

COMMUNITY COURT OF JUSTICE,  
ECOWAS

COUR DE JUSTICE DE LA COMMUNATE,  
CEDEAO

TRIBUNAL DE JUSTICA DA COMUNIDADE,  
CEDEAO



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

In the Case

MADAM SESSI MÉLÉ v. STATE OF THE TOGOLESE REPUBLIC

*Application No. ECW/CCJ/APP/48/19 - Judgment No. ECW/CCJ/JUD/29/2021*

JUDGMENT

ABUJA

On 9th July, 2021

**APPLICATION No. ECW/CCJ/APP/48/19**

**JUDGMENT No. ECW/CCJ/JUD/29/2021**

**BETWEEN:**

**MADAME SESSI MÉLÉ .....APPLICANT**

**AND**

**STATE OF THE TOGOLESE REPUBLIC .....RESPONDENT**

**COMPOSITION OF THE PANEL**

Hon. Justice Edward Amoako **ASANTE** .....Presiding

Hon. Justice Gberi-Be **OUATTARA** ..... Member

Hon. Justice Januária T. Silva Moreira **COSTA** ..... Member/Rapporteur

**ASSISTED BY:**

Dr. Athanase **ATANNON**.....Deputy Chief Registrar

## **REPRESENTATION OF PARTIES**

SCPA FEMIZA ASSOCIES Law Office..... **Counsel for Applicant**

Monsieur Le Garde des Sceaux, Minister de la Justice, Charge des Relations ..... **Counsel for Respondent**

### **I. JUDGMENT:**

1. This is the Court's Judgment read virtually in a public hearing, in accordance with Article 8 (1) of the 2020 Practical Instructions on Electronic Case Management and Virtual Sessions of the Court.

### **II. DESCRIPTION OF THE PARTIES:**

2. The Applicant, Madame SESSI MÉLÉ, is 39 years old, of Togolese nationality, a retailer and resident in Lomé, in the Anfamé neighborhood.

3. The Respondent is the State of the Togolese Republic, a Member State of the Economic Community of West African States, ECOWAS and a signatory to the African Charter on Human and Peoples' Rights, hereinafter the African Charter.

### **III. INTRODUCTION**

4. In the instant case, the Applicant came to claim the violation of her human rights, alleging that in the context of a demonstration she participated, held on September 6 and 7, 2017, in which opposition militants demonstrated in Lomé

and other cities in Togo, following the call by the Coalition of 14 opposition political parties to demand the implementation of constitutional and institutional reforms, the Applicant was violently attacked by agents of the Respondent's law enforcement and security forces, having, as a result, suffered injuries all over her body, mainly on the arms, back, hip, legs, face and a wound on the right buttock, which left exposed the underlying bone elements which demanded her admission to a clinic and urgent surgery.

## **V. PROCEDURE BEFORE THE COURT**

5. The Originating Application (doc. 1) accompanied by 5 Exhibits, was lodged at the Registry of this Court on December 11, 2019.

6. With the Originating Application, the Applicant also filed a request for Expedited Procedures (doc. 2) in accordance with the provisions of Article 59 of the Rules of the Court.

6. The Respondent State, the Togolese Republic, duly served, submitted its defense (doc. 3) on January 17, 2020, which was served on the Applicant on January 22, 2020.

8. Notified of the Expedited Procedures application, on December 18, 2019, the Respondent State submitted, on January 31, 2020, its response (doc. 4), which was served on the Applicant on February 3, 2020.

9. On February 20, 2020, the Applicant filed its rejoinder (doc. 5), which was served on the Respondent on February 21, 2020.

10. On March 12, 2020, the Respondent filed its rejoinder (doc. 6), which was served on the Applicant on March 19, 2020.

11. On June 2, 2020, the Applicant submitted its response to the rejoinder (Doc.7), accompanied by a USB device containing videos and documents, that was served on the Respondent on June 17, 2020, which, in turn, and in this sequence, also submitted its response (Doc. 8) on July 13, 2020, which twas served on the Applicant on July 15, 2017.

10. The parties were heard in a virtual hearing held on April 28, 2021, in which they presented their oral arguments on the merits of the case, and the decision of the case was adjourned to July 9, 2021.

## **V. APPLICANT'S CASE:**

### *a. Summary of Facts:*

13. On September 6 and 7, 2017, opposition activists protested in Lomé and other cities in Togo following the call by the Coalition of 14 opposition political parties to demand the implementation of constitutional and institutional reforms;

14. The protesters gathered in the center of Lomé on Thursday until 10 pm, but were dispersed from 10 pm onwards by the firing of tear gas grenades by Togolese law enforcement and security officers;

15. The Applicant participated in this demonstration on Thursday, September 7, 2017;

16. Caught by fatigue caused by the persecution of the law enforcement officers, the Applicant, sat on the cobblestones of a corner, at the crossroads called “Colombe de la Paix”, when the law enforcement and security officers began firing tear gas;

17. The Applicant started to run and when she was hit in the left arm by a tear gas can and after the shock, she fell to the ground;

18. She got up a few moments later and ran to hide behind a hut not far from “Colombe de la paix”;

19. The Applicant was found by a police officer who saw her while she was hiding;

20. The latter asked her to come out of her hiding place and began to slap her (three times in a row) before kicking and beating her all over her body;

21. Other law enforcement and security officers, about a dozen, joined the police officer in beating the Applicant violently, making death threats and accusing her of having supported the opposition by participating in the demonstrations;

22. Under the effect of the pain of the blows, the Applicant began to cry and scream;

23. Despite her screams and cries, the agents continued their actions, beating her with sticks and their shoes (rangers), asking her if she would still participate in the opposition demonstrations;

24. The Applicant was then dragged on the floor of the “Colombe de la paix” to the Central Directorate of the Criminal Police (DCPJ);

25. And while some policemen dragged her on the ground, others continued to beat her;

26. Police officers also accused her of throwing stones at law enforcement and security officers, which the Applicant denied;

27. When the Applicant arrived at the DCPJ, one of the law enforcement and security officers, who was supposedly the hierarchical superior, seeing the State of the Applicant, asked his colleagues to stop the violence against her;

28. The supposed hierarchical superior took the Applicant to the back of the DCPJ and asked her to return to her house;

29. As a result of the conduct of law enforcement and security officers, the Applicant suffered injuries all over her body, mainly on her arms, back, hips, legs, face and a wound on her right buttock, leaving the underlying bone elements exposed (**Exhibit No. 2**);

30. In view of the seriousness of her state of health, the Applicant was admitted to a clinic for intensive treatment and then underwent urgent surgery, due to torture and other cruel, inhuman or degrading treatment or punishment by the police officers (**Exhibit No. 3**);

31. Despite this surgical intervention that saved her life, her physical and psychological condition also remains precarious (**Exhibit No. 4**).

*b. Pleas in Law:*

32. The Applicant relied its case on Articles 198, 201 and 203 of the Togolese Criminal Code, Articles 13, 16 and 21 (1 and 2) of the Togolese Constitution of September 27, 1992, Articles 9 (4) and 10 of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05, Articles 4, 5 and 6 of the African Charter on Human Rights, as well as in international instruments of human rights, namely in Articles 7 and 9 (1) of the International Covenant on Civil and Political Rights, hereinafter referred to as ICCPR, Articles 5, 19 and 20 of the 1948 Universal Declaration of Human Rights and Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984.

