Wemhoff v. Germany** of 27 June 1968, declared that the detention period of three and half years was reasonable, by virtue of the nature of offences in issue, and the extreme complexity of the case.

76. The Court notes, at any rate, that the implication of several persons in the case makes it necessary for such persons to be heard, and this equally requires quite a long procedure.

To that effect, the Court recalls its case law in the case concerning **Amouzou Henri and 5 Others** *v.* **Cote d'Ivoire**, where it declared in its Judgment of 17 December 2009, paragraph 93, that:

> ***"The reasonable time-limit for the trial of detainees must be assessed on case by case basis, with due regard* to *the specific nature of the procedure and the degree of complexity of the case, as weighed against the nature of the infraction and the difficulty required in the investigation* or *with regard* to *the number of persons involved."***

77. The Court is therefore of the view that whatever the case may be, an assessment of the reasonableness of a trial time is done *in concreto,* with regard to the nature and complexity of the case, and an *in concreto* mode of assessment does not make it apparent in the instant case that the two-year time period is unreasonable, considering the complexity of the case.

78. Consequently, the Court declares that the Applicants were tried in quite a reasonable time.

7. Regarding right to visit

79. The Applicants allege that the Republic of Togo, through its ANR Officers, denied them their right to be visited by their families. That such refusal is a violation of their right to visit which every detainee is entitled to, as provided for in Articles 37 and 92 of the Standard Minimum Rules for the Treatment

of Prisoners, and Principles 15 and 16 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

80. The Republic of Togo responds that the families of the Applicants who requested to visit their detained relatives were issued with the required permit to do so by the investigating judge; that moreover, certain human rights defence organisations such as the High Commission for Human Rights (HCDH), the Togolese Human Rights League (LTDH) and the Red Cross regularly visited the detainees.

81. Here, the Court is of the view that every detainee is in principle entitled to be visited by his counsel, relatives or even other persons. However, that right is not absolute, but governed by the relevant texts in force. In most of the domestic laws, the right to visit a detained or convicted person is subject to conditions of issue of the permit required to do so by the appropriate investigating judge or prison authority. The investigating judge and the prison authority may or may not grant the right to the one making such a request, particularly where the visit may prejudice the trial or infringe upon the detainee's safety.

It is therefore up to the person intending to visit the detainee to abide by the procedures applicable under the national law in force.

82. In the instant case, the Applicants allege that the Republic of Togo refused to grant their families the right to be visited in detention. The Court notes however that the Applicants have not demonstrated that the persons from their families expressly applied to the investigating judge or to the prison authority for a permit to visit them in prison, and whether such applications were rejected.

83. The Court is of the view that to determine whether the judicial or prison authorities of the Republic of Togo refused to allow the Applicants' relatives to visit them, the onus is on the Applicants to prove that they applied to the competent authorities and that the latter, without any valid ground, refused to grant their request.

84. The Court declares that the mere allegation of a refusal to grant the Applicants the right to be visited by their families, without any justification by the Applicants, of having carried out the administrative formalities required for obtaining the permit to that effect, does not suffice to declare that the Republic of Togo violated their right to visit. Consequently, the Court

dismisses this plea and adjudges that the Republic of Togo did not violate the Applicants' right to visit.

8. Regarding right to health

85. The Applicants affirm that they were never permitted to consult a doctor or to be taken care of by a doctor of their own choice, which is a violation of the provisions of the Constitution of Togo and the Standard Minimum Rules for the Treatment of Prisoners.

86. The Republic of Togo responds that the Applicants received consultation services from the doctors of the Army, who used to issue prescriptions which were handed over to their families, who then took it upon themselves to buy the drugs. The Defendant State further argues that the Applicants did not give reasonable grounds in their request for a private doctor.

87. The Court recalls that the right to health is a fundamental human right enshrined in all the instruments of human rights protection. This right is equally available to detainees - they are entitled not only to the health care services provided by prison establishments, but have a right to medical consultation and health care services of their own choice.

Medical consultation and health care services to be given detainees constitute part of the responsibilities of State detention facilities; the latter are required to provide the detainees with ideal medical care.

88. The Court is of the view that the fact that the prison establishment offered medical consultation services and health care to the detainees does not forbid the detainees from demanding or choosing their own doctor. Such choice by the detainees cannot be dismissed on the ground that they are already being medically catered for by the Prison's doctors.

89. But the Court is equally of the view that a detainee owes it as a duty upon himself to apply for the medical care which is intended to be provided for him by a doctor of his own choice, and in the event of a refusal by the prison establishment to grant such request, he shall bring evidence to that effect, i.e. the evidence that the Prison flouted that particular right of the detainee.

90. In the instant case, the Court holds that even if the Defendant State may incur blame in putting forth the argument that the Applicants were already being provided with medical care by the Army doctors of the Prison, and

that the Applicants had no reasonable grounds for requesting to be seen by their private doctors, there is equally no proof of evidence that the Applicants applied to the prison authorities to be given medical care from their private doctors and such request was denied them.

91. Consequently, the Court holds that the absence of evidence of such request having been made by the Applicants and subsequently refused by the Prison, makes it imperative upon the Court to adjudge and declare that the Applicants' right to health was not violated.

9. Regarding right to reparation

92. The Court recalls that during the oral proceedings before the Court, the fundamental issue which opposed the two Parties related to compensation. The Defendant maintained that a compensation commission was set up, which drew the list of victims, and proposed amounts to be paid to those to be compensated. The Defendant affirms that the calculation was based on the CIMA insurance code.

93. The Applicants contest not only the number of victims, but the amount of compensation awarded, as well as the mode of calculation of the amount awarded. They maintain that the calculation does not take account of all the harms suffered by the victims. They challenge the system of calculation, as based on the CIMA code, which they allege is inapplicable to the issue at stake. They affirm moreover that they were not involved in the procedure for determining the amounts to be awarded them. For all these reasons, the Applicants prayed the Court to ask the Republic of Togo to pay to each of them the sum of One Hundred and Fifty Million CFA Francs (CFA F 150,000,000) as damages.

94. The Court recalls Article 14 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment thus:

> ***"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right*** **to** ***fair and adequate compensation, including the means for as full rehabilitation as possible."***

Again, Article 41 of the European Convention on Human Rights states that:

> ***"If the Court finds that there has been violation and if the internal law allows only partial reparation to be made, the Court shall afford just satisfaction to the injured party."***

Finally, Article 19 of the 14 October 1992 Constitution of the Republic of Togo provides that damages resulting from a malfunction of the Judiciary gives rise to compensation which shall be charged to the State.

95. Considering all the foregoing texts, and in regard to the essential details of the instant case, the Court holds that since the Republic of Togo has admitted that it has endorsed the report of the National Human Rights Commission (CNDH) and offered to compensate the victims, the Court, *in supra,* upholds the stand adopted by the Republic of Togo. The Court equally recalls that, on one hand, the Republic of Togo has taken the decision to repair the damage caused the Applicants who were victims of acts of torture inflicted on them by its State officers, and on the other hand, that the Honourable Court has upheld the said commitment made by the Republic of Togo in respect of implementing the CNDH report; but here, the Court must stress the fact that the Parties in contention disagree as to the mode of compensation.

Indeed, the Court recalls that the Republic of Togo proposes to compensate the victims in accordance with the mode of calculation followed by the CIMA code, whereas the Applicants ask that each of them be paid the sum of One Hundred and Fifty Million CFA Francs (CFA F 150,000,000) as damages.

96. The Court is of the view that the CIMA code is inapplicable to the instant case, since what is in issue is not a matter concerning ordinary accidents, but acts of torture and other human rights violations suffered by the Applicants.

The Court is equally of the view that the Applicants suffered those violations and other acts of torture in separate different ways; that in considering that fact, and in taking account of the CNDH report, and in the determination of the harms suffered by each Applicant, or in their separate different ways, and in equity, the Court holds that it shall be appropriate to compensate the Applicants in separate different ways.

97. In determining the various amounts to be awarded as compensation, the Court relied on factors of assessment both internal and external to the situation of the victims, as follows:

- The European Court of Human Rights, in its judgment on the case concerning **Hulki Gunes *v.* Turkey,**19 June 2003, indicated that the compensation to be awarded an applicant must be just, and must take into account the circumstances of the matter before the court. It must

be recalled that the Court awarded the Applicant, Hulki Gunes, who was duly recognised as a victim of inhuman and degrading treatments, the sum of Twenty-Five Thousand Euros (€25,000) for all harms suffered.

- The Inter-American Court of Human Rights in a judgment on the case concerning **Velasquez *v.* Honduras,** series No.7, 21 July 1989, declared that it is appropriate to fix the payment of a just compensation and that the sums paid as compensation shall cover material damages and moral damages .

98. To determine the amount to be awarded an applicant, international courts make reference to several factors, notably the nature of the case, grounds of equity and the condition of the Applicant.

At any rate, the European Court of Human Rights and the Inter-American Court of Human Rights, in their respective case laws, award damages for both material and moral damages.

99. Beyond the principle of reparation of injuries and various damages that may give rise to compensation, international courts equally fix the conditions under which such compensation may be awarded.

Thus, the European Court of Human Rights has provided for conditions in terms of both form and content, for any applicant who may wish to file for equitable satisfaction in compensation. These conditions are set out in the rules of procedure and practice directions of the European Court.

100. The ECOWAS Court of Justice does not have such a mechanism in the texts governing its mode of function, which would enable it to fix accurately the compensations to be awarded applicants who are victims of human rights violation. In the absence of a system for assessing, calculating and determining the conditions for depositing applications for equitable satisfaction, the ECOWAS Court of Justice has opted for compensation of both material and moral damages based on an all inclusive assessment of the harms suffered by an applicant.

Such mode of assessment takes account of the personal and professional situation of the applicant as well as the income he must have lost, the seriousness of the harm .caused and the consequences of the violations suffered, which comprise and include physical and psychological harm.

101. The Court recalls, at this juncture, its case law in **Hadijatou Mani Koraou v. Republic of Niger; Ebrimah Manneh v. Republic of Gambia; Musa Saidykhan v. Republic of Gambia** *(see the 2010 Law Report of the Court)*, where the Court relied solely on an analysis of the cases brought before it, in the absence of concrete criteria for calculating the award of compensation for victims of human rights violation.

102. In the instant case, the Court finds that the Applicants did not provide criteria for the evaluation of the damages they claimed to have suffered. The Court therefore decides on the basis of equity, recalls its relevant and established case law, and awards Twenty Million CFA Francs (CFA F 20,000,000) to each of the victims of acts of torture as listed in the CNDH report and recognised by the Defendant State; and awards Three Million CFA Francs (CFA F 3,000,000) to each of the remaining Applicants, for all harms suffered.

103. Concerning the specific issue of right to fair trial, the Court orders the Republic of Togo to take necessary and urgent measures to ensure that the violation of that right ceases.

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, after hearing both Parties, in a matter on human rights, and in last resort;

In terms of formal presentation,

- **Declares** that the action brought by the Applicants is admissible;

In terms of merits,

1. Regarding the parliamentary immunity of Mr. Kpatcha Gnassingbe;

- **Declares** that there is no violation, in that it is the procedure in respect of flagrant offence which was employed by the domestic court, pursuant to the constitutional provisions of the Defendant State;

As to rights violation

2. **Adjudges** that the Republic of Togo, through its officers, committed acts of torture on the Applicants and thus violated their rights to physical and moral integrity;

3. **Upholds** the stand taken by the Republic of Togo to repair the damage caused the victims of those acts of torture;

4. **Equally adjudges** that the Applicants' right to fair trial was violated by virtue of the fact that in the course of the trial, evidence obtained under the effect of acts of torture was used in the proceedings;

5. **Adjudges** that the Applicants' right to defence was violated;

6. **Consequently,** orders the Republic of Togo to take all the necessary and urgent steps to ensure that violation of the right to fair trial ceases.

As to other rights

7. **Declares** as non-established, the allegation of arbitrary arrest and detention made by the Applicants;

8. **Declares** that the Republic of Togo did not violate the Applicants' right to freedom;

9. **Declares** that violation of the right to health as alleged by the Applicants is not proven;

10. **Declares** that the Applicants' right to be tried in reasonable time was not violated;

11. **Declares** that since the Applicants' detention was lawful, and thus not arbitrary, the Court has no grounds upon which to order that they be released from detention;

12. **Adjudges** that the Republic of Togo did not violate the Applicants' right to visit.

As to reparation of damage

13. **Orders** the Republic of Togo to pay to the Applicants, in reparation for the respective harms suffered by them, and as damages for all harms suffered:

- The sum of Twenty Million CFA Francs (CFA F 20,000,000) to each of the victims of acts of torture as listed in the National Human Rights Commission (CNDH) report and recognised by the Republic of Togo;

- And the sum of Three Million CFA Francs (CFA F 3,000,000) to each of the remaining Applicants who had not suffered acts of torture.

14. **Asks** the Republic of Togo to bear the costs.

Thus made, declared and pronounced in a public hearing, in the Federal Republic of Nigeria, on the date mentioned above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

Hon. Justice Awa Nana DABOYA - *Presiding*
Hon. Justice Benfeito MOSSO RAMOS - *Member*
Hon. Justice Hansine N. DONLI - *Member*
Hon. Justice Clotilde Médégan NOUGBODÉ - *Member*
Hon. Justice Eliam M. POTEY - *Member*

Assisted By **Maitre Athanase Atannan** - *Registrar*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON WEDNESDAY, THE 3RD DAY OF JULY 2013

SUIT N°: ECW/CCJ/APP/21/22/23/11
JUDGMENT N°: ECW/CCJ/JUD/07/13

IN THE CASE

BETWEEN
AZIAGBEDE KOKOU & 33 ORS;
ATSOU KOMLAVI & 4 ORS; AND
TOMEKPELANOU & 29 ORS. } *PLAINTIFFS*

AND
REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE HANSINE N. DONLI** - *MEMBER*
3. **HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ** - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MAITRE AJAVON ATA MESSAN** - *FOR THE PLAINTIFFS*
2. **MAITRE NDJELLE A. EDAH,**
   SANVEE OHINI & GABRIEL A. DOSSOU - *FOR THE DEFENDANT*

Human Rights Violation - Violation of human dignity - Acts of torture - Interest to act - Lack of quality to act - Lack of capacity to act - Jurisdiction - Admissibility - Articles 9.4 and 10 d (ii) of the 2005 Protocol of the Court.

SUMMARY OF FACTS

The Plaintiffs alleged that in 2005 during the election period, violence occurred. That beating, fainting, beating and even death of some victims as a result of torture occurred.

By several Applications, all dated 22 July 2011, and filed at the Registry of the Court on 08 August 2011, the Plaintiffs applied to the ECOWAS Court of Justice for the purpose of establishing these human rights violations.

That through the Collective of Associations Against Impunity in Togo (CACIT), various complaints with civil suit were filed with the Dean of trial Judges of the Court of First Instance of Lomé, which the Plaintiffs criticize the Togolese justice for its lack of willingness to investigate such complaints.

The Defendant raised the plea of inadmissibility of the Applications on the basis of the lack of quality and the Plaintiffs' capacity to bring proceedings, because the Counsel failed to justify their actual existence by legal evidence.

LEGAL ISSUES

Can the Court declare itself competent to hear Applications for human rights violations notwithstanding the premature nature of the appeal, and the lack of irrefutable legal evidence on the actual existence of the Plaintiffs?

DECISION OF THE COURT

In its Decision, the Court declares itself competent to hear cases of violation of human rights as provided for in Article 9(4) of the 2005 Supplementary Protocol. That the Respondent State has violated the Plaintiffs' rights to be tried in a court of law within a reasonable period of time in accordance with Article 7(1)(d) of the African Charter.

The Court declares, however, that the Plaintiffs' claim for the finding of a violation of the right to life, to the safety of the human person and to acts of torture resulting from the acts of violence, rights enshrined in Articles 4 and 5 of the African Charter of Human Rights is premature and inadmissible for lack of irrefutable legal evidence of the existence of the Plaintiffs.

JUDGMENT OF THE COURT

PROCEDURE

1. By different requests all dated 22 July 2011 and lodged at the Registry of the Court on 8 August 2011, Mr. Aziagbede Kokou and 33 Others, Mr. Tomekpe Abra Lanou and 29 Others, as well as Mr. Atsou Komlanvi and 4 Others brought their case before the Court, for the purposes of asking the Court to find that the Republic of Togo violated Articles 19 and 21(1) and (2) of the 14 October 1992 Constitution of Togo, Articles 5 and 7(1)d of the African Charter on Human and Peoples' Rights, Articles 7, 9(3) and 14(3)-c of the International Covenant on Civil and Political Rights, Articles 3 and 5 of the Universal Declaration of Human Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2. By three separate pleadings lodged on 13 August 2011 at the Registry of the Court in response to each of the requests brought by the Applicants, the Republic of Togo raised an objection as to admissibility, for lack of *locus standi* and capacity to sue, on the part of the Applicants.

3. The Republic of Togo equally lodged on the same date at the Court Registry, its Memorial in Defence to each of the three cases.

4. Each Party was duly served with the written pleadings filed by the other Party.

5. The Court heard the Parties on 30 October 2012, at which hearing it joined the different Applications. The Court equally heard the Parties on 11 December 2012 and 18 April 2013.

AS TO THE FACTS OF THE CASE

6. In the course of the year 2005, during the electoral period, various sections of the Togolese society were shaken by violent incidents. The victims of those violent acts, with the assistance of the Coalition of Associations Against Impunity in Togo (CACIT) constituted a civil party and lodged various complaints : before the Doyen of investigating judges at the First Instance Court of Lome, where the victims in question were the Applicants Aziagbede Kokou and 34 Others; before the investigating judge at the Court of First instance of Amlamé, the victims concerned being Atsou Komlavi and 4 Others; and before the investigating judge at the Court of

First Instance of Atakpame, where the victims were Tomekpe Abra Lanou and 29 Others. They all filed complaints against the Republic of Togo.

7. From the time they lodged the complaints, between 13 October 2006 and 26 October 2006 (in the case of Aziagbede Kokou and Others), 1 October 2008 and 25 August 2009 (as regards Atsou Komlavi and Others), and 1 October 2008 and 25 August 2009 (concerning Tomekpe Abra Lanou and Others), and regardless of the numerous steps taken by the lawyers of CACIT and the monitoring of the complaints, which had been lodged for a period varying from 1 year to 6 years, the case had still not been heard.

ORDERS AND REQUESTS SOUGHT FROM THE COURT

Orders and requests sought by Aziagbede Kokou and 34 Others, Atsou Komlavi and 4 Others, Tomekpe Lanou and 29 Others

8. The Applicants ask the Court to adjudge and declare:

- That the beatings they were subjected to till they lost consciousness, the blows and serious wounds inflicted on them, and the death of some of the victims, are a flagrant and manifest violation of their fundamental human rights, as to their right to life and the safety of their human persons; and that the acts in question constitute acts of torture, in obvious violation of the provisions of Article 21(1) and (2) of the 14 October 1992 Constitution of Togo, Articles 4 and 5 of the 27 June 1981 African Charter on Human and Peoples' Rights, Articles 3 and 5 of the 10 December 1984 Universal Declaration of Human Rights, Article 7 of the 16 December 1966 International Covenant on Civil and Political Rights, and the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- That the manifest intention of the Judiciary of Togo not to institute an inquiry into the complaints lodged by the Applicants, deposited between13 October 2006 and 26 October 2010, is a violation of Article 19 of the 14 October 1992 Constitution of Togo and the provisions of Article 7(1)d of the 27 June 1981 African Charter on Human and Peoples' Rights;

- That the Republic of Togo encourages impunity by failing to institute an inquiry into the complaints, in violation of Point 6(a) of the 23 October 2002 Robben Island Guidelines.

9. They equally ask the Court to:

- Declare that the Republic of Togo violated their fundamental human rights, notably the right to life and safety of the human person, consequent upon the acts of torture perpetrated by the law enforcement agents;
- Order the Republic of Togo to enable the Applicants exercise their right to fair trial within the shortest possible time;
- Order the Republic of Togo to clarify the criminal charges brought, in terms of torture, and establish and acknowledge the State and individual responsibility for the crimes committed against the victims and their families, by setting up an immediate and in-depth inquiry;
- Order the Republic of Togo to fight against impunity by taking effective measures to bring to justice those responsible for the acts of torture and the ill treatments.
- Order the Republic of Togo to effect prompt reparation for the harms done by avoiding unnecessary delays in the settlement of the case - and in the implementation of the decisions and judgments awarding reparation for the victims.

Orders and requests sought by the Republic of Togo

10. The Republic of Togo asks the Court to:

- Find that the public proceedings have not yet been set in motion owing to the non-payment of the guarantee fee fixed by the investigating judge of the Lome Court of First Instance;
- Dismiss purely and simply, the requests brought by the Applicants, in all their intents and purposes;
- Ask the Applicants to bear the costs;
- Find that through the mechanism of the Justice, Truth and Reconciliation Commission (CJVR), the Republic of Togo has inquired into the criminal charges brought;
- Declare in favour of the Republic of Togo, that the latter will award compensation for the victims, following the recommendations of the CVJR.

AS TO LAW

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

Arguments of the Applicants

11. The Applicants submit that the Application is admissible on the grounds of Articles 9(4) and 10 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, which provide respectively: ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State", ..."Access to the Court is open to ... individuals on application for relief for violation of their human rights"***. They further submit that since human rights are inalienable, timeless and sacred, they cannot suffer any form of limitation whatsoever.

Arguments of the Republic of Togo

12. The Republic of Togo argues that it is a cardinal principle in judicial procedural law that any person who initiates an action in court shall justify his *locus standi* and that one of the essential conditions is a clear, obvious and precise identity of the applicant. It further argues that the court before which the case is brought shall ensure that the applicant(s) really exist(s). But, as contends the Republic of Togo, the identification of the Applicants is imprecise, and this springs serious doubts as to whether the Applicants truly exist or not.

13. Furthermore, the Republic of Togo argues that the instant suit was filed upon the initiative of the Coalition of Associations Against Impunity in Togo (CACIT), whose President is no other person than Maitre Zeus Ajavon. The Republic of Togo alleges that CACIT is indeed a political organisation whose links with political parties publicly known. It affirms, on that ground, that all forms of political intrigues are possible, towards coming up with a schedule of activities for justifying the finances engaged, in or for vilifying the Republic of Togo, the latter entertaining fears that the national and regional judicial institutions may thereby be manipulated by way of intrigues in the court procedure.

14. The Republic of Togo submits that if Plaintiff Counsel fails to justify the true existence of the Applicants by means of irrefutable legal evidence, it shall be appropriate to declare the action brought by the Applicants as inadmissible for lack of *locus standi* and lack of capacity to sue in court.

ANALYSIS OF THE COURT

Regarding jurisdiction

15. In several of its judgments, the Court has consistently held that its jurisdiction shall be upheld whenever an application submitted before it invokes human rights violation arising from the provisions of Article 9(4) of the Protocol on the Court 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."***(Refer notably to: *Judgment on Case Concerning* **Hissein Habre *v.* Republic of Senegal**, 14 May 2010, §53, §58 and §59; *Judgment on Case Concerning* **Alhaji Mohammed Ibrahim Hassan *v.* Gombe State and Federal Republic of Nigeria**, 15 March 2012, §38; *Judgment on Case Concerning Sa'adatu Umar* v.*Federal Republic of Nigeria*, 12 June 2012, §16).

16. Considering the circumstances of the case, notably the charges brought, the arguments and pleas in law invoked, as well as the orders sought by the Applicants, the Court is of the view that the substance of the dispute centres essentially on alleged human rights violations which occurred on the territory of the Republic of Togo, a Member State of ECOWAS. The Court therefore adjudges that it has jurisdiction to adjudicate on the requests brought.

Regarding admissibility

17. Article 10(d) of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol provides:

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

18. Thus, in the terms of those provisions, even where the jurisdiction of the Court is established, an application whose subject matter concerns human rights violation, shall be admissible when three criteria are met: the applicant's status as a "victim" must be established, the non anonymous nature of the application, and the absence of *litispendence* before another international court or tribunal.

19. Those criteria are not exhaustive, and notably, the Court has had to set out, in various instances, other criteria of admissibility.

20. Thus, an application on human rights violation which at the time of lodgement does not exhibit any international nature, and proves to be premature or precocious, may be declared inadmissible (*See:* **Registered Trustees of Jama'a Foundation & 5 Others** *v.* **The Federal Republic of Nigeria, Attorney General of the Federation and Minister of Justice**, 7 December 2012, §57, §58, and §63).

21. In the instant case, the Republic of Togo contends that the Application is inadmissible on the ground that the Applicants have no *locus standi* and lack the capacity to sue. It argues that barring the production of irrefutable evidence as to the real identity and physical existence of the Applicants, the Court must conclude that the Applicants have neither *locus standi* nor capacity to sue before court.

22. The Parties pleaded their submissions on this issue at the hearing of 30 October 2012. Then at the hearing of 18 April 2013, pursuant to Article 16 (formerly Article 15) of the Protocol on the Court and Article 58 of the Rules of the Court, the Court asked Plaintiff Counsel to furnish it with an exhaustive list of the victims, indicating their complete identity, age, address, exact number, and other points for reference (like evidence regarding wounds and the after effects alleged by the victims).

23. On 14 May 2013, Plaintiff Counsel produced:

- A list of victims of the 2005 violent incidents;
- Nine proofs of evidence or leads to evidence;
- Four death certificates out of the 13 alleged cases of death.

24. The Court is of the view that pursuant to paragraph (d) of the new, Article 10 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, examining the admissibility of the Application must be done in the light of the three criteria enumerated in paragraph 18 above, even if the Court has set out other criteria for admissibility in its case law. In that regard, the Court emphasises that the status of a victim is a concept which must be examined separately and independently of concepts such *locus standi* or capacity to sue. To claim to be a victim, there must exist a sufficiently direct link between an applicant and the prejudice he deems to have suffered as a result of the alleged violation.

25. In the instant case, the Court finds that the Applicants allege violation of their right, to life and the security .of their human persons, and they complain of acts of torture committed against them. Furthermore, they allege violation of their right to fair trial and the right of appeal, as a result of the undue delays of the Judiciary of Togo in trying the case they filed following the violent incidents they were subjected to.

26. In the light of the foregoing circumstances, the Court is of the view that the Applicants may be considered as victims of the alleged acts.

27. Besides, the Court finds that the same case is not pending before any other competent International Court and the requests brought are not anonymous. The Court therefore adjudges that the requests brought are admissible.

ANALYSIS OF THE ALLEGED HUMAN RIGHTS VIOLATIONS AND THE REQUESTS BROUGHT

28. An analysis of the alleged violations and the requests brought must be made in relation to the subject matter of the dispute as it emerges from the orders sought by the Applicants. In that regard, for the Court, it is trite that the subject matter essentially centres on three crucial points:

(1) finding the various human rights violations arising from the alleged acts of violence, and their effects on the Applicants (2) finding the human rights violations arising from the failure to institute a trial into the complaints lodged (3) the risk of impunity, fostered by the Togolese authorities, in failing to conduct a trial into the complaints brought by the Applicants. The Court now sets out to examine each of these grievances.

A. CONCERNING VIOLATION OF THE RIGHT TO LIFE, THE SECURITY OF THE HUMAN PERSON, AND PRAYERS TO THE COURT TO FIND ACTS OF TORTURE RESULTING FROM VIOLENT ACTS

Arguments of Aziagbede Kokou and 34 Others, Atsou Komlavi and 4 Others, Tomekpe Lanou and 29 Others

29. The Applicants allege that, at Lome (in the case of Aziagbede Kokou and 34 Others), Amlamé (as regards Atsou Komlavi and 4) and Atakpamé (concerning Tomekpe Lanou and 29 Others), where they respectively reside or are established, the law enforcement agencies or security forces

of the Republic of Togo perpetrated violent acts against them and members of their families. They notably claim that some of them were beaten to bleeding point, and others, to death; that some were maltreated and sprayed with tear gas, while others were shot. They affirm that these acts resulted in the violation of their physical integrity, in some instances, irreversibly. That some of them now bear scars of the lifetime effects of those violent acts, while others have died in atrocious conditions. They further state that they suffered material damage and psychological harm.

30. They argue that such acts on the part of the Republic of Togo constitute cruel, inhuman or degrading treatment, and that the said acts violate human dignity and security of the human person. They conclude that there is violation of Article 21(1) and (2) of the Constitution of Togo, Articles 4 and 5 of the African Charter on Human and Peoples' Rights, Articles 3 and 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and equally, violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in spirit and letter.

Arguments of the Republic of Togo

31. The Republic of Togo contends that, it is apparent from the copies of pleadings lodged as evidence by the Applicants in the case file, that the alleged perpetrators of the said acts, which they claimed to be victims of, were allegedly ***"masked armed persons dressed in military combat trousers"***. The Republic of Togo affirms that in such circumstances, it shall be crucial to know whether the persons in question were officers or agents of the Republic of Togo to such extent as to warrant that their acts incur a blame on the Republic of Togo.

32. The Republic of Togo submits that, even if the alleged facts were attributable to the law-enforcement agents and security forces of the Republic of Togo, the Republic of Togo may not be held automatically accountable for their acts.

33. Indeed, the Republic of Togo argues that by virtue of the jurisprudential principle that the State may not be systematically held vicariously liable for offences committed by its officers, when an officer acts ultra vires with obvious ill intent, he commits an offence for which he is personally liable, independently of his assigned official duty. In that circumstance, as maintained by the Republic of Togo, the officer cannot render the

State liable, and the competent criminal or correctional body shall assume the power to receive such a matter and accord reparation.

34. It further argues that when the offence committed by an officer of State is in line with the performance of his duties, such offence shall be blameable on the State and not on the officer, and in such matters, the judge with competence over criminal or correctional matters has no powers to grant reparation, due to the principle of separation of powers between the Judiciary and the Executive.

35. In support of this argumentation, the Republic of Togo asserts that, it was because the Applicants were convinced of such separable nature of the liability for offences, as alleged to have been committed by the armed forces, that they constituted a civil party and instituted proceedings before the investigating judge, when the cause of action arose. It further submits that even bringing the matter before the investigating judge does not render the targeted persons in the complaints guilty, by reason of the principle that every suspect is presumed innocent till his guilt is proved through a court of trial which avails the suspect of all the indispensable guarantees for his defence, in accordance with Article 18 of the Constitution of Togo in force, Article 7(b) of the African Charter on Human and Peoples' Rights, and Article 11 of the International Covenant on Civil and Political Rights.

36. The Republic of Togo concludes that once no court decision has been made declaring that its law-enforcement agents were responsible for the acts complained of by the Applicants, the Honourable Court cannot lay blame on the Republic Togo for the alleged violations or ask the Republic of Togo to fulfil the requests for reparation sought by the Applicants.

ANALYSIS OF THE COURT

Regarding allegations of torture and human rights violations which may have resulted from acts of violence, and related requests

37. Within the circumstances of the instant case, the Court is of the view that it should have jurisdiction to adjudicate on the matter only if, first and foremost, there were sufficient factors which enable it to conclude that the Republic of Togo was liable for the charges brought, and of such a nature as to render the Republic of Togo internationally liable. **But, it is incontrovertible, that the objective of the proceedings instituted**

before the Togolese courts is to look for, identify and punish the masterminds of the criminal acts of violence and torture; and the court proceedings are still pending.

38. As things stand, the Court may not make any finding concerning the criminal nature of the charges brought, or ascribe any blame whatsoever against the Republic of Togo, without unduly interfering in the conduct of the proceedings pending at the national level, and without violating the freedom of the judge at the domestic court .

39. Furthermore, even though the Court is entrusted with the duty to establish the facts, the Court is nevertheless of the view that for it to set that man date in motion, consideration must be given to the pragmatic approach whereby appropriate importance is accorded to the proximity between the charges made and the judge at the domestic court, just as the same importance must be given to the prerogatives of the judge at the domestic court.

40. The Court finds that it is not within its human rights protection mandate to substitute its own viewpoint on the facts of a case for that of the domestic courts seised with the same case, in terms of determining the authenticity of certain exhibits pleaded in relation to charges of a criminal nature. The issue would have been completely different if the question before the Court were to be limited to determining the fairness of the entire procedure which may have been employed at the national level.

41. In the instant case, the Court is of the view that the judge at the domestic court, before which the case is filed, shall examine the charges made in the complaints which are lodged before him.

42. Consequently, the Court adjudges that the application asking the Court for a declaration on the alleged human rights violations, arising from acts purported to have been perpetrated and attributed to the law enforcement agencies and security forces of the Republic of Togo, is premature; and that it is ripe and appropriate therefore to declare that the allegations and requests made thereto are inadmissible as things stand, since the procedures are still pending before the domestic courts.

B. CONCERNING THE RIGHT TO FAIR TRIAL IN REASONABLE TIME

1. Arguments of the Applicants

1.1. Arguments of Aziagbede Kakou and 34 Others

43. The Applicants allege that after the events of 2005, with the assistance of Coalition of Associations Against Impunity in Togo (CACIT), they filed a case before the Doyen of investigating judges at the Court of First Instance of Lome, with complaints against the Republic of Togo, asking that a trial be instituted on the charges brought, for which they were victims. They further contend that since 13 October 2006 and 26 October 2010, the dates on which their complaints were lodged, none of them had been called for the hearing of the case, despite the numerous steps taken by the lawyers of CACIT and the constant monitoring of the case by CACIT. They state that it has been six (6) years since most of the complaints were lodged, while for others, one (1) year has lapsed, since the case was filed before the court. They therefore affirm that under such circumstances, it can be said that the complaints have fallen victim to intentional bureaucratic, blockades contrived by the Judiciary.

44. They maintain therefore that the resultant effect of this state of affairs is a violation of Article 19 of the 14 October 1992 Constitution of Togo, the provisions of Article 7(1)d of the 27 June 1981 African Charter on Human and Peoples' Rights, which essentially endorse the right of every human being to be tried or heard in a reasonable time by an impartial and independent court or tribunal.

1.2 Arguments of Atsou Komlavi and 4 Others

45. They allege that they filed their case before the investigating judge of the Court of the Court of First Instance of Amlamé, located about 200 kilometres from Lome; and that for 4 years, for some of them, and 3 years, for others, their complaints have not been called for hearing in court.

1.3 Arguments of Tomekpe Lanou and 29 Others

46. They allege that 4 years have elapsed, and for others, 3 years, since they filed their case before the investigating judge of the Court of First Instance of Atakpamé; and that as at the time they brought their case before the Honourable Court, their case had still not been called for hearing.

2. Arguments of the Republic of Togo

47. According to the Republic of Togo, whereas the complainants state in their Application that since the lodgment of their complaints between 1 October 2008 and 25 August 2009, numerous steps and monitoring by the lawyers of CACIT have been engaged in, without indicating precisely which of them, it is apparent from the exhibits filed among the pleadings in the case file before this Honourable Court, and communicated to it, that certain procedural formalities were not fulfilled, notably the payment of a guarantee fee which is fixed on the orders of the investigating judge, so as to set the public proceedings in motion, in accordance with Article 71 of the Togo Code of Criminal Procedure, which provides that ***"The civil party that initiates a public action shall, if he has not obtained legal aid, pay a guarantee of a fixed sum to the registry upon an order of the investigating judge, failing which his complaint may not be admitted."***

48. The-Republic of Togo further contends that in line with the procedure practised in Togo, the fixing of the amount to be paid as guarantee fee is preceded by the formality which confirms the complaint before the investigating judge; and the Republic of Togo asks whether the Applicants have fulfilled the said formality, and that at any rate, evidence must be provided to that effect.

49. The Republic of Togo thus maintains that the failure of the investigating judge to sit or his failure to adjudicate at a speed convenient to the Applicants may not be attributable to the Republic of Togo, since the latter, in line with the constitutional principles, cannot interfere with the work of the trial judge.

50. The Republic of Togo further contends that any proven default on the part of a judge seised with a case entitles a complainant to initiate an action against the judge concerned so as to bring disciplinary procedure against him pursuant to Articles 28, 29 and 30 of the Constitutive Law No. 96-11 of 21 August 1996 on the Status of Judges. It further affirms that an inspectorate division of the judicial services exists for the purpose of helping litigants bring cases against unscrupulous judges, in procedures which result in the implementation of the above mentioned provisions.

51. The Republic of Togo concludes that unless the Applicants produce evidence to prove that they have explored those avenues without success,

the Honourable Court may find that there are mechanisms for addressing the Applicants' complaints at the local level, and that if they have had no satisfaction for their complaints, it is not as a result of any fault of the Republic of Togo, but due to the Applicants' own fault.

Analysis of the Court

Regarding allegation of the right to be tried in reasonable time

52. The Court notes that the Applicants, who allege violation of the right to be tried in reasonable time, have all filed complaints and constituted civil parties before the investigating judges of Togo.

53. At the Court hearing of 30 October 2012, Plaintiff Counsel affirmed that the Applicants had evidence on the payment of the guarantee fee as made to the investigation judges at Lome, Atakpamé and Amlamé. Upon the instructions of the Court, they communicated the said exhibits to the Court, which were duly served on the Defendant.

54. At the Court hearing of 11 December 2012, the Republic of Togo received the said documents and therefore decided to abandon its legal claim concerning non-initialisation of the public action on grounds of non-payment of the guarantee fee by the Applicants, and withdrew all the observations and arguments it had adduced in connection with that claim.

55. In such circumstances, the Court notes that the Republic of Togo no more contests the claim brought by the Applicants as well as the allegation on violation Article 7(1)-d of the Charter. The Court adjudges that this aspect of the Application is not manifestly ill founded. The Court now sets out to examine the Applicants' pleas in law in regard to this point.

56. Article 7(1)-d of the African Charter on Human and Peoples' Rights provides:

> ***"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."***

57. Now, it is incontrovertible that the acts of violence which followed the 2005 presidential elections in Togo adversely affected the human persons and properties of the victims, who were located in Lome, Atakpamé and Amlamé: that since then, the Applicants filed complaints before the investigating judges of those localities and constituted civil parties to the

proceedings, and they paid the guarantee fees required by the laws of Togo. But since then, the case has not been called for hearing: for some of them, the time lapse so far has been up to 3 or 4 years, whereas for others it is 7 years.

58. In the instant case, the Republic of Togo does not bring any argument which may justify such inaction on the part of its judicial services. The Republic of Togo rather advances the argument that it has taken measures to inquire into the complaints, so as to compensate the victims and fight against impunity.

59. In that regard, the Republic of Togo contends that after the violent incidents which constituted the aftermath of the 24 April 2005 elections, and for the purposes of stamping out the cycle of violence which had marred the political life of Togo since 1958, the socio-political actors signed on 20 August 2006 a general political agreement which advocated for the setting up of a Truth, Justice and Reconciliation Commission (CVJR), whose mandate was spelt out by Presidential Decree No.046/PR of 25 February 2009. In the terms of the said Decree, the Commission's remit, among others, was ***"... to determine the scope and effects of the human rights violations, and of the violent incidents which shook the very foundation of the country; to undertake in-depth investigations with persons, institutions, administrative set-ups, traditional, religious and political authorities, and the civil society; to carry out inquiries, towards compilation of the victims of the violent incidents or their heirs."***

60. The Republic of Togo indicates that the period covered by the work of the Commission extends from 1958 to 2005. And, in line with its mandate, the Commission carried out inquiries and investigations in all the prefectures (local government administrative units) of the country. It submitted to the President of the Republic on 3 April 2012, its inquiry report, together with recommendations. The Republic of Togo maintains that in the course of the Commission's proceedings, everyone who wished to do so could gain access to the Commission. The Republic of Togo therefore submits that the matters complained of by the Applicants were already being investigated by the Commission and that if the transitional justice system does not prevent the ordinary justice system from following its normal course, it had the credit of hearing all victims and collating all data which could serve as supporting evidence for their allegations, and finally it was worthwhile having them recorded in the programmes for reparation envisaged in the CVJR report.

61. The Republic of Togo argues that the mechanism of transitional justice provides the ordinary justice system with points of information and evidence which may enhance the settlement of cases pending before the ordinary courts, and that the next step would be the implementation of the recommendations, which consists of compensating victims.

62. The Republic of Togo asks the Court to find that inquires have already been carried out on the incriminating charges, and to rule in favour of the Republic of Togo, that the latter will soon set out to repair the harms done.

63. The issue before the Court is to determine whether within the circumstances depicted above, it could be considered that the Republic of Togo's mechanism of Justice, Truth and Reconciliation Commission (CVJR) is consistent with its obligation under Article 7(1)-d of Charter, which makes it mandatory for it to ensure that the Applicants' cause is heard in reasonable time.

64. The Court notes that it is apparent from the averments of the Republic of Togo that in regard to the act s of violence which occurred and in setting up the CVJR, the national authorities of Togo intended to render inapplicable to the tragic events that took place, the penal law of Togo. No pleading filed in connection with the case, and no argumentation put forth, is the least inclined to that line of thought. Conversely, it cannot be denied that the Republic of Togo acknowledges that ***"the transitional justice system does not prevent the ordinary justice system from following its normal course"***.

65. In such circumstances, the Court is of the view that the inaction of the Togolese judicial authorities, in terms of investigating the complaints brought by the Applicants and examining their cause in accordance with Togolese law, during a period of 3 or 4 years for some, and 7 years for others; resulted in a situation where it had become clearly obvious that the Applicants' right to have their cause examined in reasonable time had been violated.

66. The Court adjudges that by acting in the manner it did, the Republic of Togo violated Article 7(1)-d of the African Charter on Human and Peoples' Rights, and it shall be appropriate to cease that violation by proceeding to conduct a prompt trial on the complaints brought by the Applicants, in such manner as to grant them their right to be heard in reasonable time.

C. CONCERNING THE RISK OF IMPUNITY OF THE ALLEGED VIOLATIONS

As to the admissibility of such grievance

67. The Applicants aver that the Republic of Togo encourages impunity by failing to institute an inquiry into their complaints, in violation of Point 16(a) of the 23 October 2002 Robben Island Guide lines, which deals with the directive principles and measures for the prohibition and prevention of torture and cruel, inhuman or degrading punishment or treatment in Africa.

68. The Republic of Togo invokes CVJR as a body put in place to fight against impunity.

69. The Court adjudges that when it is seised with a case of human rights violation, then it is entrusted with the duty of examining, in the final analysis, whether or not there is a specific human rights violation. The Court strictly limits itself to determining whether the human rights enshrined in the international instruments recognised within the framework of ECOWAS were respected or not by the State complained of before the Court. The Court recalls, in this connection, that it has already ruled that the Applicants' right to be heard in reasonable time, is violated and they must therefore be tried in reasonable time. Thus, it is not the duty of the Court to proffer general views on the attitude of a State. Consequently, the Court is of the view that this particular grievance brought by the Applicants is inadmissible and must therefore be dismissed. And there are no further grounds for considering the other pleas in law invoked.

DECISION

For these Reasons

70. The Court,

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

- **Adjudges** that it is has jurisdiction to adjudicate on the case;

- **Adjudges** that the Applicants' request to the Court, asking it to find that there is violation of the right to life, security of the human person,

and acts of torture resulting from acts of violence, which are rights enshrined in Articles 4 and 5 of the African Charter on Human and Peoples' Rights, is premature as things stand, and inadmissible;

- **Adjudges** that the Republic of Togo violated the Applicants' right to trial in reasonable time, as enshrined in Article 7(1)-d of the Charter; Consequently, the Court orders the Republic of Togo to ask its domestic courts to try the cases brought by Applicants promptly and in such manner as to render effective the Applicants' right enshrined in Article 7(1)-d of the Charter;

- **Dismisses** the other pleas-in- law.

COSTS

71. Pursuant to Article 66(2) of the Rules of Procedure of the Court, the Court asks the Republic of Togo to bear the costs.

Thus made, declared and pronounced in French, the language of procedure, in a public session at Abuja, by the Court of Justice of the Economic Community of West Africa States (ECOWAS) on the day, month and year stated above.

72. And the following hereby append their signatures:

Hon. Justice Awa Nana DABOYA - *Presiding*
Hon. Justice Hansine DONLI - *Member*
Hon. Justice Clotilde Médégan NOUGBODÉ - *Member*

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

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON WEDNESDAY, THE 3RD DAY OF JULY 2013

SUIT N^{O}: ECW/CCJ/APP/20/11
SUIT N^{O}: ECW/CCJ/APP/24/11
JUDGMENT N^{O}: ECW/CCJ/APP/08/11

BETWEEN
1. ASSIMA KOKOU INNOCENT,
2. AZANLEKPO DOSSEY K. NARCISSE } *PLAINTIFFS*
3. DA-SILVEIRA HERMES AND 5 ORS

AND
REPUBLIC OF TOGO **-** *DEFENDANT*

COMPOSITION OF THE COURT
1. HON. JUSTICE AWA NANA DABOYA - *PRESIDING*
2. HON. JUSTICE HANSINE N. DONLI - *MEMBER*
3. HON. JUSTICE C. MÉDÉGAN NOUGBODÉ - *MEMBER*

ASSISTED BY
MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MAITRE AJAVON ATA MESSAN ZEUS,**
LAWYER REGISTERED WITH THE BAR ASSOCIATION OF TOGO - *FOR THE PLAINTIFFS*

2. **MAITRE OHINI KWAO SANVEE,**
GABRIEL ARCHANGE DOSSOU,
EDAH N'DJELLE - *FOR THE DEFENDANT.*

Human rights violation -Torture and inhuman or degrading treatment -Violation of State security -Right to fair trial -Protection of all persons under any form of detention or imprisonment -Trial in reasonable time

SUMMARY OF FACTS

The Applicants pleaded that in the year 2005, for some of them, and 2010, for others, they were summoned for questioning and detained; some, for several days, and others for several years, by the Intelligence Processing Centre (CTR), which later became National Intelligence Agency (ANR). That in the course of their detention, they were continuously tortured and subjected to inhuman and degrading treatment. That during that period, they were not brought before any judge. That it was not until several days of torture had passed that they were transferred to the civilian prison of Lome and charged with attempted violation of State security. They asked the Court to declare that the Republic of Togo committed torture against them and violated their rights, and also asked the Court for a just reparation, by way of asking the Republic of Togo to pay 20 Million CFA Francs to each of the Applicants.

The Defendant State averred that the Applicants were all being prosecuted for attempted violation of the internal security of the State, and complicity to violate the internal security of the State. It contended that for the first group of Applicants, an inquiry which was instituted, revealed that they were acting in complicity with a priest of the Catholic Church to foment an insurgency to overthrow the Government. That as regards the other Applicants, intelligence reports received suggested that they were preparing acts of violence against the internal security of the State, using the territory of Ghana as their springboard. That the complexity of the two inquiries justified the length of their period of detention, and that further, they did not bring any evidence in support of their allegations regarding torture, inhuman and degrading treatment.

LEGAL ISSUES

1. *Can a person be held in preventive custody beyond the legally stipulated time, without the authorisation of the judge?*

2. *Can a State be charged for torture upon mere allegations without any evidence being adduced in support of such claim?*

3. *Can a State cite the complexity of a procedure to support a preventive detention measure of 6 years without trial?*

DECISION OF THE COURT

The Court decided that holding the Applicants in custody beyond 21 days was arbitrary; that the Applicants' rights to be tried in reasonable time (without undue delay) was violated. The Court therefore held that the violations in issue warranted reparation. On the contrary, the Court adjudged that it did not have sufficient evidence to examine the acts of torture, and asked the Republic of Togo to open an inquiry on the matter, as required by the Convention Against Torture.

JUDGMENT OF THE COURT

PROCEDURE

1. By various Applications all dated 22 July 2011 and lodged at the Registry of the Court on 8 August 2011, Messrs. Hermès Da-Silveira, Kodzo Tunu Kpakpo, Kossi Dovi Tudzi, Komi Adjété Djifa Akakpo, Kodzo Zuzuwé Foly and Yaovi Mawulikplimi, on one hand, and Messrs. Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko, on the other hand, brought their case before the Court, for the purposes of asking the Court to find: in terms of the claims of the first set of Applicants, that the Republic of Togo violated Articles 4, 5, 7(1)-d and 16(2) of the African Charter on Human and Peoples' Rights, Articles 7, 9(3) and 14(c) of the International Covenant on Civil and Political Rights, Article 5 of the Universal Declaration of Human Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and in terms of the claims of the second set of Applicants, that the Republic of Togo violated Articles 4, 5 and 6 *in fine* of the African Charter on Human and Peoples' Rights, Articles 7, 9(1) and 10(1) of the International Covenant on Civil and Political Rights, Articles 5 and 9 of the Universal Declaration of Human Rights, and the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment.

2. The Republic of Togo lodged at the Registry of the Court, on 13 August 2011, its Memorial in Defence to each of the two cases.

3. The Court duly proceeded to serve the written pleadings on each of the Parties.

4. The Court heard the Parties at the hearing of 30 October 2012, in the course of which the proceedings were joined by the Court. The Court equally heard the Parties on 11 December 2012 and 18 April 2013.

