



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

In the Case

MR. GABRIEL MESSAN AGBEYOME KODJO

v.

TOGOLESE REPUBLIC

Application No. ECW/CCJ/APP/25/20 - Judgment No. ECW/CCJ/JUD/11/2022

JUDGMENT

ACCRA

On March 24, 2022

APPLICATION No ECW/CCJ/APP/25/20

JUDGMENT No. ECW/CCJ/JUD/11/2022

BETWEEN

MR. GABRIEL MESSAN AGBEYOME KODJO..... APPLICANT

And

STATE OF TOGOLESE REPUBLICRESPONDENT

COMPOSITION OF THE COURT

Hon. Justice Dupe ATOKI – Presiding

Hon. Justice Keikura BANGURA – Member

Hon. Justice Januária T. Silva Moreira COSTA- Member/Judge-Rapporteur

ASSISTED BY:

Mr. Tony Anene MAIDOH Chief Registrar

I. REPRESENTATION OF PARTIES

Mr. Kouadio N'Dry Claver

and

Mr. Darius Atsoo Kokou Counsel for the Applicant

Le Ministre de la Justice et des Relations avec les institutions de la République et ayant pour conseil La SCPA Aquereburu & Partners Counsel for the Respondent

II. COURT'S JUDGMENT

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

III. DESCRIPTION OF THE PARTIES

2. The Applicant, Mr. GABRIEL MESSAN AGBEYOME KODJO, born on October 12, 1954 in Tokpli, of Togolese nationality, former Prime Minister, former Speaker of the National Assembly, President of the Patriotic Movement for Democracy and Development (MPDD), Member of the National Assembly, resident and domiciled in Lomé.

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

IV. INTRODUCTION

4. In the instant case, the Applicant claims the violation of his human rights, namely, the right to equity, the right to freedom of expression and the right to liberty and security, because, on the basis of the requisition from the Federal Attorney and subsequently from the Attorney General of the Supreme Court of Togo, alleging that the Applicant was seriously suspected of having committed criminal offenses, the Speaker of the National Assembly of Togo, by resolution and deed dated 16 March 2020, proceeded to waive the immunity of the Applicant as former Speaker of the National Assembly, in violation of his right of defense.

5. That further, the Applicant's immunity having been waived, a criminal case was initiated against him, in the course of which he was arbitrarily arrested, charged and set free, under conditions or restrictions which violate his human rights.

V. PROCEEDING BEFORE THE COURT

6. The application initiating proceedings (doc.1A), was accompanied by twenty (20) exhibits and an application for provisional measures (doc.2), which were lodged at the Registry of this Court on June 08, 2020 and served on the Respondent State on June 18, 2020.

7. An additional application for interim measures (doc.3) was filed at the Registry of this Court on June 14, 2020 and served on the Respondent State on July 16, 2020.

8. On July 23, 2020, the Respondent State submitted its response to the application for interim measures (doc. 4), which was served on the Applicant on August 10, 2020.

9. The Respondent State, the Togolese Republic, on July 23, 2020 filed a preliminary objection (doc. 5) and its defense (doc. 6) which were served on the Applicant on August 10, 2020.

10. On August 06, 2020 the Respondent submitted a statement of defense on the interim measures (doc.7), which was served on the Applicant on October 08, 2020.

11. On October 12, 2020 the Applicant filed his response to the defense on interim measures (doc.8), which was served on the Respondent on 10/22/2020 and the Respondent made no comments.

12. On April 29 2021 was held the hearing of the parties, in which only the Respondent's representative attended and made his oral submissions.

13. The judgment of the case was adjourned to 24th March, 2022.

VI. APPLICANT'S CASE

a) Summary of Facts

14. By act dated March 10, 2020, from Maître André T. SAMA BOTCHO, Bailiff, the Speaker of the National Assembly of Togo notified the Honorable

Gabriel Messan Agbéyomé KODJO with an original letter with reference 091/2020/AN/SG/PA with same date as above (Exhibit #1).

15. According to the said letter, the Speaker of the National Assembly of Togo informed the Applicant that the Federal Attorney of the Court of First Instance of Lomé had submitted a requisition to her to have the Applicant's parliamentary immunity waived (Exhibit #2).

16. Indeed, by letter No. 1287/PR/2020 dated March 9, 2020, the Federal Attorney of the Lomé Court of First Instance demanded the waiver of the parliamentary immunity of the Applicant against whom there are, according to him, serious suspicions of having committed criminal offenses (Exhibit No. 3).

17. According to the Federal Attorney, the observations and actions referred to in his requisition for waiver of parliamentary immunity "fall within the provisions of the criminal provisions and are qualified as aggravated disturbance of public order (Article 495 (3) of the new Criminal Code (NCC)), dissemination of false news (Article 497 of the NCC), slanderous accusation (Articles 363, 364, 693 and Article 693 (1) of the NCC) and violation of the internal security of the state (Articles 663 and 664 of the NCC)".

18. On March 10, 2020, the Speaker of the National Assembly of Togo, allegedly after hearing the Bureau of the National Assembly and the Conference of Presidents, decided to establish a special committee, responsible for investigating the lifting of the Applicant's parliamentary immunity (Exhibit No. 4).

19. By act dated March 13, 2020, from Maître André T. SAMA BOTCHO, Bailiff, the Speaker of the National Assembly of Togo notified the Honorable

Gabriel Messan Agbéyomé KODJO by an original letter with reference 091/2020/AN/SG/PA, with same date as above. (Exhibit No 5)

20. By letter No. 100/2020/AN/SG/PA dated March 13, 2020, the Speaker of the National Assembly of Togo informed the Applicant that the Attorney General of the Supreme Court had submitted to her a requisition for authorization for criminal proceedings against him in his capacity as former Speaker of the National Assembly (Exhibit No. 6).

21. On the same day, the Speaker of the National Assembly of Togo convened a meeting of the Bureau of the National Assembly and the Conference of Presidents to deliberate on the requested authorization for criminal proceedings;

22. By letter reference 14/CS/PG-CAB dated March 12, 2020, the Attorney General of the Supreme Court requested the National Assembly to authorize the prosecution of the Applicant (Exhibit No. 7).

23. By act dated March 17, 2020, from Maître André T. SAMA BOTCHO, Bailiff, the Speaker of the National Assembly of Togo notified the Honorable Gabriel Messan Agbéyomé KODJO by an original letter with reference number 111/2020/AN/SG/PA, dated March 16, 2020, together with the copy of the resolution and proceedings of March 16, 2020 of the plenary session of the National Assembly which examined the requisition for authorization of criminal proceedings by the Attorney General before the Supreme Court against the Applicant in his capacity as former Speaker of the National Assembly; (Exhibit No. 8 - Notification of the letter dated March 17, 2020; Exhibit No. 9 - Letter No. 111/2020/AN/DSH/DSL/SG/PA dated March 16, 2020; Exhibit No. 10 - Resolution No. 001/2020/AN dated March 16, 2020)

24. The Federal Attorney attached to his requisition for waiver of parliamentary immunity a USB key, which was supposed to contain the evidence for his allegations;

25. Mr. KODJO Messan Agbéyomé did not have the opportunity to have access to the contents of the said USB key, neither at the time of the notification by the bailiff of the letter inviting him to appear before the special committee of the National Assembly, nor at the time of his appearance before the committee;

26. The parliament member who represented Mr. KODJO before the committee made such request in vain during his hearing;

27. That the USB key containing the documents attached in support of the Prosecutor's requisition determined the findings of the special committee which were submitted to the plenary on the occasion of the vote to lift the Applicant's parliamentary immunity;

28. In a correspondence dated March 11, 2020 addressed to the Speaker of the National Assembly, the Applicant already denounced the hasty invitation received the day before, on March 10, 2020, at 6:30 p.m., to appear before the special committee for the waiver of parliamentary immunity, which did not give him any reasonable time to prepare properly his defense; (Exhibit No. 12 - Correspondence from the Applicant to the Speaker of the National Assembly).