*c) Reliefs Sought by the Applicant:*

33. The Applicant sought from the Court to:

- i. Declare the application admissible;
- ii. Declare that the acts of law enforcement and security officers constitute: acts of torture and other cruel, inhuman or degrading treatment or punishment; an arbitrary detention; violation of freedom of assembly and demonstration;

Accordingly, the Court should:

- iii. Order the State of the Togolese Republic to carry out an inquiry to arrest the perpetrators of the incriminated acts, in accordance with Article 12 of the Convention against Torture of December 10, 1984 and taking into account their



seriousness under Article 4 of the same Convention and Article 206 of the New Togolese Criminal Code.

iv. Condemn the Togolese Republic to pay 150,000,000 (one hundred and fifty million) FCFA as compensation, in accordance with Articles 14 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of December 10, 1984, 9 (5) of the International Covenant on Civil and Political Rights of December 16, 1966 and 199, 202 and 204 of the New Togolese Criminal Code.

## **VI – RESPONDENT’S CASE**

### *a. Summary of Facts:*

*The Respondent alleges, in its defense, that:*

34. The police report issued in 2019 after the Applicant's alleged participation in the demonstrations organized in 2017, as well as the medical reports, cannot constitute evidence of the Applicant's allegations;

35. The medical reports presented by the Applicant contradict each other on the dates of the demonstrations. While the September 11, 2017 report speaks of the September 7, 2017 demonstration, the October 17, 2019 report speaks of the September 17, 2017 demonstration;

36. The question that arises is whether the facts reported actually exist, that is, whether the Applicant actually participated in any demonstration organized by the opposition;

37. The medical reports prepared for the purposes of the case do not even indicate the origin of the wounds the Applicant allegedly suffered;

38. That the Applicant does not present evidence of her allegations, as there is no evidence that the injuries to her body were caused by law enforcement and security agents and there is no evidence of her participation in the alleged demonstrations.

*On the preliminary objection*

39. The Respondent submits that this Court does not have the jurisdiction to examine the plea relating to the alleged violation of Articles 198, 201 and 203 of the Togolese Criminal Code, since it is not incumbent upon this Court to examine a national provision which is under exclusive jurisdiction of national courts;

40. That in matters of human rights disputes, this Court applies the provisions relating to international legal instruments for the protection of human rights ratified by the ECOWAS States Members and also applies, in accordance with Article 19 of the Additional Protocol of 1991, in addition to the provisions of the ECOWAS Treaty and its Regulations, the general principles of law defined in Article 38 of the Statute of the International Court of Justice;

41. The Respondent concluded that, in light of the aforementioned, it is for the Court to declare itself lacking jurisdiction to examine the plea relating to the violation of the provisions of the Togolese Criminal Code.

*b. Pleas in Law:*

42. The Respondent relied its contention on Article 10 of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05, on Articles 198, 201 and 203 of the Criminal Code, in force in the State of Togo, on Articles 4, 5 and 6 of the African Charter on Human Rights and on Articles 7 and 9 (1) of the International Covenant on Civil and Political Rights.

*c. Reliefs Sought:*

35. The Respondent concluded seeking from the Court to:

I - On the form:

a) Declare the claim for violation of Article 10(d) of the 2005 Additional Protocol inadmissible insofar as the Applicant fails to prove that she is a victim of a human rights violation;

II – On the Merit:

b) Find that the Applicant has failed to provide evidence of the alleged violation of her human rights by the State of Togo;

Accordingly, the Court should:

c. Dismiss all of the Applicant's claims for lack of evidence;

d) Order the Applicant to pay the costs in accordance with Article 66 of the Rules of the ECOWAS Court of Justice.

## VII. APPLICANT'S RESPONSE

44. The Applicant replied arguing that this Court entertains jurisdiction to rule on the instant case since it is dealing with an allegation of human rights violation.

45. That the obligation to investigate allegations of torture and ill-treatment requires the competent authorities of the State party to provide evidence to refute the Applicant's claims. The burden of proof is therefore on the State Party when it has failed to respond adequately to an application from an individual containing a detailed description of the treatment she suffered.

46. That it is evident that the Togolese State has not fulfilled its international commitments nor has guaranteed the physical integrity of its citizens.

47. That, with regard to the reference to Togolese Constitutional provisions or to the Criminal Code, it should first be recalled that the Applicant does not seek to have the facts or the perpetrators judged by this Court, but rather to point out and highlight the failures of the Togolese Republic to comply with its international commitments.

48. That it is clear in the report of October 17, 2019 that the date of September 17, 2017, referred to as the day of events is a clerical error;

49. It should also be noted and taken as exact the date of September 7, 2017, the day of the demonstration organized by the opposition political parties in Lomé, since there was no demonstrations on September 17, 2017.

50. That to attempt to take advantage of this clerical error of date to deny the facts is by no means convincing, but is primarily a matter of bad faith on the part of the Respondent.

### **VIII. DEFENDANT'S REJOINDER**

51. The Respondent, in response to the reply, presented its rejoinder, maintaining that the Applicant does not provide formal proof of her allegations.

### **IX- REPLY TO THE RESPONDENT'S REJOINDER**

52. The Applicant responded to the rejoinder and reiterated her factual argument, adding as evidence, 4 documents and 2 videos, contained in a USB, on which the Respondent has commented.

### **X – JURISDICTION**

#### **On the Court's alleged lack of jurisdiction**

53. The Respondent alleged that this Court does not have the jurisdiction to examine the plea in law relating to the alleged violation of Articles 198, 201 and 203 of the Togolese Criminal Code; That it is not for this Court to examine a national provision which is exclusively under the jurisdiction of national courts; that in matters of human rights disputes, this Court applies the provisions relating to the international legal instruments for the protection of human rights ratified by the ECOWAS States Members.

54. In turn, the Applicant refuted the Respondent's allegations, stating that this Court has jurisdiction to rule on the instant case, as it is dealing with an allegation of human rights violation.

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55. In order to determine the jurisdiction of this Court, it is necessary to take into account both the legal texts governing its jurisdiction and the nature of the matter raised by the Applicant, based on the facts as alleged by the Applicant.

56. Therefore, it is from the analysis of the Applicant's Originating application that the Court verifies whether the matter falls within its jurisdiction.

57. In this sense, this Court ruled in the case *BAKARY SARRE AND 28 ORS V. REPUBLIC OF MALI*, Judgment ECW/CCJ/JUD/03/11, in CCJRL 2011, pag. 67, §25, that: *“The competence of the Court to adjudicate in a given case depends not only on its texts but also on the substance of the initiating application. The Court accords every attention to claims made by applicants, the pleas-in-law invoked, and in an instance where human rights violation is alleged, the Court equally carefully considers how the parties present such allegations. The Court therefore looks to find out whether the human rights violation as observed constitutes the main subject-matter of the application and whether the pleas in-law and evidence produced essentially go to establish such violation.”*

58. Further, in the case *CHUDE MBA v. REPUBLIC OF GHANA*, Judgment No. ECW/CCJ/JUD/10/13, in CCJRL (2013) p. 349§52, the Court stated that: *“As a general rule, jurisdiction is inferred from the Applicants 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 Applicant.”*

59. The jurisdiction of this Court is provided under the Article 9 of the Protocol A/P1/7/91 on the Court, as amended by the Supplementary Protocol A/SP.1/01/05.

60. Paragraph 4 of the Article 9 provides that:

*“The Court has jurisdiction to determine the cases of human rights violations that occur in any Member State.”*

61. And it is case-law of this Court that its jurisdiction cannot be called into question whenever the facts being claimed are related to Human Rights. (See the case *HISSÈNE HABRÉ v. REPUBLIQUE DU SENEGAL*, Judgment No. ECW/CCJ/RUL/03/2010 of 14 May, CCJ, RL, 2010, p. 43, § 53-61; *MAMADOU TANDJA v. REPUBLIC OF NIGER* Judgment No. ECW/CCJ/JUD/05/10 CCJRL (2011), pag. 105 ff.; *PRIVATE ALIMU AKEEM v. REPUBLIC FEDERAL OF NIGERIA*, Ruling N° ECW/CCJ/RUL/05/11, CCJRL (2011), pag. 121 ff.)