AS TO FACTS

The facts,* as *narrated by Hermes Da-Silveira, Kodzo Tunu Kpakpo, Kossi Dovi Tudzi, Komi Adjété Djifa Akakpo, Kodzo Zuzuwé Foly and Yaovi Mawulipkplimi

5. The Applicants averred that armed gendarmes entered Mr. Kossi Dovi Tudzi's home at night, on the grounds that they were in search of arms he had allegedly hidden. That he was coerced into admitting the allegation. That after a fruitless search in his bedroom, in the presence of his wife, they

handcuffed him and took him to their car. That he was later on taken to his village, Agome-Kossountou, 3 kilometres from Kpalimé.

6. That when they arrived at the said village, the gendarmes conducted searches in his house, which once again yielded nothing. He was then taken that same night to the Intelligence Processing Centre (CTR), now the National Intelligence Agency (ANRL) where he was put in a cell.

7. When the day broke, he was brought into the company of five (5) persons among whom he recognised only Mr. Da-Silveira Hermes. They were both interrogated, given slaps in the course of the interrogation, and taken away into a cell. They alleged that they slept on bare cemented floor, without mats; that they were sometimes deprived of food; and that every morning they were flogged. For ten (10) days, they were denied visits from their families.

8. Together with another civilist Messrs. Tudzi Kossi Dovi and Da-Silveira Hermes were taken to the SRI gendarme camp where they spent four days in cell, where they were coerced to sign a statement without being given the opportunity to know the content of that document.

9. They contended further that they were transferred to the civilian prison of Lome on 27 July, 2005 for attempted violation of State security. Further, that as a result of the ill treatments they went through, they all fell sick and that the prison authorities refused to authorise the medical evacuation of Mr. Tudzi Kossi Dovi, whereas the nurse had recommended such a measure, due to the fact that he had an ailment which affected his prostate.

10. In the case of Mr. Komi Adjété Djifa Akakpo, the Applicants alleged that Corporal Amépé had arranged to meet him in a bar, but to his surprise, he saw Officer Pali appear on the scene with other operatives of the Security Forces; and that after questioning him, they handcuffed him. That he was taken away to the CTR, where he was tortured and coerced, under the watch of Agents Pali and, Abina, to make certain statements which were filmed by a cameraman. That he remained at the CTR for thirteen (13) days and that the handcuffs were removed only when he went to the toilet or took his bath, as it pleased Officer Pali. They further pleaded that on 27 July 2005, Mr. Komi Adjété Djifa Akakpo was sent back to the civilian prison of Lome and that despite the deterioration in his state of health, the prison authorities refused to have him medically examined at the University Hospital, on the grounds that Mr. Da-Silveira Hermes, a co-accused, had bolted during his hospitalisation period at the same University Hospital.

11. The Applicants affirmed that Messrs. Kpakpo Kodzo Tunu, Kodzo Zuzuwé and Ametepe Yaovi Mawulikplimi went through the same unfortunate treatment at the hands of Messrs. Nabiou, Yark and Massina, who are agents of the Security Forces. They averred that after spending more than five months, first at the CTR, and subsequently at the RIT, regardless of the seriousness of their condition of health, they were transferred to the civilian prison of Lome on 12 December 2005.

The facts, as narrated by Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko

12. The Applicants avered that in the night of 1 July, 2010, they were arrested and detained, and handcuffed for five (5)1days at the National Gendarmerie of Lome, within the premises of the SRI. They affirmed that they were interrogated on their involvement in a drivers' public demonstration against increased fuel prices, and were accused of forming part of those who mounted road blocks and barricaded streets.

13. They further contended that after five (5) days, they were taken to the ANR, where they were interrogated several times on a group they were alleged to be forming, journeys undertaken to Ghana and Gabon, and on their relations with certain Togolese politicians widely known to be opponents of the regime in place.

14. They alleged that they were subjected to cruel, inhuman and degrading treatment. Mr. Innocent Kokou Assima alleged that he was tied against a bed for ninety four (94) hours, and was allowed to go to toilet and take his bath only once in a day; that he stayed on the ANR premises for one hundred and forty (140) days in only one pair of shorts, and that the food took was poor in quality.

15. They affirmed that the ill treatments they received led to a deterioration in the health of Mr. Narcisse Dosseh Kpanou Azanleko, who, after a second visit to the SRI, was sent to the civilian prison of Lome.

The facts, as narrated by the Republic of Togo

16. In relation to the facts as narrated by Hermes Da-Silveira, Kodzo Tunu Kpakpo, Kossi Dovi Tudzi, Komi Adjété Djifa Akakpo, Kodzo Zuzuwé Foly and Yaovi Mawulikplimi, the Republic of Togo pleaded that the Applicants are being investigated for attempted violation of internal State security and for complicity in attempted violation of the internal security of the Republic of Togo, relating to incidents which date back to 2005.

17. The Defendant State contended that, from the information availed the Trial Chamber I of the Court of First Instance of Lome, Mr. Da-Silveira approached a Togolese Catholic priest for financial assistance to overthrow the regime in place; that he recruited the other Applicants, who are military men in the Togolese Army, in addition to other youths, and trained them in the use of arms.

18. The Republic of Togo further claimed that the said priest who was heard by Trial Chamber I referred to above, acknowledged having given the sum of Ninety Seven Million CFA Francs (CFA 97,000,000) to Mr. Da-Silveira, but denied giving his backing to any attempt to overthrow the regime. The priest stated that the money was meant for assisting Togolese refugees.

19. The Republic of Togo affirmed that the documents found at the home of the priest do attest to the hypothesis of a coup plot, and that when confronted on the issue, Mr. Da-Silveira Hermes maintained his version, according to which the incident in question was a case of mutiny. The Republic of Togo asserted that the Applicants Kpakpo, Akakpo, Tudzi, Folly and Ametepe were temporarily released on 12 March 2012 and that Mr. Da-Silveira, conscious of the seriousness of the case at hand, escaped from the detainee health unit at the Centre Hospitalier Universitaire (University Teaching Hospital) of Lome.

20. Vis-a -vis the facts narrated by the Applicants Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko, the Republic of Togo averred that Within the period from March to July 2010, the, Togolese intelligence services got wind of the subversive activities of a group of Togolese citizens resident on Ghanaian and Togolese territory, which indicated that they were preparing to engage in violent acts aimed at breaching the internal security of the Republic of Togo. He declared that investigations led to the arrest of the Applicants on 1 July 2010 and that a third accomplice managed to escape. The Republic of Togo further averred that the trial of the case was handed over to Trial Chamber 3 of the *parquet d'instance* of the Court of First Instance of Lome; that the said trial is still going on, and that since 12 March 2012, the Applicants have been released on temporary basis.

ORDERS AND REQUESTS SOUGHT FROM THE COURT

Orders and requests sought by Messrs. Hermes Do-Sllveira, Kodzo Tunu Kpakpo, Kossi Dovi Tudzi, Komi Adjete Djifa Akakpo, Kodzo Zuzuwe Foly andYaovi Mawulipklimi

21. The Applicants requested the Court to:

- Ask the Republic of Togo to ensure that all the declarations obtained through torture are set aside as evidence, in accordance with the terms of Article 15 of the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- Order the temporary release of the Applicants who are still in detention at .the civilian prison of Lome, in accordance with the provisions of Articles 115 and 116 of the 2 March 1983 Togo Code of Criminal Procedure, Articles 9(3) and (4) of the 16 December 1966 International Covenant on Civil and Political Rights, and Principle 38 of the 19 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

22. Alternatively, they requested the Court to:

- Order, the Republic of Togo to grant the Applicant s their right to exercise of fair trial in accordance with the terms of Article 19 of the 14 October 1992 Constitution of Togo, Article 7 of the 27 June 1981 African Charter on Human and Peoples' Rights, Article 10 of the 10 December 1948 Universal Declaration of Human Rights, and Article 14 of the 16 December 1966 International Covenant on Civil and Political Rights;

- Order that the said right be effectively exercised within the shortest possible time in line with the terms Article 19 of the Constitution of Togo, Article 7(1)-d of the 27 June 1981 African Charter on Human and Peoples' Rights, Articles 9(3) and 14(3) of the 16 December 1966 International Covenant on Civil and Political Rights, and Principle 38 of the 19 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;

- Ask the Republic of Togo to take measures towards ensuring the protection of the Applicants against all forms of ill treatment, in accordance with the terms of Article 13 of the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- Ask the Republic of Togo to pay to each of the Applicants such sums as the Court may deem sufficient, as damages (CFA F 20,000,000 - these requests were made upon the instructions of the Court), in accordance with the terms of Article 14 of the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, Article 9(5) of the 16 December 1966 International Covenant on Civil and Political Rights, Principle 35 of the 19 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Orders and requests sought by Messrs. Innocent Kakou Assima and Narcisse Dosseh Kpanou Azanleko

23. The Applicants requested the Court to:

- Order the Republic of Togo to conduct an investigation into the matter, so as to arrest t hose guilty of the criminal acts, in accordance with the terms of Article 12 of the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ask the Republic of Togo to pay to each of the Applicants such sums as the Court may deem sufficient, as damages (CFA F 20,000,000 these requests were made upon the instructions of the Court), in accordance with the terms of Article 14 of the of the 10 December 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 9(5) of the 16 December1966 International Covenant on Civil and Political Rights, Principle 35 of the 19 December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Orders and requests sought by the Republic of Togo

24. In regard to the claims brought by Messrs. Hermes Da-Silveira, Kodzo Tunu Kpakpo, Kossi Dovi Tudzi, Komi Adjété Djifa Akakpo, Kodzo Zuzuwé, Foly and Yaovi Mawulipklimi, the Republic of Togo contends that it has taken measures towards addressing the violent incidents which rocked Togo in the aftermath of the presidential election of 24 April 2005. Notably, the Republic of Togo avers that the socio-political actors signed a general political agreement on 20 August 2006 which advocated the setting up of a Truth, Justice and Reconciliation Commission (CVJR).

25. Following that agreement, the President of the Republic of Togo, by Decree No. 046/PR of 25 February 2009, created the said Commission, which was given the mandate, among others to:

- Determine the extent and consequences of incidents of human rights violation which rocked the very foundation of the country;

- Conduct in-depth investigations into the incidents by contacting persons, institutions, administrative bodies, political, religious and traditional authorities, and the civil society;

- Set up inquiries aimed at accounting for the victims of the violent incidents and their heirs.

26. The Republic of Togo affirms that by acting in line with the mandate conferred on it, the Commission conducted inquiries and investigations in all the *prefectures* (local government administrative units) covering the period from 1958 to 2005. Upon completion of its assignment, the Commission submitted it's report, with recommendations.

27. The Republic of Togo thus maintains that since the inquiries relating to the incriminating charges have already been carried out within the framework of the Truth, Justice and Reconciliation Commission (CVJR), the recommendations which propose that the victims should be compensated will soon be implemented.

28. The Republic of Togo therefore requests the Court to find that inquiries have already been conducted on the criminal charges brought, and to declare in favour of the Republic of Togo, that it will soon give effect to the reparation of the harms done.

29. Finally, with respect to all the Applicants, the Republic of Togo asks the Court to adjudge and declare that the applications for compensation have no basis, to dismiss the requests brought by Applicants in all their Intent s and purposes, and to ask the Applicants to pay the costs.

LEGAL ISSUES

Jurisdiction of the Court and admissibility of the applications

30. The Republic of Togo neither contests the jurisdiction of the Court over the matter in issue nor the admissibility of the applications filed. The Court shall ensure nevertheless that in all the cases brought before it, it has jurisdiction to adjudicate over the matter and that the application is admissible.

31. In the instant case, the Applicants allege human rights; violation pursuant to the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, instruments

ratified by the Republic of Togo. The Court adjudges that, following its consistently held case law, it has jurisdiction to adjudicate in a case once the subject-matter of the application is on allegations of human rights violations which occurred in a Member State of ECOWAS.

32. Moreover, the Applicants are the persons who declare, having suffered the allegations they brought forth. They therefore assume the status of victims. Besides, since the Application is not anonymous and has not been filed before another competent International Court, the criteria for admissibility as provided for by Article 10(d) of the new Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, are satisfied. The Court therefore, adjudges that the requests brought are admissible.

A- Arbitrary arrest and detention

Arguments advanced by Innocent Kakou Assima and Narcisse Dosseh Kpanou Azanleko

33. Messrs. Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko contend that they were detained for five (5) days at the National Gendarmerie for more than one hundred and four (104) days, on the premises of National Intelligence Agency (ANR) in serious and manifest violation of Article 52 of the Code of Criminal Procedure of Togo.

34. They maintain that the measures of detention were arbitrary and violate Article 6 *in fine* of the African Charter on Human and Peoples' Rights, Article 9 of the Universal Declaration of Human Rights and Article 9(1) of the International Covenant on Civil and Political Rights.

Arguments advanced by the Republic of Togo

35. The Republic of Togo counters that assertion by stating that in the terms of Article 9 of the International Covenant on Civil and Political Rights, a measure of detention is arbitrary when it has no basis and when it is inconsistent with the procedure provided by law.

36. The Defendant State observes that in the instant case, the Applicants are in the grips of the law for acts dating back to the period from March to July 2010, which may be described as acts amounting to criminal association and attempted violation of State security. The Republic of Togo contends further that the case is pending before Trial Chamber 3 of the Court of First Instance of Lome, and that as things stand, the Applicants have acknowledged having committed the offences in question. The Republic of

Togo maintains that the Applicants were arrested and detained in accordance with the procedure in force. It pleads further that since 12 March 2012, the Applicants have been granted provisional release by the Investigating Judge, in line with the law.

37. The Republic of Togo therefore concludes that it is erroneous for the Applicants to talk of arbitrary detention, and asks the Court to dismiss their requests, intents and orders sought.

Analysis of the Court

38. Article 6 *in fine* of the African Charter on Human and Peoples' Rights provides: **"*... no one may be arbitrarily arrested* or *detained.*"**

39. Article 9 of the Universal Declaration of Human Rights provides: ***"No one shall be subjected* to *arbitrary arrest, detention* or *exile."***

40. Article 9(1) of the International Covenant on Civil and Political Rights provides: ***"Everyone has the right* to *liberty and security of person. No one shall be subjected to arbitrary arrest* or *detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."***

41. The combination of these provisions prohibit all forms of arbitrary arrest, detention and exile; the same provisions equally prohibit denial of liberty except on grounds provided by law.

42. The Court notes that the Applicants Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko were arrested and charged with the chances of criminal association and attempted violation of State security, and that they were detained for five (5) days at the National Gendarmerie and more than one hundred and four (104) days on the premises of the National Intelligence Agency (ANR).

43. Act No. 80-1 of 13 August 1980 which put in place the criminal code applicable to Togo provides in its Article 9:

> ***"...Crimes and less serious offences are categorised as follows, as to whether they violate; (1) individuals (2) families (3) moral values (4) properties (5) State authority (6) public peace (7) the national treasury, the public domain or the national economy (8) State security."***

44. Chapter VIII of the said Act spells out offences against State security and prescribes the applicable punishments and sanctions.

45. Act No. 83-1, which put in place the Criminal Code of Togo, provides in Article 52:

> "If, for the necessities of an inquiry, the criminal investigations officer is compelled to hold in custody a person against whom serious and consistent points of proof have been found, of such nature as to warrant his accusation, ***such a person shall not be held for more than* 48 *hours.***
>
> ***The time period provided in the paragraph above may be extended by another time-limit of* 48 *hours upon the authorisation of the Public Prosecutor* or *the judge in charge of the ministère public.***
>
> Where the facts in question are particularly serious and complex, the time-limits provided in the paragraphs above ***may be extended by 8 days upon the written a****uthorisation* ***of the Public Prosecutor or*** *the,* ***judge in charge of the ministère public."***

46. In the light of the foregoing, the Court is of the view that the arrest of the Applicants Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko, which measure was taken within the framework of a judicial procedure on grounds of offences provided for and punished by the Criminal Code of Togo, is not arbitrary.

47. Conversely, the Court notes, in respect of the detention of the Applicants Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko, that the time-limit provided by the Code of Criminal Procedure of Togo in its Article 52, as cited above, is two (2) days, and that such time-limit may be extended only upon the authorisation of the Public Prosecutor or the judge in charge of the *ministère public* (public prosecution), for a further two (2) or eight (8) days where the facts are particularly serious and complex.

48. The Defendant State does not contest the time-periods of detention as alleged by the Applicants, as having taken place within the premises of National Gendarmerie and of the ANR, totalling one hundred and nine (109) days. The Defendant State does not also demonstrate that the further time-period during which the Applicants continued to be held in custody was authorised by a competent judicial authority. Whatever the case may be, even if the extension in holding them in custody was duly authorised, the detention shall not exceed eight (8) more days, i.e. a total of twelve (12) days.

49. In such conditions, the Court deduces that holding the Applicants in custody, at the mercy of the Criminal Investigations Department, in excess of the two (2) days provided for by the Code of Criminal Procedure, without a judicial decision authorising so, is arbitrary and abusive, in the instant case.

50. The Court adjudges therefore that the Republic of Togo violated Article *6 in fine* of the African Charter on Human and Peoples' Rights.

B- Torture

Arguments advanced by Hermes Do-Silveira, Kodzo Tunu Kpakpo, Kossi Dovi Tudzi, Komi Adjété Djifa Akakpo, Kodzo Zuzuwé Foly and Yaovi Mawulikplimi, and Innocent Kokou Assima and Narcisse Dosseh kpanou Azanleko

51. Hermes Da-Silveira, KodzoTunu Kpakpo, Kossi Dovi Tudzi, Komi Adjété Djifa Akakpo, Kodzo Zuzuwé Foly and Yaovi Mawulikplimi argue that at the Intelligence Processing Centre (CTR), currently National Intelligence Agency (ANR), and at the National Gendarmerie (SRI) and RIT, they were subjected to daily beatings, constant slaps and morning floggings. They claim that they were forced to sleep on bare cemented floor, without mats; that they were made to wear their handcuffs for several consecutive days, without virtually having to remove them; that they were incarcerated in spite of their precarious health condition, and that the prison authorities denied them appropriate healthcare.

52. They maintain that such treatments violate their dignity and their physical and mental health; that when considered together with the refusal by the prison authorities to offer health care to the Applicants Yaovi Mawulikplimi Ametepe, Kodzo Zuzuwé Foly and Tunu Kodzo Kpakpo, those acts constitute acts of torture, and that the said maltreatments are still going on.

53. On their part, Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko contend that by the acts of its officers, the Republic of Togo inflicted "**atrocious suffering**" on them. In particular, they allege that they were tied to a bed for ninety-four (94) hours, denied the right to receive visits, and were allowed to go to toilet and take their bath only once a day.

54. In the light of such circumstances, the Applicants affirm that the Republic of Togo violated Articles 4 and 5 of the African Charter on Human and Peoples' Rights, Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, Point 1 of the 10 December 1990 Basic Principles for the Treatment of Prisoners, and the Principles 1 and 6 of the Body of Principles for the

Protection of All Persons under Any Form of Detention or Imprisonment. They notably argue that the Republic of Togo violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Arguments advanced by the Republic of Togo

55. Against the allegations of torture made by the Applicants, the Republic of Togo argues that in order to stamp out acts of torture, the Republic of Togo must necessarily be informed of their origin; that that, was the reason why Article 13 of the Convention against Torture provides that any person who considers himself a victim of torture must file a complaint before the competent authorities. It alleges that in violation of Article 33 of the Rules of Procedure of the Court, no evidence was provided by the Applicants to that effect. Notably, the Republic of Togo contends that the Applicants, who claimed that their state of health got worsened as a result of the torture inflicted on them, should at least, have supported their averments with medical reports from a competent, objective and impartial doctor. It maintains that in such circumstances, the Court cannot adjudge that the acts of torture are proven.

Analysis of the Court

56. In the terms of Article 4 of the African Charter on Human and Peoples' Rights:

> ***"Human beings are inviolable. Every human being shall be entitled* to *respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."***

57. Equally, Article 5 provides:

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

58. Article 10(1) of the International Covenant on Civil and Political Rights provides:

> ***"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".***

59. The Court insists on the fact that before it concludes on the issue of occurrence of human rights violation, the concrete proof of the facts upon

which the Applicants base their claims must be established with a high degree of certainty, or at least, there must be a high possibility of the claims appearing to be true, upon scrutiny. In this regard, mere allegations do not suffice to elicit the conviction of the Court. Nevertheless, as regards the allegations of torture levelled against the authorities responsible for investigation and the prison administration, the Court considers whether real opportunities existed for the Applicants to obtain proofs of evidence. Finding themselves in a vulnerable situation, it can reasonably be presumed that real difficulties existed for the Applicants to gather evidence on the appalling acts they were subjected to, such that the burden of proof shall be shifted to the Republic of Togo, to prove that there were no acts of torture or acts similar to torture.

60. It is incontrovertible that in the terms of Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> ***"Each State Party shall ensure in its legal system that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.***

61. Besides, Article 12 of the same instrument provides:

> ***"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".***
>
> In the terms of Article 15 of the same Convention:
>
> ***"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".***

62. In its mandate to protect human rights; the Court always endeavours to ensure that all the obligations entrusted upon the States constitute an indivisible whole. In that sense, and in the light of the above-cited Articles 12 and 13, the Court is of the view that the State authorities are first and foremost required to investigate allegations of torture any time there are reasonable grounds to believe that such acts have been committed.

63. Hence, the Court considers that the allegations brought before it by the Applicants in 2011 against the Republic of Togo do prove that there are reasonable grounds to believe that such acts were perpetrated. Consequently, the Republic of Togo is under obligation to abide by the relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Therefore, the Defendant State cannot make a claim on the ground that it had not been informed of the existence of acts of torture. Thus, if it has not initiated inquiries into the matter since the case came before the instant Court, it must take the appropriate measures to that effect, in accordance with the Article 12 cited above.

64. Consequently, the Court adjudges that at this stage of the proceedings, the Applicants' request that the Court find that there is violation of Articles 4 and 5 of the African Charter on Human and Peoples: Rights, Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10(1) of the International Covenant on Human and Peoples Rights, in terms of the alleged acts of torture, is premature and cannot thrive as at now.

65. The Applicants equally ask to be set aside, in accordance with Article 15 of the Convention against Torture, all the declarations extracted from them under duress, to be used as evidence in the proceedings brought against them. The Court is of the view that the Republic of Togo must ensure that its courts observe the provision cited above, for the purposes of ensuring that the Applicants are guaranteed fair trial.

66. The Applicants allege that from the time they were imprisoned, six(6) years ago, at the Civilian prison of Lome, till they brought their case before the Court, they have not received appropriate healthcare in desirable conditions, and that those who require special medical attention have not been treated. They maintain that the refusal by the prison authorities to grant them right to health violates the provisions of Article 16(2) of the African Charter on Human and Peoples' Rights and Article 22(1) of the 1995 Standard Minimum Rules for the treatment of Prisoners.

Argument advanced by the Republic of Togo

67. The Republic of Togo contends that the allegations made by the Applicants are not backed by any evidence, and that on the contrary, they received regular medical care from the medical services of the prison administration. In support of that argument, the Republic of Togo avers that Hermes Da-Silveira was hospitalised at a medical unit of the prison administration located within the CHU de Lome-Tokoin (Lome-Tokoin Teaching Hospital), from where he escaped.

68. The Republic of Togo therefore maintains that it is erroneous for the Applicants to allege that the prison administration refused to offer them healthcare.

Analysis of the Court

69. Article 16 of the African Charter on Human and Peoples' Rights provides:

> ***"1. Every individual shall have the right to enjoy the best attainable state of physical mental health. 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."***

70. Paragraphs 1 and 2 of Article 22 of Standard Minimum Rules for the Treatment of Prisoners, adopted by the 1st United Nations Congress for the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, provide as follows:

> ***"1. The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.***
>
> ***2. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations."***

71. Paragraph 2, Article 16 of African Charter on Human and Peoples' Rights, whose violation is alleged, prescribes to States parties signatory to the Charter to take the necessary measures to protect the health of their 'people and to provide them with medical assistance in case of sickness. The Court is of the view that even if the States are given some room for manoeuvre, the objective of that provision or its ultimate aim is to -ensure, in accordance with paragraph 1 of the cited Article above, that everyone enjoys the best physical and mental health possible.

72. In such conditions, every Member State of ECOWAS signatory to the Charter shall particularly see to it that persons whose freedom is curtailed as well as those incarcerated are offered the best possible healthcare by' adopting appropriate measures. It is apparent from the arguments by the Parties that such framework of medical care for detainees and prisoners exists in the Republic of Togo.

73. Therefore, when a detainee or prisoner complains of violation of his right to health, as enshrined in Article 16 of the Charter, the onus is on him to demonstrate that the prison authorities did not take the required measures, or that the measures taken did not suit the particular circumstances of the case.

74. Now, the Court notes that in the instant case, the Applicants do not cite any notable reported incident or proof in support of their complaints, which may have demonstrated either the non-existence or unsuitability of the healthcare they complained of. The Court therefore concludes that the arguments made by the Applicants in that regard have no basis. Consequently, the Court adjudges that violation of the Applicants right to health as sanctioned by Article 16 of the said Charter, is not established.

D- Right to trial in reasonable time and time **for preventive detention**

Arguments advanced by Hermes Do-Silveira, Kodzo Tunu Kpakpo, Kossi Dovi Tutizi, Komi Adjete Djifa Akakpo, Kodza Zuzuwé Foly and Yaovi Mawulikplimi

75. The Applicants maintain, in terms of their six-year long preventive detention, that the Republic of Togo violated Article 7(1)-d of the African Charter on Human and Peoples' Rights, Articles 9(3) and 14(3)-c of the International Covenant Civil and Political Rights, Principle 38 of the December 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or imprisonment, which essentially sanction the right to trial in reasonable time.

76. They plead that the European Court of Human Rights declared that the existence of serious evidence of guilt in respect of an accused person does not, alone, justify continued provisional detention (*Judgments:* **Daugy** v. **France**, 23 March 1999; **Richard** *v.* **France**, 12 October 1999). They submitted further that the persistence of plausible suspicion against a detainee does not suffice, all alone, to justify detention at the end of a certain period of time, and that the only concern to preserve public order and avoid a repetition of the offence cannot serve as a substitute (Judgment: **Debboud** *v.* **France**, 9 November 1999).

Arguments advanced by the Republic of Togo

77. The Republic of Togo argues that it is erroneous for the Applicants to claim violation of their right to trial in reasonable time, by virtue of the long period of their preventive detention, more so when since 12 March, 2012 the Applicants have been released on provisional grounds, and thereby their request for special healthcare had become devoid of purpose.

78. The Republic of Togo argues that the concept of "reasonable time" is an imprecise term, discerned only in concrete terms. Citing a judgment of the European Court of Human Rights, it submits that the concept is examined ***" ….. in view of the character of the offences and the extreme complexity of the case."*** (Judgment on Case concerning **Wemhoff** *v.* **Germany**, 27 June 1968, §14). It contends further that the case in point has to do with an attempted coup plot and complicity of an attempted coup against the internal security of a State which involved Togolese civilians and military.

79. The Republic of Togo submits therefore that as regards the proceedings instituted, the trial must disentangle preparatory inquiries instituted from the acts of complicity; that the Applicants were heard together with witnesses; that expert knowledge was sought by the investigating judge; that those reports were served on the Applicants; that an inquiry on the personality of the Applicants was officially done and a summary report was made by the investigating judge. It further asserts that the Applicants duly exercised their right to apply for provisional release and to appeal against decisions of the investigating judge could not have ordered that they be released soon. The Republic of Togo further claims that whatever the case may be, the investigating judge granted the Applicants provisional release on 12 March 2012 when the circumstances permitted so.

80. The Republic of Togo therefore concludes that it cannot be claimed that the trial was conducted outside its legal confines, and it submits that the Applicants were detained within reasonable time.

Analysis of the Court

81. Article 7(1)-d of the African Charter on Human and Peoples' Rights provides***: "Every individual shall have the right to have his cause heard. This comprises …. (d) the right to be tried within a reasonable time*** by an impartial court or tribunal."

82. Article 9(3) of the International Covenant on Civil and Political Rights provides:

> ***"Anyone arrested* or *detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject* to *guarantees to appear for trial, at any other stage of the judicial proceedings, and, should the occasion arise, for execution of the judgment."***

83. Article 14(3)-c of the same instrument provides:

> ***"In the determination of any criminal charge against him, everyone shall be entitled to the following*** *minimum guarantees,* ***in full equality:*** *(...)* ***to be tried without undue delay."***

84. The combination of' all these articles places an obligation on the Republic of Togo to respect the right of anyone accused of a criminal offence, and to try him in reasonable time without undue delay; in this case, Article 9(3) states that: ***"it shall not be the general rule that persons awaiting trial shall be detained in*** *custody";* whatever the case may be, no one shall be unjustifiably detained for an unduly long period.

85. The Court notes that as at the time it is delivering its judgment, no decision has been made against the Applicants, who have remained under preventive detention for more than 6 years. This fact is not disputed by the Federal Republic of Togo; at any rate, the latter released the Applicants on provisional grounds on 12 March 2012, (i.e.) **after the Applicants had brought their case before the Honourable Court on 8 August 2011.**

86. The Court equally notes that the Republic of Togo asserts as ground for the Applicants' unduly long preventive detention period, the exceptional character of the events, without any other form of explanation or further detail, the complexity of the procedure, whereas it did not demonstrate any abuse of procedure on the part of the Applicants. The Court is of the view that such ground, as submitted in the instant case, without any concrete fact to back it up, does not suffice and cannot constitute a justifiable ground which could warrant the long preventive detention of the Applicants.

87. The Court observes at any rate that the time period expended on the procedure (more than 6 years), without any judicial decision having been made in the course of that period, necessarily contributed to the Applicants' long preventive detention. The Court therefore concludes that the Republic of Togo violated Article 7(1)-d of the Charter, which sanctions the right of everyone to be tried in reasonable time.

E- Requests for reparation

88. The Applicants substantially ask the Court to order that:

    (a) they be released;

    (b) the Republic of Togo try them in reasonable time;

    (c) an inquiry be instituted and the architects of the alleged acts of torture be punished;

    (d) each of the victims be paid 20 Million CFA Francs (CFA F 20,000,000) as damages, and that they be protected.

89. The Court finds that the Applicants have been released on provisional grounds since 12 March 2012. The Court adjudges therefore that the request brought before the 'Court by the Applicants to seek provisional release has become devoid of purpose.

90. As regards the request for reparation, the Court recalls that it has already concluded that holding the Applicants beyond two (2) days is arbitrary and abusive; that the Applicants' right to be tried in reasonable time, and thus without undue delay, has been continuously violated. The Court adjudges therefore that such violations give ground for reparation as a result of the prejudices suffered. However, even if the Court considers that the application for reparation is justified in principle, it finds that the quantum of reparation applied for is exaggerated. Consequently, by virtue of its sovereign power for determining such issues, and considering equity, the Court awards to each victim the sum of Two Million CFA Francs (CFA F 2,000,000) as damages for all the harms caused. The Court equally adjudges that the Republic of Togo must cease all violations of Article 7(1)-d of the Charter by giving the Applicants a speedy and fair trial, expeditiously, and justified by the prevailing circumstances.

91. The Court recalls, as regards the alleged charges of torture, that pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Republic of Togo is bound to inquire into and try those responsible for the acts of torture and compensate the victims thereof. The Court therefore urges the Republic of Togo to abide by the provisions of the said instrument. Besides, since the Court cannot speculate on the outcome of the implementation of the obligations owed by the Republic of Togo towards the said Convention, it adjudges, in line with its consistently held case law, that, in the current state of the proceedings, it cannot adjudicate on the request for compensation for the harms suffered.

DECISION

FOR THESE REASONS

92 . The Court, adjudicating in a public session after hearing both Parties, and after deliberation on the case:

- **Adjudges** that it is competent to adjudicate on the case;
- **Adjudges** that the Application is admissible;
- **Adjudges** that the Republic of Togo violated Article 6 *in fine* of the African Charter on Human and Peoples' Rights, in that the 109-period within which the Applicants Innocent Kokou Assima and Narcisse Dosseh Kpanou Azanleko were held (in custody) exceeded the 2-day period stipulated in the Criminal Code of Procedure, without any judicial decision having been made to extend the initial two-day period;
- **Adjudges** that the request brought asking the Court to find that there was violation of Article 5 of the said Charter, which prohibits torture, and all forms of exploitation and degradation of human beings, or cruel, inhuman or degrading treatments, is premature and cannot succeed in the current circumstances of the case;
- **Adjudges** however, that there are reasonable grounds to believe that the Applicants were tortured;
- **Adjudges** that violation of the right to health is not established;
- **Adjudges** that there was violation of the Applicants' right to trial in reasonable time as enshrined in Article 7(d)-1 of the said Charter and Articles 9(3) and 14(3)-c of the International Covenant on Civil and Political Rights;
- **Adjudges** that the application for the provisional release of the Applicants is devoid of purpose;
- **Adjudges** that the harms suffered as a result of the proven violations do give ground for reparation.

Consequently,

- **Order** the Republic of Togo to pay to each of the victims of the proven violations, the sum of Two Million CFA Francs (CFA F 2,000,000) as reparation for all the harms caused;

- **Orders** the Republic of Togo to abide by the relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, by conducting an inquiry into the allegations of torture, in offering suitable protection to the Applicants while such an inquiry is going on, and if need be, appropriate reparation;

- **Orders** that given the current circumstances, it cannot adjudicate on the application for reparation in regard to the allegations of torture;

- **Orders** the Republic of Togo to carry out the trial of the Applicants with all due diligence, on the criminal charges made against them, with guarantees for fair trial, in ensuring that Articles 12,13 and 15 of the Convention Against Torture are observed;

COSTS

93. In compliance with paragraph 2, Article 66 of the Rules of Procedure, asks the Republic of Togo to bear all the costs.

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

94. **And the following append their signatures:**

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*
HON. JUSTICE HANSINE DONLI - *MEMBER*
HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ - *MEMBER*

ASSISTED BY **MAITRE ATHANASE ATANNON** - *REGISTRAR*

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, THIS 3RD DAY OF JULY 2013

SUIT NO: ECW/CCJ/APP/16/12
RULING NO: ECW/RUL/09/13

BETWEEN
LEGAL DEFENCE AND ASSISTANCE PROJECTGTE LTD. - *PLAINTIFF*

AND
FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

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

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MR. MATHEW ECHO** - *FOR THE PLAINTIFF*
2. **EDMUND OBIAGWU** - *FOR THE DEFENDANT*

Locus standi -Legal Capacity to sue -Cause of Action -Jurisdiction

SUMMARY OF FACTS

The Plaintiff, Legal Defence and Assistance Project GTE LTD, is a public right defender and an Organization registered in Nigeria with the mandate to advance, uphold and defend fundamental human rights of citizens, Rule of law, public accountability and good governance. The Defendant is a Member State of ECOWAS.

The Application is brought on behalf of the indigenes of Bakassi (Peninsular) Kingdom in Cross River State of Nigeria, alleging the violation of its rights. The Plaintiff alleged that in 2002,the Republic of Cameroon brought a suit against the Defendant at the International Court of Justice, and entered a Pact with the people of Cameroon known as the 'Green Tea' Agreement ceding the entirety of Bakassi to Cameroon. This decision was based on the Anglo-German Treaty of 1913. This agreement gave the people of Bakassi the options to remain in Cameroon and become Cameroon citizens; remain in Bakassi and retain their Nigerian citizenship; or retain their Nigerian citizenship and relocate to Nigeria. The Plaintiff asserts that the Bakassi people are not part of the 1913 Anglo-German Treaty on which the judgment of the Court was based and that by ceding the Bakassi Peninsula to Republic of Cameroon without the consent of the Bakassi people, it is a violation to the rights to self determination of the people of Bakassi by the Defendant. That the Federal Government of Nigeria has refused to resettle the Bakassi people 10 years after the Judgment of the International Court of Justice because they are a minority Ethnic group and since the said decision, the Bakassi people have been subject to every manner of violence by the Republic of Cameroon. They also alleged that they have been disenfranchised in successive general elections in Nigeria. That the refusal of the Defendant to resettle the Bakassi people into another conducive cultural, social and economic settlement amounts to a violation of the rights to freedom and discrimination. They alleged that they have been treated unequally and excluded in the affairs of the polity of Nigeria against their wishes.

The Defendant however raised a Preliminary Objection seeking for an order of the Court to strike out the Applicant's Application for want of jurisdiction.

LEGAL ISSUES

1. *Whether the Plaintiff has the locus standi and the authority of the people of Bakassi to institute this action on their behalf.*

2. *Whether considering the circumstances of this case, there is a cause of action against the Defendant/Applicant.*

3. *Whether in the circumstance of this case, this honourable Court has jurisdiction to entertain the suit.*

DECISION OF THE COURT

1. *The Court held that it has jurisdiction to adjudicate on the case brought before it.*

2. *That the Plaintiff has the locus and the authority of the people of Bakassi to bring the action before the Court.*

3. *That there is a valid decision of the International Court of Justice which this Court recognizes as an irrevocable decision.*

4. *That the 'Green Tea' Agreement having been implemented cannot be reopened as that will amount to a breach of due process of the law and International principles of law as provided in Article 19(1) of the 1991 Protocol of the Court and Article 38 of the Statute of the International Court of Justice.*

5. *The Court therefore decided to uphold the Preliminary objection and strike out the case for reasons stated above.*

RULING OF THE COURT

PARTIES

1. The Plaintiff is a public organisation registered in Nigeria with its offices at no. 270 Ikorodu Road, Anthony Village, Lagos, Nigeria and *no 4* Mazini Street, Wuse 4, Abuja, Nigeria respectively. The Plaintiff has over 2500 members across Nigeria including the indigenes of Bakassi.

2. The Defendant is the Federal Republic of Nigeria.

SUMMARY OF FACTS

3. The Plaintiff is a public right defender, an organization registered in Nigeria with the mandate to advance, uphold and defend fundamental rights of citizens, rule of law, public accountability, good governance etc, as shown in the Certificate of incorporation which the Plaintiff shall rely upon at the hearing of this application.

4. The Plaintiff has over 2500 members across Nigeria, including indigenes of Bakassi. The Defendant is constitutionally obliged to protect and observe the enforcement of the fundamental rights of all Nigerians, including the people of Bakassi Peninsula as enshrined in chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

5. The persons which this application is brought on their behalf are indigenes of Bakassi (Peninsula) Kingdom in Cross River State of Nigeria. The Defendant in 2002 pursuant to the suit brought against it by the Republic of Cameroun, at the International Court of Justice entered into a pact with the Republic of Cameroon, otherwise known as the 'Green Tree', ceding the entirety of Bakassi peninsula to the said Republic of Cameroon. The judgment of the International Court of Justice which adopted the said Green Tree Agreement based its decision on the Anglo - German Treaty of 1913 wrongly recognizing the Bakassi Peninsula as part of the territory of the Republic of Cameroon.

6. The Green Tree Agreement provided for alternative options to the people of Bakassi, inter alia. Remain in Bakassi and become Cameroon Citizens. Remain in Bakassi and retain their Nigerian Citizenship Retain their Nigerian Citizenship and relocate to Nigeria. The people of Bakassi were

not carried along in entering the above agreement in accord with their fundamental rights to self determination under the relevant international laws and conventions.

7. The people of Bakassi are also not part of the said 1913 Anglo German treaty upon which the Peninsula to the Republic of Cameroon without the consent of the Bakassi people, the government of the Federal Republic of Nigeria apparently violated the rights to self determination of the Bakassi people as provided under the African Charter on the Human and Peoples' Rights.

8. The gamut of the entire Green Tree Agreement with the respective options therein is without more a violation of the fundamental rights of the people of Bakassi to protect their nationality/cultural identity. There are old and superior treaties recognizing Bakassi Peninsula as part of the territory of Nigeria, including the 1811 treaty between the Calabar Chiefs and the British government which were deliberately ignored by the International Court of Justice in its judgment. The aim of the deliberate avoidance of the old treaties was to unwillingly deprive the Bakassi people of their ancestral homes, farmlands and settlement.

9. The rule is that such old treaty (ies) which is/are still binding take precedent over the Green Tree Agreement which is later in time. The act of depriving the people of Bakassi their respective ancestral homes, farmlands, cultural etiquette and traditional dignity against their wish by virtue of the said Green Tree Agreement and the judgment of the International Court of Justice is traumatic, cruel, inhuman and degrading treatment.

10. The federal Government of Nigeria has also neglected and or refused to resettle the Bakassi people, 10 years after the judgment of the International Court of Justice because they are a minority ethnic group, and since the said decision the people of Bakassi have been subjected to all manner of intimidations, violence by the indigenes of the Republic of Cameroon and in addition disenfranchise in successive general election in Nigeria; as they no longer exercise their rights to vote since election materials never get to them during general elections. The apparent refusal of the Federal Government of Nigeria to resettle the people of Bakassi into another conducive cultural, social and economic enclave/settlement amounts to violation of the rights to freedom from discrimination. The people of

Bakassi have therefore not been treated equally like other ethnic nationalities/groups in Nigeria since the decision of the International Court of Justice. They have been practically excluded in the affairs of the polity of Nigeria against their wishes.

12. The Plaintiff brought this action against the Federal Republic of Nigeria seeking the following reliefs:

(1) A DECLARATION that the refusal and or deliberate neglect of the Defendant to resettle the people of Bakassi into another conductive cultural and socio-economic setting since after the judgment of the International Court of Justice in 2002 is a total violation of the fundamental rights freedom from discrimination and cultural identity guaranteed under Section 42 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), Articles 2 and 22 (I) of the African Charter on Human and Peoples' Rights.

(2) A DECLARATION that the ceding of the Bakassi Peninsula to the Republic of Cameroon without the concurrence and consent of the People of Bakassi without more is in violation of their rights to self determination guaranteed under Articles 20 of the African Charter on Human and Peoples Rights.

(3) A DECLARATION that the act of entering into the Green Tree Agreement by the Federal Government of Nigeria with the Republic of Cameroon was for the purposes inter alia to unwillingly deprive the people of Bakassi their long aged cultural identity/nationality and socio-economic base therefore degrading and dehumanizing of their persons and origin contrary to their rights guaranteed under Section 34 of the 1999 Constitution (as amended) and Article 5 of the African Charter on Human and Peoples' Rights.

(4) AN ORDER compelling the Defendant forthwith to tender public apology to all the people of Bakassi Kingdom by publishing the same in 2 widely circulated national dailies.

(5) AN ORDER restraining the Defendant from handing over and or forcefully evacuating the people of Bakassi from their homeland or doing anything to interfere with their rights to choose their identity and nationality.

(6) AN ORDER OF INJUNCTION restraining the Defendant from taking any step that will jeopardize the residency and Nigerian nationality and identity of the people of Bakassi pending the determination of the case herein.

(7) AN ORDER that the Defendant pays to all the people of Bakassi resettlement compensation or inconvenience allowances in the sum of NGN 5 Million Naira each; resulting from aftermath of the Green Tree Agreement and or Judgment of the International Court of Justice.

ARGUMENT OF THE PARTIES

The Plaintiff relied on the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap. 10 Laws of the Federation of Nigeria 1990 and the Revised Treaty of Economic Community of West African State, 1993 to buttress their point. The Plaintiff argued that the Federal Republic of Nigeria has ratified and adopted the provision of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter 10 Laws of the Federation of Nigeria 1990, that Article 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act supra provides that:

> ***"The member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".***

The Plaintiff also referred to Articles 3 (1) and (2) which provides that every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law The Plaintiff submitted that the refusal of the Nigerian government to take active steps to resettle the people of Bakassi into a conducive cultural and socio-economic setting within the shores of Nigeria since the decision of the International Court of Justice in 2002, because they are a minority is dehumanizing, cruel, unwarranted, illegal and a gross violation of their constitutional rights of freedom from discrimination guaranteed under Sections 34 and 42 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The Plaintiff also relied on Articles 2 and 13 of the African Charter on Peoples and Human Rights.

13. The Plaintiff further relied on Article 20 (1) which provides that:

> ***"All people 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"***

Upon receipt of the Plaintiffs claim the Defendants filed a preliminary objection dated 5th November 2012 stating thus: **"An order of this Court dismissing/striking out the Applicant's application for want of jurisdiction. And for such further or other orders as this Court may deem fit to make in the circumstances".**

(1) The Defendants' application was based on the following grounds: That the Plaintiff lacks the required authority to sue on behalf of the Bakassi people being neither its Ruler, Native or authority governing the territory.

(2) That the Plaintiff has failed to show any express authority granted it by the Bakassi Community to bring this suit in a representative capacity before this Court.

(3) The Plaintiff has not properly described the group on whose behalf this claim is of having 2,500 members including indigenes of Bakassi, and has not pleaded its supporting registration documents. That the Bakassi people being represented are not named, specified or are legal persons by the description given.

(4) That on October 10, 2002, the International Court of Justice (ICJ) gave a judgment affirming the sovereignty of Cameroon over Bakassi Peninsula. That on June 12, 2006, the Republic of Cameroon and the Federal Republic of Nigeria entered into an agreement (Green Tree Agreement) on the Modalities of withdrawal and transfer of Authority in the Bakassi Peninsula. That the agreement was signed by the respective of the Presidents of the Republic of Cameroon and the Federal Republic of Nigeria and witnessed by the United Nations, Federal Republic of Germany, United State of America, French Republic and the United Kingdom of Great Britain and Northern Ireland.

(5) That pursuant to the Green Tree Agreement the Defendants formally handed over the last bit of its control over Bakassi Peninsula to the Government of Cameroon on August 14, 2008 and that the Bakassi Peninsula whose dwellers the Plaintiff purports to file this application on behalf of does not lie within the geographic territory of the Federal Republic of Nigeria hence the Defendant lacks the requisite sovereignty to administer over the said Bakassi Peninsula and the affairs of its dwellers. That the Defendants territorial space visibly excludes the 665 square kilometers of land space known as Bakassi Peninsula located at Ndian, now within Cameroon.

14. That the ECOWAS Community Court of Justice Protocol A/P1/7/91, which the Plaintiff relies on as the foundation of its right to institute this application before this Court expressly denies the Applicant locus standi to sue and that the Plaintiff lacks the requisite capacity to maintain an action for violation of fundamental right before this Court. That the action taken by the Defendants in ceding the Bakassi territory to the Republic of Cameroon was in conformity with the judgment of the ICJ and the Green Tree Agreement.

15. That the reliefs 4 and 7 of the Plaintiffs application are indeterminable and merely academic and as such ought to be expunged. Those reliefs 5 and 6 of the Plaintiff's application are indeterminable and merely academic and as such ought to be expunged. That there is no cause of action against the Defendants who acted in compliance with the judgment of the ICJ and the Green Tree Agreement in ceding the Bakassi Territory to the Republic of Cameroon: In support of the application the Defendants filed a 6 paragraph affidavit deposed by Nnamadi Ekwen of Kenna Partners, Counsel to the Defendants.

ISSUES FOR DETERMINATION

16. The Defendants submit the following issues for determination of the Court.

ISSUE 1:
WHETHER THE PLAINTIFF HAS THE *LOCUS STANDI* AND THE AUTHORITY OF THE PEOPLE OF BAKASSI TO INSTITUTE THIS ACTION ON THEIR BEHALF

17. The Defendant submits that the Plaintiff does not have the locus standi to sue; the Defendant relied on **Odafe Oserada** *v.* **ECOWAS Council**

of Ministers and 2 Others (Community Court of Justice law Report) Suit No. ECW/CCJ/APP/05/07, Judgment No. ECW/CCJ/JUD/01/08 this court which held that since the applicant had not been personally or by his organization suffered any harm he did not have the locus standi/ cause of action to bring the application. The application was thus held inadmissible. The Defendants submit that the right to sue can only be enforced by Statute, the Constitution *or* Customary Law or Contract, that the Plaintiff has not been conferred with any capacity to sue by the Constitution, Statute, Customary Law or Contract and the Plaintiff has not shown that its interests or rights of its wards are affected in anyway.

18. That the Plaintiff is neither the Ruler of Bakassi Kingdom nor its native. The Plaintiff has not substantiated its claims of having 2500 members including indigenes of Bakassi. The persons being represented by the Plaintiff are not named, specified or are legal persons by the description given. In challenging the authority of the Plaintiff to sue on behalf of a Community the Defendant relied on **Nwakafor v Agumadu (2009) 3 NWLR (pT. 1129) 638** where the court held that:

> ***"Where a Defendant desires to question the authority of a Plaintiff to sue on behalf or in the name of a community, it is not open to the Defendant to raise the objection by way of defence. The Defendant should at an early stage of the proceeding move the court to strike out the name of the community as Plaintiff; or by counter Affidavit filed at the time of the hearing of the application for order of court for leave to sue in representative capacity, endeavor to prevent the order from being made".***

19. The Defendant also referred to **A.G Anambra State** *v.* **AG Federation** (2007) 12 NWLR (PT. 1047) PG 4, SC. The Defendant is challenging the jurisdiction of the court to entertain this suit at the early state of the proceeding. The Defendant submits that the Plaintiff has no cause of action against the Defendant, that no wrong has been done by the Defendants requiring the court to grant the Plaintiff a remedy and learned counsel submitted that it is trite that the absence of an authority of a party who claims to sue in a representative capacity means that he has no locus standi to have brought the action. Defendant relied on **Olasa** *v.* **Ezimou** (2003) 17 NWLR PG 120 at PG. 148**.**

20. On the reliefs sought by the Plaintiff, the Defendant submits that relief's

4 (asking the court to compel the Defendant to tender an apology in 2 national dailies) and 7 (an Order compelling the Defendant to pay all the people of Bakassi resettlement for NGN5 million naira each) of the Plaintiffs application are indeterminable, merely academic and should be expunged and the ceding of the Peninsula is a concluded act, done pursuant to the Judgment of the ICJ that the Court cannot sit on an issue already decided by the ICJ. Referring to **Odedo *v.* INEC (2008) 17 NWLR (pt, 117) 554 at 600**, where the Supreme Court referred to an academic question as being merely theoretical with no practical utilitarian value to the Plaintiff even when the Judgment is delivered in his favour. That an academic issue or question is one that does not require an answer or adjudication by a court of law.