29. Pursuant to his affidavit dated April 28, 2020, Mr. KPÉEVEY Gaby-Gadzo, a member of the Togolese National Assembly, who represented the Applicant before the special committee, as authorized by the Rules of Procedure of the said Assembly, explains how, on March 11, 2020, when he arrived before the special committee, his wish to have the assistance of a lawyer was denied since the lawyer accompanying him was prohibited from

attending the hearing; even his proposal to allow him to consult with his lawyer, who would be in another room if necessary, was rejected by the committee; (Exhibit #12 - Affidavit of Mr. KPEEVEY Gaby-Gadzo, Member of the Togolese National Assembly and Exhibit no. 13 - Diplomatic passport of Mr. KPEEVEY Gaby-Gadzo).

30. The Applicant is a political figure who has held positions of primary responsibility at the state level - Prime Minister, Speaker of the National Assembly and continues to play an active role at the political level, first, as Chairman of a political party, duly constituted, then Member of Parliament in the National Assembly and Chairman of the National Defense Commission.

31. The third condition, associated with the Applicant's release after his accusation, reads as follows: "Prohibition on making any statement tending to call into question the results of the last presidential election on February 22, 2020."

32. Since April 24, 2020, the Applicant has lost any freedom to express himself about the February 22, 2020 presidential election, an important political event in the political life of Togo, which concerns all Togolese citizens, and even more so the Applicant as a politician engaged in a legitimate competition for power.

33. Moreover, the third condition attached to the Applicant's release after his indictment prevents him from exercising his entitlement to damages, in that he is considered to be the person who won the February 22, 2020 elections, thus holding legitimacy even if the results officially proclaimed by the Constitutional Court deprived him of legality.

34. That the State of Togo, through the dean of investigative judges of the Lomé First Class Court of First Instance, by imposing on the Applicant the

third condition attached to his release, violated his right to freedom of expression, which includes freedom of opinion and freedom of political engagement, as well as his right to compensation;

35. The Applicant was arrested at his home, under circumstances of unprecedented violence and brutality, while he did not put up any resistance to his arrest, the law and order enforcement agents did not immediately notify him of any charges. In fact, Mr. KODJO Agbéyomé Messan was arrested and taken to the SCRIC premises, without being informed of the reasons for his detention.

36. Even during his hearing, which began around 10am on April 21, 2020, it was at 3:15pm that the investigators notified him of the charges, which was the subject of an observation by one of his lawyers, who, incidentally, requested that his observation be recorded in the proceedings, which were not presented for the Applicant's signature until the afternoon of Thursday, April 23, 2020, while his hearing ended the day before, around 4:30pm, with all due reservations.

37. By failing to notify the Applicant of the charges brought against him without delay upon his arrest at his home, the investigators failed to comply with a substantial constitutional formality which renders his arrest arbitrary and, therefore, his detention at the investigators' premises also arbitrary.

b. Pleas in Law

38. The Applicant in support of his cause, cited Article 9 of Law No. 2019-015 of 30 October 2019 on the Code of Judicial Organization, Article 79 (1) of the Rules of Procedure of the National Assembly of the Togolese Republic (5th edition January 2019), all in force in Togo; Articles 9 (2), 5, 6, 7, 26 and

60 of the African Charter, Articles 10 and 19 of the Universal Declaration of Human Rights, hereinafter referred to as the UDHR and Article 9 (2) and Article 14 (1 and 2) of the International Covenant on Civil and Political Rights, hereinafter referred to as the ICCPR.

39. Further, to support his claims, he relied on national and international jurisprudence.

c) Reliefs Sought

40. The Applicant concludes, seeking from the Court, to:

As to the form:

- i. Declare itself competent to examine the allegations of human rights violations against the State of Togo;
- ii. Declare Mr. Gabriel Messan Agbéyomé KODJO's application admissible;

As to merit:

- iii. Declare that there has been a violation by the State of Togo of the Applicant's rights guaranteed by the provisions of Article 7(1) of the African Charter, Article 10 of the UDHR, Article 14(1), 1st and 2nd sentences of Article 14(3)(b) of the ICCPR in view of the Special Committee of the Togolese National Assembly established on March 10, 2020;
- iv. Declare that there has been a violation by the State of Togo of the Applicant's rights guaranteed by the provisions of Article 9(2) of the African Charter, Article 19 of the UDHR on account of the dean of investigating judges of the Lomé First Class Court of First Instance;
- v. Declare that the State of Togo has violated the Applicant's rights guaranteed by the provisions of Article 9(2) of the UDHR and Article 6, in

fine, of the African Charter, because of the agents of the Service of Criminal Intelligence and Investigations (SCRIC) of the national gendarmerie;

vi. Consequently, order the State of Togo to put an immediate end to such violations by suspending the ongoing criminal proceedings against the Applicant initiated on the basis of the irregular procedure of lifting his parliamentary immunity;

vii. Order the State of Togo to repair the damage suffered by the Applicant as a result of the violation of his rights by paying him one (01) symbolic CFA franc as damages.

viii. Order the State of Togo to pay all the costs, including the fees in favor of the lawyers Maîtres ATSOO Kokou Totékpo-Mawu and Me KOUADIO N'DRY Claver.

VII. DEFENDANT'S CASE

a) Summary of Facts:

41. The Respondent pleads in its defense that:

42. In the early days of the election campaign leading up to the February 22, 2020 presidential election, the Applicant former Speaker of the National Assembly, Member of Parliament and candidate of the Patriotic Movement for Democracy and Development (MPDD), addressed the Defense and Security Forces in his capacity as future President of the Republic, making improper use of the symbols and emblems of the State;

43. The person concerned also issued a decree, which appoints a Prime Minister.

44. He also created a government website on which his acts are communicated.

45. Such facts constitute offenses provided for and punished by Togolese criminal law.

46. In order to preserve public order and social peace, the Public Prosecutor's Office, the judicial authority hearing the case, in accordance with the provisions of the Togo Code of Criminal Procedure, considered that the actions of the Applicant during and after the February 22, 2020 presidential elections constitute offenses within the meaning of the current Togolese Criminal Code.