62. This position of the Court has been permanently reaffirmed in a plethora of judgments, making it indisputable that, in a case, the mere allegation of violation of human rights is sufficient to trigger the jurisdiction of this Court and it will assume jurisdiction without necessarily examining the veracity of the claim. (See the cases *AMEDEO ADOTEVI v. REPUBLIC OF BENIN*, Judgment No. ECW/CCJ/JUD/24/19, §36; *DR. GEORGE S. BOLEY v. REPUBLIC OF LIBERIA & 4 ORS*, Judgment No. ECW/CCJ/JUD/24/19, §27).

63. Furthermore, in relation to the aforementioned Article 9 (4), this Court, in the case *SAWADOGO PAUL & 3 ORS v. REPUBLIC OF BURKINA FASO*, Judgment No. ECW/CCJ/JUD/07/20 §21 ruled that *“From the above provision, it is pertinent that two conditions must be met before the Court can exercise*

*jurisdiction over an application brought before it for consideration- a) there must be an allegation of human rights violation and; b) such violation must have occurred within the territorial jurisdiction of the Member State against which the application was brought.”*

64. In the instant case, the Applicant relies its Originating Application on an allegation of possible violation of her human rights, namely, the prohibition of being subjected to torture and other cruel, inhuman or degrading treatment or punishment; the rights to freedom and security, assembly and demonstration, which took place in the Respondent, territory of an ECOWAS Member State.

65. Therefore, contrary to what the Respondent maintains, this Court was not called upon to analyze the national law, namely Articles 198, 201 and 203 of the Togolese Criminal Code.

66. In fact, this Court has repeatedly confirmed that, in the abstract, it does not have jurisdiction to analyze national law (See the cases *MESSRS ABDOLAYE BUCKET & ORS v. REP OF SENEGAL*, Judgment No. ECW/CCJ/JUD/04/13, p. 22§72; *NNENNA OBI v. FEDERAL REPUBLIC OF NIGERIA*, Judgment No. ECW/CCJ/APP/JUD/27/16, pages 13-14) but, it should always be noted that this Court has also been reaffirming that, specifically, it assumes its jurisdiction to examine national legislation, whenever it violates or threatens to violate human rights (See the case, *FEDERATION OF AFRICAN JOURNALIST v. THE REPUBLIC OF THE GAMBIA*, where, this Court, based on its own jurisprudence, reiterated that “it will not examine the laws of member states in abstract since it is not a constitutional court but, once human rights violation are alleged, it invokes its jurisdiction to examine whether or not there has been violation.” (page 31). (See also the case *INCORPORATED TRUSTEES OF LAWS*



*AND RIGHTS AWARENESS INICIATIVES v. NIGERIA*, Judgment No. ECW/CCJ/JUD/16/20 § 62 - 67)

71. In the instant case, the Applicant raises, as grounds of the present action, the claim of human rights violation, allegedly committed in the territory of the Respondent State, guaranteed by legal instruments for the protection of human rights, namely, the African Charter on Human and Peoples' Rights, ratified by ECOWAS Member States, such as the Respondent State, and which therefore bind them and impose on them the duty to respect and protect the rights therein proclaimed. (See the case *AMOUZOU HENRI et 5 AUTRES v. RÉPUBLIQUE DE COTE D'IVOIRE*, Judgment No. ECW/CCJ/JUD/04/09, of 17th December, Case No. ECW/CCJ/APP/01/09)

68. Therefore, such invocation is sufficient to ensure the fulfillment of the requirements set forth in Article 9 (4) of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05.

69. Consequently, the Court understands that it entertains jurisdiction to rule over the instant case.

## **X. ADMISSIBILITY**

### **The alleged inadmissibility of the action**

70. The Respondent argues that, pursuant to Article 10(d) of Additional Protocol A/SP.01/01/05 on the ECOWAS Community Court of Justice, the admissibility of any application is conditioned on proof of the quality of victim of a human right violation; That in the instant case, the Applicant does not prove that quality, so the Court must declare the Applicant's application inadmissible.

71. The Applicant refuted such argument, stating that the admissibility of the application before the Community Court of Justice depends simply on the allegation of violation of human rights, as proclaimed by the international instruments for the protection of human rights; whereas the instant case is a manifest violation of several international instruments ratified by the Respondent, so the Court has grounds to declare itself competent and to entertain her application.

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The admissibility is governed by the provisions of Article 10 (d), of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05, mentioned above, which establishes that:

*“Can consult the court (...)*

*d) Anyone who is a victim of human rights violations. The request submitted for this purpose:*

*i) Must not be anonymous;*

*ii) Will only be submitted to the Community Court of Justice if it has not been submitted to another Competent International Court (...)”*

73. In order for an application to be considered admissible, in light of the aforementioned Article 10 (d) this Court, in the aforementioned case *SAWADOGO PAUL & 3 ORS v. REPUBLIC OF BURKINA FASO*, Judgment No. ECW/CCJ/JUD/07/20, § 30, noted that: *“... it is clear that three conditions must be met before an application can be declared admissible before the Court. These are a) the applicants must be victims of human rights, b) the applicants must not be anonymous, and c) the application must have been instituted before another international Court for adjudication.”* (See also the cases *AZIAGBEDE KOKOU v. REPUBLIC OF TOGO*, Acórdão N.º ECW/CCJ/JUD/07/13, pág.7,§18,

*ASSIMA KOKOU INNOCENT & ORS v. REPUBLIC OF TOGO*, Judgment No. ECW/CCJ/JUD/08/13, p. 9,§32)

74. Therefore, the essential criterion for a human rights application is that the Applicant is a victim of the human rights violation and it is up to the Applicant to prove his/her locus standi in the case.

75. And to clarify the concept of “*being a victim*” this Court pointed out in the case *EBERE ANTHONIA AMADI & 3 ORS v. THE FEDERAL GOVERNMENT OF NIGERIA*, Judgment No. ECW/CCJ/JUD/22/19, page 15 that “*To be a victim, there must exist, sufficient direct link between an applicant and the prejudice he deems to have suffered as a result of the alleged violation.*”

76. Or, as mentioned by this Court in the case *SINY DIENG v. REPUBLIC OF SENEGAL*, Judgment No. ECW/CCJ/JUD/23/2020, §148 and 149 “*(...) A victim is the person who suffered, directly or indirectly, any damage or pain (physical or mental injury), emotional suffering, economic loss or any other damage that can be classified as a violation of human rights.*” (See also the cases *REV. FR. SOLOMON MFA & 11 ORS v. FEDERAL REPUBLIC OF NIGERIA & 5 ORS*, Judgment No. ECW/CCJ/JUD/06/19, page 15, *TAHIROU DJIBO & 3 ORS v. THE REPUBLIC OF NIGER*, Judgment No. ECW/CCJ/JUD/13/2020, p. 25)

77. This concept of “victim” has the same meaning as the definition contained in principle 8 of the “*Basic Principles And Guidelines on the Right to a Remedy and Reparation...* ” of the United Nations, as being “*persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where*

*appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."*

78. In the same sense, the concept of victim is embraced by section S (n) of the "*PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA*", adopted by the African Commission.

79. In the instant case, the Applicant invokes facts that she considers to be in violation of her human rights, identifying herself as a victim, the victim not being anonymous, and there being no news in the proceedings that the present action is pending before another international tribunal, the Court finds that the claim is neither manifestly unfounded under the aforementioned Article nor inadmissible on any other grounds.