21. The Defendant referred to reliefs 5 and 6 of the Plaintiffs' application as undeterminable, completed acts and should be expunged, Relief 5 was an order restraining the Defendant from handing over and or forcefully evacuating the people of Bakassi from their homeland or doing anything to interfere with their rights to choose their identity and nationality while 6 was an order of injunction restraining the Defendant from taking any step that will jeopardize the residency and Nigerian Nationality and identity of the people of Bakassi pending determination of the case and cited the Supreme Court in **Soludo *v.* Osigbo** (2009) 18 NWLR PT 1173, page 298 where it was held that :

> **"A Court should not make an order of injunction on a completed act"**.

ISSUE 2
WHETHER CONSIDERING THE CIRCUMSTANCES OF THIS CASE THERE IS A CAUSE OF ACTION AGAINST THE DEFENDANT APPLICANT

22. The Defendant stated that a cause of action is a bundle of aggregate facts which the law recognizes as giving the Plaintiff a substantive right to claim, the Defendant relied on **Cookey *v.* Fombo (2005) 15 NWLR Pt 947 182 S.C**. The Defendant argued that a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are concerned; the Defendant again relied on **Cookey *v.* Fombo**. The Defendant states that there is no cause of action against the Defendant in this case in ceding the Bakassi Peninsula

to Cameroon, and that the Defendant acted in accordance with the judgment of the ICJ and the green tree agreement. The Defendant submits that the Plaintiff has no right of action to institute this suit, relied on **Bello *v.* A.G Oyo State (1986) 5 NWLR (pt. 45) 828**, where it was held that the court can only exercise its jurisdiction with respect to a right of action.

23. The Defendant relied on **Adigun *v.* A.G Oyo State (1987) 1 NWLR (pt, 53) 678 and Savage *v.* Uwaechia (1972) 3 S.C 214 at 221** and **Adesokan *v.* Adegorolu (1997) 3 SCNJ 1 at 16** where the Supreme Court per Fatayi-Williams and Ogundare JSC respectively held that a cause of action is the fact or combination of facts which give a right to sue consisting of a wrongful act and consequent damage. The Defendants submit that there is no wrongful act and therefore no consequential damage and urges the court to so hold.

ISSUE 3
WHETHER IN THE CIRCUMSTANCE OF THIS CASE, THIS HONOURABLE COURT HAS THE JURISDICTION TO ENTERTAIN THIS SUIT

24. The Defendant relied on **MiI Adm, Benne State** *v.* **Abayilo** (2001) 5 NWLR part 705 page 19 particularly at page 31 (Ratio 1) where the court held that, ***"jurisdiction is the authority which a court has to decide matters before it. It connotes the entire basis of taking cognizance of matters presented to the court formally for the purposes of deciding them".***

25. The Defendant also relied on **Madukolu *v.* Nkemdilim** (1962) 2 SCNLR 341 where the Supreme Court stated that for a Court to have competent jurisdiction to try a matter there must be a properly constituted panel, the subject matter of the case is within the court's jurisdiction and the case comes by due process of law upon fulfillment of any condition precedent to the exercise of jurisdiction. The Defendant submits that the overwhelming features in this case as contained in the Defendants Affidavit and preliminary objection prevent the court from exercising its jurisdiction.

26. The Defendant urged the Court to hold that the Plaintiff does not have locus standi that considering the circumstances of this case that there is no cause of action and this honourable court does not have jurisdiction to

entertain this suit. In the Plaintiffs reply to the Defendants' preliminary objection, the Plaintiff states that it has locus standi to bring this action and does not need the authority of the Bakassi Community to bring this action being a public defender. That the Plaintiff is a public defender law firm with a mandate to advance the rule of law, public accountability, good governance and defence of human right in Nigeria. The Plaintiff attached a copy of the Certificate of Incorporation and Article of Association (Exhibit LCA).

27. That the Bakassi Kingdom is a well known nation in Nigeria and hails from Cross River and the Plaintiff is a membership public defender and some of its members are in Bakassi Kingdom Peninsula. That the Plaintiff herein is not challenging the judgment of the International Court of Justice (ICJ) by this suit, but the violations of the rights of the Bakassi people recognized and guaranteed under the Nigerian Constitution, African Charter on Human and Peoples Rights including other international treaties and conventions which Nigeria is a signatory, and ratified and domesticated some of them.

28. That the Green Tree Agreement still recognizes and preserves the human rights, Nigerian nationality and residency rights of Nigerians living in Bakassi Peninsula. That the Defendant has the legal obligation to protect, respect and ensure the protection and enforcement of fundamental human rights of all Nigerians living in the Bakassi Peninsula pursuant to the Green Tree Agreement and that the Plaintiff highlighted the fact that this honourable court has in the past upheld the standi of public defenders like the Plaintiff to bring public interest litigation on behalf of a group of individuals.

PLAINTIFFS REPLY TO ISSUES RAISED BY THE DEFENDANT

ISSUE NO 1
WHETHER THE PLAINTIFF HAS THE LOCUS STANDI AND THE AUTHORITY OF THE PEOPLE OF BAKASSI TO INSTITUTE THIS ACTION ON THEIR BEHALF

29. The Plaintiff submits it has the locus standi, that it does not need the authority of the Bakassi people to bring this action being a public defender. The Plaintiff relied on the doctrine of action popularis or public interest litigation, stating that the argument that the Plaintiff needs the authority

of the Bakassi people is no longer the position in both the national and international realm. The Plaintiff relied on **SERAP** *v.* **UBEC** (unreported Suit No. ECW/CCJ/APP/08/08 to buttress their point that the Plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing.

30. The Plaintiff also relied on **Chief Ebrimah Manneh** *v.* **The Federal Republic of Gambia**, where it was held that the Court has jurisdiction to determine cases of violation of human rights that occur in Member States (para. 12, p8). The Plaintiff also relied on **SERAP** *v.* **President of The Federal Republic of Nigeria and 8 Ors.** to buttress their point on the standi of public defenders.

ISSUE NO 2:

31. The Plaintiff argued that it is not whether the Bakassi Peninsula was ceded legally but whether the fundamental human rights of Nigeria nationals complained of in the Plaintiffs' suit were violated.

    Stating that it made no difference whether the Nigerian Citizens living in Bakassi are within the Nigerian territory or not, once the Defendant fails in its duty to protect any of the rights complained of by Nigerians living in Bakassi Penisular a reasonable cause of action is made against it and that this is the basis upon which this suit is based.

ISSUE 3:

32. The Plaintiff states that the court has an unfettered jurisdiction in this suit Plaintiff relied on Alhaji **Hamman Tidjani** *v.* **The Federal Nigeria**. The Plaintiff submits that the violations complained of against the Defendants' took place after the judgment of the ICJ. The Plaintiff submits that the Defendants' argument on reliefs 4 and 7 are premature and remains part of the Substantive issue of the suit, urging this court to so hold.

ANALYSIS ON THE PRELIMINARY OBJECTION

33. The Court has the jurisdiction to adjudicate on matters of human rights violations that occur in Member States, Article 9 (4) of the protocol on the Community Court of Justice. The Court has also affirmed its stand in ensuring that human rights violations are addressed by allowing public

defenders to bring suit on behalf of groups of people. However the Plaintiff in this case is unable to show one Bakassi member, unable to satisfy the fact that, if the money was granted and the matter goes to full trail, how will the money get to the Bakassi people. The Plaintiff submitted that it has 2,500 members some of them Bakassi people, and this fact should have been proved, The Plaintiffs were unable to show by way of evidence the list of their members. It is trite law that he who alleged must prove the facts in the allegation. We found that this fact was merely stated and not substantiated. *See* **SERAP *v* Federal Republic of Nigeria**. Akin to the above is the issue of domestication of the African charter as part of the laws of the Federation of Nigeria. The Plaintiff relied on the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap. 10 Laws of the Federation of Nigeria 1990 and the Revised Treaty of Economic Community of West African State, 1993 to buttress their point that the Federal Republic of Nigeria has ratified and adopted the provision of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter 10 Laws of the Federation of Nigeria 1990, Does this make the African Charter on Human and Peoples' Rights less effective as an international law.? An ancillary point of great importance is the efficacy of international obligation *vis a vis* its effect in the national courts, even where same is domesticated. We are clear in our consideration in this context that international obligations once domesticated, retain their international quality**.** The material on **National Courts and International Rule of Law by Andre Nollkaemper at page 224**, is one of the reference points on the issue particularly where he stated that 'There is a large amount of state practice referenced below, that recognizes this and that seeks to maintain connections between an international norm and its national manifestations. So, even where such international law by way of a treaty is domesticated the argument that the constitution is superior cannot be applied as the international obligation retains its international quality.

34. On whether the Plaintiff has the locus standi and the authority of the people of Bakassi to institute this action on their behalf Learned Counsel for the Defendant submitted that the Plaintiff did not have the locus standi to sue, and he relied on **Odafe Oserada** *v.* **ECOWAS Council of Ministers and 2 Ors.** *(Community Court of Justice law Report)* Suit No. ECW/CCJ/APP/05/07 Judgment No.: ECW/CCJ/JUD/01/08 where this Court held that since the Applicant had not personally or by his

organization suffered any harm he did not have the locus standi/cause of action to bring the Application. On the other hand the Plaintiff submitted that it has the locus standi, and it did not need the authority of the Bakassi people to bring this action being a public defender, The Plaintiff relied on the doctrine of action popularis or public interest litigation, stating that the argument that the Plaintiff needed no authority of the Bakassi people and that it is no longer the position in both the national and international realm that it must arm itself with such authority and relied on the case of **SERAP** *v.* **UBEC (unreported)** suit No. ECW/CCJ/APP/08/08 to buttress their point that Plaintiff needed not show that he has suffered any personal injury or has a special interest that required to be protected to have standing. This Court is firmly resolved that the position of locus standi is explicitly stated in the case of **SERAP V. UBEC** Counsel to the Plaintiff relied upon which indicted that as a public interest matter brought by a public organization such as the Plaintiff required no authority of the people to bring an action of this nature to this Court.

35. On the second issue as to whether considering the circumstances of this case there is a cause of action against the Applicant, the Defendant submitted that there was no. cause of action but the Applicant/Plaintiff contended the stance of the Defendants that there was a cause of action as stated in their submission that it is not whether the Bakassi Peninsula was ceded legally but whether the fundamental human rights of Nigeria nationals complained of in the Plaintiffs' suit were violated and that it made no difference whether the Nigerian Citizens living in Bakassi are within the Nigerian territory or not, once the Defendant failed in its duty to protect any of the rights complained of by Nigerians living in Bakassi Penisular, there was a reasonable cause of action against the Defendant.

This fine point raised by the Plaintiff's Counsel is delicate and required careful consideration vis a vis the objection of the Defendant. As always a cause of action is proved when the pleadings show a bundle of aggregate of facts which the law would recognize as giving the Plaintiff a substantive right to a claim and in this regard the Defendant relied on **Cookey** *v.* **Fombo** (2005) 15 NWLR Pt. 947 182 S.C. Also we endorse that a cause of action consists of every fact and not just one fact which would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment.

Furthermore it is the bundle or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make a claim against the relief or remedy being sought. It is also the factual situation on which the Plaintiff relies to support his claim must be recognized by law as giving rise to substantive right, capable of being claimed or enforced against the Defendant, See **Ajayi** *v.* **Military Admin. of Ondo State** (1997) 5 NWLR (Pt 504) page 237 at pg 272 paras R-E. *See also* **Adimora** *v.* **Ajufo** (1988) 3 NWLR (Pt 80) pg1 and **Ogbimi** *v.* **Ololo** (1993) 7 NWLR [pt 304] pg 128 at 136.

36. Let us add herein that jurists have found difficulty in giving a proper definition to what a cause of action is all about. Black's Law Dictionary ninth Edition page 251 gave the definition of a cause of action thus:

> **'a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be - a) a primary right of the Plaintiff actually violated by the Defendant or b) the threatened violation of such right which violation the Plaintiff is entitled to restrain or prevent as in the case of actions of suits for injunction or c) it may be that there are doubts as to some duty or right or the right beclouded by some apparent adverse right or claim which the Plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property'.**

Another point related to the issue of a cause of action is the justiciability of an action in international law. It must be stated that not all disputes are suitable for judicial settlement to be suitable, the dispute must be justiciable. A dispute is justiciable if first a specific disagreement exists, and secondly, that disagreement is of a kind which can be resolved by the application of the rules of law by judicial (Arbitral) processes. In the case of **South West Africa ICJ Report 1962, 319 at 328**, the Court held that:

> **'..... it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of the dispute proves its non existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other'.**

Even though there are also discrepancies in the Plaintiffs' pleadings that contradict the Plaintiffs' response to the Defendants' preliminary objection but the cause of action as falling under Article 9(4) of the Protocol as amended under Article 3 of the Supplementary Protocol is not defeated by the said discrepancy mentioned.

37. As in the third issue on whether in the circumstance of this case, this Court has the jurisdiction to entertain this suit, the Defendant made reference to Relief 5 (an order restraining the Defendant from handing over and or forcefully evacuating the people of Bakassi by publishing the same in 2 widely circulated national dailies) and Relief 6 (an order of injunction restraining the Defendant from taking any step that will jeopardize the residency and Nigerian nationality and identity of the people of Bakassi pending the determination of this case. Bakassi peninsula cannot avail the Plaintiff because the area of dispute had already been handed over to the Republic of Cameroon before this case commenced. Also that in Relief 6 where the Plaintiff sought for an order that the Defendants pay to all the people of Bakassi resettlement compensation or inconvenience allowances in the sum of NGN5 Million Naira each; resulting from the aftermath of the Green Tree Agreement and the Judgment of the International Court of Justice, the Defendant argued that the Plaintiff was not entitled to same.

38. The Plaintiff responded that the court has an unfettered jurisdiction in this suit and relied on Alhaji **Hamman Tidjani *v* The Federal Nigeria** and submitted that the violations complained of against the Defendants' took place after the judgment of the ICJ and that the Defendants' argument on reliefs 4 and 7 are premature and that the same issue remained part of the substantive issue of the suit and she urged Court to so hold. The question of jurisdiction in international law proceedings as well as the national courts is an important one that must be examined in consonance in the perspective of international jurisprudence on the matter. As defined by **Terry D. Gill in his works on the World Court**, he stated that the term jurisdiction is used in two different senses. Its primary meaning refers to the power or authority of the Court to render a binding decision on the substance or merits of a case placed before it.

39. This is sometimes called mainline jurisdiction. The secondary meaning of jurisdiction relates to what is often called incidental jurisdiction. That comprises a series of miscellaneous and usually interlocutory matters

that can arise during the conduct of a case. These include the power of the court to decide a dispute as to its own jurisdiction in the case, its general powers to control the proceedings, its power to indicate provisional measures of protection. Where there is absence of an element or material element the court may lack jurisdiction to adjudicate on the matter. In addition after a judgment has been delivered the court has the power to interpret or to revise it under certain circumstances. It always derives from the Protocol on the court itself or the Rules of this Court. In the case of **Afolabi v. FRN** decided by this Court, the procedure specifically akin to the national court was imported and applied to defeat the power of the Court to determine the subject matter when the preconditions to assumption of jurisdiction were not fully met.

40. The Defendant relied on **Mil. Adm. Benue State** *v.* **Abayilo** (2001) 5 NWLR part 705 page 19 particularly at page 31 inter alia that, ***"jurisdiction is the authority which a Court had to decide matters before it. It connotes the entire basis of taking cognizance of matters presented to the Court formally for the purposes of deciding them"***, and relied on **Madukolu** *v.* **Nkemdilim** (1962) 2 SCNLR 341 where the Supreme Court stated that for a Court to have competent jurisdiction to try a matter there must be a properly constituted panel, the subject matter of the case is within the Court's jurisdiction and the case comes by due process of law upon fulfillment of any condition precedent to the exercise of jurisdiction and that the overwhelming features in this case as contained in the Applicants/Plaintiff claim and reply to the objection and the Affidavit to the preliminary objection prevented this Court from exercising its jurisdiction and urged the Court to grant the objection.

41. However in the Plaintiffs response to the Defendants' Preliminary objection the Plaintiff insists that the Green Tree Agreement and the Judgment of the ICJ are not the basis of their claim, despite labeling both acts unlawful and without the consent of the Bakassi people in their pleadings. The Plaintiff has canvassed enough grounds to show that the Court has jurisdiction in this case. With all the submissions made in this case and legal stance in this case this Court is clear in its opinion that where a case has determined the rights of the parties the case cannot be reopened to further re-litigate on the said rights except as provided by the statute or protocol relevant to the case in question and as stated above. From all indications the preliminary objection is sustained accordingly.

42. DECISION

1) That the Court has jurisdiction to adjudicate the case brought by the Plaintiff.

2) That the Plaintiff has the locus standi to bring this case before the Court.

3) That the Court has jurisdiction over the land space and Member States within the Economic Community of West African States and the peoples therein.

4) That there is a valid decision of ICJ which this Court recognizes as an irrevocable decision unless by ICJ itself as provided pursuant to its Statutes and Rules and no other Court including this Court can go into the rights of the parties already decided by ICJ in the case as mentioned hereinbefore.

5) That the Green Tea Agreement having been implemented cannot be reopened herein as that would amount to be in breach of due process of the law and international principles of law as provided pursuant to Article 19(1) of the Protocol of the Court 1991 and Article 38 of the Statute of International Court of Justice.

6) That in consequence of all the above, this Court is left with no option than to uphold the preliminary objection and strike out the case for lack of jurisdiction for the reasons stated above.

43. Each Party shall bear its responsibility for the costs of the action.

The Judgment is read in public this 3rd day of July 2013 in accordance with the Rules.

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

Assisted by **TONY ANENE-MAIDOH, ESQ.** - *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

19TH DAY OF JULY, 2013

SUIT N^{O}: ECW/CCJ/APP/09/13
JUDGMENT N^{O}: ECW/CCJ/JUD/19/13

BETWEEN
KARIM MEISSA WADE - *APPLICANT*

AND
REPUBLIC OF SENEGAL - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE HANSINE DONLI** - *MEMBER*
3. **HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ** - *MEMBER*

ASSISTED BY
MAITRE ABOUBACAR DJIBO DIAKITÉ - *REGISTRAR*

REPRESENTATION TO THE PARTIES :

1. **MAÎTRE CIRÉ CLÉDOR LY, DEMBA CIRÉ BATHILY, MOHAMED SEYDOU DIAGNE, MICHEL DE GUILLENCHMIDT** - *FOR THE APPLICANT.*
2. **MAÎTRE PAPA MOUSSA SOW, EI HADJ MOUSTAPHA DIOUF, SAMBA BITEYE, M. MOUSTAPHA MBAYE, ALY FALL, SOULEYE FALL, ABDOU KANE, SIMON NDIAYE, PAPA KHALY NIANG, WILLIAM BOURDON** - *FOR THE DEFENDANT.*

Human rights violation - Arrest and detention - Right to health - Freedom of movement - Prohibition of exit - Violation of the right to a fair trial - Interim measures - Admission of new pleas - Preliminary objection - Inadmissibility - Admission of new pleas - Article 37.2 of the Rules of Court - Expedited procedure - Article 59 of the Rules of Court.

SUMMARY OF THE FACTS

Mr Karim Meïssa Wade filed an Application before the ECOWAS Court of Justice on 10 April 2013 against the Republic of Senegal for breach of its international commitments resulting from its refusal to implement the Decision (Judgment No. ECW/CCJ/JUG/04/13 of 22 February 2013) delivered by the Community Court.

The Applicants accused the Defendant of criminal prosecution on the basis of special laws, including laws 81-53 and 81-54 of 10 July 1981 on the suppression of illicit enrichment and creation of the Court of Repression of illicit enrichment. They rely on the judgment of the Community Court concluding that the Respondent State violated political rights, privilege and immunity from jurisdiction, separation of powers and constitutional convergence and human rights, to freedom of movememnt and equality before the law, and justice, right to a fair trial, right to the presumption of innocence, right to an effective remedy) that the latter refuses to execute.

The Applicant alleges that this failure constitutes a violation of his human rights.

LEGAL ISSUES

Can the refusal of the Respondent State to enforce a Decision of the Community Court be invoked by the Applicant as a potential violation of his human rights and international commitments?

DECISION OF THE COURT

The Court in its Decision held that the Applicant's appeal against the Respondent State for the non-execution of his judgment of 22 February 2013, and the non-observance of its international obligations is inadmissible for lack of quality. Moreover, it does not have the power to analyze "in abstracto" the laws of the Member States and the potential violations of human rights.

JUDGMENT OF THE COURT

THE PARTIES

1. Mr. Karim Merssa Wade: assisted by Maîtres Ciré Clédor Ly, Demba Ciré Bathily, Mohamed Seydou Diagne, all Lawyers registered with the Bar Association of Senegal, and Maître Michel de Guillenchmidt, Lawyer registered with the Bar Association of Paris, Emeritus Professor and Honorary Dean of the University of Paris Descartes.

   The Republic of Senegal: represented by Mr. Mafall Fall, Judicial Officer at the Treasury, assisted by Maîtres Papa Moussa Sow, EI Hadj Moustapha Diouf, Samba Biteye, M. Moustapha Mbaye, Aly Fall, Souleye Fall, and Abdou Kane, all Lawyers registered with the Bar Association of Senegal, as well as Maîtres Simon Ndiaye, Papa Khaly Niang, and William Bourdon, all Lawyers registered with the Bar Association of Paris.

PROCEDURE

2. Mr. Karim Meissa Wade, through his lawyers, filed an Application before the Court on 10 April 2013 against the Republic of Senegal. He submitted in his initial memorial that in disregard for Judgment No. ECW/CCJ/JUG/04/13 delivered by the ECOWAS Court of Justice on 22 February 2013, the Republic of Senegal refuses to abide by its international commitments by its refusal to enforce that judgment.

3. In addition to his Application, he requested for an expedited procedure on the basis of Article 59 of the Rules of Procedure of the Court and also applied for provisional measures. Both applications were lodged on 10 April 2013 in separate pleadings.

4. On 29 April 2013, he requested the Court to admit new pleas-in-law, pursuant to Article 37(2) of the Rules of Procedure of the Court.

5. Through electronic means, the Republic of Senegal communicated to the Court Registry on 30 April a response to the application for expedited procedure, a memorial on preliminary objections, and it's Defence.

6. On 2 May 2013, the Republic of Senegal communicated to the Court Registry its observations on the application for expedited procedure.

7. On that same date, the Court heard the Parties on the request for expedited procedure and decided to bring the case under expedited procedure. The Court asked the Republic of Senegal to file its observations on the lodgment of new pleas in law by the Applicant, and also asked Mr. Karim Meissa Wade to file his memorial on the preliminary objections raised by the Republic of Senegal.

8. The Applicant therefore lodged his response to the Republic of Senegal's preliminary objections at the Court Registry on 9 May 2013.

9. The Republic of Senegal lodged on 10 May 2013 at the Court Registry its observations on the application for admission of new pleas in law filed by Mr. Karim Meissa Wade.

10. All the court processes and written pleadings were duly served on the Parties by the Court Registry.

11. At the hearing of 17 May 2013, the Parties pleaded on the requests for provisional measures, admission of new pleas in law, preliminary objections, and on the merits of the case.

THE FACTS OF THE CASE

12. Criminal proceedings were instituted against Mr. Karim Meissa Wade by Senegal on charges of illicit wealth. The proceedings were instituted on the basis of special laws, notably Law No. 81-53 and Law 81-54 of 10 July 1981 relating to the combat of illegal wealth and the creation of an anti illegal-wealth court. Together with a group of persons equally charged on the same counts of incrimination, he brought his case before the ECOWAS Court of Justice on 27 December 2012, asking the Court to find that the Republic of Senegal violated his political rights (privilege and immunity from prosecution, separation of powers and constitutional convergence) and his human rights (freedom of movement, equality of citizens before the law, and before the law courts, right to fair trial, right to presumption of innocence, right to effective remedy).

13. In its Judgment of 22 February 2013, the Court held that there was violation of freedom of movement by virtue of the illegal measure of prohibiting the Applicant from going outside the national territory, as well as violation of the right to presumption of innocence. The Court ordered the Republic of Senegal to remove the measure of prohibition adopted against the Applicant, debarring him from going outside the Senegalese territory.

14. After the above-cited judgment, the Senegalese authorities renewed the ban on the Applicant to travel outside the national territory, and as Mr. Karim Meissa Wade was about to take a flight bound for a foreign country, he was prevented from boarding the aircraft. Relying on that incident and on certain declarations made by the Senegalese authorities, he filed the instant application before the Court.

I. CONSIDERATION OF THE PROVISIONAL MEASURES SOUGHT

1.1 Arguments advanced by the Applicant

15. In his request for provisional measures lodged on 10 April 2013 on the basis of Article 21 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, and on the basis of Article 79 and related provisions of the Rules of Procedure of the Court, the Applicant argues that he entertains genuine fears that the Republic of Senegal may aggravate the dispute before the Court, as spelt out in the Initiating Application.

16. He pleads that after the 22 February 2013 Judgment of the Court, he was prevented by the Police from boarding an aeroplane which was bound to leave the Senegalese territory; that upon expiration of the deadline of 12 noon, 15 April 2013, imposed on him on 15 March 2013 by the Special Prosecutor of the Anti Illegal-Wealth Court, to provide justification for a sum of Seven Hundred Billion CFA Francs (CFA F 700,000,000,000) relating to matters which occurred while he was a Minister of State, whereas he had not been afforded the minimum conditions for assembling the required evidence which would exonerate him, he fears that he may be arrested by the Commission of Inquiry, in violation of the 22 February 2013 Judgment of the Court which found that only the *Haute Cour de Justice* may bring proceedings against him.

17. The Applicant equally argues that in the event of such highly probable arrest taking place, it would be based on a law that is inconsistent with the following instruments: the Constitutive Act of the African Union (Articles 3(e) and 3(h)) the African Charter on Human and Peoples' Rights (the Preamble), the Revised Treaty of ECOWAS (Articles 15(4) and 92) the Protocol on the Community Court of Justice, ECOWAS as amended by the 19 January 2005 Supplementary Protocol (Article 23(3)) the United Nations Charter (the Preamble), the Vienna Convention on the Law of Treaties (Article 26), the Universal Declaration of Human Rights (the Preamble and Article 8),

the International Covenant on Civil and Political Rights (Article 2(1), the Treaty of Rome (paragraphs 1(a) and 2(b) of Article 55, the Statute of the International Court of Justice (Article 38), the Dakar Declaration of Recommendation on the Right to Fair Trial (the African Commission, 9-11 September 1999), international custom, the general principles of law recognised by all civilised nations, the Constitution of the Republic of Senegal (the Preamble and Articles 98 and 10(2)).

18. He claims that these circumstances provide room for manifest urgency and danger of such nature as may cause irremediable violation of his rights, which he intends to safeguard through the instant suit.

19. Plaintiff Counsel therefore asks the Court, in the form of requests for provisional measures, to:

(i) Place an injunction on the Republic of Senegal to restrain it from obstructing the Applicant in future, either by use of the Police force, the Gendarmerie or any other State force, in his bid to board an aircraft to travel abroad, if he so desires;

(ii) Recall that, for the purposes of enforcing a court decision which has become *res judicata* such as the right acquired by the Applicant, which enables him to travel out of Senegal pursuant to the Judgment of 22 February 2013, the State of Senegal must employ all relevant State forces to ensure that such decision is respected;

(iii) Adjudge that the Special Prosecutor is bound by the provisions of the Article 7 which he invokes, to the effect that apart from discontinuing the proceedings, the only option left for him is the possibility indicated by the ECOWAS Court of Justice in paragraph 77 of its Judgment of 22 February 2013, i.e. that of relieving itself of the case and investing the proceedings in the competent body that is mandated to handle such cases, for the purposes of judicial proceedings against Karim Meissa Wade, if need be;

(iv) Order the Republic of Senegal to stay all proceedings and refrain from any action likely to aggravate the dispute or militate against its settlement, till the Court makes its decision on the matter, in accordance with Article 24 of the Protocol on the Community Court of Justice, ECOWAS as amended by the 19 January 2005 Supplementary Protocol on the Court.

20. At the hearing of 17 May 2013, Plaintiff Counsel pleaded before the Court that in their own estimation, the aggravation of the dispute has already occurred as a result of the arrest of Mr. Karim Meissa Wade, which took place on 17 April 2013. They therefore averred, in conclusion, that part of the requests for provisional measures had become devoid of purpose, and asked the Court to join the remainder of their requests to the merits of the case.

1.2 Arguments advanced by the Republic of Senegal

21. The Republic of Senegal contends that the Applicant filed the same requests both in the substantive application and the application for provisional measures. The Republic of Senegal maintains that the purpose for seeking provisional measures must be the adoption of interim measures, whereas the provisional measure sought in the substantive suit goes to the final settlement of the dispute. According to the Defendant State, there must be a connecting link between the substantive application and the application for interim measures in such manner that the object of the latter may appear as the inevitable consequence of the former (See CJEC Order of 8 April 1965, Guttmann, Case 18/165 R, 195). The Republic of Senegal argues that in the instant case, the similarity in the nature of the two applications renders the request for provisional measures manifestly inadmissible; that the application for provisional measures shall not prejudice the substantive application of the suit.

22. The Republic of Senegal asserts that in the instant case, the Applicant complains of on-going human rights violation without pinpointing which, and the Republic of Senegal goes on to addresses the risk involved in enforcing a domestic law whose mode of implementation falls outside the purview of the Court. The Defendant State affirms that in the procedure before the Court, the Applicant intentionally confuses unidentified rights and purported violation of such rights.

23. The Defendant State thus argues that the implementation of a duly passed law, regardless of the fears such implementation may generate in the mind of the Applicant, does not constitute a risk, and that any urgency invoked thereto shall not be hypothetical.

24. The Republic of Senegal further contends that the affirmation, which, in the eyes of the Applicant, establishes an urgency upon the presumption that as soon as a response to the formal notice is received, the Special Prosecutor

will issue a committal order against him, is ill founded. The Republic of Senegal asserts that the law referred to does not grant such powers to the Special Prosecutor, and that he has not at any rate arrogated such powers to himself. At that point, it is incumbent upon the Commission of Inquiry, upon receiving a response to the formal notice, and pursuant to Article 9 of Law No. 81-54 of 10 July 1981, to issue a committal order against the Applicant in respect of the case made on 17 April 2013 by the Special Prosecutor. This is due to the enormous risk of disturbance in public order and national security which may result from the procedure.

25. The Republic of Senegal maintains that the Court cannot indicate provisional measures which would result in hindering the normal and regular functioning of its judicial institutions, or render invalid the application of a domestic law in force. The Republic of Senegal therefore urges the Court to declare that it has no jurisdiction to order such measures, especially where the alleged risk pleaded is untrue, in the light of the relevant provisions of the aforementioned Law No. 81-84 of 10 July 198, corroborated by previous facts.

26. The Republic of Senegal equally argues that according to the case law of the Court of Justice of the European Union, the urgent nature of an application (...) must be assessed in the light of the necessity of having to adjudicate on it provisionally, so as to prevent a serious and irreparable harm from occurring to the party requesting that provisional measure.

    The Republic of Senegal further argues that to assess the **"serious"** and **"irreparable"** nature of a harm, the judge shall ask the question whether the harm in question will be removed, i.e. if the *status quo ante* will be restored, when the dispute in the substantive suit is settled. The Republic of Senegal avers that the Court has already held that the harm in question cannot be considered to be irreparable if the determination of the substantive suit enables the Applicant to regain his rights; that whatever the case may be, a condition which requires urgency shall be considered in particularly strict terms when the act at issue is temporary in nature; it contends therefore that the Court shall thus determine whether the temporary suspension of the Act in question shall not prejudice the decision on the merits of the case and deprive the said Act of its full effect, if the substantive application should be dismissed.

27. The Republic of Senegal further submits that in the prevailing circumstances of the case, the presumptuous or assumed violations and ill-founded allegations of urgency do not carry any purposefulness which may be heard

by any court of justice; that at that stage of the procedure, which represented the end of the preliminary inquiry, the central body in charge of the procedure is the Commission of Inquiry; that the acts and doings of the Special Prosecutor are enclosed in the bracket of a preliminary inquiry, and that as a result, the closure of that preliminary inquiry procedure marks the end of the mandate of the Prosecutor as a principal actor in the inquiry process.

28. The Republic of Senegal maintains therefore that the request for provisional measures has become devoid of purpose since the 15 April 2013 deadline has already elapsed and that the Commission of Inquiry, which is a judicial authority, has already brought Mr. Karim Meissa Wade under committal order; that such decision is not amenable to adjudication by the Court.

29. The Republic of Senegal also asks the Court to decide the request for provisional measures in a separate decision, since the very nature of such request demands that it be brought under a specific procedure, and may not be joined to the merits of the case as an ordinary incidental procedure. The Republic of Senegal equally avers that whatever the case may be, the decision of the Court on such an issue may neither be contained in a judgment on the merits of the case nor be deduced from that judgment, and it asks the Court to adjudge that there are no grounds for adjudicating upon the provisional measures sought.

1.3 Analysis of the Court in respect of the provisional measures

30. As to the case in issue, the Court recalls that Article 21 of its 19 July 1991 Protocol as amended by the 19 January 2005 Protocol, provides that: ***"The Court" each time a case is brought before it, may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable".***

That for that purpose, in the terms of Article 79 of the Rules of Procedure, ***"An application under Article 20 (now Article 21) of the Protocol shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for".***

31. That those provisions are complemented by Article 82(1), in the terms of which: ***"The decision on the application shall take the form of a reasoned order. The order shall be served on the parties forthwith".***

32. Consequently, pursuant to the above-cited provisions, the Court's decision in respect of the application for provisional measures shall be in the form of an order. Hence, the procedure governing the decision on the application for provisional measures is special and different from that for decision on the merits of the case, which is sanctioned by the judgment on the substantive application. By its very nature and purpose, which is that of preventing an irremediable violation of the rights which the parties intend to safeguard in the substantive application, and for the foregoing different reasons, the issue in an application such as a request for provisional measures may not be settled in the judgment on the merits of the case.

33. As far as the Court is concerned, it is the duty of each party to spell out its requests as clearly as possible, in adherence to the texts of the Court. The Court cannot take up that duty on behalf of the parties, in the determination of what provisional measures they wish to obtain. Therefore, a party cannot assert that the provisional measures it sought have become devoid of purpose, in part, without clearly indicating which of the requests are still subsisting, and at the same time ask the Court to join the subsisting requests to the merits of the case and adjudicate upon them in the final judgment. In accord with the rules, Plaintiff Counsel either had to abandon the application for provisional measures or else maintain them, so as to enable the Court decide in accordance with Article 79 and the related provisions of the Rules of Procedure of the Court.

34. The Court finds that granting provisional measures in accordance with the provisions of Article 79 and the related provisions of the Rules of Procedure, and in line with the case law of the Court, is conditioned as much by an emergence of a serious and irremediable harm resulting from the circumstances relating to the purpose of the dispute, as by the urgency to adjudicate upon it on a provisional basis. In the instant case, the Court notes that the Applicant himself acknowledges that part of the provisional measures he seeks have become purposeless and asks the Court to join the subsisting ones to the merits of the case.

35. The Court equally finds that, it can be concluded from the analysis of that assertion and the application thereto, that both the urgency which formed the basis of the measures sought and the provisional nature of the measures applied for, have no justification any more, since, when adjudicating on the merits of the instant case, any provisional measures sought therein must essentially be provisional in nature. The Court further finds that in connection with the substantive case before it, the provisional measures applied for have become devoid of purpose.

Consequently, the Court adjudges that at this stage of the procedure, there are no more grounds to adjudicate on the provisional measures sought and the Court sets aside all arguments, prayers and requests made by the Applicant relating to that issue.

36. The Court recalls that in this judgment, it must examine the Preliminary Objections raised by Senegal.

37. The Court is of the view that in the instant case, examining the Preliminary Objections regarding lack of jurisdiction of the Court, and the inadmissibility of the Application, must be done in regard to the nature of the dispute: in the light of both the Initiating Application and the application requesting the Court to admit new pleas in law considered together. Nevertheless, in accordance with Article 37, paragraph 4 of the Rules of Procedure, the Court shall first of all examine the admissibility of the new pleas-in-law as lodged.

II. CONSIDERATION OF THE APPLICATION FOR ADMISSION OF NEW PLEAS-IN-LAW

2.1 The new pleas-in-law lodged by the Applicant

38. In the application requesting for admission of new pleas in law, the Applicant avers that on 15 April 2013, upon the order of the Special Prosecutor of the Anti Illegal Wealth Court, the Research Section of the National Gendarmerie arrested him and subsequently, on the basis of the committal order issued by the inquiry commission of the Anti Illegal Wealth Court, he was charged and placed in detention from 17 April, 2013.

39. Drawing upon all the incidents that took place since he filed his case before the Honourable Court on 10 April 2013, he brings forth new pleas in law, in terms of arbitrary arrest, holding and detention, as well as violation of his right to effective remedy. He asks the Court to find these violations and award him Forty Five Billion CFA Francs (CFAF 45,000,000,000) for all the harms suffered, and order the withdrawal of the preventive measure placed on his freedom.

2.2 Arguments of the Defendant State regarding the new Pleas-in-law

40. The Defendant State, in its response to the application for admission of new pleas-in-law, maintains that there was neither arbitrary arrest nor arbitrary detention, on the grounds that the National Gendarmerie arrested,

held him in custody, and detained him upon a lawful basis pursuant to the Senegalese Code of Criminal Procedure and Law No. 8154 of 10 July 1981 on the creation of the Anti Illegal-Wealth Court.

41. It further pleads that there is also no violation of the right to effective remedy, that the Court has no powers to impose injunctions on it, and moreover, it finds the requests for reparation ill-founded.

2.3 The Court's analysis of the new Pleas-in-law

42. As to the issue regarding request for new pleas in law, the Court emphasises that paragraphs 2, 3 and 4 of Article 37 of the Rules of Procedure of the Court provide as follows:

> ***"No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.***
>
> ***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 normal procedural time-limits, acting on a report of the Judge-Rapporteur and after hearing the parties, allow the other party time to answer on that plea.***
>
> ***The decision on the admissibility of the plea shall be reserved for the final judgment."***

43. The Court recalls that at the hearing of 2 May 2013, it asked the Republic of Senegal to submit its written observations on the application for admission of new pleas in law, and that the Republic of Senegal did submit them on 10 May 2013. The Court will now examine the admissibility of the new pleas-in-law.

44. The Court is of the view that by definition, new pleas in law serve the purpose of complementing pleas already invoked in an initiating application, and they consolidate the objective sought before the Court in an initiating application. Even though new pleas in law must find their basis in the facts and law which were manifest during the procedure, their invocation by the requesting party shall not, by the same token, amount to a substantial alteration or modification of the initiating application, and thereby perform a fundamental change in the original purpose pursued.

45. A close look at the Initiating Application of Mr. Karim Wade brings to light the fact that it essentially concerns what he calls ***"the refusal by Senegal***

to enforce the 22 February 2013 Judgment of the Court." To buttress his stance, he relies on a number of texts which constitute the entire corpus of *"international obligations"* of the Republic of Senegal, declarations and acts by the Senegalese authorities, as well as the inaction of Senegal towards amending the laws complained of, which, according to him, violate in principle, the right to effective remedy and the right to fair trial.

46. The Court recalls that by its Judgment ECW/CCJ/JUG/04/13 of 22 February 2013, delivered in last resort, it adjudged and declared that ***"The ban imposed on the Applicants by the Public Prosecutor and the Special Prosecutor of the Anti Illegal-Wealth Court, to prevent them from going outside the national territory, is unlawful because it has no legal basis"***; that it ordered the removal of the ban imposed on the Applicants, since that measure had no legal basis.

47. The Court holds that regardless of the provisions of Article 22(3) of the 1991 Protocol on the Court, which states that ***"Member States and Institutions of the Community shall take immediately all necessary measures to ensure execution of the decision of the Court"***, the Republic of Senegal, only a day after the delivery of the above-cited judgment, i.e. on 23 February 2013, renewed the measure of ban imposed on Mr. Karim M. Wade, thus giving rise to his filing of a new application for admission of new pleas in law.

48. The Court notes that the said request, which was made by the Applicant in the course of the instant proceedings, and principally seeks to ask the Court to find ***"the refusal by Senegal to enforce the 22 February 2013 Judgment of the Court"***, and also consider his arbitrary arrest, holding and detention, and the violation of his right to effective remedy, on one hand, and award him the sum of Forty Five Billion CFA Francs (CFAF 45,000,000,000) for the harms suffered, and order the removal of the measure which deprives him of his freedom to travel outside the national territory.

The issues raised by the Applicant repose on a certain understanding of the Republic of Senegal of the content and scope of the 22 February 2013 Judgment of the ECOWAS Court of Justice; the Republic of Senegal, a Member State of ECOWAS, was of the view that it had served the Applicant with the measure of the ban on the basis of the provisions of the domestic law of Senegal, alleging to have repaired thus any illegality which may have vitiated the said measure.

49. Upon examining the Application for admission of new pleas in law, it becomes clear that the Application essentially brings forth concrete facts of human rights violation which occurred after the Court was seised with the case. The Applicant pleads these concrete violations in support of his claim that Senegal "refused" to implement the 22 February 2013 Judgment, in violation of its international obligations. It further pleads that the occurrence of those violations gives weight to the argument that the mere existence of the laws complained of, theoretically violate human rights, since the violations which were only anticipated in fear as at the time the case was originally brought before the Court, had finally become a reality. The Applicant therefore asks the Court to find that the violations in question had occurred and order reparation thereof.

50. In the light of the observations made above, the Court holds that the new pleas in law brought by the Applicant are well grounded on points of fact and law which became manifest in the course of the procedure, and that those new pleas in law are in line with the pleas in law contained in his Initiating Application. The Court holds that the facts concerning the matter of violation did occur a day after the 22 February 2013 Judgment of the ECOWAS Court of Justice was delivered, to the extent that the Defendant State did not bring evidence as to having complied with the provisions of the above-cited Article 22(3) of the 1991 Protocol, by way of adopting all the measures capable of enforcing the judgement. The Court holds that the points of fact and law thus invoked are a consequence of the non-execution of the Judgment of 22 February 2013, which the Applicant asks the Court to find. Considered as such, the Court holds that the new pleas in law are inseparably linked to the content of the Initiating Application, and are therefore admissible.

III. CONSIDERATION OF THE PRELIMINARY OBJECTIONS

51. For the consideration of the Preliminary Objections raised by Senegal, the Court adopts as basis for examining the matter, the Initiating Application filed by Mr. Karim Meissa Wade. To that end, the requests and orders sought by the Applicant need to be recalled, before a presentation of the arguments of each Party, and the analysis of the Court.

3.1 The purpose of the initiating Application

52. Mr. Karim Meissa Wade brought his case before this Court, firstly, as a result of the refusal by Senegal to respect its international obligations and

enforce the 22 February 2013 Judgment, and secondly, because of Senegal's presumed and potential violation of his human rights (right to effective remedy, presumption of innocence, equality of arms between the prosecution and the defence, the right not to be coerced to testify against oneself, and the right to keep silent) as a result of the absence in the anti illegal-wealth law, of appropriate measures to give effect to the human rights enshrined in and recognised by international human rights instruments. The Applicant requests the Court to ask the Republic of Senegal to pay to him the sum of Two Hundred Billion CFA Francs (CFA F 200,000,000,000) as reparation for the harms suffered, and to order that any proceedings instituted against him be terminated.

3.2 Principal orders sought by the Applicant and the measures requested by him

3.2.1 Orders sought by the Applicant

53. Mr. Karim Meissa Wade asks the Court to:

(i) Find that the Republic of Senegal did not respect its international obligations, in failing to take measures to effectively implement the decision made by the ECOWAS Court of Justice on 22 February 2013, and to order a withdrawal of the ban imposed on him to prevent him from going out of the national territory, and that his rights continue to be violated by the Republic of Senegal.

(ii) Find that the ECOWAS Court of Justice has already found in its Judgment of 22 February 2013 that proceedings may only be instituted against the Applicant by the *Haute Cour de Justice* pursuant to Article 101 of the Constitution of Senegal, and that the Court thus ordered that the Republic of Senegal must scrupulously respect the international instruments and internal laws, within the limits of the observance of the citizens' rights;

(iii) Find that the Republic of Senegal has not adhered to its international obligations, by way of ensuring that it's laws are in line with international human rights instruments and the general principles of law as recognised by all civilised nations, by adopting legislative or other measures which duly give effect to the rights recognised in the said instruments, notably:

(a) The right to effective remedy against any measure capable of violating the individual freedom of a person charged with an offence, and whose freedom may be denied by way of arrest based on the implementation of Law No. 81-53 and Law 81-54 of 10 July 1981 relating to the Combat of Illegal Wealth and the creation of the Anti Illegal-Wealth Court;

(b) Presumption of innocence, equality of arms between the prosecution and the defence, the right to have a say in one's own case and not be coerced to testify against oneself, and to keep silent, without such silence being ignored in the determination of one's guilt or innocence.

3.2.2 Measures requested by the Applicant

54. Mr. Karim Meissa Wade requests the Court to order the following measures:

(i) Suspension of Senegal from participation in all ECOWAS activities, for non-adherence to its international obligation "to immediately adopt all necessary measures to ensure execution of the decisions of the ECOWAS Court of Justice", notably the Court's Judgment of 22 February 2013, thus violating the rights of Mr. Karim Meissa Wade, by failing to comply with the order made by the same Court, to remove the travel ban placed on him to prevent him from travelling outside the national territory;

(ii) Alternatively, any appropriate measure to ensure that Senegal executes the judgment delivered by the ECOWAS Court of Justice;

(iii) That Senegal must respect its international obligations, by way of ensuring that Law No. 81-53 and Law 81-54 of 10 July 1981 relating to the Combat of Illegal Wealth and the creation of the Anti Illegal-wealth Court, are in line with international human rights instruments and the general principles of law as recognized by all civilised nations, regarding:

(a) The right to effective remedy against any measure capable of violating the individual freedom of a person charged with an offence, and whose freedom may be denied by way of arrest based on the implementation of Law No. 81-53 and Law 81-54 of 10 July 1981 relating to the Combat of Illegal Wealth and creation of the Anti Illegal-Wealth Court;

(b) Presumption of innocence, equality of arms between the prosecution and the defence, the right to have a say in one's own case and not be coerced to testify against oneself, and even to keep silent, without such silence being ignored in the determination of one's guilt or innocence;

(iv) That the Republic of Senegal must pay to the Applicant Two Hundred Billion CFA Francs (CFA F 200,000,000,000) as damages;

(v) That the Republic of Senegal must scrupulously respect the international instruments and the Constitution of Senegal, within the limits of the observance of the citizens' rights, and refrain from instituting proceedings against the Applicant, if necessary, but in the event of bringing him before justice, he must only appear before the *Haute Cour de Justice.*

(vi) That the Republic of Senegal must bear the costs.

3.2.3 Arguments by the Republic of Senegal

55. On preliminary grounds, the Republic of Senegal raises the issue of lack of jurisdiction of the Court. Armed with this plea in law, it contends that from the requests made in the Initiating Application filed by Mr. Karim Meissa Wade, he is either urging the Court for injunctions for certain acts to be carried out, or to restrain the Republic of Senegal from engaging in certain acts in connection with its domestic law, the proceedings against him, and the measures adopted along those lines; that it can equally be deduced from the application for admission of new pleas in law that the Republic of Senegal may have committed human rights violations which translate into an alleged arbitrary detention of the Applicant, on one hand, and the fact that Article 13(1) of Law No. 8154 of 10 July 1981 creating the Anti Illegal-Wealth Court violates the right to appropriate and effective remedy, on the other hand.

56. The Defendant State observes that altogether, the requests brought by the Applicant would lead the Honourable Court along the lines of making orders to the Republic of Senegal or adjudicating on decisions made by the domestic courts or on national legislative provisions. Thus, the Republic of Senegal avers that those requests seek to ask the Honourable Court to overstep the bounds of its jurisdiction, by interfering in the domestic judicial and legislative matters of the State of Senegal.