47. Therefore, the Federal Attorney submitted, pursuant to the provisions of Articles 78 and 79 of the Rules of Procedure of the Togolese National Assembly, a requisition for the waiver of the Applicant's parliamentary immunity;

48. In the same logic as the Federal Attorney, the Attorney General of the Supreme Court of Togo also requested the authorization of the National Assembly to initiate criminal proceedings against him and this, based on Articles 10 and 11 of the Organic Law No. 2007-013 of June 19, 2007 which determines the status of the Former Speakers of the National Assembly;

49. By Resolution No. 001/2020/AN dated March 16, 2020, the Togolese National Assembly proceeded to waive the Applicant's parliamentary immunity in order to enable him to organize his defense before the courts;

50. As per records dated March 16, 2020, the National Assembly authorized the Attorney General of the Republic to bring an action against the Applicant, former Speaker of the National Assembly.

51. Pursuant to a requisition to open a judicial inquiry, the Federal Attorney called upon the services of the Directorate-General of the National Gendarmerie of Togo for an in-depth investigation by the Central Bureau of

Research and Criminal Investigations into the charges brought against the Applicant;

52. Having been subjected to this requisition by the Federal Attorney, the Central Bureau of Criminal Research and Investigations invited the Applicant three (3) consecutive times to attend his hearing, but the latter deliberately refused to attend, which led the Central Bureau of Criminal Research and Investigations to pick him up at his home, in accordance with the relevant provisions of Article 51 of the Code of Criminal Procedure.

53. Following the preliminary investigation, the Applicant was brought before the Federal Attorney, who opened a judicial information before the Dean of Investigating Judges, who charged him and his accomplices with aggravated disturbance of public order, violation of the internal security of the State and dissemination of false news, pursuant to Article 495(3), Articles 497, 663 and 664.

54. That, by an act dated April 9, 2020, the Applicant submitted to the Lomé First Class Court of First Instance an application for revocation of the Resolution of the Togolese National Assembly n°001/2020/AN of March 16, 2020, on the ground that his right to defense was violated.

55. By decision No. 0920/2020 of May 18, 2020, the Lomé First Class Court of First Instance declared itself incompetent and ordered the Applicant to submit the case to the Togolese Constitutional Court.

56. That the Applicant filled an appeal against the above decision and served notice on the Togolese State to appear before the Lomé Court of Appeal.

57. The Special Committee of the Togolese National Assembly established as part of the procedure for waiving parliamentary immunity does not have the status of a Court within the meaning of international human rights law;

58. Under the procedure for waiver of parliamentary immunity, no charges were officially laid against the Applicant, since the special Commission had to simply hear him on the requisition for waiver of parliamentary immunity submitted by the Federal Attorney to enable him to organize his defense effectively.

59. The application of the texts in question presupposes the existence of criminal proceedings pending before the competent courts;

60. The texts referred to are inapplicable to the case at hand.

61. The requisition for waiver of parliamentary immunity was addressed to the Speaker of the National Assembly and, to that end, the Federal Attorney attached a USB key containing only the elements he mentioned.

62. That it was not an Exhibit cited by the Federal Attorney's letter.

63. This USB key did not contain any elements different from those contained in the Federal Attorney's letter.

64. With regard to the assistance of a lawyer, it must be said here that the Applicant was not before a court or a disciplinary committee, that the purpose of the Committee was not to judge a member of Parliament, but to hear him with a view to lifting his parliamentary immunity under Article 79(3) of the Rules of Procedure of the Togolese National Assembly;

65. It follows from this text that the Parliament Member in question can only appoint one of his colleagues to represent him and that this text excluded the presence of a lawyer because it is a purely internal matter of the National Assembly.

66. That the Applicant also maintains that only 6 days elapsed between the first letter from the Speaker of the National Assembly and the decision to

waive his parliamentary immunity, which did not allow him to organize his defense, and that this argument should be dismissed.

67. That in fact when he was charged by the Dean of the investigating judges of the Lomé First Class Court of First Instance, the Applicant was granted freedom under certain conditions.

68. That it follows from the provisions of the Code of Criminal Procedure, namely Articles 112 to 124 that any accused person may be granted simple or conditional provisional release.

69. In exercise of his legal prerogatives, the Dean of investigating judges released the Applicant provisionally with certain restrictions including a prohibition on making any statement calling into question the last presidential election of February 22, 2020.

70. This ban was not a ban on speaking out but on announcing acts that would violate the established constitutional order.

71. As evidence, after his probation, the Applicant continued to make statements about it on social media without concern, and that this argument does not stand either.

72. Following the requisitions of the Federal Attorney, the judicial authority responsible for the prosecution, in accordance with the Code of Criminal Procedure, the Central Bureau of Criminal Research and Investigation invited the Applicant to appear three (3) consecutive times, but the latter did not deign to appear, which constitutes disobedience to the judicial authority.

73. That following this refusal that the Central Bureau of Research and Criminal Investigations, proceeded to arrest the Applicant to further investigate the facts of aggravated disturbances to public order, violation of the internal security of the State and dissemination of false news of which he was accused, in accordance with the requisitions of the Federal Attorney.

74. The Applicant was heard, kept in police custody in accordance with the Code of Criminal Procedure and was presented to the Federal Attorney, who opened a judicial information, with the Dean of investigating judges who, in turn, charged him with serious disturbance of public order, violation of the internal security of the State and dissemination of false news, offenses provided for and punishable by Articles 495(3), 497, 663 of the Togolese Criminal Code.

75. That it was on the basis of the judicial process that the Applicant was arrested and charged with various offenses and placed on probation.

76. That given the existence of a judicial process, it is clear that the Applicant's arrest is not arbitrary.

The Plea of Lack of Jurisdiction of the Court

77. It is alleged by the Respondent (Doc. 5) that, pursuant to an application lodged at the Registry, on June 8, 2020, Mr. Gabriel Messan Agbéyomé Kodjo, sued the Togolese State, asking this Court to order the stay of the ongoing Criminal Proceedings against him.

78. That the Court has no jurisdiction to order a State to suspend criminal proceedings brought against a citizen under the domestic criminal provisions in force at the time of the facts, and under the jurisprudence of this Court, the mere mention of international instruments for the protection of human rights is not sufficient to vest the Court with jurisdiction.

79. That the Applicant was subjected to criminal proceedings for aggravated disturbance to public order, violation of the internal security of the State, dissemination of false news, offenses provided for and punished by Article 495 (3), 497, 663, 664 of the Togolese New Criminal Code at the date of the facts.

80. That following the preliminary investigation, the Applicant was charged by the dean of investigating judges, who released him on parole.

81. That the proceedings are legally ongoing and it is against all expectations that the Applicant seeks from this Court to stay the criminal proceedings;

82. That as the Court underlined in one of its jurisprudences “*granting this application is equivalent to interfering with the criminal proceedings initiated and pending before the Togolese Courts*”.