80. This is enough for the cause to be considered admissible.

81. It should always be reiterated that the establishment or not of the violation of the human right is a condition to the action brought being or not well-founded, and not a condition of its admissibility.

82. Thus, once the requirements set forth in Article 10 (d) of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05, have been met, it is the Court's understanding that the present action should be declared admissible, dismissing the Respondent's claim in this part.

## **XI. PROCEEDINGS BEFORE THE COURT**

### **a) Expedited Procedures**

83. Together with the Originating Application, the Applicant, pursuant to the provisions of Article 59 of the Rules of the Court, submitted a request for an expedited procedure (doc. 2), considering that there is urgency in the decision of the case, insofar as the alleged violations contribute to aggravate her situation, due to the damage caused to her.

84. In turn, the Respondent, in its response, requested the rejection of the Applicant's request, alleging that she does not objectively justify the reasons for the request and does not present proof of this special urgency.

85. In this regard, the Court understands that the opening of the oral proceedings, with the designation of the date for the hearing of the parties, determined the supervening uselessness of the aforementioned application, and the Court holds so.

## **XIII. MERITS**

86. In the instant case, the Applicant claims the violation of her human rights, namely, the right not to be subjected to torture and inhuman or degrading treatment, the right to freedom of assembly and the right to liberty and security.

87. The Court will then assess each of the human rights allegedly violated by the Defendant State, taking into consideration the questions put forth by the Applicant for the Court's consideration.

**a) The alleged violation of the right not to be subjected to torture and inhuman or degrading treatment**

88. In order to substantiate the violation of the above-mentioned right, the Applicant alleged that the actions of the law enforcement and security agents, by beating her violently, in the circumstances described above and without having committed any crime, clearly constitutes a violation of the her physical and mental integrity, as well as acts of torture and other cruel, inhuman or degrading treatment.

89. In turn, the Defendant argued that the police report issued in 2019, after the Applicant's alleged participation in the demonstrations organized in 2017, as well as the medical reports, cannot constitute proof of the Applicant's allegations.

90. That the medical reports presented by the Applicant contradict each other on the dates of the manifestations; while the September 11, 2017 report speaks of the demonstration of September 7, 2017, the October 17, 2019 report speaks of the demonstration of September 17, 2017; that the question that arises is whether the facts reported actually existed, that is, whether the Applicant actually participated in any demonstration organized by the opposition; better still, the medical reports prepared for the purposes of the case do not even indicate the origin of the wounds allegedly suffered by the Applicant; that the medical reports are fanciful because they do not say whether tear gas caused such injuries.

91. The Respondent submits that there is a general principle of law that the person claiming a fact must prove it; that the Applicant's plea must be dismissed for lack of proof of the alleged facts.

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92. Article 5 of the African Charter states that:

*“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (...)”*

93. It should be noted that the first of the instruments to guarantee such a right is the 1948 Universal Declaration of Human Rights (UDHR) by establishing that *“No one will be subjected to torture or cruel, inhuman or degrading punishment or degrading treatment.”*

94. This right is, in the same terms, also guaranteed in several other instruments for the protection of human rights, namely, in the International Covenant on Civil and Political Rights (articles 7 and 10) and in the United Nations Convention against Torture and Others Cruel, Inhuman or Degrading Treatments (CAT).

95. It is this Convention (CAT) that defines the concept of “Torture” in its article 1 (1) as:

*“(...) any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”* (A similar definition is found in Article 2 of the Inter-American Convention to Prevent and Punish Torture)

96. This same precept of the Convention, further underlines that “*The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.*”

97. The African Commission, with the same understanding, found in the case *SUDAN HUMAN RIGHTS ORGANIZATION & CENTER ON HOUSING RIGHTS AND EVICTIONS (COHRE) v. SUDAN*, Communication No. 279/03-296/05§156, that “*Torture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for the discriminatory treatment of persons or groups of persons who are subjected to torture by the State or non-State actors when exercising control over such person or persons. The purpose of torture is to control populations, destroying individuals, their leaders and frightening entire communities.*”

98. Since every individual is entitled to the right to respect for the inherent dignity of a human being and recognition of his/her legal status, the prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute. (See African Commission, *GABRIEL SHUMBA v. ZIMBABWE*, Communication No. 288/04, §167; Human Rights Committee, General Comment No. 20, §3).

99. As we have seen, the aforementioned Article 5 of the Charter, aiming to protect both the dignity of the human person and the physical and mental integrity of the individual, prohibits not only torture, but also cruel, inhuman or degrading treatment.

100. This includes not only actions that cause severe physical or psychological suffering, but that humiliate the individual or force him/her to act against his/her



will or conscience. (See the aforementioned case *GABRIEL SHUMBA v. ZIMBABWE*, Communication No. 288/04, §164, *PTE ALIMU AKEEM v. REPUBLIC OF NIGERIA*, Judgment No. ECW/CCJ/JUD/01/14, §50).

101. From the above and following the definition of the concept of Torture given by the aforementioned Convention, it is possible to extract 3 essential elements for an act to be qualified as torture: **1 - Infliction of quick mental or physical pain or suffering; 2 - By or with the consent or acquiescence of State authorities; 3 - For a specific purpose, such as obtaining information, punishment or intimidation.** (See *HANDBOOK ON STATE OBLIGATIONS UNDER THE UN CONVENTION AGAINST TORTURE*, p. 24)

102 - This understanding was also accepted by this Court in the case *MR. NOEL MIAN DIALLO v. FEDERAL REPUBLIC OF NIGERIA & ANOR*, Judgment No. ECW/CCJ/JUD/14/19, pages 13 and 14 and also, in the case *HONOR JUSTICE ALADETOYINBO v. NIGERIA*, Judgment No. ECW/CCJ/JUD/18/20, § 66)

103. In the above-cited Judgment, the Court noted that “*Common acts that have the potential to be classified as physical torture include beating, electric shocks, stretching, submersion, suffocation, burns, rape and sexual assault. (...) (See §52)*

It should also be noted that the aforementioned *1984 Convention Against Torture*, did not define the concept of “*inhuman or degrading treatment*”.

104. The Article 16 (1) of this Convention imposes on the State Party the obligation to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1.

105. This means that the notion of “torture” absorbs that of “inhuman or degrading treatment” and that it is by excluding the elements that make up the definition of “torture” that the qualification of an act as “treatment inhumane or degrading” is achieved, whenever it involves a level of severity and cruelty that affects the dignity of the victim's human condition.

106. Thus, it has been the role of jurisprudence to materialize the concept of “*inhuman and degrading treatment*”. This is reflected in the case law of the European Court, which has held that a treatment is considered “inhumane” when it is premeditated and applied for hours at a time in such a way as to cause actual bodily harm or intense physical or mental suffering, and “degrading” when it humiliates or debases an individual, showing a lack of respect or diminishing human dignity, or arouses feelings of fear, anguish, or inferiority capable of breaking down an individual's moral and physical resistance. It admitted also that it may be enough that the victim is humiliated in his/her own eyes, even if not in the eyes of others. (See the case *MSS v. BELGIUM AND GREECE*, Application No. 30696, Judgment of January 21, §220 - 221).

107. In the same judgment, the European Court noted that “*the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim*”. (see §219)

108. Likewise, this Court, in the case *GABRIEL INYANG LINUS IYEBE v. FEDERAL REPUBLIC OF NIGERIA*, Judgment No. ECW/CCJ/JUD/20/18 of 29 June 2018, relied on the same case-law to define the concept and scope of inhuman and degrading treatment - (see §6.3.4 - 6.3.5 p. 14 -15).