57. The Defendant State maintains that the Court is not empowered to examine such applications, because it has no remit to adjudicate on the court decisions which found charges against and detained the Applicant, nor sit and decide on the legislative provisions he complains of. It argues that in line with its consistently held case law, including its Judgment of 22 February 2013, the Court ***"... does not have the mandate to examine the laws of Member States of the Community..."*** nor the judgments made by the Member States. (Judgment of 22 February 2013, *Case concerning* **Abdoulaye Balde & 5 Others v. Republic of Senegal**, paragraphs 70, 71, 72); that the Court has no jurisdiction to examine applications seeking to overturn decisions made by the domestic courts of Member States, and that it is not a court of appeal or a court of cassation over decisions made by the national courts (Judgment of 7 October 2005, *Case concerning* **Jerry Ugokwe v. Federal Republic of Nigeria**; Judgment of 22 March 2007, *Case concerning* **Moussa Leo Keitc v. Republic of Mali**; Judgment of 28 June 2007*, Case concerning* **Alhaji Hammani Tidjani v. Federal Republic of Nigeria**; Judgment ECW/CCJ/JUD/03/11 of 17 March 2011; Judgment ECW/CCJ/JUG/06/12 of 13 March 2012).

58. It pleads further that the cited case law is in conformity with the new Article 9 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol on the Court.

59. It further submits that the application of this principle, as derived from the case law of the Court, is all the more justified and applicable to the instant case because there is a pending criminal procedure against the Applicant in the Republic of Senegal. It states that if the Court should adjudicate on the case lodged by the Applicant, it would amount to interfering in the judicial procedure of a Member State while the case is still pending before the law courts of that same State.

60. For all these reasons, and in the light of the Court's own settled law, as recalled above, the Republic of Senegal urges the Court to declare that it has no jurisdiction to examine the legality of Law No. 81-53 and Law No. 81-54 of 10 July 1981 on the Combat of Illegal-Wealth and the creation of the Anti Illegal-Wealth Court, and any decision made by the Commission of Inquiry of the Anti Illegal-Wealth Court, which is a domestic court of the Republic of Senegal.

61. In general terms, the Republic of Senegal asserts that the Honourable Court must declare that it lacks the jurisdiction to sit on all the requests altogether, as brought by the Applicant, since examining the case will eventually mean that the Court has overstepped the bounds of its jurisdiction, by interfering in the legislative and judicial matters of the Republic of Senegal.

62. Moreover, the Republic of Senegal maintains that the applications brought by the Republic of Senegal are inadmissible. To that extent, it invokes the res judicata of the Court's judgment of 22 February 2013, in affirming that certain requests made by the Applicant have already been addressed by the Court.

63. Finally, the Republic of Senegal pleads that since a pending criminal proceeding takes precedence over a concurrent civil proceeding in the same matter', the Honourable Court must stay proceedings on adjudicating upon the requests for reparation as made by Mr. Karim Meissa Wade, since those requests have a connection with the criminal proceedings instituted against him in Senegal.

3.2.4 Arguments by Mr. Karim Meissa Wade

64. Contrary to the assertions of the Republic of Senegal, Mr. Karim Meissa Wade submits that the Court has jurisdiction to adjudicate on the matter brought before it, and also that his requests are admissible.

65. Indeed, he argues that in the light of the settled case law of the Court, it is trite that within the meaning of Article 9(4) of Supplementary Protocol A/SP.1/01/05, simply invoking a case of human rights violation which falls under the purview of the Court suffices to establish the jurisdiction of the Court over that matter.

66. Furthermore, he submits that his substantive application as well as his application for admission of new pleas in law are prima facie admissible and are not manifestly inadmissible, since both applications are not anonymous, have not been submitted before another International Court for adjudication, and he alleges harms done against him as an individual. Thus, he alleges that the substantive application and the one applying for admission of new pleas in law are in conformity with paragraph (d), Article 10 of the said Protocol. He further pleads that the initiating Application and the application for admission of new pleas in law are in agreement with the conditions prescribed by Articles 32 and 33 of the Rules of Procedure of

the Court. He finally affirms that the subject-matter of the proceedings was clearly stated in the Initiating Application and the application requesting for admission of new pleas in law.

67. As regards invoking *res judicata* as a ground for inadmissibility of the applications, as argued by the Republic of SenegaI, Mr. Karim Meissa Wade avers that such an argument may only be admitted when three conditions are established: identical subject-matter, identical cause and identical parties. But, according to him, in the instant case, there is no identical feature between the Application now before the Court and the one which culminated in the Judgment of 22 February 2013, in terms of parties to the case, the subject-matter and the cause.

68. He therefore pleads that the applications grounded on his arbitrary detention and on the refusal by the Republic of Senegal to enforce the decisions of the Court or to bring the domestic law of Senegal in line with the international legal instruments on human rights which it has ratified, were never brought before the Honourable Court. He further states that, similarly, the requests relating to payment of damages for arbitrary detention or for refusal by Senegal to implement the measure of withdrawal of the travel ban placed on him to prevent him, from going outside the national territory, were never submitted before the Court. He thus concludes that the pleas-in-law drawn from *res judicata* for the purposes of asking the Court not to countenance his new requests are neither well founded nor relevant, and that such pleas in law must be dismissed.

69. Finally, with regard to the argument advanced by the Republic of Senegal that a pending criminal proceeding takes precedence over a concurrent civil proceeding in the same matter', he affirms that this principle is solely relevant to the domestic legal order, and upon the fulfilment of two conditions: (1) the same matter must have been submitted before the civil division and the criminal division of the courts (2) the rule must be invoked in courts belonging to the same legal order. In support of this stance, he argues that his Application before the Honourable Court, which seeks to bring sanctions against the Republic of Senegal for human rights violation against him, is entirely different from the criminal proceedings cited by the Defendant State. That, furthermore, it is clearly obvious that there is no structural link between the ECOWAS Court of Justice and the domestic courts of Senegal. Besides, he affirms that the rules of competence of the respective courts are not the same, and concludes that the said argument put forth by the Republic of Senegal must be dismissed by the Court.

3.3 Analysis of the Court in respect of the Preliminary Objections

As to the jurisdiction of the Court

70. Senegal maintains that the Court lacks jurisdiction to examine the domestic laws of Member States and the decisions made by the courts of the Member States. Conversely, the Applicant asserts that by simply invoking human rights violation in a matter, one provides a ground to establish the jurisdiction of the Court over that matter.

71. In the light of the arguments submitted by Senegal, the Court recalls that it has no mandate to examine the laws of Member States of the Community in *abstracto*, nor the power to do same in respect of decisions made by the domestic courts of the Member States. The Court made this abundantly clear in its Judgement of 27 October 2008 in the *case concerning* **Hadijatou Mani Koroou v. Republic of Niger**, and reiterated that case law in its judgment on **Hissein Habre v. Republic of Senegal**, and in its Judgment of 22 February 2013 on the *case concerning* **Abdoulaye Balde v. Republic of Senegal**, paragraphs 70, 71 and 72.

72. Nevertheless, the Court holds that simply invoking a case of human rights violation in a matter suffices to establish the Court's jurisdiction in that matter. This principle is derived from the interpretation of Article 9, paragraph 4 of the 19 January 2005 Supplementary Protocol and upheld by the Court in its Judgment of 8 November 2010 in the *case concerning* **Momodou Tandjo** *v.* **Republic of Niger**.

73. Besides, as stated in the **Hadijatou Mani Koraou** *case*, the Court holds that in the area of Human Rights, its jurisdiction is limited to ensuring the protection of an individual's rights when he is a victim of violation of those rights which are recognised as his, and the Court does so by examining concrete cases brought before it. To that end, the Court shall not overstep the bounds of its core jurisdiction, which is that of adjudicating on concrete cases of human rights violations, and sanctioning such where necessary.

74. The Court notes that this aspect of the Application by Mr. Karim Meissa Wade deals with the legal consequences of maintaining Law No. 81-53 and Law No. 81-54 of 10 July 1981 relating to the Combat of Illegal Wealth and the creation of the Anti Illegal-Wealth Court, in their current state, on the human rights he is laying claim to. Notably, he affirms that by their mere existence, the said laws are contrary to the international obligations of the

Republic of Senegal and they violate the right to appropriate remedy, presumption of innocence, equality of arms between the prosecution and the defence, the right not to be coerced to testify against oneself and the right to keep silent. He further pleads that if those laws were to be applied, they would violate the human rights stated above, to his prejudice.

75. The Court holds that its jurisdiction in human rights violation supposes, in principle, that the person bringing the matter before the Court must in actual fact be a victim of the violation he alleges. In that regard, the jurisdiction of the Court does not consist in examining the domestic laws of a Member State in *abstracto*, or in assessing whether such domestic laws are consistent or not with the Member State's international obligations. The alleged violation must have resulted from an actual implementation of the law, to the detriment of the applicant in question. To that effect, mere presumptions or conjectures do not suffice. As such, the Court, in its Judgment of 22 February 2013, has already held that it has no jurisdiction to examine in *abstracto* Law No. 81-53 and Law No. 81-54 of 10 July 1981 relating to the Combat of Illegal Wealth and the creation of the Anti Illegal-Wealth Court. The Court therefore holds that it shall be appropriate for the Parties to abide by that ruling.

76. Now, as at the date of the Initiating Application, the only concrete violation alleged by the Applicant concerns the ban imposed on him to prevent him from going out of the national territory, which was alleged to have been renewed by the Republic of Senegal after the Judgment of 22 February 2013 by the Court. The Court is of the view that to examine such a violation would mean that the Court will have to determine whether the attitude and acts of the Senegalese authorities are consistent with the obligations upon Senegal in respect of the said Judgment of 22 February 2013 delivered by the Court. In that regard, the request brought by the Applicant deals **fundamentally** with having to examine Senegal's defaults regarding its Community obligations. The Court thus adjudges, with regard to this issue, that the case brought before it for adjudication does not **principally** concern human rights violation. Consequently, the Court adjudges that it lacks the jurisdiction to examine virtual or potential human rights violations as alleged by Mr. Karim Meissa Wade.

IV. AS TO THE MERITS OF THE CASE

77. The Applicant requests in his Initiating Application that the Court may find that Senegal's non-execution of the Court's Judgment of 22 February 2013

constitutes a default of the Republic of Senegal on its international obligations. Again, the Applicant puts forth the argument that such default equally arises from Senegal's refusal to bring its laws on illegal wealth in line with the international commitments in question. He therefore asserts that as a consequence, the measures already adopted by Senegal and those yet to be adopted in connection with the said laws may virtually or potentially violate his rights. He equally asks the Court to order sanctions against the Defendant State.

4.1 Regarding violations stemming from the Republic of Senegal's non execution of the Judgment of 22 February 2013

78. The Court holds that the core of the dispute before it, going by Karim Meissa Wade's Application of 10 April 2013, partly concerns asking the Court to examine Senegal's default on its international obligations, and partly concerns a request before the Court to examine in *abstracto* the domestic laws of Senegal pertaining to illegal wealth, and the virtual or potential violation of his human rights thereto.

79. In that light, the Court recalls that Article 9(1)-d and the new Article 10 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol provide respectively:

> **Article 9(1)-d:** ***"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"***
>
> **Article 10(a):** ***"Access to the Court is open to (...) Member States, and unless otherwise provided in a Protocol, the President of the Commission, where action is brought for failure by a Member State to fulfil an obligation.***

Thus, even if these provisions confer jurisdiction on the Court to examine failure by Member States to honour their obligations, pursuant to the ECOWAS Treaty and other derived texts adopted within the framework of ECOWAS, the Court can only be seised with such cases as are brought by an ECOWAS Member State or by the President of the ECOWAS Commission.

80. As regards the enforcement of judgments of the Court, Articles 15(4) and 77(1) of the Revised Treaty of ECOWAS provide:

Article 15(4): ***"Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies."***

Article 77(1): ***"Where a Member State fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that Member State."***

On its part, Article 22 (3) of the Protocol on the Court provides: ***"Member States and Institutions of the Community shall take immediately all necessary measures to ensure execution of the decision of the Court."***

The combined effect and cross-referencing of these provisions is that, the enforcement of the judgments of the Court of Justice of ECOWAS is not an option but an obligation upon the Member States and Institutions of the Community, and the Member States and Institutions of the Community shall demonstrate, through measures taken by them, their will to ensure the execution of such decisions.

81. From all the provisions cited above, it is apparent that the dispute which may arise out of the non-implementation of a decision made by the Court, falls within the domain of having to examine the failure of Member States to fulfil their obligations, because such a dispute essentially has to do with determining whether the State dragged before the Court acted in line with its primary obligations regarding the Community law (The Revised Treaty of ECOWAS and The Protocol on the Community Court of Justice), by respecting the binding force of the judgments of the Court and by ***"...taking immediately all necessary measures to ensure execution of the decision of the Court."***

82. In terms of the request for suspension of the Republic of Senegal from participating in all ECOWAS activities, the Court makes it clear that a mechanism is provided under Supplementary Act A/SP.13/02/12 of 17 February 2012 on the Legal Regime of Sanctions, which sets out the obligations of Member States and prescribes sanctions for noncompliance. In its Article 2(3), the said instrument enshrines respect for the decisions of the ECOWAS Court of Justice as one of the categories of obligations binding on the Member States, and whose non-implementation may call for sanctions. The instrument clearly and undoubtedly portrays the frame of mind of the Community law, as to the content of the obligations that may call for the application of Articles, 9(1)-d and 10(a) of the Protocol on the

Court in the existing Community legal order, the cited Supplementary Act constitutes an auxiliary means through which the Court may interpret and apply the said Articles.

83. In the light of the foregoing, the Court adjudges that in compliance with paragraph (1) -d of the new Article 9 and paragraph (a) of the new Article 10 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, it has jurisdiction to examine any dispute relating to failure by a Member State to implement a decision made by the Court. **Nevertheless, the Court finds that in the terms of the Article 10 referred to above, actions for failure by a Member State to fulfil its obligation may only be brought by a Member State or by the President of the ECOWAS Commission. Consequently, an application lodged on such subject-matter by an individual or corporate body other than a Member State and/or the President of the Commission, shall be declared inadmissible, for lack of *locus standi.***

84. The Court therefore adjudges that in the instant case, the Application lodged by Mr. Karim Meissa Wade against the Republic of Senegal for non-execution of the Judgment of 22 February 2013 and for non-adherence to its international obligations, is inadmissible on the same ground.

4.2 Regarding violations stemming from failure by the Republic of Senegal to bring the laws on illegal wealth in line with its international obligations

85. Mr. Karim Meissa Wade complaints that the laws applied to him by the Republic of Senegal are inconsistent with the latter's international obligations. The obligations in question are not international obligations in general, but in specific terms, obligations the Member States are subject to under the Community legal framework. Here, one cannot rule out the fact that obligations which are international in origin, such as those contained in international human rights instruments, form an integral part of the Community legal order, in so far as by way of an express statement of recognition made in texts relevant to the Community, the Member States reaffirm their allegiance to and express their willingness to be bound, within the ECOWAS framework, by those obligations. **The onus is on the party that invokes such instruments of international origin, to demonstrate that the obligations contained therein are equally binding on the Member States, within the Community framework of ECOWAS.**

86. Furthermore, the request before the Court, to examine whether the Senegalese domestic law on illegal wealth is consistent with its international obligations, is synonymous with asking the Court to examine those laws in *abstracto*. The Court lacks the jurisdiction to do so and it has had occasion to point this out clearly in many of its decisions. (See: Judgment on the *Case concerning* **Hadijatou** *v.* **Republic of Niger**; Judgment of 22 February 2013 on the *Case concerning* **Abdoulaye Balde and 5 Others** *v.* **Republic of Senegal** - paragraphs 70, 71 and 72). The Court adjudges therefore that the request cannot thrive, and it is dismissed.

4.3 Regarding violations stemming from new pleas in law

87. The Applicant alleges that his arrest and detention are arbitrary because they were effected on the basis of the anti illegal-wealth laws, which violate his right to effective and appropriate remedy. He therefore asks that the measure, which deprives him of his freedom, be removed.

88. The Court adjudges, from the proceedings of the case-file which culminated in Judgment No. ECW/CCJ/JUD/04/13 of 22 February, whose non-enforcement is invoked, that the Senegalese authorities arrested and detained Mr. Karim Meissa Wade on the basis of the laws complained of. Now, the Court, in the aforesaid judgment, adjudged and declared ***"That it has no jurisdiction to examine the lawfulness or otherwise of the reactivation of Law 81-53 of 19 July 1981 relating to the Combat of Illegal-Wealth and of Law 81-54 creating the Anti Illegal-Wealth Court."***

89. The Court notes that the Applicant's allegation of violation of the right to effective remedy is understood in the instant case as the absence of appeal proceedings against the decisions of the Commission of Inquiry of the Anti Illegal-Wealth Court, and he further pleads that there is no avenue available to him to appeal against the measures adopted by the said Commission, which could harm his rights and interests.

The Court's view is that the absence of an appeal procedure against the decisions of the Commission of Inquiry stands for the non-existence of a two-tier system of Courts. In that regard, the Court recalls that in its Judgment of 22 February 2013, it already adjudicated on that alleged violation by holding in paragraph 72 that ***"...it has no mandate to examine the national laws of Member States or to review decisions made by the domestic courts of Member States".*** Consequently, the Court adjudges that that plea in law fails and must be dismissed.

90. Besides, in line with its settled case law, the Court holds that the arrest and detention in question are lawful and therefore not arbitrary. Consequently, the Court may not order the release of the Applicant as requested by him; the procedure put in place did not commit any human rights violation pursuant to Article 6 of the African Charter on Human and Peoples' Rights, which provides: ***"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".***

4.4 Regarding the reparations requested for

91. The Applicant requests the Court to ask the Republic of Senegal to pay to him the sum of Two Hundred Billion CFA Francs (CFA F 200,000,000,000) as damages for violations resulting from the non-enforcement of the Judgment of 22 February 2013, and also award him the sum of Forty Five Billion CFA Francs (CFA 45,000,000,000) for the harms suffered as a result of violations of his right to effective and appropriate remedy in connection with his arbitrary arrest and detention.

The Court observes that, upon considering the case brought by the Applicant, it found none of the human rights violations he invoked. The Court therefore holds that the requests for reparation made by him are ill-founded and must consequently be dismissed.

92. On the other hand, the Republic of Senegal asks on alternative grounds, that Mr. Karim Meissa Wade be spared any penalty in connection with having to pay costs; but requests that he be asked to pay One Billion CFA Francs (CFA F 1,000,000,000) for abuse of Court process and for discrediting the Republic of Senegal on the international scene (whereas allegedly Senegal is well known for respecting human rights), and also for causing the Republic of Senegal to incur huge financial costs in relation to legal fees for lawyers, conduct of research, etc.

93. The Court finds that reparation of harm may only be ordered upon the condition that the harm in question is established to have really occurred, and that there is found to have existed a link of cause and effect between the offence committed and the harm caused. But, in the instant case, the Republic of Senegal does not demonstrate in any way its allegations regarding abusive or vexatious court process, nor does the Republic of Senegal establish the discredit it may have suffered at the international level, as a

result. For these reasons, the Court holds that the request made by the Republic of Senegal cannot thrive, and is dismissed by the Court.

94. As regards costs, in accordance with paragraph 4, Article 66 of the Rules of Procedure of the Court, in the terms of which, ***"where each party succeeds on some and fails on other heads, or where the circumstances are exceptional; the Court may order that the costs be shared or that the parties bear their own costs,"***and pursuant to the discretionary power thereby conferred on the Court, the Court adjudges that each Party shall bear its costs.

The Court equally adjudges that there are no grounds for adjudicating on the other pleas in law brought.

DECISION

For These Reasons

95. The Court,

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

As to provisional measures

- **Adjudges** that there are no further grounds for adjudicating on the provisional measures sought;

As to new pleas in law

- **Declares** that the new pleas-in-law claimed by the Applicant are admissible, in that they are inseparably linked to the subject-matter of the Initiating Application;

As to preliminary objections

(1) **Adjudges** that it has no jurisdiction to examine Law No. 81-53 and Law 81-54 of 10 July 1981 relating to the Combat of Illegal-Wealth and the creation of the Anti Illegal-Wealth Court;

(2) **Adjudges** that it has no jurisdiction to examine whether or not the domestic laws of Senegal in respect of illegal wealth are consistent with the international obligations of Senegal;

(3) **Adjudges**, nevertheless, that simply invoking human rights violation in a case suffices to establish the jurisdiction of the Court over that case;

(4) **Adjudges** in the instant case that it has no jurisdiction to examine allegations of virtual or potential human rights violation;

As to the merits of the case

(5) **Adjudges** that it has jurisdiction to examine actions brought for failure by an ECOWAS Member State to honour its obligation;

(6) **Adjudges**, on the other hand, that in the instant case, the Application brought by Mr. Karim Meissa Wade, in the aspects relating to requests before the Court to examine failure by the Republic of Senegal to fulfil its Community obligations, are inadmissible, for lack of *locus standi*;

(7) **Adjudges** that the enforcement of the judgments of the Court of Justice of ECOWAS is not an option but an obligation upon the Member States and Institutions of the Community, pursuant to Article 15(4) of the Revised Treaty of ECOWAS;

(8) **Adjudges** that the arrest and detention of Mr. Karim Meissa Wade are lawful and therefore not arbitrary nor a violation of Article 6 of the African Charter on Human and Peoples' Rights;

(9) **Adjudges**, consequently, that the Court may not grant the Applicant's request to be released, since the procedure is still pending before the domestic courts;

(10) **Adjudges** that the requests for reparation made by Mr. Karim Meissa Wade are ill-founded and are thus dismissed;

(11) **Equally dismisses** the requests for reparation made by the Republic of Senegal, since the proceedings instituted against the Republic of Senegal by the Applicant is neither vexatious nor an abuse of court process.

As to costs

The Court, in applying its discretionary power, adjudges that pursuant to paragraph 4, Article 66 of the Rules of Procedure of the Court, each Party shall bear its costs.

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

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

HON. JUSTICE AWA NANA DABOYA - *PRESIDING*

HON. JUSTICE HANSINE N. DONLI - *MEMBER*

HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ - *MEMBER*

ASSISTED BY:
MAITRE DJIBO ABOUBACAR DIAKITÉ - *REGISTRAR*

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

HOLDEN IN ABUJA, NIGERIA

ON THURSDAY, THE 3RD DAY OF OCTOBER, 2013

SUIT N^{O}: ECW/CCJ/APP/04/07
RULING N^{O}: ECW/CCJ/RUL/11/13

BETWEEN

1. SIGIMUND BUCKNOR
2. BELL KWENTO
3. HARRISON OSSAI
4. PRECIOUS CHINAKA
5. NKECHI IBREDEM-EQUERE
6. KEMIE OYELOLA
7. EUNICE AYOKO
8. DONALDSON OKOROTE
9. LINDA NNOKE (NEE IMOKE)
10. FOYE JOHNSON
11. ADEFEMI ABIODUN ADESANYA
12. OLAYINKA SHOGUNWA
13. BOSEDE MOGBA
14. OYELOLA AJAKAIYE
15. OBIANUJU ONYIA
16. PAT AIGBEAKEAM
17. YAKUBU NASAMU
18. AKO UMUNNA
19. OBIORA OKOYE
20. CHIDI ODILEKE
21. AUSTIN ABU
22. INYENE HARRY

APPLICANTS

23. CHIDINMA ANYANWU
24. ALICE OCHOLI
25. JANE DAVIES EKE
26. CHARLES IYOLA
27. ABISOYE ABIODUN OKUNOLA (NEE KOSOKO)
28. TRACY FESTUS
29. OKECHUKWU NWANNE
30. CHIOMA OSUJI (NOW CHIAMAKA-ANOKWURU)
31. MUHAMMED ISAH (AKA MOIZA)
32. EBELE DIKE
33. RICHARD ORILABAWAYE
34. VICTORIA IHEOHA
35. CHARLES ONYEBUEKE
36. CHINWE CHIDI OKONKWO
37. OLUGBEMIGA ORESANYA
38. ADEKUNLE ALARAN
39. MARY SAMUEL-IPAYE
40. GABIREL AMEH
41. FUNMILOLA SHOMALA
42. MOJI ESAN
43. OLALEKAN MURITALA
44. DAVID EFANGA
45. OLAKUNLE ADEPOJU
46. BELVIS OJULUM
47. 0DION AKHELUMEKE
48. STPEHEN MAHAJA
49. SALISU DANJUMA
50. NICHOLAS ODIGIE
51. VERONICA PAUL
52. IBIFURO DEBISI
53. HOPE ONONJU
54. BLESSING GEORGE-OBI
55. NEEMAT IBRAHIM

APPLICANTS

56. RONKE SHONOIKI
57. CHIDINMA RUFINA NGOBIDI
58. VIVIAN CHINDAH. O
59. UJU AGU
60. QUEENIE GODWIN
61. NGOZI OLISEMENEOGOR
62. AUSTIN EMIATOR
63. PERPETUA KWURUE
64. ADUNOLA BAMGBELU-JEMILUYI

APPLICANTS

AND

1. MTN NIGERIA COMMUNICATIONS LTD.
2. AMINA OYAGBOLA, HR EXECUTIVE
3. AKIN BRAITHWAITE,
CUSTOMER RELATIONS EXECUTIVE,
MTN NIGERIA COMMUNICATION LTD.
4. THE FEDERAL REPUBLIC OF NIGERIA
5. THE MINISTER FOR LABOUR AND PRODUCTIVITY OF THE FEDERAL REPUBLIC OF NIGERIA
6. THE EXECUTIVE VICE-CHAIRMAN / CEO-NIGERIA COMMUNICATIONS COMMISSION OF THE FEDERAL REPUBLIC OF NIGERIA
7. ATTORNEY-GENERAL OF THE FEDERAL REPUBLIC OF NIGERIA

DEFENDANTS

COMPOSITION OF THE COURT
1. HON. JUSTICE HANSINE N. DONLI - *PRESIDING*
2. HON. JUSTICE M. BENFEITO RAMOS - *MEMBER*
3. HON. JUSTICE ANTHONY BENIN - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **ADETUNJI ADEDAYIN A. & SEGUN GBOLAHAN** - *FOR THE APPLICANTS.*
2. **A. A. ADEGBONMIRE, O. IYAYI (MRS) & M.I. OGUNWUMIJU** - *FOR THE 1ST, 2ND & 3RD DEFENDANTS.*
3. **CHIESONU I. OKPOKO** - *FOR THE 4TH & 7TH DEFENDANTS.*
4. **NNANA O. IBOM & E. G. OKEMINI** - *FOR THE 5TH DEFENDANT.*
5. **OLUWADARE KOLAWOLE** - *FOR THE 6TH DEFENDANT.*

-Jurisdiction- human rights violation -Failure of State to act -State responsibility.

SUMMARY OF FACTS

The Applicants' case is that they were duly confirmed employees of the 1st Defendant and their employments were unlawfully terminated contrary to laid down procedure and without any disciplinary proceedings instituted against them. That the 1st, 2nd and 3rd Defendants failed to review the unlawful dismissal while the 4th, 5th, 6th and 7th Defendants failed to curtail the abuse of their rights by reinstating them.

They thus instituted this action praying this court to order among others: the withdrawal of 1st Defendants' operating license; the 4th Defendant to implement the recommendation of the House of Assembly; the payment of three months' salary and N20 million Naira damages to each Plaintiff.

The 1st and 3rd Defendants raised preliminary objections on the Court's jurisdiction to entertain the suit on the following grounds:

1. *That the action is a labour dispute over which the court cannot adjudicate.*

2. *That action under article 10(c) of the Supplementary Protocol can only be maintained by individuals against community officials.*

3. *That human rights jurisdiction of this court is limited to dispute against Member states.*

The 4th, 6th and 7th Defendants objected on the ground that they are not proper parties as there is no reasonable cause of action against them.

The 5th Defendant's objection on ground that the court cannot entertain an ancillary issue to a main application which it lacks jurisdiction to hear.

LEGAL ISSUES:

1. *Whether or not this court can entertain an action between private parties arising from contractual agreement;*

2. *Whether this court can entertain an ancillary issue of human rights abuse in a matter it lacks competence to entertain;*

3. *Whether this court can entertain case of human rights abuse brought against an individual;*

4. *Whether a Member State can be held liable for human rights violation arising from the breach of contract between two individuals.*

DECISION OF THE COURT

The court held, striking out the case:

1. *That where the court does not have jurisdiction to go into labour dispute between the parties then it cannot go into the ancillary issues of violation of human rights.*

2. *That the Defendants being individuals cannot be sued before this court for violation of human rights.*

3. *That in the absence of any specific law mandating the 4th Defendant to act, it cannot be held answerable for failure to implement a recommendation of the House of Representatives*

4. *That the only role for the 4th Defendant to play is to make available state institution equipped to settle disputes arising from private contracts.*

DECISION OF THE COURT

1. The Plaintiffs are the above listed 64 former employees of the 1st Defendant. Their chosen address is C/o AAA Chambers, 11, Shete Olu Street (2nd Floor), Off Campbell Street, Lagos Island, Lagos State, Nigeria.

2. The 1st Defendant is MTN Nigeria Communications Ltd. whose address is at Golden Plaza, Falomo Roundabout Ikoyi Lagos Nigeria whilst the 2nd and 3rd Defendants are the Human Resource Executive Officer and Customer Relations Executive Officer of MTN Nigeria Communications Ltd., and their address is at Golden Plaza, Falomo Roundabout Ikoyi, Lagos, Nigeria. The 4th Defendant is the Federal Republic of Nigeria, a Member State of ECOWAS whilst the 5th Defendant is the Minister for Labour and Productivity of the 4th Defendant, whose address is the Federal Ministry of Labour and Productivity, 2nd Floor, Federal Secretariat Complex, Phase 1, Shehu Shagari Way, Abuja-Nigeria. The 6th Defendant is the Chairman of the Nigerian Communications Commission of the Federal Republic of Nigeria, whose address is at Plot 423, Aguyi Ironsi Street, Maitama, Abuja, Nigeria and the 7th Defendant is the Attorney-General and Minister for Justice, Federal Republic of Nigeria, Ministry of Justice, Abuja.

SUMMARY OF FACTS

3. The Applicants averred that they were all employees of the 1st Defendant and were employed individually. The Applicants stated that their employments had been confirmed after serving their three month probation period. The applicants stated that each of them had been working for the 1st Defendant between five and nine years. They averred further that their respective contracts of employment stated the duties and responsibilities attached to their respective positions but the condition for the termination of their employment was uniform and was contained in clause 8(1) thereof.

4. The Applicants also posited that contrary to the laid down procedure for the termination of employment, the 1st Defendant in a single day terminated their employment, issuing them letters which did not state any cogent reasons for their dismissal. They continued that they were dismissed without any disciplinary proceedings pending or having been instituted against them. They stated that they were unlawfully dismissed and unduly influenced to sign their acceptance letters with the aid of the Nigerian Police Force and pressured to accept a one month salary in lieu of notice.

5. The Applicants averred that they made several pleas to the 1st, 2nd and 3rd Defendants, but they failed to review their unlawful dismissal. Thereafter, the Applicants forwarded a duly endorsed petition to the 4th Defendant through its National Assembly but the 4th Defendant failed/ ignored/neglected to give a decision until the 17th January, 2013. According to the Applicants, the National Assembly condemned the acts of the 1st, 2nd and 3rd Defendants and published same in the National Gazette headed "Fourth Republic 7th National Assembly, Session No. 78 - Order Paper dated 17th January, 2013 Motion 11".

6. The Applicants stated that despite the publication / decision by the National Assembly, the 4th, 5th, 6th and 7th Defendants failed to curtail the abuse of their fundamental rights and reinstate them. Applicants averred that all their fundamental rights abuse took place in Lagos, Nigeria.

7. The Applicants instituted this action against the Defendants pursuant to Articles 4 (g), (h), and (i), 6 (b), (e), (f), (h) and (i), 15 (1) and (4), 52 (1), 57 and 76 (2) of the Revised Treaty of ECOWAS, Articles 1, 2, 17 and 19(1), (2), (3) and (4) of the Supplementary Protocol A/SP.1/06/06 amending the Revised Treaty, Articles 11, 12, 19 (1) and (2), 22 (2) and (3) of Protocol A/P1/7/91 on the Community Court of Justice and Articles 9 (1 c, 1 d, 1f, 1g, 4 & 6), 10 (c, d & e) of Supplementary Protocol (A/SP.1/01/05) amending Protocol (A/P.1/7/91). The Applicants asked the Court for the following orders:

   a) AN ORDER compelling the 4th and 6th to withdraw the operating license of the 1st Defendant for failure to comply with the Resolution of House of Representative of the Federal Republic of Nigeria and the Nigerian Constitution as a whole.

   b) AN ORDER compelling the 4th, 5th and 7th Defendants to enforce the Resolutions and Recommendations of the House of representative of the Federal Republic of Nigeria decided in favour of all the Applicants as published in the National Gazette headed "Fourth republic 7th National Assembly, Second Session N°. 78. Order paper dated 17th January, 2013 specifically Motions 11".

   c) AN ORDER compelling the 1st Defendant to issue forthwith a cheque representing 3 years gross income to all the Applicants to serve as compensation for violating their fundamental human right to fair hearing by dismissing all the Applicants without any reason whatsoever for more than 3 years.

d) AN ORDER that the 1st Defendant be compelled to pay the sum of N20 Million each to all the Applicants for aggravated damages and severe/untold/unfathomable hardship caused to them.

e) AN ORDER that the 6th Defendant be compelled to pay all the Applicants N10,000,000.00 (Ten Million Naira) for their failure to perform their statutory responsibilities as enshrined under the Constitution of the Federal Republic of Nigeria and Section 4 the Nigeria.

f) AN ORDER that the 4th and 5th Defendants be compelled to pay N20 Million each to all the Applicants for their failure to safeguard, promote and protect the fundamental human right of the Applicants.

g) A DECLARATION that the purported termination of all the Applicants' employment with the 1st Defendant be declared invalid, null and void and of no effect whatsoever while directing the 1st, 2nd and 3rd Defendants to reinstate the Applicants and grant them, opportunity to resign if they so wish.

h) AN ORDER compelling the 1st Defendant to issue forthwith a newly drafted "withdrawal of service letter" stating a good reason for disengaging all the Applicants so as to be a positive referral/ recommendation at the point of securing a new job.

Upon service of the originating summons on the Defendants, all the Defendants filed preliminary objections to the action. All the Defendants contended that this honourable Court lacks jurisdiction to entertain the Plaintiffs' Application as filed and asked the Court to dismiss the suit. In addition, the various Defendants' raised specific preliminary objections peculiar to the action filed against them by the Plaintiffs.

PRELIMINARY OBJECTION BY THE 1ST - 3RD DEFENDANTS/ APPLICANTS

8. Learned Counsel to the 1st - 3rd Defendants/Applicants submitted that for a court to have jurisdiction, the Court should be clothed with all the necessary ingredients required. Counsel contended that a Court is only competent to exercise jurisdiction over a case where the subject matter of the case is within its jurisdiction and there is no feature which prevents it from exercising its jurisdiction. Counsel argued that a close look at the facts and claims contained in the Plaintiffs/Respondents application shows that the Plaintiffs/ Respondents case is predicated on the alleged wrongful/unlawful termination

or dismissal of the Plaintiffs' from their employment by the 1st Defendant. The question to be answered in this Application is whether this Court is competent to exercise jurisdiction over labour related issues and whether the 1st, 2nd and 3rd Defendants are persons that the Court can properly exercise jurisdiction over.

If the Court decides any of the above issues in the negative, then there is a feature in the case which prevents the Court from properly exercising its jurisdiction.

9. Learned Counsel contended that it is trite learning that jurisdiction is a creature of statute. Article 9 of the Protocol on the Court of Justice as amended by Article 3 of the Supplementary Protocol on the Court circumscribes the jurisdiction of this Court.

Similarly, Article 10 of the Protocol as amended governs access to the Court and prescribes those who have access to the Court, the type of disputes they can present to it for adjudication as well as those they can sue. Learned Counsel contended that for the jurisdiction of this Court can only properly be determined when Articles 9 and 10 of the Protocol as amended is read together. Counsel submitted that individuals only have access to this Court when the right of such individuals have been infringed by a Community Official (Article 10 (c)) or the individuals seek relief for the violation of their human rights (Article 10 (d)).

10. Learned Counsel submitted that under Article 10 (c), an individual can only sue a Community Official. Counsel relied on this Court's decision in **Ukor** *v.* **Laleye & Anor.** [2009] CCJLR 30 and submitted that this Court rejected the Plaintiff's argument when he sought to rely on Article 10 (c) to found a human rights' violation claim against the Republic of Benin, the Court holding thus:

> ***"We consider the argument by Counsel to the Applicant/Plaintiff relating to such interpretation of Article 10 (c) of the said Protocol as amended that the use of the word 'Community' is akin to the words 'Member State' of ECOWAS. By the definition section of the Revised Treaty of ECOWAS, it is apparent and clear that the two sets of words cannot mean the same or be interchangeable in meaning. The said article 10 (c) if interpreted, even by applying the purposive rule of interpretation, because of its clarity the words in their ordinary sense will support our stance in this case, that***

Community is different from Member State as ascribed in the Treaty of ECOWAS".

11. Learned Counsel submitted that since the 1st, 2nd and 3rd Defendants/ Applicants are not Community Officials within the meaning of Article 10(c), the Plaintiffs/Respondents cannot rely on Article 10 (c) of the Protocol on the Court as amended to sustain their claim against the Defendants/ Applicants. Counsel submitted further that this leaves only Article (10) (d) for consideration as to whether the Plaintiffs/Respondents have the *locus standi* to sustain this suit. Counsel contended that though the Plaintiffs/ Respondents forcefully tried to infuse allegations of human rights into the case, the action is clearly predicated on the alleged wrongful or unlawful termination/dismissal of the Plaintiffs from the employment of the 1st Defendant and not on alleged violation of the human rights of the Plaintiff. Counsel submitted that the reliefs sought and the averments made in support of the reliefs show that the Plaintiffs' case is clearly a labour dispute and not a human rights violation cause.

    Counsel submitted that this Court cannot grant the reliefs the Plaintiffs are seeking without first going into the legality of the termination of the Plaintiffs' employment with the 1st Defendant. Counsel also submitted that this Court cannot make a finding with respect to the alleged human rights violation of the Applicants without first considering the contract of employment of the Plaintiffs and what rights it conferred on them, and whether the 1st Defendant had a right to terminate the employment of the Plaintiffs. These are labour issues which this Court has no jurisdiction over.

12. Further, Counsel submitted that assuming without conceding that the Plaintiffs' case is predicated on the allegation of human rights, Articles 9 and 10 of the Protocol on the Court of Justice as amended indicates who can be sued in a human rights violation cause. Counsel submitted that the human rights jurisdiction of this Court is limited to disputes that have international character and not disputes between two nationals or private citizens of a particular Member State. Counsel submitted that this Court's decision in the case of **David** *v.* **Uwechue** (ECW/CCJ/RUL/03/10), Ruling delivered on 11/06/10) supports his argument in this regard. This Court, in declining jurisdiction, held as follows:

    "For the dispute between individuals on alleged violation of human rights as enshrined in the African Charter on Human and Peoples' Rights, the natural and proper venue before which the case may be

pleaded is the domestic court of the State party where the violation occurred It is only when at the national level, there is no appropriate and effective forum for seeking redress against individuals that the victim of such offences may bring an action before an international court, not against the individual but against the signatory State for its failure to ensure protection and respect for the rights allegedly violated.

Within the ECOWAS Community, apart from Member States, other entities that can be brought to this Court for alleged violation of human rights are the institutions of the Community because, since they cannot, as a rule, be sued before the domestic jurisdiction, the only avenue left to the victims seeking redress for grievances against those institutions is the Community Court of Justice.

Consequently, the Community Court does not have jurisdiction to entertain a dispute between individuals arising from alleged violation of human rights committed by one against another".

13. Counsel concluded that the import of the decision of this Court above is that this Honourable Court does not have jurisdiction over human right causes between two private individuals/entities from the same Member State. Thus, even if the Plaintiffs' case is predicated on the allegation of violation of their human rights, this Court does not have the jurisdiction to adjudicate upon the Plaintiffs' case as there is an appropriate domestic forum for the ventilation of their grievances. Counsel urged the Court to hold that the Plaintiffs/Respondents lack the *locus standi* to maintain this suit, and consequently, dismiss the suit.

14. Furthermore, Learned Counsel submitted that it is trite that a Court must look at the reliefs claimed by a Plaintiff in order to determine whether it has jurisdiction to entertain a matter or not. Counsel contended that the reliefs being sought by the Plaintiffs are predicated on the alleged unlawful termination of the individual contracts of employment with the 1st Defendant. *(See reliefs C, D, G and H)*.

15. Counsel also submitted that it is evident that the Plaintiffs/Respondents case is predicated on the alleged wrongful termination of their contracts of employment from the 1st Defendant when the facts and narration of their application are scrutinized and urged the Court to closely examine paragraphs 10, 13, 14, 16, 25 and 27 of the statement of facts and paragraphs 5, 8 and

9 of the narration. Counsel concluded that a close consideration of the above facts and narration by the Plaintiffs/ Respondents clearly point to the fact that their claim is essentially one of labour dispute and not a human rights cause.

16. Further, Counsel submitted that it is trite that the jurisdiction of a court is determined by statute. Counsel contended that a combined reading of Articles 9 (4) and 10 of the Protocol (as amended) makes it clear that the jurisdiction of this Court does not extend to labour/employment issues. Counsel contended that section 254 C (1) of the Constitution of the Federal Republic of Nigeria as amended by the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 confers exclusive jurisdiction to entertain all labour, employment, trade unions and industrial relations and matters arising from the work place to the National Industrial Court.

The said section reads thus:

> **"Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to or connected with any dispute over the interpretation and application of the provisions of Chapter IV of this Constitution as it relates to any employment, labour, industrial relations, trade unionism, employer's association or any other matter which the Court has jurisdiction to hear and determine".**

17. Counsel submitted that the provisions quoted above are clear and unambiguous and does not lend itself to any other subjective interpretation. Therefore, the National Industrial Court of the Federal Republic is the only court that has jurisdiction over the Plaintiffs' case, being a labour/ employment dispute. Counsel submitted that it is pertinent to note that Chapter IV of the Nigerian Constitution deals with fundamental rights so the Plaintiffs' argument that this case is one of fundamental human rights does not oust the jurisdiction of the National Industrial Court. Counsel concluded that this honourable Court does not have jurisdiction over the Plaintiffs' cause.

18. Counsel contended that despite the Plaintiffs' forceful argument that this Court has jurisdiction because the contract of employment between them and the 1st Defendant contained clauses in restraint of labour and against the provisions of the Forced Labour Conventions 1930 (No. 29) and the Revised Treaty of ECOWAS, this Court does not have jurisdiction. Counsel submitted that the Plaintiffs' contention that the restraint of trade contained in their contracts of employment extends to other West African States and thus beyond the jurisdictional borders of the Nigerian National Courts is flawed. Counsel submitted that these West African States Plaintiffs/ Respondents contend are affected are not parties to this suit and no orders are sought against them, Further, Counsel submitted that it is trite that Courts cannot make orders against persons, entities, bodies or States who are not parties to the suit. Finally, Counsel submitted that the Plaintiffs/ Respondents sought no reliefs which transcends beyond the jurisdictional borders of Nigeria, which the National Industrial Court of Nigeria have no jurisdiction to make, Learned Counsel concluded that this Court lacks the jurisdiction to entertain Plaintiffs/Respondents Application and should thus strike it out.

19. The learned counsels to the other Defendants in their respective preliminary objections also contended that this Court lacks jurisdiction, we realized that their arguments in relation to the jurisdiction of this honourable Court are in substance the same as the arguments canvassed by the learned Counsel to the 1st - 3rd Defendants. Thus, we do not deem it necessary to reproduce those same arguments here. The same argument holds for the response to the preliminary objections by the learned counsel to the Plaintiffs/ Respondents.

RESPONSE BY THE PLAINTIFFS/RESPONDENTS TO THE PRELIMINARY OBJECTION OF THE 1ST - 3RD DEFENDANTS/ APPLICANTS

20. Learned Counsel to the Plaintiffs/Respondents in opposition to the preliminary objection filed by the 1st - 3rd Defendants/Applicants submitted that Article 10 (c) of the Supplementary Protocol (A./SP.1/01/05) amending Protocol (A/P.1/7/91) confers unfettered jurisdiction on this honourable Court to entertain the Application of the Applicants/ Respondents as individuals within a Member State of ECOWAS. Counsel submitted that this Court has settled in a plethora of cases that it has jurisdiction to hear cases filed by individuals and relied on the cases of **Alhaji Hammani Tijani** *v.* **Federal Republic of Nigeria & 4 Ors** [2008] CCJLR[PTI] 171, **Hadijatou Mani Koraou** *v.* **Republic of Niger** [20 10] CCJLR [PT 3] 1 among others.

21. Further, Counsel submitted that Article 4(g) of the Revised Treaty of ECOWAS clothe this Court with jurisdiction to entertain the suit filed by the Plaintiffs/Respondents. Counsel contended that it is clear that the Plaintiffs/ Respondents have the *locus standi* to maintain their case before this Court.

Counsel contended that the employment restraint being suffered by the Applicants/Respondents extends to other West African countries which the Nigerian domestic courts have no jurisdiction to make binding orders against. Counsel contended that the Applicants cannot thus take employment in the telecommunications industry in West Africa, their field of expertise. Further, Counsel submitted that it isundisputable that the fundamental human rights of the Applicants/Respondents enshrined both under the 1999 Constitution of the Federal Republic of Nigeria and Article 25 of the Forced Labour Conventions 1930 (No. 29). The said Article 25 of the Labour Convention reads thus:

> ***"The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation of any member ratifying this convention toensure that the penalties imposed by law are really adequate and are strictly enforced".***

22. Furthermore, counsel contended that the fact that the Applicants/ Respondents case is one of human rights violation is assisted by the Compendium of casesproduced by International Labour Office, Geneva titled **"Forced Labour and Human Trafficking Case Book of Court Decisions"** . The International Labour Office consequentially defines Forced Labour thus:

> **"According to the community of expert, this phrase should be construed broadly. It need not be in the form of penal sanctions but might also take form of loss of right and privilege, such as a promotion, transfer, access to new employments, housing..."**

Learned Counsel stated that clauses 17.3.3 and 17.3.4 shows that the Applicants/Respondents fundamental rights have been violated. These clauses read thus:

> **Clause 17.3.3: MTN-Telecommunications Contract of Employment**
>
> **"The restraints set out in this agreement shall apply in the territories ofthe Republic of Nigeria, Republic of Rwanda, South Africa, Uganda, The kingdom of Swaziland or any other countries MTN has investment in".**

CLAUSE 17.3.4:

> **"You shall not during the existence of your employment with the company and for a period of 48 MONTHS after the termination of your employment for any reason whatsoever, be directly or indirectly interested, engaged or concerned in, whether a principal, agent, representative, shareholder, director, employee, consultant, advisor, financier, administrator or in any other capacity in the business of any competitor situated in the Federal Republic of Nigeria with whom the employee is involved or was involved in carrying out an assignment".**

23. Counsel submitted that it is incontrovertible that restraint of labour is a violation of fundamental human rights and same has been enshrined in Article 3 of the Revised Treaty of ECOWAS which guarantees free movement of persons and goods, services and capital. Counsel relied on this Court' s decision in the case of **Chief Frank C. Ukor** *v.* **Rachad Laleye & Anor.** [2009] CCJLR [PT2] 30.

Counsel contended that the 1st, 2nd and 3rd Defendants violated the fundamental rights of the Applicants/Respondents because the contract of employment between them provided a condition precedent that had to be fulfilled before termination of their contracts but this is not the case. Specifically, Counsel submitted that the contract of employment of the Applicants/Respondents provided that any misconduct, query, disciplinary action or violation of any sort must be decided by an independent panel/ tribunal or any duly constituted authority before decisions can be taken. Counsel submitted that the Applicants/Respondents were never told the reason(s) for their dismissal nor allowed to speak concerning whatever problem arose. Counsel contended that this is a clear violation of the terms of employment of the Applicants/Respondents. Counsel submitted that clause 8 (1) of the contract of employment makes that clear. The said clause 8 is reproduced below.

> **CLAUSE 8 (1):**
>
> **"The company reserves the right to terminate your employment with or without notice, at any prior to the termination date if you commit any serious or persistent breach of any of the provisions of this agreement, MTN Nigeria Disciplinary codes, or any of your conditions of employment or are guilty of any misconduct or neglect of your duties or failed to carry out any of**

your duties in a fit and proper manner or fail to give your full time and attention to the business of the company or are guilty of any other criminal offence other than an offence which, in the opinion of the company, does not affect your position as an employees, or are guilty of any other conduct which will justify summary termination or termination on notice in law such grounds shall give rise to your summary termination".

24. Counsel contended that it is clear from the above provision that the 1st, 2nd and 3rd Defendants clearly violated the rights of the Applicants/ Respondents as they were never heard before their dismissal. That is also a clear violation of the rule of natural justice *'audi alteram partem'* which demands that the other side must always be heard before a decision that concerns him is made. Learned Counsel concluded by submitting that the case of the Plaintiffs/Respondents is clearly one of a human rights violation and not a labour dispute and urged the Court to discountenance the preliminary objection and proceed to hear the matter on merits.