83. And even if the Applicant refers to the international provisions for the protection of human rights, it is clear that the application regarding the staying of the criminal proceedings legally initiated against the Applicant does not fall within the jurisdiction of this Court, because to do so would “*interfere with the internal proceedings of the Togolese State.*”

84. The Respondent concludes that this court clearly lacks jurisdiction to hear the Applicant’s main claim concerning the staying of the ongoing criminal proceedings.

b. Pleas in Law

85. The Respondent, in support of its case, cited Article 79 (1) of the Rules of Procedure of the National Assembly of the Togolese Republic, Articles 22, 112 to 124 of the Code of Criminal Procedure, 495 (3), 497, 663 and 664 of the Criminal Code all in force in Togo; Articles 6, 7 and 9 (2) of the African Charter, Articles 10 and 19 of the UDHR, Articles 9 and 14 (1st and 2nd sentence) (3,b) of the ICCPR and Article 6 of the European Convention on Human Rights.

86. Further in support of its pleas, the Respondent relied on national and international jurisprudences.

c. Reliefs Sought

87. The Respondent State prays the Court:

As to admissibility of the Application:

i. To rule in accordance with the law;

As to the jurisdiction of the Court:

ii. On the Applicant's application for a staying of ongoing criminal proceedings in the Togolese courts:

a) To declare itself incompetent to entertain such Application;

iii. On the Applicant's pleas of violation of Articles 10 of the UDHR, Article 14(1), 2nd sentence, Article 14(3-b) of the ICCPR, Article 7(1) of the African Charter and taking into account the jurisprudence of international human rights courts:

(a) To declare that such texts are not applicable in the context of the procedure leading to the waiver of the Applicant's parliamentary immunity because the special committee constituted is not a Court within the meaning of international law.

iv. If the Court finds them applicable, it should dismiss the pleas because the Respondent has not violated any of the texts.

v. As to other pleas in law raised by the Applicant:

a) To declare that they are unfounded.

vi. Consequently, the Court should dismiss the Applicant's application and order the Applicant to pay the costs in accordance with Rule 66 of the Rules of this Court.

VIII. REPLY

88. The Applicant in his Reply (Doc. 8), objected to the application for provisional measures and the preliminary objection raised by the Respondent refuting the Respondent's arguments, reiterating the jurisdiction of this Court, stating that what is at issue is the alleged violation of his human rights.

IX. PROCEDURE BEFORE THE COURT

1. Provisional Measures

89. As already mentioned in paragraph 6 of this Judgment, with the original application, the Applicant filed an application for provisional measures (doc.2), alleging that following the waiver of his immunity as a Member of Parliament under the conditions described above, Mr. Agbéyomé Messan Kodjo was summoned, arrested on April 21, 2020 and imprisoned for three (03) days in the premises of the Central Research and Criminal Investigations service of the Togolese gendarmerie.

90. The Applicant was subsequently referred to the prosecutor's office of the Lomé First Class Court of First Instance where an investigation was opened against him by way of an indictment.

91. he Dean of investigating judges charged Mr. Agbéyomé Messan Kodjo and placed him under judicial control under the following conditions: “1 - obligation to comply with our various summonses as soon as necessary; 2 - prohibition to leave the national territory without our express authorization; 3 - prohibition to make any statement tending to call into question the results of the last presidential elections of February 22, 2020; 4 - prohibition of any

remarks, statements, or attitudes tending to question and undermine the existing constitutional and institutional order”.

92. After 03 days in police custody, of which he was not notified, in infringement of the law, he was sued before the prosecutor’s office, then brought before the dean of investigating judges, who charged him, allowing him to be released, subject to conditions that violate his freedom of opinion and political commitment.

93. That it is necessary and urgent that interim measures be ordered to put an end to the violations of his fundamental rights, pending a decision on the merits of the substantive cause.

94. The Respondent, on its turn, contended that this Court lacked jurisdiction to entertain the application for provisional measures, arguing that the Applicant is subject to criminal proceedings for aggravated disturbance to public order, violation of the internal security of the State, dissemination of false news, offenses provided for and punished by Article 495 (3), Articles 497, 663 and 664 of the New Criminal Code of Togo, at the date of the facts; that following the preliminary inquiry, the Applicant was charged by the Dean of Investigating Judges, who released him on parole; that prior to the opening of the investigation, the Applicant brought an action before the Lomé Court of First Instance seeking the annulment of the resolution waiving his parliamentary immunity; that, assisted by two lawyers, he brought an application for accelerated procedure for the case to be heard at an extraordinary hearing; that the case was heard and argued; that a decision was handed down on 18 May 2020; that the Court declared itself incompetent to annul the resolution of the National Assembly that lifted his parliamentary immunity; that, in exercise of his right of appeal under the law, the Applicant filed an appeal against the said decision; that the Court of Appeal will consider his appeal both as to form and as to merit; that as this Court has

highlighted in one of its jurisprudence, “granting this application is tantamount to interfering with the criminal proceedings initiated and pending before the Togolese Courts”; that it is clear from the above that the Court has no jurisdiction even to hear the main application submitted by the Applicant and relating to the suspension of the criminal proceedings in progress nor to rule on the application for an interim measure does not fall within the Court’s jurisdiction.

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95. As provided in Article 21 of the 2005 Additional Protocol “*The court may, whenever a dispute is submitted before it, order the provisional preparatory inquiries that it deems necessary or opportune*”.

96. And, as follows from Article 79 of the Court’s Rules of Procedure: “(1) *An application under Article 20 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.*” and that “(2) *The application shall be made by a separate document and in accordance with the provisions of Articles 32 and 33 of these Rules.*”.

97. In the instant case, the Applicant has complied with the provisions of Article 79 (2) of the Rules.

98. However, it follows from the said precept that three conditions are required for the imposition of interim measures, as described by this Court, in the case, *GODSWILL MRAKPOR ET 5 OTHERS v. AUTHORITY OF HEADS OS STATE AND GOVERNMENT, ECOWAS & ANOR*, Judgment No. *ECW/CCJ/JUD/01/11* of 18 March 2018, where it ruled that: “... *the court would not be in a position to order the interim measures asked for except upon fulfillment of three conditions:*

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

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

3. *If there is urgency in regard to the circumstances of fact and law invoked in support of the application for interim measures.” (see 17).*

99. It follows that the Court may order interim measures only if, in essence, the case before the Court falls within its jurisdiction, if the application can be granted, and if there is an urgency to be ruled on.

100. On the other hand, as is clear from Article 82 of the Rules, given the provisional nature of the measure sought, it would expire or cease to take effect as soon as the judgment terminating the proceeding is delivered.

101. Therefore, in the instant case, considering that with the present Judgment the Court decides on the merits of the present action, putting an end to the proceedings, any pronouncement on the interim measure, therein sought, becomes unnecessary.

102. Thus the Court finds that the interim measure sought is no longer necessary.

X – JURISDICTION:

On the Court's alleged lack of jurisdiction:

103. The Respondent raised the lack of jurisdiction of this Court to examine the instant case, arguing that the Court has no jurisdiction to order a State to

stay criminal proceedings brought against a citizen under the domestic criminal provisions in force at the time of the facts; that according to the case-law of this Court, the mere mention of international instruments for the protection of human rights is not sufficient to establish the Court's jurisdiction, but that jurisdiction often results from the examination of the application and that is why, when faced with an application, this Court has already delivered numerous judgments to this effect, declaring itself incompetent even though the Applicant had invoked legal instruments for the protection of human rights.