109. After this incursion into the notions of “torture” and “inhuman or degrading treatment”, it is now necessary to verify whether the facts claimed by the Applicant fall within the definition of torture or not.

110. It should be recalled that the Applicant alleged that, by having participated in a political demonstration, held in the center of Lomé on the 7th of September, Thursday until 10pm, and that exhausted due to the persecutions of the law enforcement and security agents, the Applicant sat on the cobblestones of a corner, at the crossroads called “Colombe de la Paix”, when such agents began to fire tear gas; That she started to run and when she was hit in the left arm by a can of tear gas, she fell to the ground; She got up a few moments later and ran to hide behind a hut not far from “Colombe de la paix”, where she was found by a police officer who saw her while she was hiding;

111. The police officer asked her to come out of her hiding place and began to slap her (three times in a row) before kicking and beating her all over her body; Other law enforcement and security officers, about a dozen, joined the police in violently beating the Applicant, making death threats and accusing her of having supported the opposition, by participating in the demonstrations; Under the effect of the pain of the blows, the Applicant began to cry and scream; Despite her screams and cries, the agents continued their actions, beating her with sticks and their shoes (rangers), asking her if she would still participate in the opposition demonstrations; The Applicant was then dragged on the floor of the “Colombe de la paix” to the Central Directorate of the Criminal Police (DCPJ), and while some policemen dragged her on the ground, others continued to beat her;

112. When the Applicant arrived at the DCPJ, one of the law enforcement and security officers, who was supposedly the hierarchical superior, seeing the status

of the Applicant, asked his colleagues to stop the violence against her, taking her to the back of the DCPJ and ordering her to return to her home;

113. As a result of the beatings, the Applicant suffered injuries all over her body, mainly on her arms, back, hips, legs, face and a wound on her right buttock, leaving the underlying bone elements exposed;

114. Given the seriousness of her health condition, the Applicant was admitted to a clinic for intensive treatment and then underwent urgent surgery; Despite this surgical intervention that saved her life, her physical and psychological condition also remains precarious.

115. Based on an objective analysis of the facts described above, it appears that it is possible to extract from them the three essential elements for an act to be qualified as torture:

- 1 - Infliction of quick mental or physical pain or suffering;
- 2 - By or with the consent or acquiescence of State authorities;
- 3 - For a specific purpose, such as obtaining information, punishment, or intimidation.

116. Since, in the instant case, the violent beating inflicted mental, physical pain and suffering on the Applicant; it was committed by agents of the Respondent's law enforcement and security forces, i.e., by state authorities and with the specific purpose of punishing and intimidating the Applicant.

117. There is no doubt that such facts, as described in detail, qualify as Torture in light of article 1 of the aforementioned Convention (CAT).

118. As seen, the Respondent limited its defense, placing the burden of proof on the Applicant, alleging that it is up to the Applicant to prove the facts alleged by her.

119. Therefore, the question that arises here is whether the Applicant was subjected to the facts described above and who is responsible for the burden of proof, in the case of the alleged violations of human rights.

### **On the burden of proof**

120. The general principle in matters of proof places the burden of proof on the one who makes the allegations.

121. This means that, as a rule, the burden of proof lies with the party asserting the fact, and this party will fail if the evidence offered is not sufficient to convince the Court of the veracity of the alleged fact. (See the case *FEMI FALANA AND ORS V. THE REPUBLIC OF BENIN AND ORS*, Judgment ECW/CCJ/JUD/02/12, in LR pag 1 and 18).

122. In order to support his/her claims, the Applicant can use all legal means and provide all evidence, and there must be a nexus between the evidence and the alleged facts which makes them convincing.

123. This is the understanding of this Court in the case of *MESSIEURS WIAYAO GNANDAKPA ET AUTRES v. ETAT DU TOGO*, Judgment No. ECW/CCJ/JUD/18/15, October 7, 2015, when it held that: “*Considérant qu’en règle générale, il appartient au demandeur de rapporter la preuve de ses prétentions, et qu’en application de ce principe, la Cour de la CEDEAO retient de manière constante (...) que tous les cas de violation des droits de l’homme*

*invoqués devant elle par un requérant, doivent être étayés de manière spécifique, par des preuves suffisamment convaincantes et non équivoques.” (§10)*

124. However, despite the general rule stated above, it cannot be overlooked that the evidential requirements in international courts for the protection of human rights are more flexible and less formal than in domestic proceedings. Nevertheless, the principles of legal certainty and the procedural balance of the parties must be taken into account, as the elements of conviction to be incorporated into a specific case result from the evidence offered by both the Applicant and the Respondent.

125. And the Rules of Court in its Articles 33 (c) and 35 (b) point out the procedural moment in which each party shall present their arguments of facts, as well as offer their evidence and observe the adversarial procedure, to provide equality of arms between the parties.

126. On the other hand, there are circumstances that attenuate the Applicant's responsibility for the burden of proof.

127. Therefore, the general rule is reversed when there is presumption of law, dispensation, or exemption from the burden of proof, situations in which this same burden falls on the respondent party.

128. Thus, in a case where the party to whom the burden of proof is incumbent fulfills it, the latter will enjoy the benefit of the presumption and, as such, it will be for the counterpart to challenge the produced evidence.

129. In this way, the facts alleged in the Originating Application, the relevant parts of which have been communicated to the Respondent State in question and the

latter has not provided relevant information to dispute them, will be presumed to be true, provided that other elements of conviction do not result in a contrary conclusion.

130. In accordance with the principle of the necessity of a specified challenge, the defendant must state in its answer whether it accepts the facts alleged and form of order sought by the applicant or whether he/she contradicts them, and the Court may consider as admitted those facts that have not been expressly challenged and those claims that have not been expressly contested. (In this regard, see Judgment of the Inter-American Court in the case *VILLAGRAM MORALES ET OTHERS V. GUATEMALA* of November 19th, 1999, where the Court “*considered that, as it has done in other cases, that when the State does not contest the litigation in a specific way, the facts about which it has kept silence are presumed to be true, whenever from the existing evidence it is possible to infer consistent conclusions about them [...].*”

131. In this regard and in the same sense, see also African Commission in the case, *GABRIEL SHUMBA v. ZIMBABWE*, Communication No. 288/04, §152, where it wrote “*this principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. Since the Respondent State did not fully respond to all the allegations the African Commission must, regrettably, come to a conclusion based on the facts and opinions submitted by the Complainant.*

132. This means that the Defendant cannot simply remain silent in the face of the facts that the Applicant imputes to it. It must take a defined position on all the alleged facts, accepting or contradicting them, under penalty of allowing the court to assume as true those about which it kept silent, *whenever from the existing evidence it is possible to infer consistent conclusions about them.*

133. Thus, it should be concluded, although the general rule places the burden of proof on the claimant, there are situations in which such a burden is imposed on the respondent State, and other circumstances in which the burden disappears, since it is presumed - in the absence of opposition from the respondent State - that the facts alleged are true.

134. With regard to complaints or allegations of acts of torture, it is the understanding of the African Commission that the Applicant bears the initial burden of establishing a factual basis to support his/her allegations, i.e, it is required, inter alia, that allegations of torture are substantiated, and the complainant must state the facts in detail. (See African Commission, *CIVIL LIBERTIES ORGANISATION, LEGAL DEFENCE CENTER AND LEGAL DEFENCE AND ASSISTANCE PROJECT v. NIGERIA*, Communication No. 218/98, §45).