PRELIMINARY OBJECTION BY THE 4TH AND 7TH DEFENDANTS/ APPLICANTS

25. The 4th and 7th Defendants, in addition to the fact that they contended that this honourable Court lacks the requisite jurisdiction to hear and determine Plaintiffs' case as presently constituted also contended that the Plaintiffs have no contractual relationship with them on the subject matter of this suit or at all. They also contended that the claims of the Plaintiffs/Respondents did not disclose any reasonable cause of action against them.

26. Learned Counsel to the 4th and 7th Defendant Applicants contended that the Plaintiffs claim as constituted did not disclose any reasonable cause of action against them. Counsel submitted that the Plaintiffs/Respondents were not employed by the 4th and 7th Defendants/Applicants. The Plaintiffs/ Respondents primary claim is predicated on their alleged wrongful termination of their contracts of employment by the 1st Defendant, a matter which clearly has nothing to do with the 4th and 7th Defendants. There is thus no relationship, contractual or otherwise between the Plaintiffs and the 4th and 7th Defendants. Counsel contended that the well-known doctrine of privity of contract is a principle of general application in all civilized nations and parties who are privies to a contract cannot suffer harm or enjoy any benefits in respect of the contract. Therefore, Counsel concluded

that it is clear that the 4th and 7th Defendants/Applicants are not proper parties to the suit and urged the Court to strike out the Plaintiffs/Respondents claims as against them.

PLAINTIFFS/RESPONDENTS RESPONSE TO THE PRELIMINARY OBJECTION FILED BY 4TH AND 7TH DEFENDANTS/ APPLICANTS

27. Learned Counsel to the Plaintiffs/Respondents in opposition to the preliminary objection filed by the 4th and 7th Defendants/Applicants submitted that the preliminary objection has no merit and should be struck out. Counsel submitted that the 4th Defendant as a Member State of ECOWAS and signatory to several international conventions and treaties is compelled to promote, protect and enforce the legal rights of its citizens. Further, Counsel contended that the claims of the Plaintiffs/Respondents are predicated on the violation of their fundamental human rights which the 4th and 7th Defendants/Applicants have ignored/neglected or failed to enforce even after the National Assembly condemned the acts of the 1st, 2nd and 3rd Defendants/Applicants. Counsel contended that once the National Assembly condemned the dismissal of the Plaintiffs/Respondents, the 4th Defendant was duty bound to enforce their rights.

28. Learned Counsel to the Plaintiffs/Respondents further submitted that the provisions of the Forced Labour Conventions (1930) No. 29, which the 4th Defendant ratified on 17th October, 1960 compels Nigeria to punish violators of the Convention.

    This is clearly provided under Article 25 of the Convention thus:

    "The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation of any member ratifying this convention to ensure that the penalties imposed by law are really adequate and are strictly enforced".

29. Further, Counsel contended that the issue of privacy of contract is not applicable in the case of human rights violations because once there is a violation, this Court has jurisdiction to look into the violation irrespective of whatever the cause of the violation. Counsel relied on this Court's decision in the case of **Hadijatou Mani Koraou** *v.* **Republic of Niger** [2010] CCJLR [PT 3] 1 and concluded that this Court adjudicated on the case and awarded damages against the Defendant even though the Defendant was not responsible for the forced labour and slavery, the subject of the claim.

PRELIMINARY OBJECTION BY 5TH DEFENDANT/APPLICANT

30. In addition to contending that this Court lacks jurisdiction to entertain the case of the Plaintiffs/Respondents, learned Counsel to the 5th Defendant/ Applicant submitted that this Court cannot determine any purported human rights claims arising out of the alleged unlawful dismissal of the Plaintiffs/ Respondents because they are ancillary claims arising out of the main dispute, the labour dispute which this Court has no jurisdiction to hear and determine. Learned Counsel relied on the case of **Jerry Ugokwe** *v.* **The Federal Republic of Nigeria & Christian Okeke** [2004-2009] CCJLR 37. Counsel submitted that at paragraphs 46 and 52 of the judgment, this Court made it clear that it had no jurisdiction to adjudicate on electoral disputes.

PLAINTIFFS/RESPONDENTS RESPONSE TO THE PRELIMINARY OBJECTION FILED BY 5TH DEFENDANT/APPLICANT

31. Learned Counsel to the Plaintiffs/Respondents in response to the preliminaryobjection raised by the 5th Defendant/Applicant contended that the Plaintiffs/Respondents claims are predicated on a violation of their fundamental human rights and not a labour dispute. Counsel urged the Court to look at the arguments canvassed before it and hold that the issue in dispute is purely one of human rights, and thus hold that it has jurisdiction to hear and determine same.

PRELIMINARY OBJECTION BY 6TH DEFENDANT/APPLICANT

32 . The 6th Defendant/Applicant contends that the Plaintiffs/Respondents' suit discloses no reasonable cause of action against it. Learned counsel to the 6th Defendant submitted that the 6th Defendant is the statutory body given the duty and power to regulate the practice of the communications industry, particularly as it relates to the provision of telecommunications services. Counsel submitted that by virtue of Chapter II, Part 1 Section 4 (a) - (w) of the Nigerian Communications Act CAPN97 LFN 2004, the main functions of the Commission is the regulation of the communications sector in line with the provisions of the Act, particularly as it relates to the protection of the interests of customers from unfair practices and high tariffs. It is generally saddled with the responsibility for economic and technical regulation of the communications industry.

33. Counsel contended that the 6th Defendant's functions does not cover the management and intervention in the internal affairs and governance of

telecommunication companies. Counsel contended that the welfare of staff of independent telecommunication companies is not the responsibility of the 6th Defendant. Learned Counsel also submitted that the Labour Act of Nigeria is the principal law that regulates employment matters in all facets of commerce in Nigeria and not the Nigerian Communications Act. Counsel also submitted that the 6th Defendant is not privy to any contract between the 1st Defendant and its employees.

34. Learned Counsel contended that the Plaintiffs/Respondents contention that the 6th Defendant neglected to withdraw the license of the 1st Defendant after a complaint was lodged against the 1st Defendant is misconceived as the 6th Defendant would be acting *ultra vires* if it interfered in the internal affairs of the 1st Defendant. Counsel contended that it is clear that there is no nexus between the 6th Defendant and the alleged wrong done to the Plaintiffs to entitle them to the reliefs sought. Further, learned Counsel contended that the Plaintiffs/Respondents claim that the 6th Defendant condemned the acts of the 1st - 3rd Defendants through a Committee on Public Petitions as constituted by the National House of Representatives, Nigeria does not make the 6th Defendant liable in any way. Counsel submitted that the House of Representatives only made a recommendation in these terms ***"MTN Nigeria Communication Limited reconsider the case of the retrenched staff with a view of re-engaging some of those they still consider qualified and fit in the company's work ethics and value"*** and this has nothing to do with the 6th Defendant. Counsel concluded that in the unlikely event that the Court holds that it has jurisdiction to hear and entertain the matter in dispute, the Court should hold that the 6th Defendant is not a necessary and proper party to the suit.

PLAINTIFFS/RESPONDENTS RESPONSE TO THE PRELIMINARY OBJECTION FILED BY 6TH DEFENDANT/APPLICANT

35. Learned Counsel to the Plaintiffs/Respondents in opposition to the preliminary objection filed by the 6th Defendant contended that contrary to the position taken by the 6th Defendant, it is saddled with the responsibility of resolving all disputes in the telecommunications industry, including that submitted to it by the Plaintiffs/Respondents. Counsel contended that the only law applicable to disputes in the telecommunications industry in Nigeria is the Nigerian Communications Act. Counsel submitted that Article 4 (p) makes it clear that the 6th Defendant is empowered to resolve disputes such as that which arose between the Plaintiffs/Respondent. The section provides thus:

Section 4:
The Commission shall have the following functions.

Section 4 P:
"Examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communication industry, using such dispute resolution methods as the Commission may determine from time to time including mediation and arbitration".

Further, Counsel contended that the 6th Defendant conceded that it had the capacity to intervene and settle the dispute between the Plaintiffs and the 1st - 3rd Defendants by virtue of the letter it wrote to the Plaintiffs' Solicitors dated 6th March, 2013. In the said letter, the 6th Defendant stated thus:

"We wish to state that the Commission can no longer intervene in the matter since it is now subject of litigation".

Counsel concluded that the words above indicated clearly that the Commission has and always had the capacity to resolve the dispute but woefully failed to do so and is thus liable for the untold hardships suffered by the Plaintiffs/Respondents and is therefore a necessary and proper party to the suit.

CONSIDERATIONS BY THE COURT

36. The jurisdiction of this Court is clearly spelt out under Article 9 of the Protocol on the Court of Justice as amended. It is clear that this Court will only have jurisdiction over a private agreement involving two private parties when the parties in advance choose to submit disputes arising, from their agreement to this Court for adjudication. Article 9(6) states thus:

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

37. Thus this Court assumed jurisdiction in the case of **Petrostar Nigeria Limited** *v.* **Blackberry Nigeria Limited & 2 Ors.** (ECW/CCJ/RUL/09/09, ruling delivered on 27/10/09) because the parties had agreed in writing to submit any dispute that arose from their contract to this Court for adjudication.

38. On the record, there is no agreement between the parties to submit their dispute to this Court for adjudication. Thus, this Court has no jurisdiction over the contractual relationship or dispute between the Plaintiffs/ Respondents and the 1st - 3rd Defendants.

39 . However, the Plaintiffs in their originating application have gone beyond the employment or contractual dispute between themselves and the 1st - 3rd Defendants and are suing for a breach of their fundamental human rights. It is not in dispute that this Court has jurisdiction over human rights violations that occur within Member States of ECOWAS. For the avoidance of doubt, Article 9(4) of the Protocol on the Court as amended provides thus:

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

40. Indeed, this Court has held in a plethora of cases that it has jurisdiction over human right violations that occur within Member States of ECOWAS. *See*: **Hadijatou Muni Koraou** *v.* **Republic of Niger** [2010] CCJLR [pT 3] 1, **Musa Saidykhan** *v.* **The Republic of Gambia** (ECW/CCJ/RUL/04/09 ruling delivered on 30/06/09) etc .

41. It is imperative to state that human rights provisions are typically not inserted into private contracts. They are contained in national and international legislations and could be triggered by the acts of a party to a contract when his actions violate these provisions. Human rights violations could thus arise from virtually every set of facts and every relationship, contractual or otherwise.

42. Since the Plaintiffs have made human rights violation claims against all the Defendants, it behoves us to look at the Application and decide whether *prima facie*, the violation of fundamental human rights is involved, and if so, against which of the Defendants. We will look at the case made against the various Defendants and determine whether it discloses a *prima facie* case of human rights violation.

1ST - 3RD DEFENDANTS

43. Learned Counsel to the 1st - 3rd Defendants contended that the Plaintiffs/ Respondents' case is predicated on their alleged unlawful dismissal from the employment of the 1st Defendant/Applicant and not on the violation of human rights.

Learned Counsel to the Plaintiffs/Respondents on the other hand contends that the issue at hand is one of violation of human rights.

44 . It is trite learning that to determine the jurisdiction of a Court, the facts and claims of the Plaintiff are the key elements to consider. From the narration of facts by the Plaintiffs, the case against the 1st - 3rd Defendants is essentially that they were dismissed by the 1st Defendant without due regard to the process of termination contained in their contracts of employment, no reason was assigned for the dismissal and they were not heard. Learned Counsel to the Plaintiffs/Respondents contend that this is a violation of the fundamental human rights of the Plaintiffs/ Respondents. In particular, learned Counsel to the Plaintiffs/Respondents contend that the natural justice rule of *audi alteram partem* has been violated. Learned Counsel to the 1st - 3rd Defendants/Applicants on the other hand contend that the issue at hand is nonetheless a labour dispute because the Court cannot make a determination as to whether the rights of the Plaintiffs/Respondents were violated without going into the contract of employment, an area where the Court clearly does not have jurisdiction over.

45. From the facts, it is clear that the Plaintiffs/Respondents were employees of the 1st Defendant until their contracts were terminated. For the Court to ascertain whether the manner of the termination of the Plaintiffs/ Respondents' contracts violated their fundamental rights will necessarily entail a consideration of the terms of the contract between the parties. Learned Counsel to the Plaintiffs/Respondents contends that the natural justice rule *audi alteram partem* was breached by the 1st - 3rd Defendants and therefore a violation of their fundamental right to fair hearing. As persuasive as this argument is, it has to be noted that the terms of the contract of employment between the parties will determine whether the 1st - 3rd Defendants were right in summarily dismissing them without hearing them or providing a reason for such dismissal. If the Court does not have jurisdiction to go into the labour dispute between the parties, then it cannot go into the ancillary issue of whether the human rights of the Plaintiffs/ Respondents were violated or not in the course of their dismissal from their employment.

46. The claims of the Plaintiffs/Respondents against the 1st - 3rd Defendants is important in determining whether there is a *prima facie* case of human rights violations which will confer jurisdiction on this Court. The claims of the Plaintiffs against the 1st - 3rd Defendants are essentially for an order directing the 1st Defendant to pay three years gross salary to all the Plaintiffs for violating their right to fair hearing and for a declaration annulling the termination of their employment and giving them an opportunity to resign if

they so wish. These claims, essentially deal with the labour dispute between the parties before any alleged human rights violation can arise. In short the alleged human rights violation claim cannot stand without first determining the labour dispute.

47. Learned Counsel to the 1st - 3rd Defendants also contended that even if there is a case of human rights violations, Articles 9 and 10 of the Protocol on the Court as amended make the 1st - 3rd Defendants/Applicants the wrong party to sue. Counsel relied elaborately on the judgment of this Court in the case of **David** *v.* **Uwechue (supra)** where the Court held that it does not have jurisdiction to entertain a dispute between individuals arising from alleged violation of human rights committed by one against another. In that case, the Court delved deep into the issue of an individual suing another individual for alleged violation of human rights and concluded that it has no jurisdiction. The Court also stated clearly that apart from Member States the only entities that can be sued for alleged violation of human rights are Community Institutions. The 1st - 3rd Defendants/ Applicants are neither Member States of ECOWAS nor Institutions of ECOWAS. Therefore, the Plaintiffs/ Respondents cannot sue them for human rights violations in this Court.

5TH & 6TH DEFENDANTS

48. The 5th & 6th Defendants, like the 1st - 3rd Defendants are neither ECOWAS Member States nor Institutions of ECOWAS. Therefore, in line with the analysis above, they cannot be sued in human rights violations before this Court. The Court thus does not deem it necessary to go into the other issues contained in their preliminary objections.

4TH & 7TH DEFENDANTS

49. Learned Counsel to the 4th and 7th Defendants contends that the Plaintiffs/ Respondents' case as constituted did not disclose any reasonable cause of action against them. On the contrary, learned Counsel to the Plaintiffs/ Respondents contend that the 4th Defendant is liable for its failure to implement the Recommendations of its House of Representatives, which was in favour of the Plaintiffs/Respondents. Further, Counsel to the Plaintiffs/Respondents submitted that the provisions of the Forced Labour Conventions (1930) No. 29, which the 4th Defendant ratified on 17th October, 1960 compass Nigeria to punish violators of the Convention. Counsel submitted that the 4th Defendant as a Member State of ECOWAS and signatory to several international conventions and treaties is compelled to promote, protect and enforce the legal rights of its citizens.

50. From the averments and the claims, is there a *prima facie* case of human rights violations against the 4th Defendant which is represented by the 7th Defendant? The answer to this question will become clear if the relevant follow up question is answered. Is the 4th Defendant duty bound to perform any of the duties the Plaintiffs/Respondents allege it did not do?

51. The 4th Defendant, the Federal Republic of Nigeria is a Member of ECOWAS and signatory to several international human rights treaties which oblige it to promote and protect the fundamental human rights of its citizens. Learned Counsel to the Plaintiffs/Respondents contend that it has failed to perform that obligation in not implementing the Recommendations of its House of Representatives. Further, it is imperative to state that a recommendation is different from a binding decision. In the absence of anything on record compelling the 4th Defendant to implement the Recommendations of its House of Representatives, we hold that the 4th Defendant is not answerable in human rights violations for not implementing the said recommendations.

52. Learned Counsel also contended that the 4th Defendant is liable for human rights violations because the Labour Convention of 1930 (No. 29) obliges signatory states to punish offenders of the convention. However, Counsel failed to point out how the 1st - 3rd Defendants have violated the convention, and for which reason the 4th Defendant ought to have punished them. Thus, that ground also fails to make the 4th Defendants answerable for any human rights violations.

53. Finally, we will consider whether the totality of the facts presented by the Plaintiffs/respondents in anyway makes the 4th Defendant culpable for human rights violation. The Plaintiffs/Respondents allege that their fundamental rights were breached by the 1st Defendant in the way and manner it terminated their appointments. The 4th Defendant is clearly not privy to the agreement between the Plaintiffs/Repondents and the 1st Defendant. The only role the 4th Defendant state plays in such private contracts is to make available state institutions equipped to settle disputes that arise from such contracts. If a party is aggrieved in the performance of a contract, his remedy is to approach the relevant state institutions for redress. If the state fails to make such institutions available, or the institutions of the state fails to perform their duties, then the state could be held responsible for failure of its institutions to protect the fundamental rights of its citizens. In the case of **Hadijatou Mani Koraou** *v.* **Republic of Niger** (supra), the Defendant state was held liable for human rights violations because its institutions failed to curtail a clear violation of human rights. This is not the

case here. According to the pleadings the 4th Defendant state has institutions which are mandated to handle the grievances of the Plaintiffs/Respondents but they have not been approached. Therefore it is not possible to hold that any *prima facie* violation of human rights exists for which the 4th Defendant should be called upon to answer.

54. Therefore, we hold that there is no reasonable cause of action against the 4th and 7th Defendants.

DECISION

55. From the foregoing, the various preliminary objections raised by all the Defendant's succeed. The suit is accordingly struck out. There will be no order as to costs.

HON. JUSTICE HANSINE N. DONLI - *PRESIDENT*
HON. JUSTICE BENFEITO M. RAMOS - *MEMBER*
HON. JUSTICE ANTHONY A. BENIN - *MEMBER*

ASSISTED BY **MR. 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, NIGERIA

ON TUESDAY, 5TH DAY OF NOVEMBER, 2013

SUIT N^{O}: ECW/CCJ/APP/11/13
RULING N^{O}: ECW/CCJ/RUL/05/13

In the case

BETWEEN
HISSEIN HABRE - *APPLICANT*

AND
REPUBLIC OF SENEGAL - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE M. BENFEITO RAMOS** - *MEMBER*
3. **HON. JUSTICE HANSINE DONLI** - *MEMBER*
4. **HON. JUSTICE C. MEDEGAN NOUGBODE** - *MEMBER*
5. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY

MAITRE ATHANASE ATANNON - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **MAITRE MAMADOU ISMAILA KONATE;**
   MAITRE IBRAHIMA DIAWARA; &
   MAITRE FRANCOIS SERRES. - *FOR THE APPLICANT*
2. **MR. HAMADY COUMBA GADIAGA**,
   ASSISTED BY HIS COUNSEL,
   MAITRE SADEI NDIAYE; &
   MR. ALIOUNE SALL - *FOR THE DEFENDANT*

Expedited procedure -provisional measures -Violation of the principle of presumption of innocence -Equality before the law -Independence and impartiality of the judiciary -Equality of arms -Res judicata -Principle of non-retroaction of criminal law -Checks and controls related to international agreements -Rationae personae competence of ad hoc tribunals -Examining the functioning of extra ordinary chambers in Africa

SUMMARY OF FACTS

Mr. Hissein Habre brought his case before the Court, for the purposes of asking the Court to find, that the agreement concluded between the Republic of Senegal and the African Union concerning the creation of extraordinary African chambers within the Senegalese court system to try him, as well as the constitutive act of the said chambers, violate the Decision of 18 November 2010 made by the Court of Justice of ECOWAS, the constitutional law of Senegal and international law; and that due to the persisting effect of the said agreement and the constitutive act of the said chambers, there is continuing violation of his human rights.

That was the reason why he sought an expedited procedure and the indication of provisional measures or instructions.

The Republic of Senegal did not respond to the application for expedited procedure filed by the Applicant but opposed the indication of provisional measures as requested by him, arguing that the conditions required for granting provisional measures were not yet met.

The Republic of Senegal maintained that the conditions required for ordering such measures shall necessarily be granted upon a condition or circumstance of urgency and that it must fulfil one of the following goals: prevention of irreparable prejudice, safeguarding the rights of parties, or yet still, averting an aggravation of the dispute. The Republic of Senegal affirmed that in the instant case, there was no sufficient ground for the Court to interrupt the judicial proceedings initiated by the agreement concluded between the African Union and the Government of Senegal.

The Republic of Senegal further argued that the Applicant made no mention of any great danger to his physical integrity nor a violation of his life, and that there was nothing in the circumstances he pleaded which could warrant the adoption of provisional measures; that the conditions for indicating provisional measures did not apply to his life conditions, nor was he confronted with any threat.

The Republic of Senegal stressed that the application for provisional measures as filed by the Applicant is rather aimed at derailing the judicial proceedings instituted in Senegal, so as to paralyse the conduct of the trial as best as possible, and to delay the steps being taken towards setting up the trial.

In relation to the conditions for the conclusion of the 22 August 2012 Agreement on creation of extraordinary African chambers within the Senegalese courts, the Republic of Senegal recalled that it acted in conformity with the 18 November 2010 Judgment of the Court, and in line with diplomatic practice relating to national tribunals of international character, as endorsed by the United Nations.

LEGAL ISSUES

- *Is the Applicant required to benefit from an expedited procedure and provisional measures?*

- *Is the agreement concluded between the Republic of Senegal and the African Union in respect of the creation of extraordinary African chambers within the Senegalese judicial system, for the purposes of trying and punishing perpetrators of international crimes committed in Chad between 7 June 1982 and 1 December 1990, legitimate?*

- *Is the agreement concluded and the corresponding implementation measures taken by the Republic of Senegal consistent with the Republic of Senegal's Community obligations, notably its obligation towards observance of the judgment of 18 November 2010 delivered by the Community Court of Justice, ECOWAS, and its obligation towards respecting human rights on its territory?*

- *Is the Court vested with powers to examine any defects associated with the extraordinary African chambers?*

DECISION OF THE COURT

In its ruling, the Court granted the request for expedited procedure. It adjudged that it is prima facie incompetent to adjudicate on the substantive application, notably in those aspects which touch on the exercise of control over the validity and consistency of agreements signed among Member States, and also declared that it has no jurisdiction to suspend judicial procedures instituted by Member States. The Court thus dismissed the application for provisional measures.

The Court further ordered the closure of the case and any other incidental action.

RULING OF THE COURT

1- FACTS AND PROCEDURE

1. Whereas by Application dated 27 March 2013 and registered at the Registry of the Court on 23 April 2013, Mr. Hissein Habre, with his Counsel constituted by Maitre Mamadou Ismaila Konate and Maitre Ibrahima Diawara, lawyers registered with the Bar Association of Mali, and Maitre Francois Serres, lawyer registered with the Bar Association of Paris, brought his case before the Court, for the purposes of asking the Court to find, firstly, that the agreement concluded between the Republic of Senegal and the African Union, concerning the creation of extraordinary African chambers within the Senegalese court system, as well as the constitutive act of the said chambers, violate the Decision of 18 November 2010 made by the Court of Justice of ECOWAS, the constitutional law of Senegal and international law, and secondly, that due to the persisting effect of the said agreement and the constitutive act of the said chambers, there is continuing violation of his human rights. He further submits that the implementation of the agreement and the act could result in suing and trying the architects of the international crimes committed in Chad, between 7 June 1982 and 1 December 1990, which would amount to violation of his human rights.

2. Whereas by two separate Applications dated 27 March 2013, registered at the Registry of the Court on 23 April 2003, he requested, relying on the new Article 21 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, and on Article 79 of t he Rules of Procedure of the Court, an expedited procedure and the indication of provisional measures or instructions.

3. Whereas the Initiating Application and the aforementioned two Applications were served on the Republic of Senegal on 23 April 2013.

4. Whereas after that service, the Republic of Senegal, represented by Mr. Hamady Coumba Gadiaga, State Judicial Officer, assisted by his Counsel, Maitre Sadei Ndiaye, lawyer registered with the Bar Association of Senegal and Mr. Alioune Sall, Professor of Law at the University of Dakar, Senegal, communicated to the Court Registry on 6 June 2013, its observations on the request for provisional measures.

5. Whereas following the objection raised by Plaintiff Counsel on the representation of the Republic of Senegal by Professor Alioune Sall, whose name had previously been struck out of the Roll of Lawyers of Senegal, the Court, in a ruling, rejected the constitution of the said Professor Alioune Sall as Counsel, but admitted the validity of the written pleadings and orders sought, on the ground that the said written pleadings and orders had been signed by at least one lawyer who had legal capacity to plead a case before the instant Court. The Court therefore ordered proceedings to be conducted further.

6. Whereas at the court hearing of 12 June 2013, the Court heard the Parties on the request for provisional measures.

7. Whereas the Applicant asked the Court to bring his Application under expedited procedure, it shall be appropriate, beforehand, to adjudicate on that request.

A. Arguments advanced by the Applicant

8. Whereas from the Initiating Application, it is apparent that Mr. Hissein Habre asks the Court to find :

- That the powers, conferred on the African Union and the decision made by the International Court of Justice were aimed at setting up trials before the competent Senegalese Courts, and that such approaches directly violate the provisions of the judgment delivered by the ECOWAS Court of Justice, and his human rights; that Senegal, at any rate, renounced those powers conferred on it, as the legal basis of the assignment entrusted to it by the African Union before the International Court of Justice;

- That Senegal had undertaken with the African Union an enterprise which had no other objective than to create a court within the Senegalese State judicial system, thus contradicting the principles laid down by the Court of Justice of the Economic Community of West African States (ECOWAS) in the operative part of its Judgment of 18 November 2010, and violating his human rights;

- That the legal framework and procedure applied at the African chambers do not conform to the criteria laid down for tribunals and the international ad'hoc procedure, thus perpetuating the violation

of his human rights; and that such undertakings, which have no other purpose than to organise the trial of former President Habre under the aforementioned conditions, will have no other effect than to amount to violation of the principle of presumption of innocence, equality before the law and non-discrimination, which forbid every form of discrimination on the basis of personal considerations in determining the establishment of a court or a tribunal which shall be invested with the power of trying human beings; that such undertakings, when implemented, perpetuate the violations sanctioned by the Court;

- That the African chambers are not a type of tribunal established in accordance with international law and the constitutional law of Senegal; and that the statute creating the African chambers is inconsistent with the fundamental provisions of the Constitution of Senegal, in that the latter guarantees and protects the rights of all those who are qualified to seek redress before the law courts, and it upholds the equality of litigants before the law; that the structure, organisation, composition and rules of procedure put in place are of such nature as to violate the rules of fair trial and his human rights;

- That the plans being hatched up by Senegal have no other purpose than to go round the various legal obstacles in the Senegalese State judicial system, so as to bring him to trial (notably, he refers to the rules of legality on offences and punishments) *non bis in idem,* immunity or time bar); that the rules devised for appointing the judges, the rules of procedure (which are based on the Code of Criminal Procedure of Senegal), the rules governing tendering of evidence, the rules on putting up defence, and the rules regarding appeal processes, violate the independence of judicial functions amongst the chambers, or tend to limit the rights of an indicted person.

9. Whereas the Applicant further pleaded that beforehand, the steps taken prior to the creation of the chambers, which owe their existence to financial support from Chad, with the latter playing an essential role in dictating to the Senegalese Executive, the outlines of charges to be preferred, how investigations should be conducted, and how the tendering of evidence should be handled, are all in violation of the principles of independence and impartiality of the Judiciary, and the related principle of equality of judicial arms.

10. Whereas the Court is further asked to adjudge:

- The offences sought after within, the framework of the powers conferred on the African Union and in respect of the judgment delivered by the International Court of Justice (ICJ) are limited to charges relating to violation of the Convention Against Torture;

- The plans followed by Senegal since the Court made its last decision, violate the human rights of the Applicant;

- Senegal violates the human rights of the Applicant by continuing to hold him under house arrest since 2001, upon no judicial or administrative ground;

- If Senegal should extradite the Applicant to Belgium, in favourable response to the request for his extradition to that country, such measure cannot but violate the fundamental rules already upheld by the ECOWAS Court of Justice.

11. Whereas the Applicant equally asks the Court to order the Republic of Senegal to :

- Cease all undertakings, inquiry or proceedings aimed at suing and bringing him to trial, in violation of the said rights, and thereby, where necessary, order the discontinuation of any procedure instituted against him :

- Cease all measures aimed at placing him under house arrest, depriving him of his freedom of movement, both within and outside the territory of Senegal;

- Fulfil the request he made, so as to obtain such document as enables him to travel , including travelling outside Senegal, in line with his status as a political refugee;

- Respect all his rights as a political refugee, as guaranteed by the provisions of international conventions on rights of refugees;

- Guarantee him the right to the respect of his private life, the moral health of his family, the security every refugee is entitled to, and the respect for his human dignity, by ceasing all media campaign which violates his honour and reputation.

12. Whereas finally, Mr Hissein Habre asks the Court to order the Republic of Senegal to:

    - Pay to him the sum of Five Hundred Million CFA Francs - (CFA F 500,000,000) as reparation for the harms dome him since 2001, as arising from the implementation of the plans and undertakings devised against him, in violation of his rights, freedom, honour and reputation, and in violation of the principle of presumption of innocence, his moral health and the moral health of his family;

    - Pay to him the sum of Two Hundred and Fifty Million CFA Francs (CFA F 250,000,000) as litigation costs incurred by him since 2001.

13. Whereas in support of the request for expedited procedure, the Applicant recalls that in spite of the force of *res judicata* of the 18 November 2010 Decision made by the Community Court of Justice, which is binding on the Senegalese authorities, the Republic of Senegal still persists in its plans to try him before its courts, with no regard for the principles laid down by the Court, and as a result, commits fresh violations of the basic principles of human rights, and of the directive principles for holding trials.

14. Whereas according to the Applicant, those violations arise out of:

    - The non-respect of *res judicata* and of the principle of non-retroactivity of criminal law;

    - The persistence of Senegal in its resolve to have him tried within its judicial system, which has been disqualified by the Court;

    - The implementation of a judicial process within the framework of an agreement concluded with the African Union, whereas the Court has made a declaration to the effect that the African Union has no legal capacity to administer justice;

    - The creation of extraordinary African chambers which do not fulfil international standards, as much from their *ad'hoc* nature as in their adoption of a procedure that is not international in character;

    - The resolve of the Senegalese Executive to bend back the rules on *non bis in idem,* immunity, time bar, presumption of innocence, equality before the law, and non-discrimination; and

    - The creation of chambers, and of an inquiry process, under the control of the Executive powers of Senegal and Chad.

15. Whereas consequently, for the Applicant, it is necessary to prevent Senegal from continuing further with violations sanctioned by the Honourable Court, and also ensure that the Decision of the Court is absolutely adhered to.

16. Whereas indeed, according to the Applicant, there are corroborating signs of human rights violations which arise as much from the body set up by Senegal, as from the procedure it put in place before he was brought under investigation; whereas he justifies the urgency of his case by the alleged seriousness of the violations invoked and their irremediable character, which, according to him, calls for the immediate intervention of the Court.

17. Whereas for, the Applicant therefore, it is of prime importance that the Court acts with extreme urgency, so as to adjudicate on the serious, repeated and irreversible violations of his human rights, generated by the illegal measures, acts and intentions undertaken by the Republic of Senegal.

18. Whereas relying on the Revised Treaty of ECOWAS, various international human rights instruments, the 2005 Supplementary Protocol, the 28 August 2002 Rules of the Court, and on the Decisions of the Court as made on 14 May 2010 and 18 November 2010 in respect of *Case Concerning* **Hissein Habre** *v.* **Republic of Senegal**, the Applicant requests the Court to find that there is urgency, and to make an order for expedited procedure as provided for by Article 59 of the Rules of Procedure of the Court.

19. Whereas in support of the application for provisional measures, the Applicant argues that the conditions warranting the measures sought are met; whereas he emphasises in particular that there exists a high probability of aggravation of the dispute or of irreparable harm; whereas indeed, according to the Applicant, the pursuit of the plans and intentions of Senegal, in violation of his rights and in violation of the previous judgment delivered by the Court, together with the implementation of preparatory measures which are contrary to the rules of fair trial, could only lead to fresh violations, including the likelihood of the Applicant being sentenced or coming under preventive detention; and that this could engender considerable and naturally irreparable damage against him ; whereas he argues that it is urgent to examine whether the Act creating the chambers is in conformity with the 18 November 2010 Judgment of the Court.

20. Whereas he affirms that all the regional human rights courts and international courts lay down the same conditions for granting provisional measures; whereas what is at stake here is the seriousness and imminence of the damage confronting the Applicant.

21. Whereas he argues further in his contention regarding his request for provisional measures, that in examining applications for provisional measures, the International Court of Justice has set out principles relating, : notably, to : (1) the existence of serious prejudice *(Case Concerning* **Congo v. France***,* Order of 17 June 2003), (2) urgency, and (3) imminent threat of irreparable damage *(Case Concerning* **Argentina v. Uruguay***,* Order of 13 July 2006); whereas he pleads further that according to the World Court, the risk of irreparable damage does not need to be certain for it to be justified by a provisional measure, and that it suffices that such risk be potential or virtual (refer to the **Anglo-Iranian Oil** *Case,* Order of 5 July 1951, 1951 Reports, page 93).

22. Whereas he contends further that the African Court of Human Rights in *Judgment on Case concerning* **Commission v. Libya***,* singled out two elements for granting provisional measures: that firstly, there must be *prima facie* competence of the Court, and secondly, there must be a serious and imminent prejudice against the Applicant.

23. Whereas he affirms that each of these conditions have been fulfilled in the instant case, he asks that it may please the Court to order the Republic of Senegal to:

- Suspend with immediate effect the measures adopted, the inquiries, the steps undertaken or yet to be undertaken to apply the acts creating the trial chambers, and the implementation of related procedures;

- Produce, on provisional basis, the budget put in place since 2007, comprising all, the external support obtained or to be received, in terms of financial and human resources, the modalities for disbursement, and the budget for the trial;

- Notify the Court of all the measures it has taken towards giving effect to the Court order, once such future decision is made by the Court.

B. Arguments advanced by the Defendant State

24. Whereas the Republic of Senegal, in its written pleadings, did not respond to the application for expedited procedure filed by the Applicant, served on the Republic of Senegal on 24 April 2013.

25. Whereas the Republic of Senegal opposes the indication of provisional measures, principally arguing that the conditions required for ordering such measures are not met in the instant case. Whereas indeed, it maintains, that provisional measures must necessarily be granted upon a condition or circumstance of urgency and that it must fulfil one of the following goals: prevention of irreparable prejudice, safeguarding the rights of parties, or yet still, averting an aggravation of the dispute; whereas the Republic of Senegal affirms that in the instant case, there aren't sufficient grounds for the Court to interrupt the judicial proceedings initiated by the agreement concluded between the African Union and the Government of Senegal.

26. Whereas the Republic of Senegal further argues that the Applicant made no mention of any great danger to his physical integrity nor a violation of his life, and that there is nothing in the circumstances he pleads which warrants the adoption of provisional measures, that the conditions for indicating provisional measures do not apply to his life conditions, nor is he confronted with any threat; whereas the Republic of Senegal buttresses its arguments by relying; among others, on the case-law of the instant Court and that of the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human Rights.

27. Whereas the Republic of Senegal stresses that the application for provisional measures as filed by the Applicant is rather aimed at derailing the judicial proceedings instituted in Senegal, so as to paralyse the conduct of the trial as best as possible, and to delay the steps being taken towards setting up the trial ; whereas it avers that the application for provisional measures is ill-founded and asks that the Applicant be made to bear the costs.

28. Whereas in relation to the conditions for the conclusion of the 22 August 2012 Agreement on creation of extraordinary African chambers within the Senegalese courts; the Republic of Senegal recalls that it acted in conformity with the 18 November 2010 Judgment of the Court, and in

line with diplomatic practice relating to national tribunals which are of international character; as endorsed by the United Nations.

29. Whereas indeed, the Republic of Senegal affirms that the Applicant's arguments on the powers of the African Union are outdated; whereas the Republic of Senegal draws the attention of the Court to the fact that the Court cannot examine, as is requested by the Applicant from the Court, whether the Agreement the Republic of Senegal concluded with the African Union is consistent with international law or with the Constitution of Senegal; whereas the Republic of Senegal submits that the procedure employed in the creation of the extraordinary chambers, the choice of the members of the Court, as well as the fixing of the court's jurisdiction, to try Hissein Habre is not vitiated; whereas in relying on the international practice of *ad'hoc* tribunals which have an international character, the Republic of Senegal contends that the *rationae personae* competence of such international courts or tribunals are set out by the statute creating them, in a manner which leaves no doubt as to those who are qualified to seek redress before them; that at such stage of a trial, one could not talk of violation of presumption of innocence or violation of the Applicant's right to defence.

II- ANALYSIS OF THE COURT

30. Whereas the Applicant partly asks the Court to treat his Application under expedited procedure and partly requests that the Court order provisional measures in his favour.

A. As to the request for expedited procedure

31. Whereas Mr. Hissein Habre asked the Court to implement the expedited procedure pursuant to Article 59 of the Rules of Procedure of the Court, in that it is urgent to prevent Senegal from continuing with the human rights violations already sanctioned by the Honourable Court, considering that the violations in question are serious and repetitive and may turn out to be irremediable for him without the prompt intervention of the Court; whereas the Republic of Senegal did not file any prayers in respect of that request, although it was served with the said application on 23 April 2013.

32. Whereas the Applicant's request is justified by the fact that further pursuit of the procedure put in place by Senegal risks prejudicing his human

rights irremediably: whereas the Court itself found the urgency at stake, and in the absence of prayers from the Defendant State in response to that request, expedited action on the instant proceedings as much as was required; whereas as a result, and in principle, the Court grants the application for expedited procedure in interim ruling.

B. As to the request for provisional measures

33. Whereas the Court may adopt provisional measures when it finds that there is a human rights violation in a Member State; whereas the Court has ruled in that respect, in its judgment on the *Case concerning* **Baldini Salfo** *v.* **Burkina Faso** (ECW/CCJ/JUD/13/12, paragraph 59) that, ***"The principal objective behind the making of an order when the Court finds an occurrence of human rights violation, is the cessation of the said violation and the institution of reparation."*** This decision is in conformity with Article 21 of the 9 January 2005 Protocol and Article 79 of the Rules on which the Court relied to define the criteria enabling it to order provisional measures (refer to the Court's ruling on *Case concerning* **Godswill Mrakpor** *v.* **5 Others**, 18 March 2011 § 17.

34. Whereas where the Court adjudicates on a request for provisional measures, in compliance with the texts cited above, it is solely guided to do so upon a triple condition, by determining:

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

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

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

35. Whereas from the foregoing, it can be deduced that the Court can only adopt provisional measures within its areas of competence; whereas it is a general rule which determines the purview of the regional courts of integration; ***whereas it is therefore ripe and appropriate for the Court to determine its competence in respect of the substantive case submitted before it***, whether the Application may be granted and whether there is an urgency to be adjudicated upon.

36. Whereas indeed, it can be deduced from the Initiating Application that Mr. Hissein Habre brings complaints on human rights violation, current, continuing and future violations which, essentially revolve around : the powers conferred on the African Union, the invalidity of the Agreement concluded between Senegal and the African Union in violation of the rules of international law and of the domestic law and Constitutional law of Senegal, the assertion that the composition of the extraordinary African courts is legally inconsistent with the Constitution, and the fact that Senegal did not enforce the judgment made by the Court on 14 and 18 November 2010 in **Hissein Habre** *v.* **Republic of Senegal.**

As to the *prima facie* competence of the Court

37. Whereas the Court is a regional Court which, inter alia, sanctions human rights violations committed by Member States, and whereas it has jurisdiction in the area of interpretation and application the ECOWAS Community texts; whereas the Court adjudicates on human rights and ECOWAS Community law in the exercise of these two principal areas of its competence.

38. Whereas the Applicant complains, certainly, of continued violation of his human rights arising from non-respect of the 18 November 2010 Judgment of the Court, and of forthcoming violations of his human rights, in that he may probably be charged, before the Court; whereas he further argues that the measures taken in implementation of the agreement and of the constitutive act of the extraordinary African chambers, could target him directly and thus violate his rights, whereby he argues that the agreement could be in consistent with the rules of international law, and moreover, that the courts derived from such measures could not have any international character.

39. Whereas the Court observes that even if the issue of human rights violation appears in the Application of Hissein Habre, it does not form the substance of the dispute.

40. Whereas indeed, it can be deduced from the Initiating Application that the heart of the main dispute truly lies in:

    (1) Examining the validity of the agreement concluded between the Republic of Senegal and the African Union, and that of the annexed Act creating the extraordinary African courts within the Senegalese

court system, for the purposes of trying and punishing perpetrators of international crime committed in Chad between 7 June 1982 and 1 December 1990;

(2) Examining how consistent those legal frameworks are, and extending the same analysis to the subsequent measures taken by the Republic of Senegal *vis-a-vis* Senegal's commitments towards the Community, particularly its obligation to respect the 18 November 2010 Judgment of the Court, and to respect human rights on its territory;

(3) Finding out features which vitiate the setting up of the extraordinary African chambers.

41. Whereas the Court intends first of all to examine if there are any grounds of manifest incompetence or inadmissibility, in applying the criteria recalled above from the provisions of paragraph 1, Article 88 of the Rules of Procedure of the Court, which provides: **"where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the parties and without taking further steps in the proceedings, give a decision."**

42. Whereas in its Judgment of 18 November 2010, the Court recalled that ***"The Republic of Senegal is bound by duty to design and propose any form of modality appropriate for suing and for trial purposes, within the strict framework of a special ad'hoc procedure of international character, as practised in international law by all civilised nations."***

Whereas it follows from the judgment that it was incumbent upon the Republic of Senegal to take steps to set up a Court or Tribunal of international character for the purposes of trying Hissein Habre and others.

43. Whereas the Court finds, in this vein, that the Defendant State concluded with the African Union an agreement on the creation of extraordinary African chambers within the Senegalese court system, for trying the Applicant.

Whereas thus, the judicial procedure complained of by Mr. Hissein Habre reposes on the said international agreement concluded by the Republic

of Senegal for eliminating international crimes considered by human beings as serious, punishable and timeless. Now, such an undertaking takes its source from the obligation upon Senegal to observe its international commitments and it is based on the implementation of the treaty-making power between Senegal and the African Union; whereas given that this is the case; Senegal is therefore carrying out acts which come under the exercise of its sovereignty, not within the framework of Community law, *stricto senso,* but under general international law, the law of the African Union and the domestic law of Senegal.

44. Whereas for the Court, the African Union is an international organisation invested with a legal status enabling it to have its own rules of functioning and organs for examining and controlling the actions it undertakes. Again, the Court is of the view that in questioning the validity of the agreement in question, in querying its consistency with the Community law and notably with the obligation upon a Member State to observe human rights on its territory, and in submitting such question before the Court to be examined by the Honourable Court, the Applicant is simply asking the Court to prefer sanctions against the said act of concluding an agreement and thereby assume the status of a judge over the actions engaged in by the African Union. In that regard, the Court recalls what it has consistently held in its case law, that it has no jurisdiction to examine consistency in international agreements as declared into by Member States, nor to suspend judicial procedures instituted by the Member States.

Consequently, the Court adjudges that it has no jurisdiction to examine whether or not the said acts engaged in were valid or in conformity with the Community law; those acts do not come under the implementation of the primary or derived Community law - such review exercises are carried out within the purview of other mechanisms in general international law, and under treaties.

45. Whereas regarding the Republic of Senegal's non-execution of the Court's judgments delivered on 14 May and 18 November 2010 in relation to *Case Concerning* **Hissein Habre v. Senegal***,* the Court recalls, as it has already done in **Karim Wade v. Senegal,** that disputes relating to the enforcement of the Court's judgments come under a specific procedure set out by Article 15 of the 17 February 2012 Supplementary Acts; whereas in the terms of that Supplementary Act,

an application seeking to determine whether or not a Member State has adhered to a decision of the Court, comes under issues concerning Member States' default in their obligations towards the Community, and cases thereto may only be filed by the Member States or by the President of the Commission, in accordance with Article 10 of the 19 January 2013 Supplementary Protocol. **Hence, the Court is of the view that an application brought by a natural person complaining against anyone of the Court's decisions is, upon the grounds mentioned above, inadmissible**.

46. Whereas whether the creation process of the extraordinary African chambers was vitiated or not, and as to whether that process is in conformity with international standards, or whether or not the chambers are a type of ad'hoc tribunal or an independent judicial body, or whether or not the chambers apply a procedure of fair trial, etc., the Court reaffirms its stand that the creation of such chambers, the devising of their rules of organisation and functioning, and their powers, are governed by the agreement complained of and by their own constitutive acts or statutes.

The Court therefore adjudges and declares that it has no jurisdiction to examine the independence of such courts or tribunals which do not come under its purview.

47. Whereas regarding the plea in law on the question of whether the extraordinary chambers are international or not, the Court recalls that it has indicated in its judgment of 18 November 2010 that it is absolutely necessary to offer Hissein Habre the guarantee of an international standard of fair trial.

The Court is of the view that even if the extraordinary African chambers were created within the Senegalese national court system, that does not make them less international by virtue of their mode of creation through an international agreement, and as well, their own rules of functioning do differ from those of the domestic courts of Senegal. Moreover, the existence of those courts on Senegalese national territory and the fact

that the judges were only partially composed of judges of Senegalese nationality do not make the chambers less international; whereas hence, **the Court considers that the international agreement which created the extraordinary African chambers and their own specific rules of functioning, by virtue of the statute creating them, do confer on them an international character.**

48. Whereas it is trite that there is no hierarchy among international courts; whereas consequently, **the Court adjudges that it cannot exercise any control over the rules governing the functioning of the extraordinary African chambers.**

49. Whereas in the final analysis, the Court adjudges that it has no jurisdictions to adjudicate on the substantive application in those aspects touching on the exercise of control over the validity and consistency of the agreement signed between the Republic of Senegal and the African Union, whereas in addition, the other aspects relating to the occurrence of continued violations arising from the non-respect of the Court decision of 18 November 2010, and the possibility of occurrence of future violations, are manifestly inadmissible, for the reasons stated above; whereas, finally, the international nature of the extraordinary chambers is established.

Whereas it is no more necessary to examine the other criteria set out in paragraph 34 herein above.

50. Whereas the Court is prima facie incompetent to adjudicate on part of the Application, whilst the other part is manifestly inadmissible, there are no grounds for ordering interim measures.

51. Whereas the substantive case cannot succeed, it is ripe and appropriate for the Court to pronounce the closure of the; whereas, hence any other incidental action shall be devoid of purpose.

FOR THESE REASONS

The Court,

- Having regard to the 7 July 1993 Revised Treaty of ECOWAS;
- Having regard to the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol;
- Having regard to the 3 June 2002 Rules of Procedure of the Court;

Adjudicating in a public session, after hearing both Parties, and after deliberating in this ruling;

- **Grants** the request for expedited procedure.
- **Adjudges** that it is prima facie incompetent to adjudicate on the substantive application.
- **Adjudges** therefore that there are no grounds for ordering interim measures.
- **Orders** the closure of the case and any other incidental action.
- **Adjudges** that each party shall bear its costs.

Thus made and pronounced in French, the language of proceedings, at a public hearing at the seat of the Court, Abuja, on the 5th day of November 2013.

And the following hereby append their signatures:

Hon. Justice Awa Nana DABOYA - *Presiding*
Hon. Justice Benfeito Mosso RAMOS - *Member*
Hon. Justice Hansine DONLI - *Member*
Hon. Justice Clotilde Medegan NOUGBODE - *Member*
Hon. Justice Eliam M. Potey - *Member*

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

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

HOLDEN AT ABUJA, NIGERIA

THIS THURSDAY 6TH NOVEMBER, 2013

SUIT N^{O}: ECW/CCJ/APP/18/12
RULING N^{O}: ECW/CCJ/RUL/13/13

BETWEEN

1. LINDA GOMEZ
2. LENE LYKKE FAYE
3. EBOU KAMAR
4. ALAGIE BAMBA BAH
5. CIVIL SOCIETY ASSOCIATION, GAMBIA
6. SAVE THE GAMBIA DEMOCRACY PROJECT } *PLAINTIFFS*

AND

THE REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT

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

ASSISTED BY

MR. TONY ANENE·MAIDOH - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **FRANCOIS SERRES & MAMADOU ISMAILA** - *FOR THE PLAINTIFFS*
2. **AMIE JOOF**, *HONOURABLE ATTORNEY GENERAL OF THE GAMBIA* & **D.O. KULO**, *DIRECTOR FOR SPECIAL LITIGATION IN THE ATTORNEY GENERAL'S CHAMBERS* - *FOR THE DEFENDANT*

Jurisdiction -Abuse of Court process -Exhaustion of local remedies

SUMMARY OF FACTS

The 1st, 2nd, 3rd and 4th Plaintiffs are persons who have been sentenced to death by the Gambian Government. The Plaintiff is a Civil Society Organization and the 6th Plaintiff is a Political and Humanitarian Association. The Defendant is a Member State of ECOWAS. Whereupon the Plaintiffs brought an action against the Defendant for the alleged violation of their right to fair hearing arising from the alleged imposition of death penalty, torture, cruel, inhuman and degrading treatment by the Defendant. Also, that the trials were not in accordance with laid down laws. Furthermore, that some detainees were executed in September, 2012 without allowing them exhaust their appeal processes. The Plaintiffs added that this act was condemned by the International and Domestic Community particularly the Amnesty International. Plaintiff's application was premised on the provisions of the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights amongst others some of which the Defendant has ratified. Amongst several reliefs, the Plaintiffs are seeking the order of the Court asking the Defendants to comply with the provisions of various international human rights instruments even if it means amending its constitution and domestic legislations amongst others.