104. To substantiate its position the Respondent cited the ECW/CCJ/JUD/03/05 judgment of October 7, 2005, in the case HON. DR. JERRY UGOKWE v. THE FEDERAL REPUBLIC OF NIGERIA AND HON. DR. CHRITIAN OKEKE.

The Applicant in turn, (Doc. 8) refuted the Respondent's arguments, reiterating the jurisdiction of this Court, stating that what is at issue is the alleged violation of his human rights.

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106. 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.

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

108. 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.”

109. 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.”

110. 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.

111. 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.”

112. And it is case-law of this Court that its jurisdiction can not 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.)

113. 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 case *DR. GEORGE S. BOLEY v. REPUBLIC OF LIBERIA & 4 ORS*, Judgment No. ECW/CCJ/JUD/24/19 §27).

114. 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 §2 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.*”

115. In the instant case, the Applicant grounds his application on alleged violation of his human rights, namely, those under Article 7(1) of the African Charter, Article 10 of the UDHR, Article 14(1), 1st and 2nd sentences and Article 14(3)(b) of the ICCPR on account of the Special Committee of the Togolese National Assembly established on March 10, 2020; under Article 9(2) of the African Charter and Article 19 of the UDHR on account of the dean of investigating judges of Lomé First Class Court of First Instance; under Article 9(2) of the UDHR and Article 6, *in fine*, of the African Charter on account of agents of the Criminal Intelligence and Investigations Service (SCRIC) of the national gendarmerie.

116. Contrary to the Respondent's allegation, the Applicant has not merely made a reference to international instruments protecting human rights, but

has alleged facts that in his view constitute violations of the said articles protecting human rights.

117. It should be highlighted once again that the mere allegation of a violation of human rights is sufficient to trigger the jurisdiction of this Court and this Court will assume its jurisdiction without necessarily examining the veracity of the allegation.

111. Therefore, considering the facts alleged and the claims made by the Applicant, the grounds for the present action is the claim of violation of human rights, 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 proclaimed therein. (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 in LRCCJ, 2009, pág. 296, parag. 58 a 61).

119. Therefore, since the requirements of Article 9 (4) of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05, are met, the Court understands that it entertains jurisdiction to adjudicate on the instant case.

XI – ADMISSIBILITY

120. The admissibility of the application initiating proceedings 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, cited above, which provides 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 (...)”

121. Therefore, the Applicant having identified himself as a victim of human rights violations, the Court finds that the claim is neither manifestly unfounded under the aforementioned article nor inadmissible on any other grounds.

122. Accordingly, the instant case must be declared admissible.

XII. MERITS

123. The Court will then examine each of the human rights allegedly violated by the Respondent State, taking into consideration the questions put forth by the Applicant for decision of the Court.

1. The alleged violation of Article 10 of the Universal Declaration of Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights

124. The Applicant submitted, that in the instant case, contrary to the provisions of Article 79(1) of the Rules of Procedure of the National Assembly of the Togolese Republic (5th edition January 2019) the requisition for waiver of parliamentary immunity was submitted by the Federal Attorney before Lomé First Class Court of First Instance;

125. That to examine the legality of the prosecution in the instant case, just like France, Togo applies the penal system in which, the Federal Attorney like all public prosecutors are placed under the direction and control of their hierarchical superiors and under the authority of the Minister of Justice. They are bound by the instructions given by their hierarchical authority for the presentation of their written requisitions. At the hearing, they are entitled to speak freely (Article 5 of Organic Law No. 96-11 of August 21, 1996 establishing the Statute of Magistrates, as amended by Law No. 2013-007 of February 25, 2013); that it has been shown that the Federal Attorney is an “Applicant party” who does not present the required guarantees of independence and impartiality; therefore, he is not a judicial authority within the meaning of the UDHR, the ICCPR and the African Charter.

126. That by lifting the Applicant's parliamentary immunity on the basis of a requisition submitted by the Federal Attorney when the latter is not competent to do so, the Togolese Republic, through its National Assembly, violated the provisions of Article 79(1) of the Rules of Procedure of the said National Assembly, involving the violation of the Applicant's rights guaranteed by the aforementioned articles.

127. The Respondent refuted the Applicant's arguments on the grounds that the Special Committee established in connection with the waiver of the Applicant's parliamentary immunity is not a Court within the meaning of Articles 10 of the UDHR and 14 of the ICCPR; that it was not the role of the Committee to try the Applicant since it does not rule on disciplinary matters. That the committee's mission was merely to conduct the procedure to enable the Applicant to defend himself before the courts, since he is presumed innocent until a court decision is handed down; that the facts alleged against the Applicant constitute offenses under criminal law and in this regard, and pursuant to Article 22 of the Code of Criminal Procedure, the Public

Prosecutor's Office represented by the Federal Attorney and his deputies constitute the judicial authority hearing the case; that it was on the basis of this same principle that the application for authorization to proceed was made by the Attorney General of the Togolese Supreme Court on the assumption that the Applicant is a former Speaker of the National Assembly; that a comparative study of the Internal Regulations of the countries of the sub-region allows confirmation that any requisition for waiver of parliamentary immunity is submitted by the Federal Attorney or the Attorney General (See Internal Regulations of Burkina Faso, Benin, Côte d'Ivoire, etc.); that the jurisprudence of this Court follows in the same vein because the Federal Attorney has the quality of authority of the judicial proceedings (See judgment ECW/CCJ/RUL/09/11 (Case: EL HADJ MANE ABDOU GAYE C/ Senegal, Collection of Jurisprudence, 2011, p. 259, n° 40)”; that it follows from this settled case law that the Federal Attorney has the status of a Judicial Authority pursuant the Togolese Code of Criminal Procedure, which distinguishes between the functions of prosecution (conducted by the Federal Attorney), investigation (investigating Judges) and trial (judge).

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128. The Article 10 of the UDHR establishes that:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

129. Article Article 14 (1, 2nd part) that ICCPR provides that:

“(…) In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law(…)”

130. Article 14 covers the right of access to the courts in cases of determination of criminal charges and rights and obligations in judicial proceedings. Access to the administration of justice must be effectively guaranteed in all such cases to ensure that no individual is procedurally deprived of his or her right to claim justice.

131. The right to a fair and public hearing by a competent, independent and impartial court or tribunal established by law pursuant to the second paragraph of Article 14(1) shall be guaranteed in cases concerning the determination of criminal charges against persons or of their rights and obligations in a judicial proceeding. Criminal charges relate in principle to acts declared punishable under domestic criminal law. (*See Human Rights Committee, General Comment No. 37 § 15*).