135. The African Commission stressed that it was not sufficient to allege that the victims were tortured without giving details of the date, place, acts committed and any effects that the victims may or may not have suffered as a result. Otherwise, the Commission will not find a violation of Article 5 in the absence of such information. (See *The Prohibition of Torture and ill-treatment in the African Human Rights System: A Handbook For Victims And Their Advocates 2nd edition OMCT Handbook Series Vol. 3, p. 105; ACHPR, CIVIL LIBERTIES ORGANISATION, LEGAL DEFENCE CENTER AND LEGAL DEFENCE AND ASSISTANCE PROJECT v. NIGERIA*, Communication No. 218/98, § 45.)

136. With the same understanding this Court stated that the party alleging torture must prove a minimum of severity to fall within the meaning of “torture” under Article 5 of the African Charter. (See *BENSON OLUA OKOMBA v. REPUBLIC OF BENIN*, Judgment No. ECW / CCJ / JUD / 05/17, p. 10; *MR. NOEL MIAN*



*DIALLO v. FEDERAL REPUBLIC OF NIGERIA & ANOR*, Judgment No. ECW/CCJ/JUD/14/19, page 14).

137. On the other hand, in the case *GABRIEL SHUMBA v. ZIMBABWE*, Communication No. 288/04, § 159) the African Commission noted that to refute the Applicant's allegations, “(...) it is not sufficient for the Respondent State to simply argue that they are unfounded when they are supported by a variety of documentation. Instead, the Respondent State must provide evidence to the contrary.”

138. As can be seen, the African Commission has understood that when a complaint makes a substantiated allegation of facts, the State is obliged to respond. In the absence of such a response, the Commission bases and decides on the information provided by the complaint.

139. That is, when the State does not respond to contest the case *prima facie* formulated by the Applicant, the Commission accepts the version of the facts presented by the complaint. (See, among others, *MALAWI AFRICA ASSOCIATION AND OTHERS v. MAURITANIA*, Communication Nos. 54/91, 61/91, 98/93, 164-169/97 and 210/98, § 92, 103 and the *AMNESTY INTERNATIONAL AND OTHERS v. SUDAN*, Communication No.48/90-50/91-52/91-89/93, § 57).

140. In the same vein, the Human Rights Committee wrote, stating that in the case where the complaint can narrate in sufficient detail the beatings and other forms of ill-treatment and that the state agent is unable to respond to such accusations, or does not deny the allegations, the Commission considers that the information it faces represents a violation of Articles 7 and 10 (1) of the ICCPR. (See the cases *BLANCOV v. NICARAGUA*, Communication No. 328/1988, UN Doc.

CCPR/C/51/D/328/1988 (1994), 18 August 1994, Communication No. 328/1988 para. 6.5-6.6, 10.5; *ANTHONY LEEHONG v. JAMAICA*, Communication No. 613/1995, UN Doc. CCPR/C/66/D/613/1995 (12 August 1999, § 9.2).

141. This Court has taken a similar position, ruling in favor of victims of torture in cases where Respondent States simply deny allegations made regarding torture, without providing any substantiated evidence. (See the cases *MUSE SAIDYKHAN v. REPUBLIC OF THE GAMBIA*, Judgment No. CW/CCJ/JUD/11/07, § 37-42).

142. Repeatedly, this Court has echoed that: “*Under the principle of proof, where the Applicants make depositions on torture, inhuman and degrading treatment, the Respondent needs to go beyond mere denial to adduce evidence to show the Applicants were treated with respect and dignity.*” (See case *OUSAINOE DARBOE & 31 ORS v. THE REPUBLIC OF GAMBIA*, Judgment No. ECW/CCJ/JUD/01/20, p. 23, 26; see also the case *MR. NOEL MIAN DIALLO v. FEDERAL REPUBLIC OF NIGERIA & ANOR*, Judgment No. ECW/CCJ/JUD/14/19, page 14).

**Application of the above principles to the instant case:**

143. As can be seen from the description of the facts claimed above by the Applicant, she precisely indicates the circumstances, time, and place of the occurrence of the facts, describing the acts committed and their perpetrators, as well as the effects she suffered as a consequence of said acts. (See paragraphs 106-113, pages 25 to 26).

144. Also to corroborate her specific allegations, the Applicant gathered (with doc. 1):

a) A verbal verification process; Birth certificate of the Applicant; 6 photographs of the Applicant; and two medical reports dated September 11, 2017 and October 19, 2019.

145. And with the reply to the rejoinder (doc. 7) she added:

b) a USB device which includes:

- Videos related to a report carried out by the "*Droit Libre TV*" with images of the 7 September 2017 demonstrations and in which the Applicant appears, testifying, reporting in detail how the facts set out in the proceedings hereto happened, and the consequences that arose from them.
- Records of the response session before the United Nations Commission Against Torture (CAT), namely, the intervention of the Rapporteur for Togo, S. Touzé and the statements of Chief d'Escadron M. MELEOU on the facts related to the Applicant.
- Copies of the reports of the 67th Session of 29 July 2019 of the CAT containing the analytical summary of its 1765th and 1768th meetings, in which it analyzed the report on torture in the State of Togo, paragraphs 7 and 11 of which refer to the the Applicant's case.

146. The Respondent, reacting to the evidence presented by the Applicant, only argued that the police report issued in 2019 after the Applicant's alleged participation in the demonstrations organized in 2017, as well as the medical reports, cannot constitute evidence of the Applicant's allegations; that the medical reports presented by the Applicant contradict each other on the actual dates of the demonstrations; that the medical reports prepared for the purposes of the case do not even indicate the origin or cause of the wounds the Applicant allegedly suffered and that she does not present evidence of her allegations, as there is no

evidence that the injuries to her body were caused by the law enforcement officers and that there is no evidence of her participation in the alleged demonstrations.

147. The Respondent further submitted, referring to the evidence offered by the Applicant and contained in a USB (attached to Doc. 7) that the former cannot convince the Court because they are not authentic and serious and that the video records do not justify the allegations of torture and that copies taken from the analytical responses session of the 1765th and 1768th CAT meetings do not confirm that Dame SESSI MÉLÉ was subjected to torture, as she claims.

148. The Respondent concluded that the sum of the evidence presented by the Applicant to support her allegations of torture is neither credible nor convincing and cannot in any case constitute formal evidence of her claims.

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149. Analyzing the set of evidence offered by the Applicant, the Court, however, finds:

- The photographs gathered to the proceedings demonstrate the injuries on the Applicant's body, mainly on the arms, back, hips, legs, face and a wound on the right buttock, leaving underlying bony elements exposed;
- the medical report dated September 11, 2017, prepared by the "Polyclinique Saint Antoine De Padoue" states that "**CIRCONSTANCE DE L'ACCIDENT:**" (...) *La patiente était à une manifestation le jeudi 07/09/2017 vers 22h30 quand les forces de l'ordre ont surgi avec des lancements de gaz lacrymogènes. Dans l'impossibilité de s'échapper elle fut rapidement encerclée par ces derniers qui ont commencé par la rouer de coup de gourdin. Elle fut par la suite amenée par ces derniers à la police judiciaire d'où elle a finalement été libérée après quelque heures....* **Bilan des lésions**- Plusieurs plaies larges et profondes à suturer dont les sièges,

Coude gauche, longueur: 7cm et très profonde, Jambre droite, longueur 8cm et très profonde, Bassin au pli interfessier 8 cm profonde laissant à nu les os du sacrum, Les deux bras: 6cm profonde, Les deux fesses larges plaies profondes (...)"

- the medical report dated October 17, 2019, issued by the same clinic, states that: *"(...) Au cours des manifestation du 17 Septembre 2017 elle été victime de coups et blessures volontaire de la part des forces de l'ordre ce qui provoqué un polytraumatisme avec des plaies traumatiques graves sur tout le corps. Une prise en charge a été faite au bloc opératoire (...) Actuellement son état clinique est stable mais il se pose le problème de la réintégration sociale."*

150. Regarding this last document, the Respondent questioned the date of September 17, 2017 contained therein, claiming that no demonstration took place on that date. The Applicant came to clarify that the mention "September 17th" can only be understood as a clerical error, since the demonstration in which she participated took place on "September 7th".