The Defendant raised a preliminary objection to the jurisdiction of the Court to sit in an appellate capacity over domestic courts and stated that the application before the Court amounts to an abuse of Court process.

LEGAL ISSUES

- *Whether or not this Court has the jurisdiction on the matter.*
- *Whether the Applicant's case constitues an abuse of Court process.*

DECISION OF THE COURT

The Court held that the issue before it is one founded on human rights violation which is entirely different from the criminal cases pending or decided in the Courts in The Gambia;

- *That it has neither jurisdiction to annul domestic legislation of ECOWAS Member States nor the jurisdiction to act as appellate court over their domestic court;*

- *That the Application raises a prima facie case of human rights violation which confers jurisdiction on the Court to entertain such;*

- *That the Court has jurisdiction despite the status of any case pending or decided before a domestic Court since exhaustion of local remedies is not a requirement in this Court;*

- *That it has jurisdiction to hear and determine this case on the merits and rejected the Preliminary Objection.*

RULING OF THE COURT

PARTIES AND REPRESENTATION

1. The 1st Plaintiff is a citizen of The Gambia and wife of Bakary Demba, who was sentenced to death on 30th May, 2011 whilst the second Plaintiff is of Danish nationality and wife of Batch Samba Faye, who was sentenced to death for murder in 2004. The 3rd Plaintiff is of Gambian nationality and brother of Modou Colley who was sentenced to death on 30th May 2011 whilst the 4th Plaintiff is of Gambian nationality and brother of Alieu Bah, sentenced to death for treason on 27th October 1998 and executed on 26th August 2012. The 5th Plaintiffis a coalition of civil society organizations in The Gambia and domiciled at Georgia, United States of America whilst the 6th Plaintiff is a political and humanitarian association, also domiciled at Georgia in the United States of America. The Defendant is a Member State of the Economic Community of West African States (ECOWAS). The Plaintiffs were represented by Mamadou Ismaila Konate and Francois Serres whilst the Honourable Attorney General of The Gambia, Amie Joof and D.O. Kulo, Director for Special Litigation in the Attorney General's Chambers represented the Defendant.

SUMMARY OF THE FACTS

2. The Plaintiffs averred that forty-eight (48) persons were detained at a detention center in Mile Two Central Prison in the Republic of Gambia, as a result of death sentences imposed on them, The Plaintiffs averred that at least forty-seven (47) persons have been executed in The Gambia. The Plaintiffs continued that some of those sentenced to death and detained are very old whilst some are suffering from mental disorders. Further, some of them are political prisoners whilst others are foreign nationals. The Plaintiffs alleged that some of those death row inmates have been detained for about twenty-seven (27) years.

3. The Plaintiffs averred that the conditions of detention and treatment of those sentenced to death were regularly denounced by many non-governmental organizations, international organizations and foreign governments, many of these detained prisoners never received family visits and have lived in total isolation for years. The Plaintiffs also averred that many of the death sentences appear to have been imposed as a result of legal proceedings that did not meet the requirements of fair hearing and were politically motivated by the government to stifle press freedom and silence political opponents.

4. The Plaintiffs stated that on 19th August 2012, President Yahya Jammeh declared that those sentenced to death could be executed in September 2012, causing serious concern among Gambians, the detainees and their families. Plaintiffs averred that this statement was strongly condemned by the international and domestic community, particularly by the Amnesty International, CSAG and RADDHO. Plaintiffs continued that on 24th August, CSAG stated that nine (9) death row inmates were executed on the night of 23/24 of August 2012. The government of The Gambia stated that these executions were legitimately carried out in strict compliance with existing legal framework. These executions were condemned by the Amnesty International.

5. The Plaintiffs' averments continued that some of the inmates were executed even though they had not exhausted their appeal processes, including Mr. B. G. Mbeye and Mr. Batch. The Plaintiffs commenced this action asking the Court to find that the Defendant had violated the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, Customary International Law, the right to life and the prohibition of the death penalty, the right to fair trial, *et cetera* and to make among others, the following declarations and orders:

   a) Adjudge and declare that the keeping of all the inmates condemned to death on death row perpetrates the violations listed above;

   b) Adjudge and declare that the execution of these inmates constitutes a violation of the above mentioned texts;

   c) Order the Republic of The Gambia to comply with the rights and principles recalled above and to stop pronouncing the death sentence and consequently, the executions;

   d) Order the Republic of The Gambia to comply with the rights and principles recalled above and take necessary measures to repeal its criminal law on the death penalty;

   e) Order the Republic of The Gambia to comply with the rights and principles recalled above and amend its Constitution so as to abolish the death penalty;

   f) Order the Republic of The Gambia to respect the free access of lawyers to the prison(s) where death row inmates are detained;

g) Order the Republic of The Gambia to respect the right of families to visit inmates sentenced to death;

h) Order the Republic of The Gambia to give back to the families the corpse of the inmate executed specifically Mr. Alieu Bah and the others.

i) Condemn the Republic of The Gambia for the violations against Mr. Alieu Bah, an inmate who was executed in violation of the rights and principles recalled above, and to pay Mr. Bamba Alagie Bah, the sum of 500 million Francs CFA for non-pecuniary damages suffered;

j) Order the Republic of The Gambia to pay the sum of 150 million Francs CFA in settlement of attorneys' fees;

k) Order the Republic of The Gambia to bear the cost of the proceedings.

6. Upon service of the originating Application on the Defendant, she raised a Preliminary Objection to the suit, predicated on the following grounds:

a. This Court lacks jurisdiction to entertain this matter as the Court has no appellate jurisdiction over the decisions of the national courts of ECOWAS Member States.

b. This Court lacks the jurisdiction to annul a national law or statute of ECOWAS Member States.

c. The Applicants' case is an abuse of the process of this Court.

7. In the consideration of this preliminary objection we deem it appropriate to consider the first two issues raised by the Defendant/Applicant together, that is whether this Court can act as an appellate Court over domestic courts of ECOWAS Member States and whether it has the jurisdiction to annul existing statute law of ECOWAS Member States since both are based on the jurisdiction of the Court. We shall then consider the third issue, which is abuse of the process of this Court.

WHETHER THIS COURT HAS APPELLATE JURISDICTION OVER .DOMESTIC COURTS OF MEMBER STATES OF ECOWAS OR JURISDICTION TO ANNUL THEIR EXISTING STATUTE LAWS

8. Learned counsel to the Defendant/Applicant contended that this Court cannot overturn the decisions of national Courts of ECOWAS Member States. Counsel relied on the cases of **Jerry Ugokwe** *v.* **Federal Republic of Nigeria & Anor** (2004- 009) CCJELR 37, **Moussa Leo Keita** *v.* **Republic of Mali** (2004-2009) CCJELR 63, **Alhaji Hammani Tidjani** *v.* **Federal Republic of Nigeria & 4 Ors** (2004-2009) CCJELR 77 and **Frank Ukor** *v.* **Rachad Laleye & Anor** (2004-2009) CCJELR 131 to support his submission that this Court cannot overturn the decisions of national Courts of ECOWAS Member States. Learned Counsel submitted that in all these cases, this Court has upheld the decisions of national courts of ECOWAS Member States and emphasized that it has no jurisdiction to act as an appellate Court over domestic Courts of Member States.

9. Counsel further submitted that the offences carrying the death sentences have been in existence before the Applicants were arrested and tried, in conformity with already laid down procedures which afforded an opportunity for appeals to The Gambian Court of Appeal and finally to The Gambian Supreme Court. Thus, there is no issue of human rights violation with respect to the arrest, trial, conviction and death sentence imposed on the Plaintiffs/Respondents.

10. Counsel submitted that the jurisdiction of any Court of law is determined by the statute establishing the Court. Counsel submitted further that this Court was established by Article 6(1) (e) and 15(1) of the ECOWAS Revised Treaty whilst Article 15(2) provides that **"The status, composition, powers, procedure and other issues concerning the Court of Justice shall be set out in a Protocol relating thereto".** Counsel submitted that the Protocol on the Court of Justice (A/P.1/7/91) was subsequently adopted and Article 9 thereof clearly spells out the jurisdiction of this Court. Counsel contended that there is nowhere in Article 9 of the Protocol of the Court that allows it jurisdiction to overturn decisions of national courts of ECOWAS Member States and urged the Court to dismiss the case of the Plaintiffs/Respondents.

11. On the issue of annulment of statute laws of ECOWAS Member States, learned counsel submitted that Plaintiffs/Respondents' relied primarily on the provisions of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, but a strict construction of these international and regional covenants show that the

special courts on human rights (including the ECOWAS Court) are not vested with power to annul any national statute which appears to be in conflict with the intent and spirit of the covenants. Learned Counsel submitted that the International Covenant on Civil and Political Rights only obliges state parties to take measures to abolish the death penalty and an order of this Court annulling provisions of The Gambia criminal code dealing with the death penalty will certainly not be a measure necessary to abolish the death penalty within the territorial jurisdiction of The Gambia.

12. Learned counsel submitted that the African Charter on the other hand envisages a steady and timed program of abolition of the death sentence and not an instant one. Further, counsel submitted that the African Charter restricts extension of offences in which the death penalty applies, but allows state parties time within which to take measures to abolish the death penalty all together in line with the provisions of the international Covenant on Civil and Political Rights. Counsel contended that the African Charter provides moderate restrictions on rights as are necessary in a democratic society as democracy cannot thrive in societies with infinite freedoms and attendant lawlessness, and relied on Article 9 (11) of the African Charter which provides thus:

> **"Any restrictions on freedom shall be provided by law, serve a legitimate interest and be necessary in a democratic society".**

13. Counsel submitted that in the Republic of The Gambia, there are minimum restrictions on human rights and these can only be found in section 25(4) and 209 of the 1997 Constitution and section 35 of the Criminal Code cap 10 volume III, Laws of The Gambia, Counsel contended that section 18 (2) of the 1997 Constitution of The Gambia permits the imposition of the death penalty in appropriate circumstances, Counsel contended that the fair restrictions necessary for tranquility and stability in a democratic society are sparingly invoked for the preservation of law and order and are applied in conformity with the provisions of Article 9(11) of the African Charter, Counsel urged the Court to hold that it lacks the power to annul any legislation or statute as this is the exclusive preserve of the national courts and the national assemblies of the ECOWAS Member States.

14. In response, learned Counsel to the Plaintiffs/Respondents submitted that the Plaintiffs/Respondents are not asking the Court to act as a supreme

Court of Member States or to cancel their internal constitutional, legislative or regulatory acts, However, the Plaintiffs/Respondents are asking the Court to find that there are human rights violations, regardless of any procedural issues and to condemn the government of Gambia for violation of international conventions and treaties which abolish capital punishment Therefore, the issue before the Court is not about annulling a judgment of the courts of The Gambia or determining whether the Applicants are guilty or not but determine whether the imposition of death sentence, detention on death row, execution and the manner thereof violate rights and principles enshrined in international and regional covenants and to urge The Gambian government to institute measures to curb such violations if they exist.

15. Counsel submitted that the Protocol on the Court of Justice empowers it to ***"review failures by Member States to fulfil their obligations under the Treaty, Conventions and Protocols, Regulations, decisions and guidelines"***. Thus, the Court can determine whether there are human rights violations, and if there are, urge the Member State to curtail them, pay compensation and prevent future violations through the adoption of legislation or amendment of their Constitution, Counsel submitted that the Court urged the government of Senegal to comply ***"with decisions of its national courts especially in respect of res judicata"*** after it found violations of human rights in the case of **Hissein Habre** *v.* **Republic of Senegal** (suit no. ECW/CCJ/APP/07/08 and judgment no. ECW/CCJ/JUD/06/10).

16. Counsel submitted further that in the **Hissein Habre Case** (supra), the Court was not asked to annul a constitutional or legislative provision, but to look at the facts of the case and the application of the law and determine whether the prosecution on that basis violated provisions of the African Charter on Human and Peoples' Rights.The Court made a finding on the human rights issue without making itself an appellate Court of Senegal.

17. Furthermore, counsel submitted that this Court has established in a long list of cases that it can intervene in a human rights cause even though the Applicant has not exhausted local remedies. Counsel contended that the cases of **Jerry Ugokwe** *v.* **Federal Republic of Nigeria & Anor, Tidjani v Federal Republic of Nigeria & 4 Ors and Frank Ukor** *v.* **Rachad Laleye & Anor** (all supra) are distinguishable from the present case as either the Court did not have jurisdiction because the cases did

not involve human rights violations or the Court was essentially asked to "retry" a case which had been tried at national level. In contrast however, the Court in the case of **Hadjatou Mani Koraou** *v.* **The Republic of Niger** (2004-2009) CCJELR 217, the Court considered/reviewed a judgment of the Republic of Niger and held that the national judge, who has established the act of slavery without any penal measure against the perpetrators of the offence should take measures to punish them.Further, the Court held that it did not have jurisdiction to review the laws of ECOWAS Member States in abstract, but had jurisdiction to protect human rights having regard to empirical evidence presented to it.

18. Counsel submitted that Article 27 of the Vienna Convention on the Law of Treaties prohibits a state from invoking the provisions of its internal law as justification for non-performance of treaty obligation. Further, the European Court of Human Rights and the Inter-American Court of Human Rights have had the opportunity to rule on domestic laws violating international covenants and have held that a country cannot rely on its internal legislation, even its constitution, as justification for non-fulfilment of its Treaty obligations.

WHETHER FROM THE TOTALITY OF THE FACTS AND CIRCUMSTANCES OF THIS APPLICATION THE APPLICANTS' CASE IS NOT AN ABUSE OF THE PROCESS OF THIS COURT

19. Learned counsel submitted that The Gambia legal system is adequately equipped with the legal framework and institutions that promotes the enjoyment of fundamental rights guaranteed by the African Charter on Human and Peoples' Rights. Counsel submitted that Section 128 ofthe 1997 Constitution of The Gambia provides thus:

"An appeal shall lie to the Supreme Court as of right:

A. From any judgment of the Court of Appeal on an appeal in any civil or criminal cause or matter...

B. From any judgment of the Court of Appeal dismissing an appeal from a sentence of death imposed by the High Court or any other Court".

Section 130 of the same Constitution provides:

"An appeal shall lie as of right to the Court of Appeal from any judgment, decree or order of the High Court."

20. Counsel contended that there are elaborate provisions of the law and available institutions within Gambia for the ventilation of the grievances of the Applicants but they have chosen to litigate at this Court to the expense, annoyance and irritation of the Respondent. Counsel relied on the case of **Alhaji Hammani Tidjani** *v.* **Federal Republic of Nigeria & 4 Ors** (supra) and submitted that the holding at paragraph 77 is instructive and urged the Court to carefully consider it. The said paragraph reads:

> ***"And even if the processes are flawed or abused in some way, there are still avenues for him to seek redress within the established and recognized laws and procedures in the hierarchy of Courts of the Federal Republic of Nigeria. This is precisely what Article 6 of the African Charter on Human and Peoples' Rights envisages: the situation whereby it is possible to justify arrest and detention in accordance with previously laid down law...".***

21. Learned Counsel concluded that this is a clear case of an abuse of the process of this Court and urged it to uphold the objection and accordingly strike out the Applicants' case on the grounds canvassed above.

22. In opposition to the submissions of Learned Counsel to the Defendant, Learned Counsel to the Plaintiffs/Respondents contended that there is no requirement for the exhaustion of local remedies before approaching the ECOWAS Court for the ventilation of human rights grievances. Counsel submitted that there are only two requirements to the admissibility of human rights applications before this Court, namely the application ought not to be anonymous and should not be brought whilst the same action is pending before another international Court.

23. Learned Counsel submitted that the President of the Republic of The Gambia did not wait for the Applicants to exhaust their local remedies before announcing that all death row inmates at Mile Two Central Prison would be executed. Counsel laid emphasis on the fact that though the convicts were at different stages in their criminal trials, the declaration of President Yahya Jammeh was general and included all those on death row. Further, it would be absurd to wait for the exhaustion of local remedies when the death penalty is the only possible punishment under the law once the accused is convicted.

24. Further, Counsel submitted that the European Court of Human Rights have frequently stressed the need for flexibility in the application of the rule of exhaustion of local remedies. Counsel contended that it must be proved that there is effective remedy in place at the material time for the rule of exhaustion of local remedies to be applicable. Counsel contended that there are institutional and political barriers to the exhaustion of local remedies as indicated by the strong commitment of President Yahya Jammeh to accelerate the execution process of those condemned, compulsory imposition of death penalty for certain crimes and the violation of due process.

25. Learned Counsel submitted that the application filed by the Applicants does not constitute the abuse of the process of this Court.

CONSIDERATIONS BY THE COURT

A. APPELLATE COURT AND ANNULMENT OF EXISTING STATUTE LAW

26. It is trite learning that jurisdiction is the creature of statute. The jurisdiction of this Court is clearly spelt out in Article 9 of the Protocol on the Court of Justice (A/P.1/7/91) as amended by Article 3 of the Supplementary Protocol (A/SP.1/01/05).

Article 9: Jurisdiction of the Court

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

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

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

c) the legality of Regulations, Directives, Decisions and other subsidiary legal instruments adopted by ECOWAS;

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

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

f) the Community and its officials; and

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

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

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

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

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

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

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

8. The Authority of Heads of State and Government shall have the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in this Article.

27. From the above, it is clear that the Court has neither jurisdiction to annul domestic legislations of ECOWAS Member States nor the jurisdiction to act as appellate Court over their domestic courts, This Court has

emphasized in a long list of cases that it is not an appellate Court to the domestic courts of Member States. *See* **Alhaji Hammani Tidjani** *v.* **Federal Republic of Nigeria & 4 Ors., Frank Ukor** *v.* **Richard Laleye & Anor., Moussa Leo Keita** *v.* **Republic of Mali** (all supra).

However, it is the contention of counsel to Plaintiffs/Respondents that the application is founded on human rights violations allegedly committed by the Defendant/Applicant. Thus, the Court will have to examine the record before it in determining whether there is a *prima facie* case of human rights violations for which the Defendant should be called to answer and thus confer jurisdiction on the Court.

28. Article 9 (4) of the Protocol on the Court as amended clearly gives this Court jurisdiction over any human rights violations that occur within Member States of ECOWAS. The Court's human rights jurisdiction is expansive; indeed Article 10(d) of the Protocol as amended lays down only two conditions necessary to the admissibility of human rights causes that occur within ECOWAS Member States.Article 10(d) provide thus:

Article 10: Access to the Court

Access to the Court is open to the following:

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

i) not be anonymous; nor

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

29. Thus, a combined reading of Article 9(4) and 10(d) of the Protocol on the Court as amended makes it clear that the human rights jurisdiction of this Court can only be ousted when one of the following conditions exists:

a) the alleged human rights violation did not occur within an ECOWAS Member State;

b) the Application is not filed by an individual;

c) the application is anonymous; or

d) the same matter is pending before another International Court for adjudication.

30. Thus, this Court will have jurisdiction in a human rights violation claim except where one of the four conditions listed above exists. Thus, the human rights jurisdiction of this Court cannot be ousted by the constitution or other domestic legislations of ECOWAS Member States. This Court is empowered by the provisions of Article 4(g) of the Revised Treaty of ECOWAS to apply the provisions of the African Charter on Human and Peoples' Rights in determining the human rights cases that come before it. Article 19 of the Protocol on the Court as amended also empowers this Court to apply the provisions of Article 38 of the Statutes of the International Court of Justice.

    There is no doubt that these provisions have an international character and are applicable irrespective of the domestic legislations of Member States of ECOWAS.

31. It is in this light of the analysis above that this Court held in the case of **Socio-Economic Rights and Accountability Project (SERAP)** *v.* **Federal Republic of Nigeria & Anor** (Suit no. ECW/CCJ/APP/08/08, ruling delivered on 27th October 2009) that the right to education in the Federal Republic of Nigeria is justiciable even though the 1999 Constitution of the Federal Republic of Nigeria states that the right to education is not justiciable. The Court came to that conclusion because Article 17 of the African Charter clearly makes the right to education justiciable and enforceable.

32. It is trite learning that to determine the jurisdiction of a Court, the facts and claims of the Plaintiff are the key elements to consider. The essence of Plaintiffs Application is that the death penalty imposed by the courts of The Gambia are contrary to international human rights instruments, particularly the African Charter and the International Covenant on Civil and Political Rights, both of which have been ratified by The Gambia. The Plaintiffs' case is that these instruments seek to abolish the imposition of the death penalty altogether. They referred to Article 1 of the Second Protocol to the International Covenant on Civil and Political Rights which provides thus:

    "No one within the jurisdiction of a State Party to the present Protocol shall be executed".

Similarly, the African Charter on Human and Peoples' Rights provides thus:

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity ofhis person. No one may be arbitrarily deprived of this right.

Article 5

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.

33. The Plaintiffs averred further that the imposition of the death penalty and the circumstances surrounding its execution constitute torture, cruel, inhuman and degrading treatment. The Plaintiffs averred that the abolition of the death penalty has risen to the status of a peremptory norm of international law from which no derogation is permitted. The Plaintiffs concluded the Defendant is guilty of violation of international law by the imposition of the death penalty.

34. The Plaintiffs also averred that The Gambian system of justice does not guarantee fair trials. Plaintiffs stated that one of the salient requirements for fair trial is an impartial and independent judiciary. However, that is absent in The Gambia as the President appoints and dismisses judges. The judges have no security of tenure and the absence of tenure violates Article 26 of the African Charter and undoubtedly fair trial.

35. The reliefs sought by the Plaintiff are in the main declarations to the effect that the Defendant/Applicant has violated several international human rights instruments and should be ordered to comply with them, even if it means amending its constitution and other domestic legislations. The Plaintiffs also sought for an order compelling the Defendant to respect the rights of families to visit death row inmates and also to give the corps of those executed back to their families.

36. The key question at this preliminary stage of proceedings is whether the facts narrated by the Plaintiff and the reliefs sought raise a *prima facie* case of human rights violation. At the preliminary stage of proceedings, the Court is duty bound to look at the record and determine whether

there is a *prima facie* case of human rights violations without going into the merits of the case. The Plaintiff allege that the Defendant is guilty of violating the international human rights instruments abolishing the death penalty, some of which the Defendant has ratified. The Plaintiffs also allege that the Defendant has violated the right to fair trial. These facts raise a *prima facie* case of human rights violations. The reliefs sought by the Plaintiffs seek to curtail the violations of human rights. Therefore, we hold that the application raises a *prima facie* case of human rights violations which confers jurisdiction on the Court to entertain the Plaintiffs' Application, and hear same on merits.

ABUSE OF COURT PROCESS

37. Learned Counsel to the Defendant / Applicant contended that the Plaintiffs case represents a clear case of an abuse of the process of this Court because there are elaborate provisions which entitle the Applicants to appeal against their death sentences from the High Court to the Court of Appeal and ultimately to the Supreme Court of The Gambia. Learned counsel to the Plaintiffs Respondents on the other hand contended that there is no requirement for the exhaustion of local remedies before instituting a human rights action before this Court and therefore there is no case of an abuse of the process of the Court.

38. A party would be abusing Court process if he files against the same Defendant claims which are materially the same before two or more courts concurrently. The same set of facts can give rise to two actions concurrently without amounting to an abuse of Court process because a party is entitled to seek a relief from a second Court if the first Court does not have jurisdiction to grant that particular relief. It is trite learning that criminal trials are essentially different from civil claims because their objectives are fundamentally different. The actions pending before the courts of The Gambia are criminal actions whilst the action instituted before this Court is a civil one. The criminal actions seek to determine the guilt or innocence of the accused and ends in either an acquittal or a conviction whilst the object of a human rights violation claim is to determine whether the Defendant is guilty of the alleged human rights violations or not. Moreover, the application before this Court does not seek a review of any decision by the courts in The Gambia; hence there is no question of this Court sitting on appeal over the courts in The Gambia. The two actions are thus fundamentally different.

39. Further, this Court has established in a plethora of cases that there is no requirement for the exhaustion of local remedies before Applicants can approach it in fundamental human rights causes. See **Professor Etim Moses Essien** *v.* **The Republic of The Gambia** (2004-2009) CCJELR, 95, **Hadijatou Mani Koraou** *v.* **Federal Republic of Niger** (supra).

40. Article 10(d) of the Protocol on the Court as amended clearly does not require a Plaintiff to exhaust local remedies before approaching the Court for the ventilation of a human rights grievance. Thus, the fact that there are opportunities for the Applicants to appeal against their convictions and sentence within the legal system of The Gambia does not inhibit them from pursuing a human rights violation claim before this Court, as this application is essentially different from that pending or decided by the courts of the Defendant State. There is therefore no case of abuse of the process of this Court.

DECISION

41. Consequently, for the reasons explained already that the issue before this Court is one founded on human rights violation which is entirely different from the criminal cases pending or decided in the courts in The Gambia; that the Court has jurisdiction despite the status of any case pending or decided before the Defendant's domestic Court since exhaustion of local remedies is not a requirement in this Court; the Court decides that it has jurisdiction to hear and determine this case on merits.Accordingly the Court rejects the preliminary objection.

Costs will abide the event.

This Ruling has been delivered in public at the Community Court of Justice, ECOWAS, holden at Abuja on 7th November 2013.

BEFORE THEIR LORDSHIPS:

Hon. Justice Awa Nana DABOYA - *President*
Hon. Justice Anthony A. BENIN - *Member*
Hon. Justice Eliam M. POTEY - *Member*

Assisted by **Mr. Tony ANENE-MAIDOH** *(Esq.) - Chief Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, THE 6TH DAY OF NOVEMBER, 2013

SUIT NO: ECW/CCJ/APP/01/13
RULING NO: ECW/CCJ/RUL/14/13

BETWEEN
MR. CHUDE MBA - *PLAINTIFF/RESPONDENT*

AND
REPUBLIC OF GHANA - *DEFENDANT/APPLICANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HANSINE N. DONLI**- *PRESIDING*
2. **HON. JUSTICE BENFEITO M. RAMOS**- *MEMBER*
3. **HON. JUSTICE C. NOUGBODE MEDEGAN**- *MEMBER*

ASSISTED BY
TONY ANENE-MAIDOH -*CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **DR. B. A. M. AJIBADE S.A.N &**
   FEYISOLA OWOLANA (MS) - *FOR THE PLAINTIFF/RESPONDENT*
2. **DR. DORNINIC AYINE** *(DEPUTY ATTORNEY GENERAL, REPUBLIC OF GHANA)* **&**
   MRS. DOROTHY AFRIYIE ANSAH
   (CHIEF STATE COUNSEL) - FOR THE DEFENDANT/APPLICANT

Extension of time -Discretionary reliefs
-Reasonable time-what constitutes

SUMMARY OF FACTS

The Defendant/Applicant by an application filed on 16th September, 2013 and brought pursuant to Article 35(2) of the Rules of the Court, prayed this Court for leave to file its defence out of time. Prior to the present application, it had applied for an extension of time to file its defence which was granted by the Court. Defendant however, failed to file the defence within the extended time. The Defendant brought the present application after the plaintiff has moved its motion for default judgement and the matter adjourned for judgment. Defendants contended that its failure to file the defence was as a result of the delay in procuring relevant information from some state agencies involved in the case and that it has a defence to the claims of the Plaintiff.

The Plaintiff/Respondent opposed the application for extension of time on grounds that there is a pending application for default judgment against the Defendant/Applicant and same was duly served on the Defendant. That the Defendant/Applicant had every opportunity to lodge its defence within the time allowed by the Rules and extended by the Court but has failed, refused and /or neglected to do so. That granting the said application will arrest and delay the judgment of the Court.

LEGAL ISSUES

Whether or not the Court can in the circumstances of this case extend the time for Defendants to file a defence.

DECISION OF THE COURT

The Court held rejecting the Application:

1. *That the extension of time within which the Defendant should lodge her defence is considered based on a reasoned application.*

2. *That from the date of service of the application on the defendant to the extended time granted is a period of eighty five (85) days and*

reasonable enough for all comments and enquiries to have been collated.

3. *That the Defendant/Applicant has not provided substantial proof as to why the Deputy Attorney General and Chief State both of whom appeared at the last hearing were unable to represent the Defendant/ Applicant subsequently.*

4. *That any person asking the Court for discretionary relief must provide the Court with cogent material fact to justify the exercise of such discretion.*

RULING OF THE COURT

Defendant/Applicant's Application:

1. The Defendant/Applicant herein, by Motion on Notice brought pursuant to Article 35 (2) of the Rules of Court, dated 3rd August, 2013 and filed on 16th September, 2013, is applying for leave of this Honourable Court to file defence out of time. The said motion is supported with 13 paragraph affidavit deposed to by one Jonathan Acquah of the Attorney-General's Department, Accra. The Defendant/Applicant's Counsel and Deputy Attorney-General of Ghana, Dr. Dominic Ayine relied on all paragraphs of the affidavit, particularly on paragraphs 4 to 12 in support of his application. The Counsel moved his application in terms of the motion paper and the affidavit in support.

2. By facts deposed to in the Affidavit, Counsel to the Defendant submitted that the Notice of Registration in respect of this suit was, served on the office of the Attorney-General on the 15th of February, 2013 and the Solicitor-General wrote to request comments from relevant State Institutions which were mentioned in the Applicant's Application for the Enforcement of Fundamental Human Rights.

3. He further submitted that as a result of the delay in procuring comments from some of the State Agencies in order to file a Defence in the suit herein, the Defendant, by an Application dated 8th March, 2013 applied for extension of time to file Defence which was granted by the Court by a correspondence dated 20th March, 2013. That notwithstanding the extension of time granted by the Court the Defendant was unable to file a defence within the time extended by the Court because it took considerable period of time and consultations to procure all relevant information to prepare a Defence.

4. He further submitted that even though the Defendant was unable to file her defence within the stipulated time, the Defendant however, has a Defence to the Claims of the Plaintiff which had been sent (as a Statement of Defence) to the Court Registry through courier service of DHL on 8th July, 2013.

5. The Counsel further submitted that under the Rules of Court and natural justice, the Defendant should be given the opportunity to file their Defence for the matter to be determined on its merit, as it is the time honoured

practice of Court for a case to be heard and determined on its merit but not on default on procedural grounds.

6. He finally submitted that there are questions of law and facts from the side of the Defendant to be evaluated by this Hounourable Court to determine this matter on its merits.

Plaintiff/Respondent's Opposition

7. The Plaintiff/Respondent opposed the application by filing a Counter Affidavit in opposition to the Defendant's Motion on Notice for Extension of time to file Defence. In a 22-paragraph affidavit deposed to by one Mrs. Bolaji Gabari of S. P. A. Ajibade & Co and filed at the Registry of the Court on 2nd of October, 2013, Counsel to the Plaintiff, Dr. B. A. M. Ajibade relied on all the paragraphs of the affidavit in opposing the Application of the Defendant/Applicant.

8. By way of adumbration, Counsel for the Plaintiff/Respondent denies the facts deposed to in paragraphs 6, 8, 9, 10, 11 and 12 of the affidavit of Jonathan Acquah filed in support of the application for leave to file defence out of time. He submitted that on 4th March, 2013, the Plaintiff/Respondent filed an application for default judgment against the Defendant/Applicant and same was duly served on the Defendant/Applicant.

9. He further submitted that on 8th March, 2013, the Defendant/Applicant applied for an extension of time within which to file her defence and this Honourable Court granted the application and extended the time to file the defence by thirty (30) days with effect from 20th March, 2013.

10. He also contended that the period extended to the Defendant/Applicant by this Honourable Court elapsed without the Defendant/Applicant filing any defence or other processes before the Court. However, on 2nd May, 2013, the Court issued hearing notice and served on both parties, indicating that the Plaintiff/Respondent's application for default judgment had been fixed for hearing on the 22nd May, 2013.

11. He further contended that on 22nd May, 2013 when the matter came up before this Court for hearing of the Plaintiff/Respondent's Application for default judgment, the Defendant/Applicant was not in Court and was not represented by any Counsel. That the Defendant/Applicant however wrote to the Court through a letter delivered to Court on 21st May, 2013

and served on the Plaintiff/Respondent in Court on 22nd May, 2013, seeking adjournment on the grounds that the hearing date of 22nd May, 2013 was not convenient for the Attorney-General to attend Court, as she was otherwise officially engaged.

12. He further contended that the said letter did not seek any additional time for the filing of Defendant/Applicant's defence, even though the time previously extended has lapsed and vehemently opposed the said request for adjournment and same was refused by the Court on 22nd May, 2013 when the matter came up for hearing.

13. He also contended that after refusing the application for an adjournment, this Court asked the Plaintiff/Respondent to move its application for default judgment and also argue its substantive application on the merits, subsequent to which the Court adjourned the matter to 2nd of July for judgment. He submitted that even on the record of this Court, when the matter came up for judgment on the 2nd of July, 2013, representatives of the parties were informed by the Court that although the judgment was ready, it could not be delivered as it has not yet been translated into the other languages of the Court and the case was further adjourned to 3rd October, 2013 for judgment.

14. The Counsel to the Plaintiff/Respondent contended that the Defendant/Applicant's application for leave to file defence out of time is belated and is designed to arrest and delay the judgment of this Court which has been ready since 2nd July, 2013 and would have been delivered on that date, save for the need to translate into other languages of the Court. He therefore submitted that the Defendant/Applicant has shown nothing but disdain and disrespect for this Honourable Court in the entire course of these proceedings.

15. He further submitted that the Defendant/Applicant will not be prejudiced in any way if the application for extension of time to file defence is refused, since it has had every opportunity to lodge its defence to the application of the Plaintiff/Respondent within the time allowed by the Rules and extended by this Court but has failed, refused and/or neglected to do so. He also submitted that it will be in the interest of justice if the Defendant/Applicant's application for extension of time to file defence is refused as granting same would overreach the Plaintiff/Respondent.

Consideration by the Court.

16. The time limit for the Defendant to lodge a defence is governed by Article 35 (1) of the ***Rules of the Community Court of Justice, ECOWAS, the relevant portion thereof read thus:***

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

17. However, the Court, in the exercise of its inherent jurisdiction and discretionary powers, may extend the time limit on a reasoned application by the Defendant. This is clearly provided for under Article 35 (2) of the Rules of Court thus:

> ***"(2) The time limit laid down in paragraph J of this Article may be extended by the President on a reasoned application by the defendant".***

18. Any party seeking an exercise of this Honourable Court's discretion must however base such on a reasoned application. In the instant case, the Defendant/Applicant had filed an Application pursuant to Article 35 (2) of the Rules of Court, for Extension of time to file Defence signed by Solicitor General, Amma A. Gaisie (Mrs.) and dated 8th March, 2013 and filed at the Registry of the Court on the 21st of March, 2013.

19. The Defendant/Applicant submitted that the delay in filing defence was as a result of the delay in procuring comments from some of the State Agencies involved in this case. The Plaintiff/Respondent's Counsel however, argued that his Application for default judgment was filed after a period of forty-one (41) days after the service of the originating process on Defendant/Applicant and notwithstanding, on 8th March, 2013, the Defendant/Applicant applied for extension of time to file Defence which was granted by the Court with another thirty-days (30) extension.

20. This Court observes absolute compliance with the provisions of Article 11 (2) of Protocol (A/P.1/7/91) which reads as follows:

> ***"The Chief Registrar of the Court shall immediately serve notice of the application and of all documents relating to the subject matter of the dispute to the other party, who shall make known his grounds for defence, within the time stipulated by the rules of procedure of the Court".***

21. From the above provisions, notice of the application with all documents relating to the suit, was served on the Defendant on the 23rd of January, 2013. It is the view of this Court that from the date of service of the notice on the Defendant/Applicant to the extended time limit by the Court is a period of eighty-five (85) days, reasonable time for all comments and enquiries to have been collated.

22. Also, in this Court's response to the Defendant/Applicant's letter for Extension of time to file defence marked as Exhibit BG2 in Plaintiff/ Respondent's Counter Affidavit dated 2nd October, 2013, another thirty (30) days' extension of time within which to lodge defence was granted with effect from 20th March, 2013. There was a strict notice from the Court which reads as follows ***"Take notice that in default of your so doing, the Applicant may proceed herein and judgment may be given in your absence "***.

    It is the view of this Court that the Defendant/Applicant was put on notice that any default in filing defence may leave the Applicant with no option than to proceed.

23. On the 4th of March, 2013, the Plaintiff/Respondent also filed an Application for default judgment against the Defendant/Applicant and same was duly served on the Defendant/Applicant on the 5th of March, 2013 through DHL Courier Service. There was no reaction from the Defendant/Applicant to the Plaintiff/Respondent's Application for default judgment, instead, the Defendant/Applicant filed at the Registry of the Court on the 21st of March, 2013, an Application for Extension of time to file defence, dated 8th March, 2013.

24. Also, at the expiration of the extended time limit within which the Defendant/Applicant should lodge her defence, this case was fixed for hearing to the 22nd of May, 2013 and hearing notice dated 2nd May, 2013 was served on all parties on the 3rd of May, 2013. In the hearing notice, the Court informed the parties as follows: ***"If either party desires to postpone the date for hearing he must apply to the Court as soon as possible for that purpose and if the application is based on any matter of fact, he 'must be prepared to give proof of those facts***". In the instant case, the Defendant/Applicant's request for adjournment dated 14th May, 2013 was received at the Court on 21st of May, 2013. There is also, no proof of any fact as alleged by the Defendant/Applicant.

25. The Plaintiff/Respondent vehemently opposed this request for adjournment during the Court hearing of 22nd May, 2013 and urged the Court to hear his application for default judgment. The Court ruled against the Defendant/Applicant's request for adjournment and granted the Plaintiff/ Respondent's request to move his application for default judgment.

26. This Court, in its decision to hear the Application for default judgment, took into consideration the provisions of Article 90 of the Rules of Court. In Article 90 (1) of the Rules, it is provided that:

> ***"If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defense to the application in the proper form within the time prescribed, the applicant may apply for judgment by default"***.

27. This Court heard the Plaintiff/Respondent's Application for default judgment on 22nd May, 2013 and adjourned for judgment, having considered the aforementioned provisions and all the requirements contained therein, including service of the Application for default judgment on the Defendant in line with Article 90 (2) of the Rules of Court; Opening of oral procedure on the Application in line with Article 90 (3) of the Rules of Court. The suit was then adjourned to the 2nd of July 2013, for judgment.

Conclusion:

28. Whereas this Court holds that the Defendant/Applicant's right to file defence is regulated by Articles 34 and 35 of the Rules of Court.

29. Whereas this Court holds that the extension of time limit within which the Defendant/Applicant should lodge her defence, dated 8th March, 2013 and filed at the Court on 21st March, 2013, was considered based on a reasoned application, in line with Article 35 (2) of the Rules of Court.

30. Whereas this Court holds that the Defendant/Applicant was served with the Plaintiff/Respondent's Application for Default Judgment but however did not oppose nor react to the said Application.

31. Whereas this Court holds that the Defendant/Applicant's request for adjournment received by the Court on 21st May, 2013 did not provide any proof of facts contained therein.

32. Whereas this Court holds that the Defendant/Applicant has not provided substantial proof as to why the Deputy Attorney General and Chief State Attorney who both appeared at the last hearing were unable to attend the Court session of 22nd May, 2013 to represent the Defendant/Applicant.

33. Whereas this Court holds that anybody who comes to Court seeking the discretion of the Court is seeking an exercise of equitable jurisdiction and must provide the Court with cogent material to justify the exercise of such discretion.

Decision

34. The Court sitting and adjudicating in public at its seat in Abuja, decides that in view of the foregoing reasons, the Defendant/Applicant's Motion for Extension of Time to file defence is rejected.

35. In the circumstance, the Court shall proceed to deliver its judgment accordingly.

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

Ruling Read in Public in accordance with Article 100 of the Rules of this Court and dated this 6th Day of November, 2013.

HON. JUSTICE HANSINE N. DONLI - *Presiding*
HON. JUSTICE C. NOUGBODE MEDEGAN - *Member*
HON. JUSTICE BENFEITO M. RAMOS - *Member*

ASSISTED BY: **TONY ANENE-MAIDOH** *(Esq.)* - *Chief Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, 6TH DAY OF NOVEMBER, 2013

SUIT N° ECW/CCJ/APP/01/13
JUDGMENT N° ECW/CCJ/JUD/10/13

BETWEEN
MR. CHUDE MBA - *PLAINTIFF/APPLICANT*

AND
THE REPUBLIC OF GHANA - *DEFENDANT/RESPONDENT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE BENFEITO M. RAMOS** - *MEMBER*
3. **HON. JUSTICE C. NOUGBODE MEDEGAN** - *MEMBER*

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

REPRESENTATION TO THE PARTIES
1. **DR. B.A.M AJIBADE S.A.N,**
   B. GABARI, (MRS.),
   C. OSISIOMA (ESQ). AND
   F. OWOLANA - *FOR THE PLAINTIFF/APPLICANT*
2. ***NO REPRESENTATION*** - *FOR THE DEFENDANT.*

Jurisdiction -Human Rights Violation
-Freedom from Arbitrary Arrest and Detention
-Reasonable Suspicion -Right to Property -Default Judgment

SUMMARY OF FACTS

The Plaintiff, Mr. Chude Mba is a Nigerian Citizen and the beneficial owner of Allison Heights Limited and Commodore Marketing Associates Limited both incorporated under the laws of the Republic of Ghana. Plaintiff/Applicant has filed this application against the Defendant/ Respondent for the violation of his fundamental rights under Articles 4, 6 & 14 of the African Charter and Articles 9 & 17 of the Universal declaration of Human Rights.

Plaintiff/Applicant was engaged in building projects in Ghana which he carried out through two registered companies. In pursuance of the said projects, Plaintiff/Applicant obtained credit facilities from two banks in Ghana and foreign capital approval from the Bank of Ghana. He acquired two (2) acres of land from a Ghanaian Company at the sum of USD 930,000 (Nine Hundred and Thirty Thousand USD) for construction of 36 luxury apartments. Having obtained all requisite building permits, he commenced construction. When the project was about 80% completed, he was served with a stop work order, dated 2nd November, 2009, by the Accra Metropolitan Assembly (AMA) lifted five (5) months later ,consequent upon which he incurred substantial financial loss and bank interests.

The banks subsequent refusal to provide him additional funding due to the residual uncertainty arising from the Defendant's apparent interest in the project adversely affected the financing of the project. Plaintiff/ Applicant was as a result compelled to dispose of the investments at a loss in order to discharge his indebtedness to the banks.

Plaintiff/Applicant further states that he was unjustly accused of money laundering by agents of the Defendant/Respondent, detained for several hours and released on bail under stringent conditions. Meanwhile the Defendant/Respondent directed the banks to freeze his accounts without complying with legal provisions regulating the exercise of such power.

Defendant/Respondent failed to enter a defense and the Plaintiff/Applicant filed an application for judgment in default. Defendant/Respondent then applied for and was granted extension of time within which to file its defense but again failed to file its defense within the extended period.

The application for judgment was heard and on the date fixed for judgment, Defendant/Respondent was neither in Court, nor represented by Counsel, but rather sent a letter asking for an adjournment.

LEGAL ISSUES

- *Whether the subject matter of this application is within the competence of this Court?*
- *Whether in the circumstances of this case the Plaintiff has the locus to institute this action against the Defendant.*
- *Whether or not corporations can claim rights to property.*
- *Whether the Plaintiff's allegation has been established and sufficient to ground the reliefs sought?*

DECISION OF THE COURT

The Court held:

· *That the Plaintiff/Applicant's allegation of human rights violation is well-founded and established with supporting documentary evidence.*

· *That the Plaintiff/Applicant by virtue of being an exclusive or majority shareholder of the Companies acquired the status of victim to submit a complaint under Article 10 of the Supplementary Protocol A/SP.1/ 01/05*

· *That the right to property does not exclude legal persons which include corporations, thus corporations may also benefit from the right to property as guaranteed by Article 14 of the African Charter.*

· *That the confiscation/freezing order fell short of the law by the failure of the executive Director's compliance with the requirement of Article 33 (2) of the EOCO Act and constitutes a breach of the Plaintiff/ Applicant's right to property guaranteed under Article 14 of the African Charter.*

· *That the Plaintiff/Applicant's arrest and detention was not based on reasonable grounds of suspicion and therefore constitutes a breach of the Plaintiff/Applicant's right to freedom from arbitrary arrest and detention.*

· *Awards monetary compensation to the Plaintiff/Applicant against the Defendant/Respondent.*

JUDGMENT OF THE COURT

Parties

1. The Plaintiff, Mr Chude Mba, is a Nigerian citizen with dual Nigerian/ British citizenship. He is an Engineer, a former Banker, a Chartered Accountant and Fellow of the Institute of Chartered Accounts in England and Wales, also the alter ego and ultimate beneficial owner of Allison Heights Limited and Commodore Marketing Associates Limited, companies in Corporated under the laws or the Republic of Ghana. The Plaintiff resides at N°5, Iru Close, off Oyinkan Abayomi Drive, Ikoyi, Lagos State, Nigeria. The Plaintiff hereby pleads his Nigerian International Passport.

2. The Defendant is the Republic of Ghana, a Member State of the Economic Community or West African States (ECOWAS).

PROCEDURE

3. By an Application dated 16th January 2013 and lodged at the Registry of the Court on 21st January 2013, the Applicant, Mr. Chude Mba, sued the Defendant, the Republic of Ghana, for alleged violations of Articles 4, 6 and 14 of the African Charter on Human and Peoples' Rights and Articles 9 and 17 of the Universal Declaration of Human Rights.

4. The Application was duly served directly on the Defendant through DHL to Accra, Ghana, and also through its High Commission in Abuja. The Defendant however failed to file its Defence within the one month time-limit as prescribed by Article 35 (1) of the Rules of the Court.

5. Subsequently, pursuant to Article 90 of the Rules of the Court, the Applicant, filed at the Registry of the Court, an Application dated 4th of March 2013 and filed on the same day, asking the Court to give a judgment by default.

6. The Plaintiff/Applicant's Application for judgment by default was served on the Republic of Ghana, through its High Commission at Abuja on the same date of 4th of March 2013.

7. By an application dated 8th of March 2013, the Defendant, Republic of Ghana, asked for extension of time within which to file its Defence.

8. On the 20th of March 2013, pursuant to Article 35 (2) [or 77] of the Rules of the Court, the Court granted an additional period of one month to the Defendant to file its Defence.

9. The hearing of this case was fixed for the 22nd of May, 2013 and, on that date, the Defendant failed to appear in Court and was neither represented by an Agent, Counsel or Advisor. The Defendant also failed to file its Defence within the extended time limit that was granted by the Court, but however sent a letter to the Court asking for adjournment. The Plaintiff's Counsel, Dr. B.A.M Ajibade, opposed the letter for adjournment and urged the Court to proceed to hearing of the application for judgment by default.

10. The Court, in a short ruling, dismissed the Defendant's application for adjournment and allowed the Applicant to move his Application for judgment by default.

FACTS AS PRESENTED BY THE PLAINTIFF

11. The Plaintiff commenced investments In Ghana sometime in May 2004 and acquired several landed properties in Accra. He invested in a discount house, which was later converted into a bank, Fidelity Bank Ghana, of which he was a Director. The Plaintiff also incorporated two companies in Ghana, Allison Heights Limited and Commodore Marketing Associates Limited, through which he carried out his building project in Ghana. The latter company was originally registered as "4MAC Developments (Cantonments) Limited" but by a special resolution dated 2nd December 2004, the Company's name was changed to "Commodore Marketing Associates Limited". The Plaintiff is the Chief Executive Officer, alter ego, financier and controlling mind of both companies and had sole control of their activities at all times relevant to this suit.

12. Pursuant to the above, the Plaintiff channelled investment funds into Ghana through the banking system and obtained letters from the Central Bank of Ghana confirming the in-flow of investment funds into Ghana. The Plaintiff also successfully went through the Bank of Ghana's due diligence on source of funds.

13. The Plaintiff also sought and obtained some credit facilities from Guaranty Trust Bank (Ghana) Limited and Intercontinental Bank (Ghana) Limited, after executing some Banking Facility Agreements with his bankers.

14. In November 2006, the Plaintiff acquired two (2) acres of prime land in the Cantonment Area of Accra, from a Ghanaian company, Central Estate Development Limited, owned by a national of Ghana, in the sum of US$930,000 (Nine Hundred and Thirty Thousand USD), in the name of 4MAC Developments (Cantonments) Limited (now Commodore Marketing Associates Limited), on which he commenced the construction of two towers of 36 luxury apartments, after obtaining all requisite building permits, aviation clearance permit and security clearance from the Accra Metropolitan Assembly (AMA), the Ghanaian Civil Aviation Authority and the Ghanaian Armed Forces respectively.