132. The meaning of “court” in Article 14 (1) designates a body, regardless of its name, that is established by law, is independent of the executive and legislative branches of government and of the public authorities, or enjoys in specific cases judicial independence to decide matters in proceedings of a judicial nature. Article 14 (1), second sentence, guarantees access to such courts to all those who have criminal charges against them. This right cannot be limited and any criminal conviction by a body that does not constitute a court is incompatible with this provision. Similarly, whenever rights and obligations are determined in a lawsuit, this must be done at least at one stage of the process by a court within the meaning of this sentence. The requirement of a court's competence, independence and impartiality within the meaning of Article 14(1) is an absolute right that is not subject to any exception. (*See Human Rights Committee, General Comment No. 32 § 18, 19*).

133. The requirement of *independence* refers, in particular, to the procedure and qualifications for the appointment of judges and guarantees concerning

their stability until mandatory retirement age or the end of their term of office, if any, the conditions for promotion, transfer, suspension and termination of their duties, and the effective independence of the judiciary from political interference by the executive and legislative branches of government. States should adopt specific measures to ensure the independence of the judiciary by protecting judges from any form of political influence in their decision making through the establishment or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, term of office, promotion, suspension and dismissal of members of the judiciary and disciplinary sanctions against them. The requirement of *impartiality* has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor prejudices about the particular case before them, nor act in a way that unduly promotes the interests of one party over the other. The court must also appear impartial to a reasonable observer. (*See Human Rights Committee, General Comment No. 32 §20 e 21*).

134. Returning to the case at hand, it should be noted that the Applicant at the time of the facts, was a Member of Parliament with the status of former Speaker of the National Assembly and, for these facts, he held parliamentary immunity.

135. The Respondent does not contradict this argument, but rather confirms it.

136. However, the Applicant believes that the Federal Attorney was not competent to make the requisition for waiver of his parliamentary immunity because he was not a *judicial authority*.

137. Let us see whether this argument by Applicant proves to be well founded.

138. It should first be noted that, as the Court of Justice of the European Union held: *“the concept of “judicial authority” within the meaning of Article 6(1) of Framework Decision 2002/584 requires an autonomous interpretation and it is not limited to designating only the judges or courts of a Member State, but must be understood as designating more broadly the authorities involved in the administration of criminal justice in that Member State, as opposed to, inter alia, the ministries or police authorities, which form part of the executive branch. Thus, this concept is likely to cover authorities of a Member State who, without necessarily being judges or judicial bodies, participate in the administration of criminal justice in that Member State.”* (...) *Therefore, an authority, such as a prosecutor's office or a public prosecutor, which has the competence, in the context of criminal proceedings, to prosecute a person suspected of having committed a criminal offense, must be regarded as participating in the administration of justice in the Member State concerned, which the Court of Justice considers to be the case for, respectively, the prosecutor's offices in Germany (OG and PI cases) and the Attorney General in Lithuania (PF case).*" - **See Case C-509/18 PF** (preliminary ruling procedure by the Supreme Court) **Judgment of the Court of Justice of the European Union (Grand Chamber) of May 27, 2019 and further the Conclusions submitted on June 25, 2020, by Advocate General Manuel Campos Sánchez - Bordona, in Case C-510/19 of the Court of Justice of the European Union.**

139. In the instant case, in the Constitution of the Togolese Republic, in its Articles 112 to 119, there are the General Provisions on the Judiciary.

140. It follows from such norms that the judiciary is independent from the legislative and executive branches of government and that in the performance of their tasks, the magistrates are subject only to the authority of the law; (113) and they are irremovable (114).

141. In terms of their recruitment, Article 118 provides that:

“Le recrutement de tout magistrat se fait sur proposition du garde des Sceaux, ministre de la justice, après avis du Conseil supérieur de la magistrature

La nomination des magistrats du siège est faite par décret pris en Conseil des ministres sur proposition du Conseil supérieur de la magistrature.

La nomination des magistrats du parquet est faite par décret pris en Conseil des ministres sur proposition du garde des Sceaux, ministre de la justice, après avis du Conseil supérieur de la magistrature.”

142. On its turn, the Code of Criminal Procedure in force in Togo, in its Chapter II - Articles 22 to 25 - sets out the general provisions on the Public Prosecutor's Office”. Article 22 provides: that *“Le Ministère public exerce l'action publique et requiert l'application de la loi”*.

143. Article 28 provides that: *“Le Garde des Sceaux, Ministre de la Justice est le chef du Ministère public. Il peut demander aux Procureurs Généraux tous rapports sur les affaires en cours et leur donner toutes directives relativement à l'exercice de l'action publique.”* And from **Article 29** it is provided that *“Procureur Général a autorité sur tous les magistrats du Ministère public du ressort de la Cour d'Appel. Il a, à l'égard de ces magistrats les mêmes prérogatives que celles reconnues au Ministre de la Justice par l'article précédent.*

Le Procureur Général est tenu informé de l'état des affaires en cours d'instruction par les magistrats instructeurs (...). Le Procureur Général peut s'informer auprès du Président de la Chambre d'Accusation des causes de retard dans l'instruction des affaires et attirer son attention sur l'importance de leur règlement, ou sur la prolongation des detentions préventives.”

144. Section 3 regulates the duties of the Federal Attorney, providing as follows:

“Art. 31 – “Le Procureur de la République représente en personne ou par ses substituts le Ministère public près le Tribunal de première instance.

Art. 32 - Le Procureur de la République reçoit les plaintes et les dénonciations et apprécie la suite à leur donner. En cas de classement sans suite, il avise le plaignant et lui fait connaître le motif de ce classement.

Art. 33 – Tout autorité constituée, tout officier public ou fonctionnaire qui, dans

l’exercice de ses fonctions, a connaissance d’un crime ou d’un délit est tenu d’en donner avis sans délai au Procureur de la République et de transmettre à ce magistrat tous les renseignements, procès-verbaux et actes qui y sont relatifs.

Art. 34 - Le Procureur de la République procède ou fait procéder à tous actes

nécessaires à la recherche et à la poursuite des infractions à la loi pénale.

A cette fin, il dirige l’activité des officiers et agent de la police judiciaire de son ressort.

ressort. En cas d’infractions flagrantes, il exerce les pouvoirs qui lui sont attribués par l’article 56 du présent Code.”

145. The Togolese Criminal Procedure Code, distinguishes the functions of prosecution (conducted by the Federal Attorney), the functions of investigation (investigating judges) and trial (judge) (see Articles 22-25; 39-42; 335-358).

146. In the instant case, from a reading of Togolese Code of Criminal Procedure (articles cited above) there is no doubt that the Public Prosecutor's

Office is a public authority, with autonomous judicial power and integrated into Togolese judicial system. The Public Prosecutor's Office is a parallel and independent judicature to the judiciary. The agents of the Public Prosecutor's Office, namely, Federal Attorneys, are magistrates in terms comparable to judges, and should always act in strict obedience to the law, with objectivity and impartiality.

147. The Federal Attorney in Togo is a judicial authority with competence in the investigation of a criminal offense.

148. Indeed, the Constitution of the Togolese Republic, in its article 53 recognizes parliamentary immunity of national Parliament Members.

149. The parliamentary immunity of national Member of Parliaments is also provided for in Article 77 Rules of Procedure of the Togolese National Assembly.

150. The same instrument, in its Articles 78 and 79, determines the situations that may lead to the waiver of parliamentary immunity, as well as the legal procedure for the purpose.