151. In this respect, the Court agrees with the Applicant that where it reads "17" it should read "7" since it is evident that there was a clerical error in the preparation of the aforementioned document, even because the manifestation in which the Applicant participated occurred on September 7th and no other occurred on September 17th.

152. This clerical error cannot benefit the Respondent.

153. Therefore, from the combined analysis of the aforementioned evidence, it seems beyond doubt that the Applicant suffered the injuries she claimed.

154. What should be checked is whether such injuries were caused to the Applicant as a result of a violent action by the Respondent's law enforcement and security agents, as alleged by the Applicant.

155. In order to determine whether the evidence offered indicates that there is a violation of the Applicant's right not to be subjected to torture or cruel inhuman or degrading treatment, as provided for in the aforementioned diplomas, the Court must be convinced that the allegations made by the Applicant are proven beyond reasonable doubt.

156. This evidence may result from a set of sufficiently serious, precise and consistent evidence and/or facts that may be admitted.

157. Therefore, analyzing the evidence offered by the Applicant, it is worth noting that upon a request for explanation made by the Rapporteur of the CAT for Togo, Mr. Touzé, regarding the case of Mélé Sessi "*arrêtée en septembre 2017 lors d'une manifestation de la coalition de l'opposition et violemment battue par des policiers et des gendarmes*", Mr. M. Meleou, a member of the CAT delegation for Togo, in declarations, admitted that "*Quant à Mélé Sessi, elle n'a pas été personnellement interpellée par une dizaine de policiers comme cela a été prétendu. Elle a été emmenée par les forces de l'ordre, avec d'autres manifestants, pour avoir occupé un rond-point jusque tard dans la nuit en violation de la loi n° 2011-010, qui interdit la tenue de réunions ou de manifestations sur la voie publique au – delà de 22 heures. Tous on été libérés le lendemain et aucune plainte formelle n'a été portée à la connaissance des autorités policières. (...).*" (See §7 and 11 of the analytical summary of the 1765th and 1768th meetings).

158. It is recalled that the Respondent stated in its Defense that the Applicant did not present evidence that she participated in the aforementioned demonstration on September 7, 2017, nor that, during this demonstration, she was assaulted by the Respondent's law enforcement and security officers.

159. However, the statements made by Mr. M. Meleou confirm that the Applicant not only participated in the said demonstration, but, as a result, was arrested.

160. What the Respondent has failed to explain is, how and in what manner the Applicant, suffered the injuries she exhibited after her release, the severity of which required hospital admission and urgent surgery, or whether any steps were taken to investigate and resolve the surrounding circumstances. Such a burden, obviously, rested with the Respondent.

161. Therefore, the facts alleged by the Applicant as occurred and imputed to the Respondent's agents, it was up to the Respondent to contradict them, substantiating them in a credible manner.

162. It is not enough that the Respondent State simply argues that the medical reports contradict each other on the actual dates of the demonstrations, that there is no evidence that the Applicant's injuries were caused by law enforcement officers and that there is no evidence of her participation in the alleged demonstrations. Instead, the Respondent had to provide evidence to the contrary. (See African Commission in the cited case *GABRIEL SHUMBA v. ZIMBABWE* §159).

163. However, it failed to do so, opting for silence.

164. In this matter, it has been the understanding of the international courts (see Judgment TOMASI C. FRANCE 27 August 1992 series A no. 241 p. 40 and AKSOY v. TURKEY 18 December 1996 p.17 of the European Court of Human Rights) that the distribution of the burden of proof cannot be the same as in common criminal or civil law, since, whenever an individual is taken into the custody of the police authorities while in full health and at the time of his/her release is found to be injured, it is up to the State to justify, in an acceptable manner, the origin of such injuries.

165. Now, in the instant case, from the concatenated set of evidence offered, the Court finds that these, in particular, the verbal verification process (attached to doc. 1); the statements made by the Applicant to the press that coherently describe the circumstances in which the facts occurred (video on the USB from the web TV Droit libre TV attached to doc. 7); the medical reports stating that the Applicant was beaten by police during the demonstration and describe the serious physical damage that led to hospitalization and the need for urgent surgical intervention; (Exhibits 3 and 4 attached to doc. 1) the intervention of the United Nations Commission Against Torture, through its Rapporteur to the Respondent who seeks clarification on the Applicant's case, the content of the answer given by Chef d'Escadron Mr. M. Meleou (see video from the USB device attached to the doc. 7 and paragraphs §7 and 11 of the analytical summary of the 1765th and 1768th meetings), constitute sufficiently serious and consistent evidence that, together with the fact that the Respondent State chose not to pronounce on the facts that were imputed to its agents, create in the Court the conviction that these are proven without any reasonable doubt.

166. That is, the detailed manner in which the Applicant alleged the facts, coupled with the documentary evidence presented by her, is sufficient and enough to create in the judge the sure conviction that the Applicant, on the day of 7th September,



2017, by the conduct undertaken by the Respondent's law enforcement and security officers, as described above, was violently harassed by physical aggression inflicted on her on the public road and dragged to the premises of the Criminal Police Directorate, having suffered the injuries contained in the medical reports gathered to the proceedings, which led to her hospitalization and urgent surgery.

167. As we have seen, the action of law enforcement and security agents on the Applicant constitutes “torture” in light of Article 1 of the United Nations Convention Against Torture.

168. On the other hand, there is no information in the proceedings as to whether, in relation to the Applicant's case, the Respondent opened an investigation and if so, what was the outcome, despite the Applicant having filed a complaint with the Court of First Instance of Lomé. (See Pièces n.º1: Copie de la plainte du 15 juin 2018, déchargée par Maître BALOA, greffier du deuxième cabinet d’instruction près le tribunal de première instance, attached to document 5). (See the aforementioned case *ZIMBABWE HUMAN RIGHTS NGO FORUM v. ZIMBABWE* § 161). This burden falls on the Respondent.

169. The Court finds that in this regard, the Respondent has failed to comply with its positive obligation under Article 1 of the African Charter on Human and Peoples' Rights and Article 2 of the Convention against Torture to protect the Applicant against abuses by its police officers by failing to demonstrate that it has taken adequate measures to ensure an independent and effective investigation of the Applicant's complaint, in which she accused the Respondent's officers of torture.

170. Thus, considering that the Respondent's generic submissions do not explain the alleged acts of torture and that it does not gather to the case-file any evidence that contradicts the specific accusations made against it, coupled with the fact that it has not taken any measures to investigate the alleged facts by the Applicant, the Court finds that such acts establish the Respondent's liability for violations of the provisions of Articles 1 and 5 of the African Charter.

171. Thus the Court finds that the Applicant's human right *not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment*, guaranteed by Articles 1 and 5 of the African Charter, 1, 2 (1), 4, 10 and 11, 12 and 13 of the Convention against Torture, 7 and 10 (1) of the International Covenant on Civil and Political Rights and 5 of the Universal Declaration of Human Rights, cited above, was violated by the Respondent.

**a) The alleged violation of the right to freedom of assembly**

172. The Applicant alleges that the conduct of the police on her person constitutes a manifest violation of her right to freedom of assembly and demonstration and that she was harassed because of her opinions.

173. The Defendant, in turn, argues that the Applicant does not indicate or objectively demonstrate how the State prevented her from expressing her opinions or deprived her of freedom of assembly or forced her to belong to an association.