15. The project was about 80% complete as at November 2009, but on 2nd November 2009, the AMA directed the Plaintiff to stop further construction on the project, by a "stop work order" dated 2nd November 2009.

16. The stop-work order from AMA stated:

"(...) we write to request you to stop work with immediate effect to enable the Accra Metropolitan Assembly address some security concerns that had been brought to its attention (...)."

17. At this point, full marketing and sales on the project had begun and the Plaintiff had outstanding project finance loans in Ghana of US$ 6.4million (Six Million Four Hundred Thousand USD) on the project, and completion time scheduled for the following four (4) months.

18. Following the developments in the paragraphs 15 above, the Plaintiff, through his Iawyers in Ghana, wrote a petition to the AMA demanding the immediate reversal of the stop-work-order. The said petition was copied to the Chief of Staff, Office of the President and the National Security Coordinator of the National Security Council. The Plaintiff did not receive any reply to the petition and all efforts to find out on whose instructions the project was stopped and why, including contacting the Nigerian Ambassador to Ghana and the Ghanaian High Commissioner in Nigeria, proved futile.

19. The Plaintiff did not receive any reply to the said petition but was, however, severally invited for different interviews by various Ghanaian authorities including but not limited to the Serious Fraud Office (SFO) (later renamed Economic and Organized Crimes Office, (EOCO), Financial Intelligence Unit of the Central Bank, Bank of Ghana, the Ghanaian Military

Headquarters and the office of the National Security Adviser (NSA), which informed the Plaintiff that a committee had been set up to look into the acquisition of the land on which the project was being developed. The Plaintiff, at the various meetings and interviews with the authorities, provided oral information on his business activities in Ghana including the purchase of land, construction of the project and his sources of funds.

20. The Plaintiff also attended interviews at the EOCO Offices on 16th March 2010 and 25th March 2010, during which he was questioned on the source of the materials imported for the project, beneficiaries of the sales of the apartments and the sources of funds. After the interviews and upon requests for additional information, the Plaintiff responded by a letter dated 31st March, 2010.

21. After series of interviews and meetings at the behest of various Ghanaian authorities, and suspension of further construction on the project following service of the stop-work order, the Plaintiff received a letter dated 22nd March 2010 from AMA (five months after the original stop-work order was issued), granting clearance to the Plaintiff to continue the project.

22. Meanwhile, as a result of the stop-work order issued concerning the project, the Plaintiff incurred substantial costs, apart from bank interests, because all personnel including architects, consultants and contractors remained on standby. Thus, more funding was now required to complete the project. However, owing to the residual uncertainty arising from the Defendant's apparent interest in the project, the banks refused to provide the much needed additional funding and the Plaintiff was constrained to introduce additional equity into the project to re-start construction.

23. Based on the clearance letter received from the AMA and subsequent work on the project, the Plaintiff, who had assumed that all investigations had been concluded, was surprised to receive a letter dated 13th April 2010 from NSA formally notifying him of a further investigation into financial matters pertaining to the construction of the Plaintiff's twin building. By the said letter, the Plaintiff was also informed of the Defendant's intention to acquire the top three (3) floors of the buildings (comprising twelve (12) apartments and penthouses) against the Plaintiff's wishes and without his consent.

24. The development above caused great difficulties for the Plaintiff as some of the apartments sought to be acquired by the Ghanaian government

had already been paid for by some individual purchasers. The development above also strained the relationship between the Plaintiff and his bankers, Guaranty Trust Bank Ghana and Intercontinental Bank Ghana. As a result, the Plaintiff drafted another petition dated 6th May 2010, addressed to the President of the Republic of Ghana, which the Plaintiff personally submitted through Mr. John Mahama, the then Vice-President of the Republic of Ghana. As with the first petition, this petition also received no response.

25. Subsequently, the Plaintiff ran out of money sometime in September 2010, and construction ceased once again. In an attempt to mitigate his losses, the Plaintiff attempted to sell the property to investors and private equity groups, between September 2010 and December 2010. However, the Plaintiffs attempt to do so failed because of the cloud hanging over the project arising from the Defendant's investigations and allegations of fraudulent activities that pervaded all segments-banks, sales agents, contractors, potential buyers, etc. The Defendant's actions and the allegation of fraudulent activities against the Plaintiff had effectively placed a caveat on the project.

26. Between January and April 2011, after a period of about six (6) months, when it appeared that further investigations and disruption by the Defendant's agencies had stopped, the Plaintiff re-engaged with his bankers who then reached an agreement with the Plaintiff to fund the project to completion.

27. No sooner had the Plaintiff set to re-mobilize workers on site, the EOCO re-surfaced by a letter dated 21st April 2011, demanding this time, more information from not only the Plaintiff, but also from the Plaintiffs bankers. The Plaintiff pleads the said letters of request for information to both the Plaintiff and Guaranty Trust Bank Ghana respectively dated 21st April 2011, his response to the request dated 3rd May 2011 and the letter from Guaranty Trust Bank (Ghana) Limited notifying the Plaintiff of the receipt of a letter from the EOCO dated 9th May 2011.

28. This development served as the final straw for the banks who, sometime in September 2011 unilaterally terminated the funding agreement with the Plaintiff and demanded for full payment of the loans granted to the Plaintiff including accrued interest.

29. On 19th July 2011, the EOCO Deputy Director, Mr. Tsar invited the Plaintiffs lawyers and requested that the Plaintiff attend an interview with the EOCO on 26th July 2011. The Plaintiff could not attend the interview on the requested date as he was away to the United States of America at that time. However, the Plaintiffs lawyers wrote to the Deputy Director, by a letter dated 21st July 2011 requesting that the meeting be rescheduled to a later date and the EOCO by a letter dated 25th July 2011 confirmed the new date.

30. On 1st August 2011; as early as 9.00am, the Plaintiff arrived at the office of the EOCO for the scheduled interview with the Executive Director of EOCO, Mr. Kwaku B. Mortey Akpadzi, and was kept waiting till about 5.00pm when the Executive Director, EOCO appeared. The said Executive Director accused the Plaintiff of not attending interviews and ordered his immediate arrest for alleged "money laundering". Despite the Plaintiffs demand to be given specific details of the money laundering activities he was accused of, the Executive Director bluntly refused and, upon his directive, the EOCO Police arrested the Plaintiff.

31. The Plaintiff was detained and was made to make written statements. The Executive Director, EOCO set very stringent conditions before the Plaintiff could be granted bail. He set bail at GHe 1 million, which was the equivalent of US$670,000 (Six Hundred and Seventy Thousand USD). He also insisted that one of the conditions of bail was that the surety must be Ghanaian and that full investigations of any assets or properties pledged by the surety must be concluded before the Plaintiff could be released. In effect, the Executive Director of the EOCO intended to have the Plaintiff locked up for a considerable period.

32. However, the Plaintiff made frantic efforts to meet bail conditions and was able to secure the assistance of a former business associate who intervened and pledged his motor trade business to bail the Plaintiff out, in the sum of GHe 1 million. In spite of the intervention and pledge, substantial pressure still had to be put on the Executive Director of the EOCO by various persons including Ghanaian High Commissioner to Nigeria before the Plaintiff was released at about 9:00 pm on Police bail without "full verification of the assets and business" being completed. The Plaintiff was ordered to return on 9th August 2011 for further alleged "money laundering" investigation.

33. The Plaintiff appeared as required before the Police unit of EOCO on 9th August 2011. He was interviewed and requested to provide, more information, which request the Plaintiff complied with by providing further statements as required and another written submission to the EOCO dated 10th August 2011.

34. The Plaintiff also honoured a further request for information dated 24th November 2011, by a letter dated 7th December 2011, supplying the requested information that he had access to and giving reasons why certain information was unavailable.

35. In the meantime, foreclosure discussions began, and although the bankers were in breach of the agreement to fund the construction to completion, the Plaintiff was compelled by the circumstances to agree with the bankers for the sale of the project as he was already exhausted by the harassment from and fear of incarceration by agencies or the Defendant.

    There was a settlement with the banks and all creditors (contractors, suppliers, consultants) who were ready to take various losses ranging from 35%-50% on their contractual entitlements. All those who had paid for the apartments got their money back in full, and the Plaintiff received the residue after disbursements. In the event, the Plaintiff lost well over 90% of the investment.

36. In April 2012, the Plaintiff was contacted by his bankers in Ghana who confirmed to him that they had been accused of conspiring with the Plaintiff to sell the project and transfer "property under investigation" outside Ghana. Thereafter, the EOCO orally ordered the banks not to honour any instructions on any banking accounts related to the Plaintiff.

37. On 17th May 2012, the EOCO finally instructed the Plaintiffs bankers to freeze all accounts associated with the Plaintiff or the Plaintiff's Company, Allison Heights Limited, on the ground of "suspicious activities of Chude Mba/Allison Heights."

38. Under Section 33 (2) of the Economic and Organised Crimes Office Act of Ghana, 2010, it is stipulated that the Executive Director of the EOCO shall, within fourteen (14) days after making of a freezing order, apply to the court for a confirmation of the order. Also, the provisions of Section 34 of the Act, which set out the particulars of the affidavit in support of the application for confirmation of the freezing order and Section 35 of

the Act which mandates the Executive Director to inform a person against whom a freezing order has been made within seven (7) days of confirmation of such order by the court, must be complied with before the freezing order can become effective. None of the provisions of these sections or other sections of the Act was complied with by the Defendant, and to date, the Plaintiffs accounts have remained frozen and the Plaintiff has remained on bail with a cloud of alleged criminality hovering over him.

39. The Plaintiff states that he was, for four (4) years, the President of Environmental Remediation Holding Corporation (ERHC) Energy Inc., a quoted United States of America oil company trading on the US NASDAQ OTC-BB, and regulated by the US Securities and Exchange Commission (SEC). The Plaintiffs remuneration and stock holdings are quite transparent and disclosed on the ERHC Energy Inc. filings with the SEC. The Plaintiffs source of income was primarily from the disposal of his stocks holdings in ERHC and all this was explained to the Defendant's agencies.

40. The Plaintiff suffered severe loss and damage arising from the activities of the officials and agencies of the Defendant. He was physically and emotionally traumatized and his business reputation was tarnished.

RELIEFS SOUGHT BY THE PLAINTIFF

41. Whereof the Plaintiff seeks the following reliefs against the Defendant:

    a. A DECLARATION that the persecution, harassment, intimidation, restrictions and threatened incarceration of the Plaintiff by various government agencies in Ghana was unjust, arbitrary, unwarranted, unfounded, unlawful, unconstitutional, null and void and a violation of the Plaintiffs fundamental rights to personal liberty and security of his person as guaranteed under Article 6 of the African Charter on Human and People's Rights, 1981; Articles 9 of the Universal Declaration of Humans Rights 1948; Articles 14 and 15 of the Constitution of the Republic of Ghana 1992.

    b. A DECLARATION that the actions and activities of various government agencies in Ghana and their undue interference with and/or interest in the Plaintiffs project (two towers of 36 luxury apartments in the prime Cantonments Area of Accra, Ghana) were

unjust, arbitrary, unwarranted, unlawful, unconstitutional, null and void and a clear flagrant violation of the Plaintiffs fundamental right to property as enshrined under Article 14 of the African Charter on Human and Peoples' Rights 1981, Articles 17 of the Universal Declaration of Humans Rights 1948; Articles 18 and 20 of the Constitution of the Republic of Ghana 1992.

c. A DECLARATION that the freezing order made by the Economic and Organised Crimes Office of Ghana over various accounts of the Plaintiffs Allison Heights Limited held in Guaranty Trust Bank Ghana and Intercontinental Bank Ghana is arbitrary, unjust, unfounded, unlawful, unconstitutional, null and void and contravenes the provisions of Sections 33, 34 and 35 of the Economic and Organised Crimes Act of Ghana, 2010 and is thus a flagrant violation of the fundamental rights of the Plaintiff to own property as enshrined under Article 14 of the African Charter on Human and Peoples' Rights 1981, Articles 17 of the Universal Declaration of Humans Rights 1948; Articles 18 and 20 of the Constitution of the Republic of Ghana 1992.

d. A DECLARATION that the continued harassment, intimidation, interrogation and restriction of the Plaintiff by the officials of the Defendant without preferring any known charge(s) against him before any competent court of law for over two (2) years is unjust, arbitrary, unlawful and unconstitutional and a clear violation of the Plaintiffs fundamental rights to personal liberty and security of his person as guaranteed under Article 6 of the African Charter on Human and Peoples' Rights, Article 9 of the Universal Declaration of Human Rights and Articles 14 and 15 of the Constitution of the Republic of Ghana.

e. AN ORDER directing the Defendant to pay the total sum of US$25,000,000.00 (Twenty Five Million USD) to the Plaintiff for damages suffered as a result of' the infringement by the Defendant of the Plaintiffs fundamental rights to personal liberty, freedom from arbitrary arrest and detention, security of his person and right to own property.

f. AN INJUNCTION restraining the Defendant by itself, it agencies, privies and/or bodies from further harassing, persecuting, intimidating,

restricting, investigating, interrogating and/or threatening to incarcerate the Plaintiff.

g. AN ORDER for the unconditional and immediate discharge of the bail granted to the Plaintiff in the sum of GHe 1 million to secure his release from the detention by the EOCO as no known charge(s) were or have since been preferred against him before any competent court of law and no evidence of any wrongdoing or guilt has been found against him by any competent court of law in Ghana or in any other State.

h. AN ORDER for the unconditional and immediate discharge of the surety provided by the Plaintiff in the said sum and release of the motor trade business which the surety pledged to secure the release of the Plaintiff on bail.

i. AN ORDER compelling the Defendant and its agency, the Economic and Organized Crimes Office, to forthwith discharge, release and lift the freezing order over the Plaintiffs Allison Heights Limited's accounts held in Guaranty Trust Bank Ghana and Intercontinental Bank Ghana.

j. PAYMENT by the Defendant to the Plaintiff of the total sum of US$130,000 (One Hundred and Thirty Thousand USD) being the cost of this action.

ANALYSIS OF THE COURT

42. The present action was filed on the 21st of January 2013 for the enforcement of the Plaintiffs' fundamental Human Rights to property and freedom from arbitrary arrest and detention.

43. The Defendant in line with the procedural requirements under Articles 34 of the Rules of the Court was served with the application directly by DHL and through its High Commission in Abuja on the 21st January 2013.

44. Article 35 of the Rules of the Court provides for the lodging of defence thus:

1. "Within one month after service on him of the application, the Defendant shall lodge a defense stating:

a. The name and address of the Defendant;

b. The arguments of fact and law relied on;

c. The form of order sought by the Defendant;

d. The nature of any evidence offered by him."

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

45. The Defendant failed to enter a defence and upon the expiration of the time, as provided by Article 35(1) of the Rules of this Court, the Plaintiff filed an application dated and filed on the 4th day of March asking this Court to enter judgment in its favour in default of Defendant's entering of defence, as prescribed under Article 90(1) of the Rules of the Court.

46. The Plaintiffs application for default judgment was duly served on the Defendant. The Defendant did not reply to that application, but instead brought an application pursuant to Article 35(2) of the Rules of the Court, for an extension of time within which to file its defence, dated 8th March 2013. The proposed defence was not annexed to the application which was nonetheless granted on 20th of March 2013.

47. The matter was then adjourned to 22nd May 2013 for hearing. On the adjourned date, the Defendant was neither in Court nor represented by Counsel or Agent but however, sent a letter to the Court requesting an adjournment without lodging its defence to the action. The application for adjournment was opposed by the Plaintiff's Counsel and rejected by the Court. Consequently the Plaintiff moved its application for default judgment.

48. Article 90 of the Rules of Procedure makes provision for default judgment where the Defendant fails to lodge a defence and provides:

1. "If a Defendant on whom an Application initiating proceedings has been duly served fails to lodge a defense to the Application in the proper form within the time prescribed, the Applicant may apply for judgment by default.

2. The Application shall be served on the Defendant.

3. The Court may decide to open the oral procedure on the Application.

4. *Before giving judgment by default the Court shall after considering the circumstances of the case consider;*

   a. Whether the Application initiating proceedings is admissible.

   b. Whether the Application formalities have been complied with, and

   c. Whether the Application appears well founded.

5. The Court may order a preparatory inquiry".

49. Pursuant to the provisions of Article 90 (4) above, this Court, in deciding whether or not to grant the Application for default judgment has to consider the issue of admissibility of the action, the fulfilment of procedural requirements as well as the sufficiency of facts adduced by the Applicant to warrant the granting of the default judgment.

50. The Court will now proceed to consider these three requirements.

a) On the admissibility of the Application

51. To determine if the action is admissible the Court has to determine if the subject matter is within the competence of the Court, if the parties can access the Court and if parties have the requisite standing to institute the action.

52. As a general rule, jurisdiction is inferred from the Plaintiffs claim and in deciding whether or not this Court has jurisdiction to entertain the present action, reliance has to be placed on the facts as presented by the Plaintiff.

53. The complaint filed by the Plaintiff/Applicant is based on the allegation of a series of acts committed by agents and in situations of the Defendant that would amount to the violation of personal rights of the Complainant and property rights of the companies in which he has invested capital and of which he is manager.

54. The Plaintiffs case, in a nutshell, hinges on the alleged actions and activities of the Defendant which violate his fundamental human rights to property,

as provided under Article 14 of African Charter on Human and Peoples' Rights, Article 17 of the Universal Declaration of Human rights and Articles 18 and 20 of the Constitution of the Republic of Ghana, and his right to personal liberty and freedom from arbitrary arrest and detention as provided under Articles 6 of the African Charter and Article 9 of the Universal Declaration of Human Rights and Articles 14 and 15 of the Constitution of the Republic of Ghana.

55. Article 9(4) and 10(d) of the Supplementary Protocol provides:

> *9(4):* ***"the Court has jurisdiction to determine cases of violation of human rights that occur in any Member state".***
>
> *10(d):* ***"Access to the Court is open to …individuals on application for relief for violation of their human rights…"***

56. By virtue of Articles 9(4) and 10(d) of the Supplementary Protocol, this Court has jurisdiction to determine cases of violation of human rights that occur in the Member States.

57. In its judgment in the action between **Private Alimu Akeem** *and* **Federal Republic of Nigeria**, judgment N°: ECW/CCJ/RUL/05/11, this Court stressed that its jurisdiction cannot be in doubt once the facts adduced are related to human rights, as indicated by its own case law (Cf. Judgment N°: ECW/CCJ/RUL/02/10 of 14th May 2010, ECW/CCJ/APP/07/08, **Hissein Habre** *v.* **Republic of Senegal**, paragraphs 53, 58 and 59; Judgment N°: ECW/CCJ/JUD/05/10 of 8th November 2010 in the case ECW/CCJ/APP/05/09 of **Mamadou. Tandja** *v.* **Republic of Niger**, paragraph 18(1)(b).

58. Those instruments on which the present action is based are legal instruments ratified by and binding on Member States of ECOWAS, including the Defendant who is under the duty to respect and protect the rights enshrined therein. See this Court's decision in suit N°: ECW/CCJ/APP/01/09 **Amoussou Henri** *v.* **the Republic of Cote d'Ivoire**, Ruling N°: ECW/CCJ/JUD/04/09 of the 17th December, 2009.

59. The facts described in the initiating application and which were not in any way challenged by the Defendant appear therefore to constitute violation of human rights guaranteed by the instruments to which the Republic of Ghana is a party, including the African Charter on Human and Peoples' Rights.

60. Article 9 (4) of the Protocol on the Court, as amended by the 2005 Protocol, states that the Court has jurisdiction to hear cases of violations of human rights that have occurred in any Member State of the Community.

61. Article 10 of the same Protocol further states that individuals have a right of access to the Court to obtain relief for the violation of human rights as long as: (1) the Complaint is not anonymous and (2) is not already pending before another International Court.

62. The requirements described above appear to have been met in the instant case because the complaint is not anonymous and there is no evidence that identical complaint is pending before another international court.

63. There is no doubt that by acts affecting his own rights, the complaint filed by the complainant is admissible.

64. The question that remains to be examined is whether the Complainant can also submit a complaint against acts by agents and institutions of the Defendant that did not directly affect the Complainant but rather the companies where the Complainant is the exclusive or majority shareholder.

65. To answer this question, it should be noted that the right in issue, relating to these companies, is the right to property that is guaranteed in Article 14 of the African Charter on Human and Peoples' Rights, which states as follows:

> **"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".**

66. Unlike other provisions of the Charter, the text just quoted above does not specify whether or not the right to property is only guaranteed to individuals or people. It has therefore not excluded legal persons, which include corporations. Therefore, Corporations may also benefit from the right to property as guaranteed by Article 14 above and as recognized by the National Laws of Members States and by the Council of Europe through Protocol 1 to the European Convention of Human Rights.

67. On the other hand even if we argue that the rights as guaranteed under Article 14 does not extend to legal persons, with the understanding that

rights under the African Charter refer only to individuals, individually or collectively, the Applicant, as exclusive or majority shareholder of these companies, will still not fail to be directly affected by the measures he is now challenging, which gives him the status of victim to submit a complaint under Article 10, paragraph (d) of Protocol A/SP.1/01/05 on the Court.

68. It is important, in this regard, to note the general comment to the International Covenant on Civil and Political Rights, which reads:

> ***"The beneficiaries of rights recognized by the Covenant are individuals. Although, with the exception of Article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (Article 18), the freedom of association (Article 22) or the rights of members of minorities (Article 27), may be enjoyed in community with others, The fact that competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (Article 1 of the Option Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entitles amount to a violation of their own rights".***

69. Similarly, there are also several decisions by the European Court on Human Rights, in particular: **G.J.V. Luxembourg**, *paragraph 24 and* **Glas Nadezhcla EOOD & Elenkov** *v.* **Bulgaria**, *Application No. 14134/ 02 Judgment delivered on 11th October, 2007 in paragraph 40.* Based on the argument presented above, the Court concludes that the Application of the Plaintiff/Applicant is also admissible in terms of acts committed against the companies wherein the Plaintiff/Applicant has ownership, either full or partial, which violate his right to property.

b) On whether the formalities were complied with

70. We now turn to the question of compliance with the appropriate formalities as stipulated by the Rules of this Court.

71. The first formality that must be observed throughout the process has to do with the adversary principle which aims at notifying the Defendant that an application has been filed against him/her at the Court and offering him/her the opportunity to defend.

72. The Application initiating this proceeding was duly served on the Defendant, the receipt of which was admitted by the Defendant in its Application for extension of time. The Defendant neglected/failed to enter a defence and prayed this court for an extension of time within which to file its defence. The time was extended and communicated to the Defendant on 21st of March 2013. The Defendant failed to file a defence and the extended time-limit elapsed again. The matter was set down for hearing on 2nd May 2013 on which date the Defendant failed to appear in Court.

73. The Plaintiff brought an Application for default judgment which was duly served on the Defendant. The Defendant did not oppose the application and did not appear in Court on the date set down for hearing.

74. In view of the above stated grounds, the Court is satisfied that all appropriate formalities were complied with in the present case.

c) On whether the Application is well founded

75. The next issue for consideration by this Court is the sufficiency of the facts adduced by the Plaintiff to ground the default judgment by this Court. In other words this Court will now consider whether this application is well founded.

76. The Plaintiff pleaded in paragraphs 4.1 to 4.28 of the application that it commenced investment in Ghana in 2004 and in 2006 embarked on the acquisition of land and the development of two blocks of luxury apartments in the prime cantonments area of Accra, incorporated two companies in Ghana as special purpose vehicles namely Allison Heights Limited and Commodore Marketing Associates limited, funded the investments through a combination of loans from local banks in Ghana and foreign capital which he influxed with the approval or the Bank or Ghana after undergoing due diligence on the source of funds.

77. That though he obtained all requisite permits, the Accra Metropolitan Authority issued him a stop-work order after the project was at about 80% completion stage. He annexed to his application a photograph or the project and a copy of the stop order. That he petitioned to the National Security Adviser and was informed that a committee had been set up to look into the acquisition of the land on which the project was being developed. The Plaintiff was subsequently granted clearance to continue with the project. He also attached a copy of the letter of clearance.

78. Having resumed work on the strength or that clearance, he subsequently received yet another stop-work order from the office of the National Security Adviser of the Defendant informing him of further investigation and the decision of the Defendant to compulsorily acquire portions of the Plaintiff's properties. He attached a copy of the letter under reference.

79. He petitioned to the President but received no reply rather he was invited for interview by the agencies of the Defendant; accused of money laundering, detained for several hours and released on bail under stringent conditions. Despite his demands, he was not provided with any information or details of the alleged money laundering activities neither has he been charged to court.

80. The actions of the Defendant adversely affected the financing of the projects thereby compelling him to dispose of the investment at a loss through the banks in order to discharge his indebtedness.

81. That the Defendant subsequently wrote a letter to the Plaintiff's banker s directing them to freeze both the Plaintiffs as well as his companies accounts, without complying with the legal provisions regulating the exercise of such powers. He attached a copy of the said letter to his Application.

82. The issue to consider now is whether in light of the above facts as presented by Plaintiff/Applicant, this Court considers this application well founded as to grant the Applicant's prayers.

83. The general principle of evidence is that he who alleges has the burden of proof. Once a person who has the onus to proof fulfills same, he carries the benefit of presumption and as such, the burden of proof passes to the other party.

84. Where therefore, in a proceeding, a party submits evidence that the Court considers *prima facie* evidence of existence of a state of affairs, it creates an evidentiary burden upon the other party, against whom the judgment will be entered, if no further evidence is led in rebuttal.

85. In the instant case, the Plaintiff's submissions on the alleged activities of the Defendant which violate his rights to property and personal liberty were supported by documents in proof of the averments.

86. As required by article 32(4) of the Rules of Procedure, the Defendant was duly served with the Plaintiff's application, but failed and neglected to enter a defence and therefore failed to join issues with the Plaintiff. It is trite law that facts may be proved by the production of documents. Therefore, having provided documents in support of averments in the Plaintiffs pleadings, the onus falls on the Defendant to rebut those averments.

87. We will now consider briefly specific allegations made by the Applicant

On allegation of unlawful detention

88. The Plaintiff's case here is that he was invited for interview by the agencies of the Defendant, accused of money laundering, detained for several hours and released on bail under stringent conditions and he was not provided with any information or details of the alleged money laundering activities neither was he charged to court.

89. The object of detention for questioning is to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention. The suspicion however must be based on reasonable grounds in order to safeguard against arbitrary arrest and detention.

90. In **Fox Campbell & Hartley** *v.* **The United Kingdom** 1990 ECHR 12244/86 at para 32, the European Court held that what is reasonable depends upon all the circumstances, but the court must be furnished with at least some facts or information capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offense and not having provided any further material upon which the suspicion against the applicants was based, it will not go into the purpose for which the applicant was arrested.

91. See also **Gueinskiy** *v.* **Russia** 2004 ECHR 70276/01, where the European Court of Human Rights held that the words "reasonable suspicion" meant the existence of facts or information which would satisfy an objective observer that the persons concerned might have committed the offence.

92. The Defendant did not contest the Applicant's averments which this Court accepts as proof of the facts stated therein. This Court therefore holds that the Plaintiff's arrest and detention was not based on reasonable grounds of suspicion and constitutes a breach of the Plaintiffs human rights to freedom from arbitrary arrest and detention.

On the freezing of Plaintiffs accounts

93. The Plaintiff alleged that the freezing order was not lawful because the procedure laid down in the EOCO law was not followed. He further averred, without contradiction by the Defendant, that he was not informed of details of the money laundering and has not been charged with the offence of money laundering.

94. Lawfulness presupposes conformity with the law. Though it is the national Court that should interpret and apply domestic laws, this Court can and should exercise certain powers to review whether this law has been complied with. This view was expressed by the European Court of Human Rights in **Benham *v.* UK** (1996) ECHR 19380/92 at para 4 and followed in **Gusinskiy *v.* Russia** 2004 ECHR 70276/01.

95. The Economic and Organized Crimes Act, 2010, makes provision for the freezing of properties by the Executive Director of the Economic and Organized Crimes Office to aid an investigation or trial.

96. Section 33 (1) however mandates the freezing order to be submitted within 14 days to a Court for confirmation. Section 34 of the Act lays out the content of the application to be submitted for confirmation by the court while section 35 sets out four (4) conditions to be met before the court will confirm the freezing order.

97. The mere fact of an ongoing investigation alone is not enough to warrant a confirmation of confiscation order. The court has to be satisfied that there are reasonable grounds to believe that the property is tainted property related to a serious offence for which the respondent has been charged.

98. A careful study of the above provisions show that the confiscation order, though made in accordance with Article33(1) of the EOCO Act, fell foul of the law by the failure of the Executive Director's compliance with the requirement of Article 33(2) which provides that ***"the Executive Director shall within fourteen days after freezing the, property apply to Court for a confirmation of the freezing".***

99. It is our view therefore, that the freezing order is in violation of the provisions of sections 33(2) and constitutes a breach of the Plaintiffs right to property as guaranteed under Articles 14 of the African Charter.

100. In case 68/88, **Commission *v.* Greece**, an action filed by the European Commission, the Hellenic Republic failed to submit any pleading and the Commission asked the Court to give judgment by default pursuant to Article 94(1) of the Rules of Procedures (which is in *pari materia* with Article 90(1) of this Court's rules), the European Court of Human Rights accepted the uncontradicted evidence submitted by the Commission in proof of the facts alleged.

101. The Court went further to hold that where the Court gives judgment by default, it needs only, in considering the merits of the application to verify whether the applicant's submissions appear well founded. See also case c-274/93 **Commission *v.* Luxembourg** judgment of the European Court of Human Rights of 25 April 1996.

102. In the light of the foregoing, the Court is of the view that the facts enumerated above and imputed to the agents and institutions of the Republic of Ghana are sufficient to support a claim for violation of the Plaintiffs/Applicant's rights guaranteed by the international instruments on human rights to which the Republic of Ghana is a signatory.

103. We therefore hold that the complaint on the Plaintiff human rights violation is well-founded.

On the issue of Damages

104. Damages denote a monetary award which compensates the victim of any loss resulting from violation.

105. This Court held, in Suit N° ECW/CCJ/APP/10/06 **Djotbayi Talbia & Ors** *v.* **Federal Republic of Nigeria & 3 Ors**, (2004 -2009) CCJ ELR, page 267, 268, ***"that total reparation is impossible on matters of human Rights, violation however, it is important to award reparation that is equitable in nature to all applicants that are entitled to it. Thus as a result of the facts and elements of the case it behoves on the Court to have sufficient evaluation and award reparation that is inclusive of the prejudice suffered by the ten applicants due to the unique nature of their detention which is unlawful".***

The Court then awarded the ten (10) Applicants who suffered unlawful detention the amount of US$42,720 each for all the prejudices and violations against them by the 1st Defendant (The Federal Republic of Nigeria)".

106. Having held that there was violation of the Plaintiffs human rights, this Court, in view of an equitable compensation, awards therefore, the sum of $800,000 USD (Eight hundred thousand US Dollars) for the Plaintiff against the Defendant accordingly.

107. Where the application for violation of human rights succeeds, cost shall follow.

108. Considering the circumstances of this case, especially the number of times parties attended Court, this Court is of the view that the amount claimed is excessive and awards the sum of 500.000 Naira, as per Article 66 of the Rules.

109. Thus considering that the Republic of Ghana did not in any way challenge the complaint filed against it, under Article 90 of the Rules of Procedure, the Court hereby:

a) **Considers** admissible the application filed by the Applicant, Mr. Chude Mba against the Defendant, Republic of Ghana.

b) **Considers** that the Defendant, Republic of Ghana, has violated the right of the Applicant to liberty and security, as guaranteed by Article 6 of the African Charter on Human and People's Rights and his right to property as guaranteed by Article 14 of the same Charter.

c) **Orders** the Defendant, Republic of Ghana, to discontinue the violations of the rights of the Applicant and compensate him with damages in the sum of $800.000 USD.

d) **Orders** the Defendant, Republic of Ghana, to pay the costs, as well as all the expenses incurred by the Applicant throughout the process, including legal fees of this proceedings, in the sum of N500.000.00 (Five hundred thousand naira).

The Judgment is Read in Public in accordance with the Rules of this Court, on this 6th November, 2013.

HON. JUSTICE HANSINE N. DONLI - *PRESIDING*
HON. JUSTICE BENFEITO M. RAMOS - *MEMBER*
HON. JUSTICE C. NOUGBODE MEDEGAN - *MEMBER*

Assisted by: **TONY ANENE-MAIDOH** *(Esq.) - 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 28TH DAY OF NOVEMBER 2013

SUIT N^{O}: ECW /CCJ/APP/15/12
JUDGMENT N^{O}: ECW/CCJ/JUD/11/13

IN THE CASE,

BETWEEN
MR. AMÉDÉO ADOTEVI - *PLAINTIFF*

AND
THE REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT

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

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

REPRESENTATION TO THE PARTIES:

1. **MESSRS LEOPOLD OLORY TOGBE** *(ESQ.)* **&**
   THIERNO OLORY TOGBE *(ESQ.)* - *FOR THE PLAINTIFF*
2. **MRS. ALEXANDRINE**
   SAIZONOU-BEDIE *(ESQ.)* - *FOR THE DEFENDANT*

Human rights violation - Economic and social rights - Articles 14 and 18(4) of the African Charter on Human and Peoples' Rights - Objection concerning jurisdiction - Inadmissibility - Articles 87(1) and 87(5) of the 2002 Rules of Procedure of the Court

SUMMARY OF FACTS

Compelled to flee into political exile in the advent of the revolution in the Republic of Benin, Mr. Amédéo Adotévi brought an application before the Court, suing the Republic of Benin for violation of his human rights, notably his economic and social rights as guaranteed by the African Charter on Human and Peoples' Rights under Articles 14 and 18(4).

The Application of Mr. Amédéo Adotévi was filed following the alleged refusal by the Republic of Benin to pay back the bank guarantee it had undertaken when it still held the reigns of power at the company named BETRACO-SA. In support of his claim, he invoked Cotonou Appeal Court Judgment No.197/99 which endorsed his entitlement to that claim. The Defendant State raised a Preliminary Objection in regard to the jurisdiction of the Court ***in limine litis****, and on the inadmissibility of the Application, on the basis that it had entirely executed the Judgment of 12 August 1999 by paying Mr. Amédéo Adotévi's debtors the amount due.*

LEGAL ISSUES

- *Can the Applicant bring his case before the Court for violation of his economic and social rights, whereas the competent national courts have recognised his right to property, and ordered that his bank guarantee be paid back to him?*
- *Does the advanced age of the Applicant justify the filing of his case for human rights violation, whereas he has already been compensated?*

DECISION OF THE COURT

The Court held that it has jurisdiction to adjudicate on cases of human rights violation which occur in the Member States of ECOWAS, in accordance with international instruments of human rights protection. It also held however, that when an applicant is making a fiscal recovery claim, it does not constitute a violation of the said rights, regardless of his age.

JUDGMENT OF THE COURT

I) FACTS AND PROCEDURE

1. By Application dated 21 September, 2012 and filed at the Registry of the Court on 24 September 2012, Mr. Amédéo ADOTEVI, residing at LOT Q 10, Airport Road Cotonou (Republic of Benin), and who, for the purposes of this procedure, elected domicile in Mr. KOSSOUOH Felix' at Prince & Princess Estate, Drive 5, Close 4, House 8, Apo Area, Abuja (Nigeria), and whose Counsels are Messrs Leopold Olory TOGBE (Esq.) and Thierno OLory TOGBE (Esq.), Lawyers registered with the Court of Appeal in Cotonou, Republic of Benin, brought before this Court a case on the violation of Articles 14 et 18-4 of the African Charter on Human and Peoples Rights, against the Republic of Benin, whose Counsel is Mrs. Alexandrine SAIZONOU-BEDIE (Esq.), Lawyer registered with the Court of appeal in Cotonou located, and whose address is Lot 118 - Sud Zone Présidentielle, Vons du PNUD in Cotonou.

2. Having established that service of all notifications and written exchanges had been done at the required date and time, pursuant to the relevant provisions of its Rules of procedure, the Court heard the parties at its sitting of 02/07/2013.

3. At that day's hearing, Counsel to the Republic of Benin, Mrs. Alexandrine SAIZONOU-BEDIE (Esq.) raised *in limine litis* a preliminary objection, as to the lack of jurisdiction of the Court, without presenting it in a separate Application, pursuant to Article 87-1 of the Rules of the Court.

4. As Plaintiff did not make a counter plea on preliminary objections raised by Defendant, the Court accepted the request of both parties to join the said plea to the substantive case, pursuant to the provisions of Article 87-5 of its Regulations and adjudicate on them, on the merits.

A) The facts according to Parties

a) The facts according to Plaintiff

5. Plaintiff avers that, having been forced into political exile at the advent of the Revolutionary Military Government, the Republic of Benin pursuant to a law promulgated, to confiscate the properties of the nationals who were not in the country, decided to nationalise BETRACO SA, and replaced it with another company called SONATRAC, of which he was the Managing Director, Manager and shareholder, together with his brother Mr. Desire

ADOTEVI, and replaced it with another company called SONATRAC; that the said (new) company, due to the way it was mismanaged, got indebted to the SDB, the *Société Dahoméenne de Banque (SDB)*, which later became La Banque Commerciale du Benin (BCB).

6. Plaintiff also avers that upon return to the country, after 15 years of exile, and due to the folding-up of SONATRAC, he bought over the former SONATRAC, which was again renamed BETRACO SA, for the second time; he further claimed that while claiming to have kept an old debt on the former-SONATRAC, the BCB withheld a bank guarantee amounting to Two Hundred Thousand (200,000) Deutsch Marks granted to the former *Société Dahoméenne de Banque (SDB)* for the benefit of his first company *BETRACO* for the latter to enjoy credit facilities of the bank.

7. He further avers that he instituted proceedings against the BCB and SONATRAC in liquidation before the Tribunal of First Instance in Cotonou, which, after hearing both parties, delivered a judgment on 12 January 1998, acceding to his request, and ordering the BCB to refund him the bank guarantee that he had earlier deposited, as well as a provisional enforcement of the Judgment; that further to the appeal lodged by the BCB and *BETRACO-SA,* the Cotonou Appeal Court, through a judgment delivered on 12 August 1999 has confirmed the contested Judgment.

8. Plaintiff added, that in spite of these Courts' judgments and all the measures he personally initiated, the Republic of Benin has refused to make any refund to him, up till this day.

b) The facts according to the Defendant

9. The Defendant State rejects Plaintiff's claims that it is still holding on to the sum of Two hundred Thousand (200,000) Deutsch Marks and that it refused to enforce Judgment N° 197/99 of 12 August 1999, and by so doing, it violated Plaintiff's economic rights, notably Article 18-4 of the African Charter of Human and Peoples Rights;

10. The Defendant State also avers that, contrary to the Plaintiff's allegations, at the time the Debt Recovering Office of State Banks was preparing to enforce the Judgment under reference, two third party (holding property) notices were served to that Office by the General Management of Tax Office, claiming a cumulated amount of money which is, by far, higher than the amount of Two Hundred Thousand Deutsch Marks, being owned by Plaintiff to the Tax Office; the Tax Office further claimed that the two

notices were brought to the knowledge of Mr Amedee ADOTEVI who, in return, wrote to the Chief Tax-Collectors Office, located at Champ de foire area in Cotonou, a letter dated 7 December 1999, through which he denounces the seizure of the properties of BETRACO International SA, as stated in the books of the Debt Recovering Office of former State Banks.

11. Moreover, the State Defendant further avers that, Plaintiff, in a mail dated 11 October 2000, had asked the State Judicial Officer in the Treasury Department, to pay him (Plaintiff) the sum of Five million Two Hundred and Thirty-Two Thousand Five (5,232,205) CFA Francs representing the differentials between the value in exchange in CFA of the sum of Two Hundred Thousand (200,000) Deutsch Marks i.e. Sixty Seven Million Seventy-Eight Thousand (67,078,000) CFA Francs and Sixty-One Thousand Million Eight Hundred and Forty-Five Thousand Seven Hundred and Ninety-Five (61,845,795) FCFA, the sum which was paid back to Headquarters of the Tax Office, pursuant to the two third party (holding property) notices;

12. The State Defendant further claimed that, in a letter dated 16 October 2000, the State Judicial Officer gave Mr. ADOTEVI explanations on the payment of Thirty Thousand (30,000) Deutsch Marks equivalent to Five Million Two Hundred and Thirty-Two Thousand Two Hundred and Five *CFA* Francs to Barrister AGBANRIN-ELISHA as honorarium on his retainership, upon request by Plaintiff's wife Mrs. Heide ADOTEVI, through the Finance Minister, via letter dated 15 November 1999;

13. The Defendant State further alleges that Plaintiff acknowledged that the BCB in Liquidation paid him the sum of Two Hundred thousand (200,000) Deutsch Marks, such that he only claimed some interests on that payment, before the Court; that the Tribunal of First Instance in Cotonou, through Judgment N°15/02 -1 delivered on 20 February 2002, by it Modern Civil Chambers, acceded to that claim, but that following an appeal filed by the Republic of Benin as well as the appeal on a point of law by Mr ADOTEVI, the Court of Appeal in Cotonou, setting aside the lower court's decision and sitting afresh, declared Plaintiff's appeal inadmissible;

14. That against all expectations, the claimant, through a writ dated 26/11/2010 took the Republic of Benin to court, afresh, seeking that the Defendant State be ordered to refund the sum of Two Hundred Thousand (200,000) Deutsch Marks which it was still holding on to; that at the hearing of 05/081/011, the claimant's Counsel realizing his client's mistake, announced his withdrawal from the case;

15. That thus, the Defendant State believes it has enforced Judgment of 12 August 1999 by paying to Mr. Amédéo ADOTEVI or, at least to his creditors the sum of Two Hundred (200,000) thousand Deutsch Marks.

B) Arguments by the Parties

a) Arguments by Plaintiff

16. On the preliminary objection raised by the Defendant State, Counsel to Applicant, in countering Defendant's arguments, argues that Mr. ADOTEVI's economy or business has been badly affected "for some said fiscal reasons" and that, consequently, his right to own property as guaranteed under Article 14 of ACHPR has been violated; that according to him, this Honourable Court has jurisdiction over cases on economic matters, which, in the instant case, constitutes an issue relating to Plaintiffs survival.

17. Referring to the Court's Judgment in the Hadijatou Mani Koraou v. Republic of Niger case, he also claims, that the jurisprudence of the Court is constant, as regard the non-exhaustion of local remedies and as such, this argument by Defendant should be rejected;

18. As to merit, Applicant claims that the Defendant State's failure to refund him the said sum caused him some moral as well as pecuniary harm in that this situation put him in serious financial and professional difficulties and damaged his marital life;

19. While making reference to the preamble to the African Charter on Human and Peoples' Rights, which was ratified by the Republic of Benin, and domesticated in the ECOWAS Treaty, and which provides that:

> **"civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political right;"**.

Mr Amédéo believes that the passive attitude of the Defendant State caused him severe financial prejudice, which deprived him of enjoying his economic rights.

20. Moreover, Counsel to Plaintiff argues that by refusing to repay his client the aforesaid amount which would have served, not only to help him meet his needs but also honour his many financial commitments, the Republic of Benin failed in its obligation of protecting a person, whose age is today put

at 80 years, and made him suffer serious moral prejudice, thereby contravening the provisions of the African Charter on Human and Peoples' Rights, notably those relating to Article 18-4 which stipulate:

> ***"The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".***

21. He furthermore believes that his client's bank guarantee, which he deposited in 1997, but which is held back on no ground by the Republic of Benin, should be considered as fixed deposit and, consequently, should attract interests, at the rate of 6.5%, which thus shall raise his claim to the sum of Five Hundred and Seventy-nine million, Seven Hundred and One Thousand, Two Hundred and Eighty Two (579,701,282) CFA Francs; that the refusal to pay him this sum of money constitutes a violation of his economic rights especially, as guaranteed under Article 14 of ACHPR.

22. Plaintiff further solicits from the Court:

- To note the loss of the bank guarantee;
- To order the refund of the sum of money the Republic of Benin is owing him;
- To order the payment of 50,000,000 million CFA francs as damages for the prejudice suffered.

a) Arguments by the Defendant State

23. The Republic of Benin raises a preliminary objection as to the lack of jurisdiction of this honourable Court to hear this suit filed by Plaintiff. It avers that by the combined effects of Articles 9 and 10 of the Supplementary Protocol A/SP.1/01/05, amending protocol (A/P.1/7/91) on the Community Court of Justice show that individuals cannot directly bring a case before the Court, except when their human rights are violated.

24. He points out that in order to justify his action Counsel to Mr. Amédéo ADOTEVI argues in his suit that depriving his client from enjoying his economic fights occasioned by the non-enforcement of Judgment N°167/99 of 12 August 1999 led, by correlation to deprivation of full enjoyment of his civil and political rights, which is a violation of Article 18 of ACHPR, a violation that should be restored, by granting Applicant, who was extremely wronged in this matter, a compensation amounting to Fifty million (50,000,000) CFA Francs, as damages for the prejudice suffered.

25. Moreover, he points out that, as far as the claimant is concerned, the behaviour of the Republic of Benin seriously contravene the provisions of the ACHPR, notably Article 18-4 which stipulate that: ***" The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs"***.

26. The Defendant State argues that Mr ADOTEVI could not prove that it refused to enforce the Judgment in question, which purportedly deprived him of specific protection measures relating to his physical and moral needs; that Applicant could neither show any proof for the violation of his human rights by the Defendant State, for which this Honourable Court can declare its jurisdiction; that on the contrary, Mr. ADOTEVI had already taken this matter before the national courts in Benin, which is still pending before the Second Chamber on Civil matters at the Tribunal of First Instance of the Cotonou, with Case N°61/03, and that is billed for deliberations, and judgment to be delivered on 14 November 2013.

27. Consequently, The Defendant State requests that the Honourable Court should declare it lacks jurisdiction over the case and order Plaintiff to file a proper appeal, before an appropriate Court.

28. **As to merit,**

Counsel to the Defendant State, while recalling *mutatis mutandi* the facts as already stated, argues that Mr Amédéo ADOTEVI is trying to get the refund of a purported confiscated debt and the reparation of prejudice suffered, as a result of the non-enforcement of Judgment N°197/99 of August 1999 by the Republic of Benin.

29. Defendant further avers that, in order to justify the refusal of the Republic of Benin to enforce the said Judgment, Applicant must prove that he took some measures in seeing that the enforcement is done; that no exhibit attached to the case file proves that Plaintiff took some steps towards the enforcement.

30. Counsel to Defendant argues that, on its part, the Republic of Benin has shown proof, through exhibits numbered 7 to 13 to support the two third party notices sent to the Office of the Debt Recovery of former State Banks, by the Tax Office; he further argues that if the taxes claimed by the Tax Office have been cooked with the sole aim of avoiding the enforcement of Judgment 167/99 of 12 August 1999, it then the responsibility of Applicant to show proof for this, and subsequently, bring the litigation before the competent national courts in Benin, within the period required by the law;

that Plaintiff has never raised any objection as regards those taxes owned by his company, and that it is in vain he is claiming to be a victim of discrimination, after he consented to the payment of these taxes, by asking for a balance he could not secure, for reasons already stated above.

31. Counsel to Defendant further argues that, even if under the terms of Article 33 of the OHADA Uniform Act on the simplified procedures of recovery and ways of enforcement, the State enjoys enforcement immunity, the OHADA Law Maker makes provision, for defeating the State resistance to enforce a Judgment containing costs, the possibility to pay compensation, Mr. Amedeo ADOTEVI cannot show proof of his own steps taken, in order to facilitate the enforcement of the said Judgment by way of compensation.

32. Counsel to Defendant argues that, on the contrary, in his writ of 25 October 2000, Applicant recognised that the BCB liquidation paid him the sum of Two Thousand Deutsch marks; thus, the Republic of Benin did not , in any way, resist the enforcement of that Judgment, that above all, Mr. ADOTEVI, like all other people victimised under the Revolution period, was paid compensation, and received the sum of One hundred and three millions (103,000,000) CFAFrancs out the One hundred and fifty-one millions (151,000,000) he claimed was the prejudice suffered, as a result of the nationalization of his company; consequently Counsel to the Defendant State is asking the Court to note that there is no debt owned Mr. ADOTEVI by Defendant, the latter having fully complied.

33. In regard to the violation of Article 18-4 of the African Charter on Human and Peoples' Rights, the Defendant State points out that, as the time of the facts, Plaintiff was 65 years old, and that the respect for his economic rights involves his own obligation towards his father land, which is run on an essentially fiscal budgetary policy; Defendant further claimed that, by allowing Plaintiff and his company to stay in business, in his own country, Mr. ADOTEVI cannot now claim that his economic rights, as guaranteed under Article 18-4 of the African Charter on Human and Peoples' Rights are violated, simply because an additional tax adjustment was made against his company, and he was made to pay his tax, as a business man.

He therefore requests the Court to strike out all claims made by Plaintiff.