151. Thus, Article 79 provides as follows:

“1. La demande de levée de l’immunité parlementaire est adressée par l’autorité judiciaire au président de l’Assemblée nationale.

2. Toute demande de levée de l’immunité parlementaire est instruite par une commission spéciale composée de:

- Un membre du bureau de l’Assemblée nationale, président ;*
- Le président ou, à défaut, un rapporteur de la commission des droits de l’homme, rapporteur;*
- Le président ou, à défaut, un rapporteur de la commission des lois constitutionnelles et de la législation de l’administration générale;*

- *Un représentant de chaque groupe parlementaire.*

3. *La commission spéciale entend le député dont la levée de l'immunité parlementaire est demandée ou l'un de ses collègues qu'il aura désigné pour le représenter.*

4. *Le rapport de la commission spéciale est transmis à la conférence des présidents en vue de l'inscription du dossier à l'ordre du jour de la plus prochaine séance de l'Assemblée nationale, suivant la procédure de traitement des questions urgentes.*

5. *La décision relative à la levée de l'immunité parlementaire est prise par l'Assemblée nationale, en séance plénière au cours de laquelle, il n'est donné lecture que des conclusions du rapport de la commission spéciale.*

6. *La décision d'accorder la levée de l'immunité parlementaire est adoptée au scrutin secret, sous la forme d'une résolution, par la majorité absolue des députés composant l'Assemblée nationale.*

Cette décision ne s'applique qu'aux seules infractions pour lesquelles la levée de l'immunité parlementaire a été demandée.

7. *En cas de rejet, aucune demande relative aux mêmes faits et à la même personne n'est recevable au cours de la même session ».*

152. This Article only requires that the requisition for waiver of parliamentary immunity be addressed to the Speaker of the National Assembly by a judicial authority, such as the Federal Attorney.

153. Thus, it should be concluded that, under the terms of the aforementioned Article 79(1), the Federal Attorney, as the judicial authority, has the competence to demand the waiver of parliamentary immunity from the Speaker of the National Assembly.

154. On the other hand, being a former Speaker of the National Assembly, special procedures must be observed to allow the exercise of the criminal action against the Applicant as provided by the Organic Law n°2007-13 of June 19, 2013, in its Article 10, which states that:

“Aucun ancien Président de l’Assemblée nationale ne peut être poursuivi ou arrêté en raison des faits délictuels par lui commis qu’avec l’autorisation de l’Assemblée nationale obtenue après délibération spéciale votée à la majorité absolue des membres de l’Assemblée nationale”.

155. And further in its Article 11 which states that:

“Le procureur général près la Cour Suprême avisé des faits par tous moyens, saisit le bureau de l’Assemblée nationale d’une requête en vue de la convocation de l’Assemblée nationale aux fins de délibération sur l’opportunité de la poursuite ou de l’arrestation de l’ancien Président de l’Assemblée nationale”.

156. Therefore, in the instant case, the dual status enjoyed by the Applicant (former speaker of the National Assembly and acting as Parliament Member) required the verification of two conditions for criminal proceedings against him: (1) the National Assembly's deliberation on the appropriateness of prosecution (or arrest) and (2) the waiver of parliamentary immunity.

157. The Court notes that the waiver of the Applicant's immunity was submitted and obtained in accordance with the provisions of Article 79 Rules of Procedure of the Togolese National Assembly and that the National Assembly's deliberation on the appropriateness of instituting proceedings against the Applicant is shown to be in accordance with Article 11 of the aforementioned Organic Law No. 2007-13 of June 19, 2013.

158. On the other hand, the cited Articles **10 of the Universal Declaration of Human Rights and 14(1) of the International Covenant on Civil and**

Political Rights enshrine the right to a fair trial, especially in proceedings before criminal or civil courts.

159. That is, they enshrine the right to be heard by a competent, independent and impartial court or tribunal, as mentioned above.

160. Ultimately, the articles of the UDHR and the ICCPR invoked by the Applicant concern the right to a fair trial before criminal or civil courts and are not applicable to the procedure of a waiver of parliamentary immunity in the National Assembly, which in this case is the competent authority to waive the Applicant's immunity and authorize the criminal proceedings against him.

161. In this regard, it should be specified that the procedure at issue before the Togolese National Assembly is not a procedure before a court of law and that, moreover, its purpose is in no way related to the determination of the Applicant's guilt. Rather, it concerns the waiver of his immunity precisely to allow the exercise of criminal prosecution against him.

162. Ultimately, the Articles of the UDHR and ICCPR invoked by the Applicant concern the right to a fair trial before criminal or civil courts, which is not the case with the National Assembly which is the competent authority to waive the Applicant's immunity and authorize criminal proceedings against him.

163. And, as this Court ruled in the case *SALIFOU SAWADOGO v. STATE OF BURKINA FASO*, Judgment No. ECW/CCJ/JUD/26/19 of September 26, 2019: “*Inviolability (or procedural immunity in the strict sense) translates into not subjecting Members of Parliament to arrest, detention, mere hearing (as deponent or as defendant) or trial for any other acts, except in cases specified in the Constitution or the Law and with the formalities provided for*

therein. That is, this immunity does not to exempt the Parliament Member from being detained, arrested, heard or tried, but it only prohibits it without the authorization of the Assembly, which will then be able to check whether there is any indication that justify maintaining such immunities.” (See pag 12).

164. The Court further noted in the same judgment that: *“The deliberation of the assembly on immunity, as a rule, takes the form of resolution (as proceeds in the Respondent State) – This resolution is a legal-constitutional act with a political nature, as it represents the exercise of a faculty directly conferred by the Constitution that defines its requirements and its object. Thus, this is an act of relationship between two branches of sovereignty (National Assembly and the Court) that represents in practice a conditioning of the Judiciary by the Parliament, with scope beyond the mere procedural effects, as it configures as an instrument for the affirmation and independence of the legislative power, and is therefore on the same level as legislative acts coming from a sovereign body or a supreme State body, with an individual and concrete nature, similar in their content to administrative acts. Parliamentary immunity enjoyed by the applicant is not a personal privilege of the Member of Parliament, but prerogatives or guarantees granted to Parliament Members with a view of ensuring them the protection and independence necessary for the performance of his duties. Therefore, they are ultimately aimed at preserving the dignity, integrity and independence of Parliaments as a whole, vis-à-vis other State bodies or any other authorities. (See pag. 13)*

165. That being said, the Court found that, contrary to the Applicant's contention, the process of waiving his parliamentary immunity followed the steps required by law. It was initiated by requisition of the Public Prosecutor at the Lomé Court of First Instance, which on March 9, 2020 addressed to

the Speaker of the National Assembly a requisition for the waiver of the Applicant's parliamentary immunity (*See Exhibit No. 1 to the application initiating proceedings "Lettre du Procureur de la République sollicitant la levée de l'immunité parlementaire du sieur Gabriel Messan Agbéyomé KODJO"*) three days later, that is, on March 12, 2020, the Attorney General of the Supreme Court sent to the Speaker of the National Assembly a requisition for authorization of criminal proceedings against the Applicant in his capacity as former Speaker of the National Assembly (*See Exhibit No. 2 to the application initiating proceedings "Lettre du Procureur Général près de la Cour Suprême du Togo sollicitant l'autorisation de l'Assemblée Nationale"*).