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174. The right to freedom of assembly is guaranteed by Article 11 of the African Charter, which provides as follows:

*“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the Safety, health, ethics and rights and freedom of others.”*

175. This right is also guaranteed by Articles 20 (1) of the Universal Declaration of Human Rights, 21 of the Covenant and 11 of the European Convention on Human Rights.

176. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such society. Thus, it should not be interpreted restrictively. As such, this right covers both private assemblies and assemblies on public roads, as well as static assemblies and public processions; moreover, it can be exercised by individuals and by the organizers of assemblies.

177. The Court further notes that States must not only safeguard the right to peaceful assembly but must also refrain from applying unreasonable indirect restrictions to such right.

178. The Human Rights Committee ruled that *“(…), while the essential purpose of Article 11 is to protect the individual against arbitrary interference by public authorities in the exercise of protected rights, there may, in addition, be positive obligations to ensure the effective enjoyment of such rights.”* (See *ADALI v. TURKEY*, Application No. 38187/97, §267)

179. In the instant case, in view of the facts claimed and the evidence produced as reported above, this Court finds that the Applicant's arrest was made following her participation in the aforementioned demonstration on September 7. (This fact

is proved by the declarations of Mr. M. Meleou in § 11 *of the analytical summary of the 1768th meeting*).

180. Therefore, the Court understands that the Respondent, for the same reasons set out above, violated her right to freedom of assembly guaranteed by Articles 11 of the African Charter, 20 (1) of the Universal Declaration of Human Rights and 21 of the ICCPR.

**c) The alleged violation of the right to liberty and security**

181. The Applicant alleges that she was arrested during the demonstration, and that the reason for her arrest is clearly identifiable as her participation in the demonstration, and that as a result, her right to liberty and security was violated.

182. The Respondent relied on the same arguments presented to substantiate the non violation of the Applicant's right not to be subjected to torture and inhuman or degrading treatment.

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183 - The Article 6 of the ACHPR provides that:

*“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”*

184. The Universal Declaration of Human Rights (UDHR) in its Articles 3 and 9 and the ICCPR in its Article 9 (1) follow in the same vein.

185. Similarly, Article 7 of the American Convention on Human Rights and Article 5 of the European Convention on Human Rights guarantee in similar terms the right to liberty and security of individuals, the latter being the only one that specifically lists in points (a) to (f) the grounds that can legally justify deprivation of liberty.

186. All the human rights protection instruments mentioned above guarantee to individuals the right to personal liberty and security, establishing that the deprivation of liberty must, in all cases, happen for reasons and under conditions previously determined by law (it is thus understood to be the domestic or national law of the States Parties), that is, with due respect to the principle of legality.

187. In the instant case, as stated above, the Applicant's detention followed her participation in the aforementioned demonstration.

188. With regard to arrests made as a result of exercising the right of freedom of assembly, the *European Commission for Democracy Through Law, (Venice Commission)*, *(Osce/Odihr) Guidelines on Freedom of Peaceful Assembly (3rd ed) §35*, notes that “Law enforcement should as far as possible avoid the use of containment (a tactic often referred to as “kettling” or “corralling”) or mass arrests of participants at an assembly. Such indiscriminate measures may amount to an arbitrary deprivation of liberty under international human rights law. Clear and accessible protocols for the stop, search and arrest or detention of assembly participants must be established.”

189. Thus, the detention of the Applicant resulting from the violation of her freedom of assembly automatically amounts to an arbitrary deprivation of her liberty under international human rights law. (See also AFRICAN COMMISSION MALAWI AFRICAN ASSOCIATION AND OTHERS v.

MAURITANIA, Communications.] No. 54/91, 61/91, 98/93, 164-196/97 & 210/98 (2000), §111)

190. In this regard, the Court concludes that the Respondent violated Articles 9 (1) of the Covenant, 3 and 9 of the UDHR and 6 of the Charter.

## **XII – REPARATION**

191. The Applicant seeks from the Court to order the Respondent to indemnify her in the amount of 150,000,000 (one hundred and fifty million) FCFA, due to the damages she suffered.

192. The Respondent did not comment on this request.

193 – According to the principle of international law, “*every person who is a victim of human rights violations has the right to fair and equitable compensation*”, considering that in matters of human rights violations, full reparation is, as a rule, impossible. (See Judgment No. ECW/CCJ/JUD/01/06, rendered in the case *DJOT BAYI TALBIA & OTHERS v. FEDERAL REPUBLIC OF NIGERIA & OTHERS* in CCJ ELR ( 2004-2009)).

194. In the instant case, as we have seen, it was established that the Respondent State, through its agents, violated the rights of the Applicant *not to be subjected to torture, inhuman or degrading treatment, freedom of assembly and freedom and security*, as explained above, which gives the Applicant the right to compensation.

195. Considering the gravity of the rights violated and their consequences for the Applicant, making a global and equitable evaluation, the Court awards to the Applicant, as compensation for immaterial damages suffered, the amount of 30,000,000 (thirty million) FCFA.

## **XII. COSTS**

196. The parties sought a reciprocal order for costs.

197. Article 66 (1) of the Court's Rules of Procedure provides that "*The judgment or order that ends the process decides on expenses.*"

198. Paragraph 2 of the same Article states that "*The unsuccessful party is ordered to pay the costs if so decided.*"

199. Thus, in light of the above provisions, the Court considers that the Respondent, as the losing party, will bear the costs of the proceeding, and the Chief Registrar is responsible for settling them.

## **XIII. OPERATIVE CLAUSE**

200. For these reasons, the Court held a public hearing and having heard both parties:

### **With regards to the form:**

- i. **Declares** that it entertains jurisdiction to examine the cause.
- ii. **Declares** that the application is admissible.

**On the merit:**

**iii. Declares as established** the violation of the Applicant's right not to be subjected to torture or inhuman or degrading treatment by the Respondent, in accordance with Article 5 of the African Charter, Article 7 of the ICCPR and Article 5 of the Universal Declaration of Human Rights.

**iii. Declares that** the Respondent has violated the Applicant's right to freedom of assembly under Article 11 of the African Charter and Article 21 of the ICCPR.

**v. Declares established** that the Respondent's detention of the Applicant was arbitrary and unlawful under Articles 6 of the African Charter, 9 (1) of the ICCPR, 3 and 9 of the UDHR.

Accordingly, the Court:

**vi.** Orders the Republic of Togo to carry out an immediate investigation of the Applicant's complaint to establish possible responsibilities under Articles 1 of the African Charter, 12 and 4 of the Convention against Torture of 10 December 1984.

**WITH REGARDS TO REPARATION**

**vii.** Orders the Respondent to indemnify the Applicant in the amount of 30,000,000 (thirty million) FCFA, for immaterial damages suffered by the violation of her rights.

**XIV. COMPLIANCE AND REPORTING**



vii. Orders that the Respondent State submit to the Court, within three (3) months from the date of notification of the present judgment, a report on the measures taken to implement the orders therein imposed.

## **XV. ON THE COSTS**

viii. Pursuant to Article 66 (2) of the Rules of the Court, the Respondent bears the costs of the proceedings, which must be settled by the Chief Registrar.

### **Signed by:**

Hon. Justice Edward Amoako **ASANTE** - Presiding \_\_\_\_\_

Hon. Justice Gberi-Be **OUATARA** - Member \_\_\_\_\_

Hon. Justice Januária T. S. M.**COSTA** - Member/Rapporteur \_\_\_\_\_

### **Assisted by:**

Dr. Athanase **ATANNON**-Deputy Chief Registrar \_\_\_\_\_

201. Done in Abuja, on the 9th day of July 2021, in Portuguese and translated into French and English.