II) LEGAL ANALYSIS BY THE COURT

34. Plaintiff invoked the violation of his economic rights, as guaranteed under Article 18-4 of the African Charter on Human and Peoples' Rights, as the subject-matter of his Application. He accuses the Republic of Benin of

failing to enforce Judgment dated 12 August 1999, wherein it (Defendant) was ordered to refund to him, the sum of Two Hundred (200,000) thousand Deutsch Marks, thus failing as well to give him the protection that he required, as an aged person, pursuant to the provisions of Article 18 - 4 of the African Charter on Human and Peoples' Rights.

35. The Defendant State raised a preliminary objection, as to lack of jurisdiction of the Court, on the grounds that the case had earlier been taken before national courts, and that Plaintiff has not avail the Court with any proof for the purported human rights violations, and specifically the violation of Article 18-4 of the African Charter on Human and Peoples'Rights.

The Court shall start the analysis by establishing its jurisdiction on the instant case.

a) On the jurisdiction of the Court.

The African Charter on Human and Peoples' Rights invoked by Plaintiff is indeed a legal instrument that the Court refers to when considering cases on human rights violations that occur in the Community Member States. To this effect, the Court recalls the provisions of Articles 9, 4 and 10 of its Supplementary Protocol, which grant jurisdiction, as well as the types of justice seekers that can bring cases before it: these Articles provide thus:

> **"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State. Access to the Court is open to individuals on application for relief for violation of their human rights."**

36. Through its constant and abundant jurisprudence, in this regard, the Court has severally declared that, the simple allegation by Plaintiff, of the violations of international human rights protection instruments, in an ECOWAS Member State, suffices for the Court to establish its jurisdiction, which shall not be tied to whether such allegations are true or otherwise.

37. Moreover, the Court notes that, in its preliminary objection, Defendant premised its action on the fact that the case had earlier been referred to national courts, to claim lack of jurisdiction by the Court on the instant case. Once' again, the Court wishes to point out that exhaustion of local remedies does not constitute a condition for admissibility of Applications brought before it. *(Ref Judgments in* **Prof. Etim Moses *v.* Republic of the Gambia &University of the Gambia***, dated 14 March 2007, §27;* **Hadidjatou Mani Koraou *v.* Republic of Niger** *dated 27 October 2008, § 49 - 53;* **Abdoulaye Balde et al *v.* Republic of Senegal** *dated 14 February 2014, § 17 - 19).*

38. The Court notes that, in the instant case, Mr. Amédéo ADOTEVI brought a case against the Republic of Benin, for the violation of Article 18-4 of the African Charter on Human and Peoples' Rights, which provides that:

> ***"The aged and the disabled shall also have the right to special measures of projection in keeping with their physical or moral needs."***

Consequently the Court declares that it has jurisdiction over the acts of violation that were brought before it.

b) On the violation of Articles 14 and 18 - 4 of the African Charter on Human and Peoples' Rights.

39. Applicant alleges that his economic rights especially his right to own property, as guaranteed under Article 14 of the African Charter on Human and Peoples' Rights, which provides that:

> ***"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".***

are violated.

40. The Court notes that the crux of the matter relates to the enforcement of a court judgment, wherein the Republic of Benin was ordered to refund the sum of Two Hundred (200,000) thousand Deutsch Marks, which Mr. ADOTEVI had earlier deposited as guarantee with the Banque Nationale SDN, which later became the BCB.

41. Indeed, the Court observes that, whereas Plaintiff claims that the Defendant State was oppose to the enforcement of the said court decision, the latter counters the claim, by averring that it enforced the said judgment, through a third party, to whom Plaintiff is indebted, and that this contestation which had not been made within legal time-limit, because it relates to a fiscal argument was still pending before the national courts.

42. The Court notes that the actions made by an individual or a corporate body can lead to damages which the person who claims to be victim might suffer but the onus lies on the said victim to demonstrate the illicit nature of the damages, and hold the author of true damages responsible, even if it is a Member State; the Court believes that this civil case finds its solution before the national courts, especially when there is refusal or resistance to enforce the decisions of a national court.

43. The Court notes that in the instant case, the national courts have recognised Mr. Amédéo ADOTEVI's right to own property, and have ordered the refund of the sum of Two Hundred (200,000) thousand Deutsch Marks. The Court points out that the real problem that Plaintiff has brought before it relates to the mode of enforcement of the said decision; Plaintiff's action seeks to, on the one hand, find out whether Defendant was to return the whole Two Hundred (200,000) thousand Deutsch Marks to him, or through another third party to whom the Plaintiff was indebted, or on the other hand, if the additional tax adjustment that was made should be against Mr. Amédéo ADOTEVI, as an individual, or BETRACO S.A, a corporate body. The Court thus holds that it is not within its responsibility to find answers to these posers, which can only be sorted out before the national courts. Consequently, the Court declares and adjudges that the plea drawn from the violation of Article 14 of the African Charter on Human and Peoples' Rights cannot prosper.

44. Mr. Amédéo ADOTEVI also complained about the violation of Article 18-4 of the African Charter on Human and Peoples' Rights, which provides that:

> ***"The aged and the disabled shall also have the right to special measures of protect ion in keeping with their physical or moral needs."***

45. The Court points out that the protection of aged or disabled persons, as enshrined in the provisions of this Article, presupposes that Member States put specific legislative, and regulating measures in place, which shall allow for an effective protection of the said persons, especially in regard to their physical and moral needs. Aged or disabled persons fall within the categories of citizens who need some protection other than what is provided for in general terms. It has to do with a protection relating to their mental and physical conditions, for which they have more or less diminished capabilities. This specific protection calls on the obligation of member States, in taking more favourable measures that could ease the work conditions, insertion into professional life, access to medics, and more appropriate care for them etc.

46. However, the Court notes that this obligation of Member States must also be appreciated in relation to their material and economic strength, on the one hand, and also, their real readiness to take appropriate measures in favour of these categories of citizens, on the other hand.

47. The Court is of a strong opinion that if the issue of human rights violation is as a result a national judicial procedure, it must then be clearly identified as such, and should be based on a legal instrument, upon which the Application is premised, by the direct link between the alleged violation and the instrument that guarantee its protection.

48. In the instant case, the Court notes that, the invocation of Article 18-4 of the African Charter on Human and Peoples' Rights by Plaintiff seems to underline the fact that by the non-enforcement of the court decision, his professional and social condition has been worsened. Thus, Plaintiff sees a direct link with the violation of the aforementioned provisions. Whereas, by referring to it, Plaintiff failed to prove the direct link to the facts that constitute, according to him, the violation of the protected rights, and worse still, he did not raise the issue of the violation of a specific right. Indeed, the Court holds that, if it is undeniable that Article 18-4 provides for the protection of the rights of aged and/or handicapped persons, it is the responsibility of Plaintiff, who claims to belong to that category of citizens, to clearly demonstrate the specific rights that are said to have been violated by the State. Furthermore, Applicant has not brought any proof establishing that he applied to the State, the enjoyment of any specific measure of protection, owing to his advanced age, as well as his moral and physical needs.

49. The Court holds that the mere reference to his age, which Plaintiff puts at 80, cannot, in anyway be a determining factor to establish the alleged violation of Article 18- 4 of the African Charter on Human and Peoples' Rights, even if he pleads that his vulnerability and sufferings are as a result of the non-enforcement of Court Judgment dated 12 August 1999. Consequently, the Court notes that the alleged human rights violations, as enshrined under Article 18-4 of the African Charter on Human and Peoples' Rights, by Plaintiff against the Republic of Benin cannot prosper;

50. Thus, the Court adjudges that the alleged violation against the Republic of Benin, of the economic and social rights, as well as the protection of aged or handicapped persons, which are respectively enshrined under Articles 14 and 18-4 of the African Charter on Human and Peoples' Rights, is not established.

For these reasons,

The Court, sitting in a public hearing, after hearing both parties, and after deliberating:

- **Whereas** Plaintiff brought a case against the Republic of Benin, for the violation of his rights as enshrined under Articles 14 and 18-4 of the African Charter on Human and Peoples' Rights;

- **Whereas** the Republic of Benin raised preliminary objections, as to the lack of jurisdiction by the Court over the case;

The Court,

As to form,

- **Rejects** the Preliminary Objection raised by the Republic of Benin; consequently, declares its jurisdiction over the human rights violations case filed by Plaintiff;

As to merit,

- **Declares** that the violation of Articles 14 and 18-4 of the African Charter on Human and Peoples' Rights by the Republic of Benin is not established;

Costs

The Court declares that pursuant to the provisions of Article 66 (4) of its Rules of procedure, each party shall bear its own costs;

Thus made, adjudged, and pronounced in French being the language of 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.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon. Justice Benfeito Mosso RAMOS - *Presiding*
Hon. Justice Clotilde MEDEGAN NOUGBODE - *Member*
Hon. Justice Eliam M. POTEY - *Member*

Assisted by **Me Athanase ATANNON** - *Registrar*

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

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, THE 28 DAY OF NOVEMBER, 2013

SUIT N^{O}: ECW/CCJ/APP/06/11
RULING N^{O}: ECW/CCJ/APP/15/13

BETWEEN
SHAGBOR JOSEPH YONGO & 4 ORS - *PLAINTIFFS*

AND
THE GOVERNMENT OF BENUE STATE & 7 ORS - *DEFENDANTS*

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING JUDGE*
2. **HON. JUSTICE C. NOUGBODE MEDEGAN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **TERRENCE VEMBE**
2. **DANIEL ALUMUN**
3. **AFE ADEBOWALE** - *FOR THE PLAINTIFFS*

1. **MR. P.O. AHEMEA,**
DCL BENUE STATE - *FOR THE 1ST & 2ND DEFENDANTS*

2. **STEPHEN T. MANDEUM -** *FOR THE 3RD & 6TH DEFENDANTS*
3. **MR. OKONACHI OGAR** *AND*
4 **MR ANOZIE CHINONSO**
5. **BNC EKERE &**
6. **MS. ONYEYINYE NWAKOBY -** *FOR THE 4TH & 5TH DEFENDANTS*
7. **MRS. EGO EZUMA with**
8. **IFEANYI ALOR -** *FOR THE 7TH DEFENDANT*

Preliminary Objection -Jurisdiction -Proper Parties -Statute of limitation -Cause of Action

SUMMARY OF FACTS

The Plaintiffs who are members of Mbayenge community in Benue State Nigeria filed an application before the Court for breach of their fundamental human rights. The application is based on the fact that the Bebi tribe a neighbouring community attacked, destroyed properties, looted and murdered members of the Plaintiffs community, while the security men who are agents of the Defendants enjoined to protect them where absent.

The Plaintiffs reported the crisis to the Defendants who neglected and refused to take necessary action to provide security for the Plaintiffs protection. A resolution from the Benue State House of Assembly directing the 1st and 2nd Defendants to secure lives and ensure calm was also neglected. Consequently, the Plaintiffs came under series of attack owing to lack of provision of security by the Defendants who rather preferred to protect Godoligo farms Nigeria Ltd, a company a stone throwaway from the Community with heavily armed men in place of the Plaintiffs who were left unprotected. Therefore, the Plaintiff avers that the failure of the Defendants, their officers, servants agents and privies to provide adequate and timely security to the Plaintiff is a gross violation of the Plaintiffs right to life contrary to Article 4 of the African charter on Human and Peoples Rights. The Defendants in opposition, raised a preliminary objection on the grounds that the Court lacks jurisdiction to entertain the matter.

LEGAL ISSUES

1. *Whether the Community Court of Justice has Jurisdiction to entertain individual/personal cases and or cases involving warring communities*

2. *Whether the action is maintainable having regard to the fact that the cause of action arose over 3years ago.*

3. Whether the action is not Statute Barred.

4. Whether the 1st, 2nd, 3rd 4th 5th, 6th and 7th Defendants are proper and necessary parties.

DECISION OF THE COURT

The Court decides that parties affected by the provision of Article 9(3) of the Protocol as amended are the Institutions of the Community and Members of the Community, the Defendants are not such parties except the 3rd Defendant. The Court also held that the violation of Human Rights alleged in the main application is not within the jurisdiction of the Court and that even though the case was for violation of Human Rights, the complaint can only stand for trial against the Federal Republic of Nigeria, the 3rd, 4th, 5th Defendant and not against the 1st, 2nd, 6th, 7th and 8th Defendants which are not parties recognised in International law as proper parties to sue or be sued before this Court. The Court further held that the action is statute barred as against the 3rd Defendant in view of Article 9(3) of the Supplementary Protocol which specified those that shall be affected by the said provisions as the Members of the Community 4th, 5th, 6th, 7th (which are Member States) and institutions of the Community. Whereas the 1st, 2nd and 8th Defendants are not legal/ proper parties in this case before the Court but nominal Defendants. Consequently their names are struck out, Statute barred in accordance with Article 9(3) of the said Supplementary Protocol as the Applicant is neither a state nor an institution of the Community. The Court decided that the preliminary objection succeeds in its entirety and the originating action failed and it is struck out accordingly.

RULING OF THE COURT

1. The Plaintiffs are citizens of the Federal Republic of Nigeria who reside in the Mbayenge community and they are also kindred of Ikurav-ya district of Kwande Local Government Area of Benue State of Nigeria.

2. The Defendants are described as follows:

   (a) The 1st Defendant is the Government Benue State of Nigeria, one of the 36 states of Nigeria.

   (b) The 2nd Defendant is the Governor of Benue State of Nigeria, who is the Chief Executive Officer and Chief Security Officer of the 1st Defendant.

   (c) The 3rd Defendant is the Federal Republic of Nigeria, a Member State of ECOWAS.

   (d) The 4th Defendant is the Government of Cross River State of Nigeria, one of the 36 States of Nigeria.

   (e) 5th Defendant is the Governor of Cross River State who is the Chief Security Officer of the 4th Defendant.

   (f) The 6th Defendant is the Inspector General of Police of the Federal Republic of Nigeria.

   (g) The 7th Defendant is the Commissioners of Police Benue State, Police Command; and

   (h) The 8th Defendant is the Police Service Commission of Nigeria.

SUMMARY OF THE FACTS

3. On the 1st day of July, 2007 at about 5a.m., the Bebi people, a tribe in Obanliku Local Government Area of Cross River State attacked the Mbayenge Community of Benue State and wantonly destroyed and looted their properties and murdered. At the time of the incident the security men who are agents of the government who were enjoined to protect the community were not present.

4. Prior to the attacks, the Bebi people had land dispute resulting to crisis with the neighbouring community to wit the Mbayenge community, the Mbaipka community of Ikurav-ya district of Benue State, with both sides carrying out attacks and reprisal attacks.

5. The crisis was reported to the Defendants but they neglected and or refused to take necessary action and provide security for the Applicants protection.

6. On 27th of June, 2007 three days before the attacks on the Applicants, the Benue State House of Assembly passed a resolution that the Benue State Executive be informed of the situation in that area and also directed that security details should be put in place to secure lives and ensure calm environment but the Defendants particularly the 1st and 2nd Defendants though properly briefed neglected and refused to provide the required security for the needed protection to avert the mayhem meted on them (the Applicants)

7. On 1st of July, 2007, there was an attack on the Applicants and their properties taken away by the Belli tribe. Again, the Applicants reported the attacks to the Defendants through the Divisional Police Officer (DPO) Adikpo Division under the jurisdiction of the aggrieved community but all fell on deaf ears.

8. On 2nd and 3rd July, 2007, the said aggrieved community was attacked. Mobile policemen were deployed to the community on the 8th, July, 2007, four (4) days after the attack. After the attacks on the Applicants, the 1st and 4th Defendants set up a joint Peace Committee on the7th of September, 2007 to among others determine the extent of destruction caused by the crisis in order to enable government offer compensation to the affected persons or communities and offer recommendations on ways of forestalling future occurrence of the crisis.

9. The incident was reported to the 7th Defendant by the Members representing the Turan/Ikurav-ya constituency of Benue House of Assembly on the 28th of June, 2008 and a promise made to deploy some policemen to the area but that also failed. However, the Defendants gave preference to Godilogo Farms Nigeria Ltd., a company that is a stone throw from the community and deployed heavily armed mobile policemen to guard the said place instead of the Applicants' community and the Applicants were still left unprotected.

10. Even though this committee was given 2 weeks to submit its report, the 1st and 4th Defendants are yet to publish the report of a white paper on the findings and recommendations of the said committee. The Applicants acting through the 1st Applicant have since the attacks of July 2007, made several oral and written representations to the Defendants particularly the 1st Defendants with a view to securing compensation and security for the victims of the attack so that they can pick up the pieces of their lives but such representations have all been rebuffed or ignored by the Defendants.

11. Wherefore, the plaintiffs claim against the Defendants jointly and severally as follows:

    (a) A Declaration that the failure of the Defendants, their officers, servants, agents and privies to provide security for the Applicants and their properties but rather deploy security operatives to their next door neighbor, Godoligo Farms Nigeria Limited to the detriment of the Applicants constitute a gross violation of their rights to be equal before the law and entitlement to equal protection before the Law contrary to Article 3 of the African Charter on Human and Peoples Rights.

    (b) A Declaration that the failure of the Defendants, their officers, servants, agents and privies to provide adequate and timely security to the Applicants is a gross violation of the Applicants rights to liberty and security of their persons contrary to Article 6 of the African Charter on Human and Peoples' Rights.

    (c) A Declaration that the failure of the Defendants, their officers, servants, agents and privies to provideadequate and timely security to the Applicants is a gross violation of the Applicants rights to life contrary to Article 4 of the African Charter on Human and Peoples Rights;

    (d) A Declaration that the Applicant have a right to National and International Peace and Security as enshrined in Article 23 of the African Charter on Human and Peoples Rights, and failure of the Defendants, their officers, servants, agents and privies to provide adequate and timely security for their lives and properties is a gross violation of the said right contrary to the said Article.

    (e) A Declaration that the failure and refusal of the 1st and 4th Defendants to publish the white paper or report of the Joint Peace Committee set up by them to investigate the crisis that led to the destruction of the Applicants properties and loss of lives and recommend measures to forestall future occurrence constitute a gross violation of their right to liberty and security of their persons and to National and International Peace and Security as enshrined in Article 6 and 23 of the African Charter on Human and Peoples Rights.

    (f) An Order directing the Defendants to establish forthwith in the Mbayenge Community a modern Police Station fully equipped with sufficient service personnel to forestall the occurrence of any similar wanton destruction of lives and property in the community.

(g) An Order directing the 3rd Defendant to carry out immediate demarcation of border between Kwande local Government of Cross River State to forestall any further crisis between the people of the two local Governments.

(h) An Order directing the Respondents to pay the Applicants damages in the sum of One Billion Naira only on the footing of exemplary and aggravated damages for the unlawful violation of the Applicants rights, the Defendants actions being negligent, oppressive, arbitrary, capricious, and for injuring the dignity and pride of the Applicants and causing them great psychological trauma.

(i) An Order directing the Respondents to publish apologies to the Applicants in two (2) national daily newspapers operating and circulating in Nigeria, to wit: This Day Newspaper and the Guardian Newspapers for the gross breaches of the Applicants' fundamental rights.

(j) An Order directing the 1st and 4th Defendants to publish forthwith the report and white paper on the joint committee on peace set up by them and inaugurated on the 7th September, 2007 in the wake of Bebi invasion of July, 2007.

(k) An Order directing the Defendants to pay to the Applicants the sum of N 25 Million only being cost of prosecuting this suit.

12. In view of the Originating Application the Defendants herein filled preliminary objections pursuant to Articles 87 and 88 of the Rules of the Community Court of Justice, ECOWAS seeking for the originating Application filed by the Plaintiffs to be struck out for lack of Jurisdiction on various grounds stated therein in their objections.

13. Learned Counsel for the 1st, 2nd and 7th Defendants raised the following issues for determination in respect of the preliminary objection thus:

a) Whether the Plaintiffs or their Counsel have a proper grasp and understanding of the rationale for the establishment of the Community Court of Justice of ECOWAS, its competence and jurisdiction.

b) Whether the Community Court of Justice of ECOWAS has jurisdiction to entertain individual/personal cases and or cases involving warring communities bothering on land disputes of sovereign states.

c) Whether the 1st, 2nd and 7th Defendants are proper and necessary parties in this instant suit before the Court.

14. Learned Counsel for the 3rd and 6th Defendants' raised issues for determination thus:

    a) Whether the action is maintainable having regard to the fact that the cause of action arose in July, 2007, over 6 years ago? and

    b). Whether the 3rd and 6th Defendants are proper parties;

15. Learned Counsel for the 6th and 7th Defendants raised issues for determination thus:

    a) Whether in the circumstances of this case the action as presently constituted is not statute barred taking into consideration the provision of the Rules and Protocol of the Court;

    b) Whether the Court has jurisdiction to entertain the suit; and

    c) Whether the 6th and 7th Defendants are proper parties.

16. Learned Counsel to the Plaintiffs raised issues in reply to the objection thus:

    a) Whether this Court has jurisdiction to entertain actions bordering on violation of Human Rights of the Plaintiff; or

    b) Whether the Plaintiffs have rights of direct access to this Court to litigate their rights, when there exists a local law in the Federal Republic of Nigeria to file the case;

THE ARGUMENTS OF LEARNED COUNSELS TO THE PARTIES IN RESPECT OF THE ISSUES:

17. The 1st, 2nd and 7th Defendants argued that the Community Court of Justice was essentially established to adjudicate upon disputes in accordance with the provisions of Article 76 of the Treaty between the Member States or the Authority when such disputes arise between the Member States and Institutions of the community on the interpretation or application of the provisions of the Treaty the Court has jurisdiction after amicable settlement had been explored but failed. They stated that, the Member States under International law referred to Heads of Governments (Sovereign States) and not a state within a State/country. He submitted that the Revised Treaty in consonance with international law defined the word *"community"* as a body of sovereign States of the Economic Community of West African States and not local communities within a state of the Federation or Member States. They also defined the word *"Institution"* to mean the different organs of the Economic Community of West African States. On this score, they submitted that the Court is a special Court with clear mandate and

functions and not a local/national Court that entertains disputes between warring communities and individuals within sovereign states and contended that this Court is thus deprived of jurisdiction to entertain the present suit.

18. They submitted further that, from the Plaintiffs' statement of claim, there is an apparent pending land dispute between the Bebi Community of Cross River and their neighbours of Mhayenge community of Benue state which led to attacks and counter attacks resulting in the present crisis and subsequent suit. Learned counsel contended that the facts of the case bordered on criminal conspiracy and trespassing on land and culpable homicide for which if, the Bebi people were arrested, they would have been charged for the said offences.

19. They finally submitted on this issue that it is the Federal High Court of Nigeria that has jurisdiction to entertain the matter and not the Community Court of justice of ECOWAS, and for the 3rd issue, they argued that even if they were proper parties in this suit, the 1st and 2nd Defendants have taken steps to forestall the crisis by dispatching the 7th Defendant to the crisis ridden area of the Plaintiff as shown at paragraph 16 of the Plaintiffs' claim but the 7th Defendant and his team only arrived at the crisis area on the 5th day of July 2007, four days after the attack. Even after the crisis he submitted that the 1st and 2nd Defendants and their counterparts from Cross River state showed concern by promptly setting up a Commission of enquiry to look into the matter.

SUBMISSION OF LEARNED COUNSEL TO THE 3RD AND 4TH DEFENDANTS

20. Learned Counsel to the 3rd and 6th Defendants in their submission argued that it is an elementary knowledge in the practice and procedure of law that any party instituting a matter in the Court of Law must fulfill certain well established conditions before a Court can assume jurisdiction to assume same. Relying on paragraphs 9 and 10 of the originating Application, they argued that these paragraphs unequivocally state that the cause of action arose in July 2007 and since then there has been no known attack to warrant the application almost four years after the cause of action arose to be resuscitated and keep it alive. The instant action therefore became statute barred.

21. They submitted that it is an established principle of law that in order to determine whether an action is statute barred or not, as in this case the originating Applications would show that the date of the cause of action and when it arose. They cited **Megawalu *v.* Kano State Govt.** (2006) AFWLR (pt.329) 918, **Nigerian Ports Authority Plc *v.* Lotus Plastics**

Ltd (2006) AFWLR (pt.297) 1023 on limitation of statutes. They contended that there was nowhere in the affidavit where the Applicants averred facts showing that there was any other act of aggression apart from the occurrences of the 1st, 2nd and 3rd July 2007. He contended that the purported continued suffering of the Applicants since the incidents that occurred in July 2007 does not amount to continuing wrong and urged the Court to hold that there was no continuity of the alleged violation if any as to defeat the lapse of time.

22. They further argued that, bringing this application almost four years after the cause of action arose is contrary to Article 3(3) of the Supplementary Protocol AS/SP.1/01/05) amending Protocol (A/P1/7/91) relating to the Community Court of Justice which provides that:

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

21. They urged the Court to consider the case of **Obiakejule *v.* Delta Govt** (2009), 17 NWLR 91170)298, where the Court held that:

> ***"When an issue of lack of jurisdiction is raised regarding a suit being statute barred, it is not relevant to look at the substance of the cause of action"***

23. Based on the above cases and statutory provisions, they contended that the application was not maintainable as the action was statute barred and that where the action is statute barred, the Court is said to lack jurisdiction to entertain same.

24. On the 2nd point for determination, the 3rd and 6th Defendants argued that assuming they were proper parties in this case and that the Plaintiffs in their originating Application did not disclose any cause of action against them. They contended that while the 3rd and 6th Defendants are mentioned in paragraphs 21 and 22 of the Application about a joint peace committee set up to examine the cause of the crisis and issue a report, no report has been issued; he submitted that no action or omission on the part of the 3rd and 6th Defendants were disclosed or articulated anywhere in the Application. They therefore submitted that the 3rd and 6th Defendants have absolutely no case to answer as they have not been shown to violate the rights of the Applicants. Learned Counsel urged the Court to strike out the names of the 3rd and 6th Defendants for non-disclosure of cause of action against them.

SUBMISSION OF LEARNED COUNSEL TO THE PLAINTIFFS

25. Learned Counsel to the Plaintiffs in their reply argued based on the issues they raised by the Defendants that the Court has jurisdiction to adjudicate on the case and that the Defendants were proper parties and there is a proper cause of action against the Defendants. They submitted that the case was based on violation of human rights pursuant to article 9(4) of the Supplementary Protocol of the Court 2005 and that the case was not Statute barred under Article 9(3) of the said Supplementary Protocol 2005. He urged the Court to dismiss the preliminary objection.

26. With regards to the preliminary objections raised, the Plaintiff in their reply argued that their case is not based solely on the events of the 1st, 2nd and 3rd July, 2007 but based also on the Defendants' actions and inactions that were in existence at the time of filing this suit and even on the continuation with the said breaches of the Plaintiffs' right with impunity. They submitted that this suit was filed the day the cause of action accrued and not a day after. Therefore, the filing of this suit is thus not caught by the three year limitation of statute as provided in Article 9(3) of the Supplementary Protocol (A/SP.1/01/05).

27. They further argued that assuming without conceding that the cause of action giving rise to this suit accrued from the events of 1st to 3rd July 2007, this action is still not statute barred in view of the doctrine of continuing violation of human rights which is now firmly entrenched in the international law jurisprudence on human rights. They contended that statutory limitations are not applicable in cases of human rights violations that are continuing. They cited cases where the doctrine was evoked by various regional Courts such as the European Court of Human Rights(ECrtHR.), International Court of Justice(lCJ), the Inter-American Court of Human Rights (IACtHR) and Human Rights Committee (HRC).

    The cases include **De Becker *v.* Belgium**, **ECHR, 27 March 1962**, Application No.U5/56 where the Doctrine of continuing violation was first evoked by the European Commission for Human Rights. Other cases cited includes, **Cyprus *v.* Turkey, ECtHR 10 May 2001, Application no. 25781194**, **Serrano - Cruz sisters *v.* El Salvador, Inter-Am. Ct, HR (ser.C) No. 120 at l (Mar. l, 2005)**, **Moiwana village *v.* Suriname, Inter-Am. Ct. HR (ser.C) No. 124 at 1 (June 15, 2005)** and so on.

28. On the 2nd issue as to proper parties, the Plaintiffs argued that the jurisdiction of this Court in respect of allegations of human rights violation is not in doubt. They argued that by virtue of Article 4(g) of the Revised Treaty on ECOWAS which provides for the recognition, promotion and protection of

the Human and Peoples rights in accordance with the African Charter on Human and Peoples Rights and most importantly Article 9(4) and 10(d) of the Supplementary Protocol (A/SP.1/01/05) relating to this Honorable Court expressly Confers jurisdiction on this Court to hear the matter. They referred to the case of **Alhaji Hammani Tijani *v.* Federal Republic of Nigeria & 40 Ors**, Suit No. ECW/CCJ/APP/01/06, judgment delivered on the 28th day of June, 2007 on the combined effects of Article 4(g) of the RevisedTreaty of ECOWAS and Article 9(4) of the protocol of the Court the Plaintiff must invoke the Jurisdiction of the Court by: Establishing that there is a right recognized by the Charter on Human and Peoples Rights; that the Right has been violated by the Defendants; that there is no pending action before another international Court in respect of the alleged breach of his right; and that there was no previous laid down law that led to the alleged breach or abuse of his rights.

29. The Plaintiffs in their reply to the objection of the 3rd and 6th Defendants raised a preliminary point as to the fact that the Preliminary Objections of the 6th Defendant dated 10th day of May 2011 and filed the same date and that dated 7th day of December, 2011 but filed the 12th day of December, 2011 constitute a gross judicial process that lacked propriety. Relying on the Supreme Court of Nigeria case of **Saraki *v.* Kotoye (1992)** 9 NWLR (pt 264) 156 at 188 paragraphs E to G, the Plaintiffs argued that where a party to a suit files a multiplicity of Applications on the same issue, the Applications so filed constitute an abuse of judicial process.

30. They urged this Court to dismiss the 6th Defendant's objections as same constitutes an abuse of Judicial process, and relied on the case of **Ambo *v.* Aiyeleru (1993)** 3 NWLR (pt.280) 126 at 142 paragraph B where the Supreme Court of Nigeria held that:

> ***"Once a Court is satisfied that any proceeding before it is an abuse of process it has the power, indeed the duty to dismiss it."***

31. After raising the preliminary point on the objection of the 6th Defendant they submitted that the application of the Plaintiffs which was premised on Articles 3, 4, 6, 23, and 24 of the African Charter on Human and Peoples' Rights was properly filed as required by the Rules of the Court and urged the Court to hold that it has jurisdiction to adjudicate on this case. The Plaintiffs further submitted that by virtue of Article 1 of the African Charter on Human and Peoples' Rights the Defendants shall not only recognize the rights, duties, and freedoms enshrined in the Charter but the Court is enjoined to adopt or take measures to give effect to provisions therein.

32. On the issue of proper parties and joinder of parties, they referred to, the cases of ***Commission Nationale des droits de l'Homme et des Libertes Chad (2000)*** AHRLR 66 (ACHPR 1995) and **Malawi African Association and others *v.* Mauritania (2000)** AHRLR 149 (ACHPR 2000) paragraph 140 to contend and further submitted that it is trite law that where a person would be affected by a decision of Court it is proper to join him in the action.

33. They referred to the case of **Adisa *v.* Oyinwola (2000)** 6 SC (pt.II) page 47 and also **Professor Etim Moses Etim *v.* the Republic of Gambia (2004-2009)** CCJELR 95. They argued that the Defendants who were directly involved in the violation of the Plaintiffs human rights should be joined because failure to join them would be fatal to the case and further added that if the Defendants were not joined in this suit, they ought to have applied to be joined as held by the Supreme Court of Nigeria in the case of **AG Lagos State *v.* A.G of the Federation NWLR** (pt 833) at page 74.

34. They submitted finally, that the totality of the 3rd and 6th Defendants' preliminary objection which is in the main an invitation extended to this Court to decline jurisdiction to hear this matter is an invitation to judicial timidity and they urged the Court to decline such invitation and hear the matter on it merits. The Plaintiffs further submitted that the objection of the 1st, 2nd and 7th Defendants which is predicated on two points namely: that this matter can only be determined by the Federal High Court of Nigeria; that the Court lacked Jurisdiction to entertain same and that they are not proper parties, lacked merit. On those issues, the Plaintiffs argued that the jurisdiction of this Court in respect of allegations of human rights violation is not in doubt. They referred to Article 4(g) of the Revised Treaty on ECOWAS which provides for the recognition, promotion and protection of the Human and Peoples' Rights in accordance with the African Charter on Human and Peoples' Rights and most importantly Article 9(4) and 10(d) of the Supplementary Protocol (A/SP.1/01/05) relating to this Honorable Court which also expressly confers jurisdiction on this Court to hear the matter in respect of violation of human rights. They referred to the case of **Alhaji Hammani Tijani *v.* Federal Republic of Nigeria & 4 Ors**, Suit No. ECW/CCJ/APP/01/06, judgment delivered on the 28th day of June, 2007 on the combined effects with Article 4(g) of the Revised Treaty of ECOWAS and Article 9(4) of the Protocol of the Court to buttress their points.

35. With regards to the second issue, the Plaintiffs submitted that by virtue of Article 1 of the African Charter on Human and Peoples' Rights the Defendants shall not only recognize the rights, duties, and freedoms enshrined in the Charter but shall undertake to adopt measures to give

effect to them. They referred to the cases of **Commission Nationale des droits de l'Homme et des Libertes Chad (2000)** AHRLR 66 (ACHPR 1995) and **Malawi African Association and others v. Mauritania (2000)** AHRLR 149 (ACHPR 2000) paragraph 140 to support their claim. They further submitted that it is trite law that where a person would be affected by a Decision of a Court it is proper to join him in the action. They referred to the case of **Adisa T. Oyinwola (2000)** 6 SC (pt.II) page 47 and also **Professor Etim Moses Etim *v.* The Republic of Gambia (2004-2009)** CCJELR 95.

36. They further argued that the Defendants are directly involved in the violation of the Plaintiffs human rights and ought to be joined in the suit as parties and that if Defendants were not being joined in this suit, they ought to have applied to be joined as held by the Supreme Court of Nigeria in the case of **AG Lagos State *v.* A.G of the Federation** NWLR (pt 833) at page 74.

37. In respect of the submission of the 6th and 7th Defendants' Counsel relied on his response to that he had given in respect of the 3rd and 6th Defendants because of their similarities.

ANALYSIS AND CONSIDERATION OF THE PRELIMINARY OBJECTION

38. The Court considered the submissions and the issues raised therein by Learned Counsel as summarized above, as to whether this Court lacked jurisdiction in this case. As always it is trite to state that the Courts are enjoined not to go into the substance of a case where the question of jurisdiction or otherwise is at stake especially when it is clear that it lacked jurisdiction. It was rightly observed and relied upon by the Defendants that lack of jurisdiction in an objection that the case is statute barred if upheld will defeat the action. We think the observation made in that regard cannot be faulted because action commenced outside the statutory period is statute barred and cannot be extended except by statute for actions that may be lodged thereafter and not for the previous action. In the jurisprudence of this Court there is a replete of authorities on the fact that statutory limitation period is mandatory and must be respected and in this regard we refer in the first instance to the cases of **Lijadu- Oyemade *v.* Exec. Secretary, ECOWAS (No. 2.) 2008** ICCJLR (PT.1) page 25 at 58 para. 10 and **Alhaji Hammani Tidjani *vs* Federal Republic of Nigeria & 4 Ors**, case no. ECW/CCJ/JUD/04/07 and reported in 2004-2009 page 85. Counsel also relied on the Nigerian case law of **Obiakejule *v.* Delta Govt. (2009)**, 17 NWLR 91170)298, on the same principle.

39. The Defendants in support of the action being statute barred contended that the alleged acts or omissions of the Defendants which constitute the

cause of action of this case took place between July 1st and July 3rd, 2007 and that the Plaintiff only sued almost 4 years after the cause of action arose and that by so doing the right of action had clearly expired several months before the commencement of the action. In view of the said arguments the Plaintiffs' cannot be heard because the action is already statute barred by virtue of the specific provision of Article 3 of the Supplementary Protocol (A/SP.1/01/05) of the Community Court of Justice, ECOWAS, 2005 which provides that: **"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 action arose".**

40. They further contended that it is not in controversy that the period had elapsed as it would be easily discernable from the originating process. They referred to the Nigerian case of **Egbe *v.* Adefarasin (No.2) (1987)** 1 NWLR (pt. 47) 1 at 20 which *inter alia* gave an opinion on influx of time precluding the hearing of the substantive case.

41. They argued also that where the case which commenced more than 3 years after the conclusion of the event being complained of, the Court should decline from adjudicating upon same on the grounds that the action is statute barred and for lack of jurisdiction. On this point on limitation of action, the submissions made thereof showed clearly that the action in the instant case was commenced after three years of the occurrence of the event that the Plaintiffs complained of violation of their rights. All the Plaintiffs and the Defendants agreed that the period when the action accrued and the lodgment of the suit exceeded the statutory period of three years.

42. We hold unequivocally that the action in this case occurred about the period of 1st to 3rd July 2007 but same was not lodged in this Court until 23rd March 2011, a period of more than three years. Article 9(3) of the Protocol of the Court as amended by the Supplementary Protocol No. A/SP.1/01/05 states: **"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."**

43. Does this action become statute barred against the Plaintiffs in this case? Are the Plaintiffs one of those specified in the said Article 9(3) of the Protocol of the Court that are precluded from pursuing thier reliefs after three years of the occurrence of the event complained of thereof? For a proper understanding of the said provision of Article 9(3), it must be appreciated that the provision of this Article being so clear requires no interpretation. Therefore same shall be applied in its ordinary sense of the words and

meaning. The said Article 9(3) applies to any action by or against a Community institution of any Member of the Community.

44. Where the action is by or against a Community Institution, the said provision shall apply. In the instant case, the action is by community citizens against institutions, persons, organs of a member state of the Community and also a member of the Community. However, 'Community' is described by Article 1 of the Revised Treaty as the Economic Community of West African States (ECOWAS) and Article 6 of the said Revised Treaty specifies the institutions of the Community thus:

> **"1. The Institutions of the Community shall be:**
>
> **a) the Authority of Heads of State and Government;**
> **b) the Council of Ministers;**
> **c) the Community Parliament;**
> **d) the Economic and Social Council;**
> **e) the Community Court of Justice;**
> **f) the Executive Secretariat;**
> **g) the Fund for Co-operation, Compensation and Development;**
> **h) Specialised Technical Commissions; and**
> **i) Any other institutions that may be established by the Authority.**

45. All the above institutions are the institutions of the Community. Any other institutions of the Member States are illegible as the institution of the community. Having observed as stated above we hold that the institutions of the Federal Republic Nigeria mentioned in this instant case are not affected by the limitation statute of Article 9(3) of the Protocol. It means that the Plaintiff and the Defendants should be either Community institution of Member of the Community. We hold that that is lacking in this case as the parties are not as described in Article 9(3) stated above.

46. The next category of parties mentioned in Article 9(3) of the said Protocol is Member of the Community, Who are members of the Community? Article 2(2) of Cap 1 of the Revised Treaty defined Members of the Community thus:

> ***"The members of the Community, hereinafter referred to as "the Member States," shall be the States that ratify this Treaty."***

It is therefore the view that Member of the Community mentioned in Article 9 (3) of the Protocol relates to Member States of ECOWAS and which

instituted the action against any institution or another member state are enjoined to comply with Article 9(3) of the Protocol or else the action would be statute barred. Having dealt with the provision of Article 9(3) of the Protocol in form and material, it is necessary to state herein that since the action in this case is against one of the Member States - the Republic of Nigeria, same must fail on grounds of Article 9(3) of the Protocol that it was not an action by a community institution or Member of the Community.

PROPER LEGAL PARTIES IN THIS CASE

47. The next question to address is the point canvassed by counsel to parties relating to legal/proper parties to this case. It is the contention of all the Defendants that they are not proper parties before this Court. The arguments of the Defendants are basically the same on this issue- except for the 3rd and 6th Defendants. Despite the preliminary point raised by the Plaintiffs' Counsel regarding the multiplicity of the objection by the 6th Defendant who filed multiple objections/actions without applying to strike the one that is a duplication is a fine point but not a decisive one. We think a decision can be given without going into the propriety of that preliminary point and still obtain a just consideration that is fair to all parties. The Defendants further argued that assuming without conceding that there is a cause of action against the Federal Republic of Nigeria, the 3rd Defendant, the alleged violation of the human rights of the Plaintiffs cannot be sustained against the other defendants in this case, in view of Article 9(a) and 9(d) of the Supplementary Protocol which provides in summation that, ***the Court has competence to adjudicate on any dispute relating to the following (a) The failure by member state to honor their obligation under the Treaty, Convention, and Protocols, Regulations, Directives or Decisions of ECOWAS and 9(d) that individuals on application for relief for violation of their human rights; the submission of application for which shall: i) not be anonymous; nor ii) be made whilst the same matter has been instituted before another International Court for adjudication.***

48. The Defendants argued that Article 3 of the Supplementary Protocol does not in any way contemplate Statutory Agencies and Parastatals of Member States as the proper/legal parties to this action but the contracting parties to the Treaty and the Government of Member States and the proper party in this case is, the Government of the Federal Republic of Nigeria, They submitted that making the Defendants proper parties before this Court would tantamount to usurping or duplicating the Jurisdiction of the internal/national courts of the Member States. We accept in toto that the institutions of the community and Member states of the Community and those also specified in the Protocol of the Court as amended are the proper parties in cases and

before this Court. We bold that the following Defendants sued in this case are not legal or proper parties before this Court to wit, the 1st, the 2nd, the 4th, the 5th, the 6th, the 7th, and the 8th Defendants but nominal parties being organs and officials of the Federal Republic of Nigeria.

CAUSE OF ACTION

49. Article 9(4) of the Supplementary Protocol gives the Court the Jurisdiction to entertain matters on violation of fundamental human rights that occur in Member States are within its competence for adjudication. In this regard we refer to the authorities of **Lijadu-Oyemade *vs* Executive Secretary of ECOWAS** supra; **Keita *v* Mali** (2009) PT) p.58 at 69-70; **Manneh *vs.* Republic of the Gambia (2008)** 2CCJLR 30; **Ugokwe *vs.* Okeke (2008)** ICCJLR p.149; **Tidjjani vs.FRN (2008)** supra at 175 paras.5, 6, 7 at p. 176 para. 8, It is therefore the view that Article 9(4) of the Protocol as amended and Article 4(g) of the Revised Treaty with Article 9(d) and Article 6 of the African Charter on Human and Peoples Rights would apply to defeat the objection of the Defendants when there is a *prima facie* fact that the rights of the Plaintiffs were violated in any member state of the Community with no pending suit before an international Court.

50. The totality of the facts alleged in the originating Application show *prima facie* several alleged violations of the rights of the Plaintiffs. As rightly pointed out by the defence, some of the violations are best suited for National Courts like that relating to the boundary dispute and culpable homicide punishable by death. We hold that even though the Plaintiffs would prefer the hearing of the case in this Court, we are inclined to hold otherwise that severance of the case to several components as to hear the allegation likely within the jurisdiction of this Court would be inappropriate when the national Courts can competently deal with all the components and matters arising from the case in their Courts in the interest of all the parties.

CONTINUATION OF VIOLATION OF HUMAN RIGHTS

51. The Counsel to Plaintiffs contended that the violation alleged did not come to an end on the 3rd of July 2007 as to bring in the Application of Article 9(3) of the Protocol as amended.

He submitted that the doctrine of continuity of action applied to defeat the defence of the action becoming Statute barred because the government committee that was set up to look into the matter was yet to submit its report. He invoked various Regional Courts decisions particularly the European Court of Human Rights (ECrtHR), International Court of Justice (ICJ), the Inter-American Court of Human Rights (IACtHR) and Human

Rights Committee(HRC). The cases he relied upon, included **De Becker *v.* Belgium, ECHR, 27 March 1962**, He also relied on Application No. 215/56, where the Doctrine of continuing violation was first invoked by the European Commission for Human rights, *and also* **Cyprus *v.* Turkey**, ECtHR 10 May 2001, Application no.25781/94, **Serrano - Cruz sisters *v.* EI Salvado**r, Inter-Am. Ct. H.R (ser.C) No. 120 at 1 (Mar. 1, 2005) **Moiwana Village *v.* Suriname**, Inter-Am.. Ct. H.R (ser.C) No. 124 at 1 (June 15, 2005) and so on.

52. On the above arguments the Defendants submitted arguments for lack of continuity of the violations despite the fact that a panel was set up which had not submitted its report. Also we find it absurd that even though the Plaintiffs submitted that they have stated in clear terms in their originating application (summary of facts) pages 1 to 24 particularly paragraphs D 4, 6, 10, 13, 14, 16, 17, 18, 20, 23, 24 that the Defendants have failed and refused to provide security for the members of their community, and the non submission of the said report that we hold would not amount to a continued breach of their aforementioned rights up to date.

53. Another point also that was apparent in the arguments of the parties is whether if there is evidence of gross violation, same could operate as having continuity span beyond the statute of limitation period albeit Article 9(3) of the Protocol as amended. The Plaintiffs' Counsel held unto the contention but the Defendants were not impressed or persuaded by such stance in that the alleged violation never went beyond 3rd of July 2007. We think that it is not ruled out that sometimes gross violations of rights cannot be limited by a statute of limitation like the provisions of Article 9(3) of the Protocol as amended but not in this case on the grounds earlier given in this case.

54. We agree that right to life is a grossviolation but because of its serious nature same can be heard by an appropriate national Court with criminal jurisdiction. This Court disagreed with the Defendants that the subject matter should only be heard under the jurisdiction of the national Court albeit High Court of Benue State of Nigeria because this Court has concurrent jurisdiction on human rights with the national Courts.

55. Consequently, we hold that while the 1st, 2nd and 4th, 5th, 6th, 7th and 8th Defendants are not legal or proper parties before this Court as earlier stated, and the action against the 3rd Defendant is not statute barred because of the serious violations, and the provisions of Article 9(3) of the Supplementary Protocol of the Court.

56. DECISION

1) **Whereas** the Plaintiffs lodged a complaint for violations of their human rights as provided pursuant to Articles 6 and 7 of the African Charter on Human and Peoples' Rights and Article 9(4) of the Protocol as amended by the Supplementary Protocol on the Court;

2) **Whereas** the Supplementary Protocol as opined by this Court in various decisions gave the said provision a wide meaning or expression by virtue of Articles 9(4) and 10 (d), Articles 6 and 7 of the African Charter on Human and Peoples Rights that persons whose human rights are alleged to have been violated may access the jurisdiction of this Court to seek remedy sought therein;

3) **Whereas** the preliminary objection relied on the facts that the Defendants were not proper parties in international law as to be sued in this case and that the action was not statute barred by virtue of Article 9(3) of the Supplementary Protocol on the Court; and whereas this Court was of the opinion that the action was not statute barred by Article (.....

4.) **Whereas** the alleged violation was committed about the 1st to 3rd of July 2007 and Article 9(3) of the Protocol as amended made action brought outside the statutory period of three years from the date the action accrued as statute barred.

5.) **Whereas** the legal/proper parties before this Court are those parties specified in Article 9 of the Protocol of the Court as amended and the Revised Treaty and those recognized by the international community as representing others in view of their legal status;

6) **Whereas** the Court adjudged that parties affected by the provision of Article 9(3) of the Protocol as amended are the parties mentioned therein albeit institutions of the community and members of the Community and the Defendants are not such parties except the 3rd Defendant.

7) **Whereas** the Court held after analyzing the facts, Treaty and Protocols mentioned therein above that the violation of human rights alleged in the main application in this case is not within the jurisdiction of the Court and rejected the submission that since the facts depicted some elements of gross violation, and there was a pending report of the Committee to investigate the clashes and event on the fateful date, there was continuity of the violation of human rights.

8) **Whereas**, even though the case was for violation of human rights, the complaint of such violation can only stand for trial against the Federal Republic of Nigeria - the 3rd Defendant and not against the 1st, 2nd, 4th, 5th, 6th, 7th and 8th Defendants which are not institutions of the Community or the parties recognized in international law as proper party to sue or be sued before this Court and as not proper parties;

9) **Whereas** the action is statute barred as against the 3rd Defendant in view of Article 9(3) of the Supplementary Protocol which, specified those that shall be affected by the said provision as the Members of the Community (which are member states) and institutions of the community;

10. **Whereas** the 1st, 2nd, 4th, 5th, 6th,7th and 8th Defendants are not Legal/proper parties in this case before the Court but nominal Defendants, consequently, their names are struck out statute barred in accordance with Article 9(3) of the said Supplementary Protocol as the Applicant is neither a state nor an institution of the Community;

The Court decides that in the light of the above, the Preliminary Objection succeeds in its entirety and the originating action failed and it is struck out accordingly.

57. COSTS

Where the preliminary objection succeeds against an individual like in this case, the parties shall bear the costs of action in accordance with Article 66 of the Rules of this Court.

The Judgment is Read in Public in accordance with the Rules of this Court, dated 7th November, 2013.

HON. JUSTICE HANSINE N. DONLI - *PRESIDING JUDGE*
HON. JUSTICE ELIAM M. POTEY - *MEMBER*
HON. JUSTICE C. MEDEGAN NOUGBODE - *MEMBER*

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

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