166. And because no other facts have been alleged by the Applicant that would call into question his right to a fair and public hearing by a competent, independent and impartial court or tribunal established by law, the Court rejects the Applicant's argument and finds that the Respondent did not violate Article 10 of the UDHR nor Article 14 (1, 2nd part) of the ICCPR.

2. On the violation of Article 7 (1) of the African Charter, Article 10 of the UDHR and Article 14 (1) and (3) of the ICCPR.

167. The Applicant alleged that in the instant case, the Public Prosecutor attached to his requisition for waiver of parliamentary immunity a USB key, which was supposed to contain the evidence for his allegations; that curiously, Mr. KODJO Messan Agbéyomé did not have the opportunity to have access to the contents of the said USB key, neither at the time of the notification by the bailiff porting the letter inviting him to appear before the special committee of the National Assembly, nor at the time of his appearance before the committee; that the Parliament Member who represented Mr. KODJO before the committee made the same request in vain

during his hearing; that it is nevertheless obvious that the USB key containing the documents attached in support of the Prosecutor's requisition determined the findings of the special committee submitted to the plenary on the occasion of the vote to lift the Applicant's parliamentary immunity; that this is a substantial irregularity that undermined the work of the special committee and compromised the vote on resolution No. 00001/2020/AN concerning the lifting of the parliamentary immunity of Mr. KODJO Messan Agbéyomé; that the possibility for a litigant to benefit from equality of arms and the right to adversarial proceedings in any proceeding - judicial or otherwise - is a fundamental requirement guaranteed and controlled by all international quasi-judicial jurisdictional bodies; that, indeed, adversarial proceedings cannot be realized if the accused or his representative does not have the documents on which the Federal Attorney relies to request the waiver of the Applicant's parliamentary immunity; that in the instant case, in a correspondence dated March 11, 2020, addressed to the Speaker of the National Assembly, the Applicant already denounced the hasty invitation received the day before, on March 10, 2020, at 6:30 p.m., to appear before the special committee for the waiver of parliamentary immunity, which did not grant him any reasonable time to prepare well his defense; that under the terms of the affidavit dated April 28, 2020, Mr. KPEEVEY Gaby-Gadzo, a Member of Parliament in the Togolese National Assembly, who represented the Applicant before the special committee as authorized by the Rules of Procedure of the said Assembly, explains how, on March 11, 2020, when he arrived before the special committee, his wish to enjoy the assistance of a lawyer was denied him since the lawyer accompanying him was prohibited from attending the hearing; even his proposal to allow him to consult his lawyer, who would be in another room if necessary, was rejected by the committee; that in support of the Applicant's request addressed to the Togolese Speaker of the National Assembly, recalled at point 60 of this

application, Mr. KPEEVEY Gaby-Gadzo, in his affidavit, reported that he had suffered a refusal from the special committee when he requested the postponement of the hearing to one week in order to properly prepare his colleague's defense.

168. On its turn, the Respondent argued that the legal texts relied on by the Applicant are not applicable in the instant case since the Special Committee of the Togolese National Assembly, set up in the context of the procedure for waiving parliamentary immunity, does not have the status of a Court within the meaning of international law in matters of human rights; that the criteria defined by the European Court of Human Rights in the context of the application of Article 6 of the European Court of Human Rights drafted in the same terms as the texts referred to by the Applicant must be a Court performing judicial functions; that, in the context of the procedure for waiver of parliamentary immunity, no charges were officially brought against the Applicant but the committee was simply to hear him on the requisition for waiver of parliamentary immunity submitted by the Federal Attorney, to enable him to organize his defense effectively that the application of the texts in question presupposes the existence of criminal proceedings pending before the competent courts; that it is very important to highlight here that the requisition for waiver of immunity was addressed to the Speaker of the National Assembly and, to that end, the Federal Attorney enclosed a USB key containing only the elements mentioned by him that it was not a piece cited in the letter from the Federal Attorney; that the said USB key contained no elements other than those contained in the Federal Attorney's letter; that with regard to the assistance of a counsel, it should be stated here that the Applicant was not before a court nor a disciplinary committee. The purpose of the special committee is not to judge a member of parliament, but to hear him with a view to waiving his parliamentary immunity; that under Rule

79(3) of the Rules of Procedure of the Togolese National Assembly: “*the special committee hears the member of parliament whose waiver of immunity is requested or one of his colleagues whom he has appointed to represent him*”; that it follows from this text that the member of parliament in question may only appoint one of his colleagues to represent him and that this text excluded the presence of a lawyer because it is a purely internal matter for the National Assembly; that in all the internal regulations of the National Assemblies of most countries, the presence of a lawyer next to the Parliament Member whose waiver of parliamentary immunity is requested is not permitted (See internal regulations of Burkina-Faso, Benin, Côte d'Ivoire, Niger, Senegal and others); that the Applicant further contends that only six (6) days elapsed between the first letter from the Speaker of the National Assembly and the decision to waive his parliamentary immunity, which did not allow him to organize his defense; that this plea is unfounded as this is an expedited procedure pursuant to Rule 79(4) of the Rules of Procedure of the Togolese National Assembly.

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169. Article 7 (1, c) of the African Charter, provides that:

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

[...];

3. Right of defense [...]”

170. And Article 14(1) and (3) of the ICCPR, establish that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public

hearing by a competent, independent and impartial tribunal established by law.(...)”

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(...)

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

171. The right of defense provided in Article 7 (c), of the Charter includes not only the right to choose one’s defense but also to have an adequate opportunity to prepare one’s defense.

172. This subparagraph should be interpreted in conjunction with Article 14 (3) of the International Covenant on Civil and Political Rights.

173. In this regard the African Court in the case *OSGAR JOSIAH v. UNITED REPUBLIC OF TANZANIA*, Application No. 053/201 6, March 28, 2019, para. 66, wrote that: *“The Court notes that Article 7 (1) (c) of the Charter as indicated above, provides for the right to defense, including the right to be defended by counsel of one's choice. This Court has consistently interpreted this provision in light of Article 14 (3) (d) of the International Covenant on Civil and Political Rights (ICCPR), which establishes the right to free legal counsel and determined that the right to defence includes the right to be provided with free legal assistance in circumstances where the interest of justice so require.”*

174. It should be noted that the first sentence of Article 14(1) guarantees, in general terms, the right to equality before the courts or tribunals. This guarantee does not only apply to the courts and tribunals referred to in the second sentence of this paragraph of Article 14, but must also be respected

whenever domestic law assigns a judicial task to a judicial body. This right, in addition to the principles mentioned in the second sentence of Article 14(1), those of equal access and equality of arms, ensures that the parties to the proceedings in question are treated without discrimination. (*See Human Rights Committee, General Comment No. 32 §7, 8*).

175. The right to equality before the courts also ensures equality of arms. This means that the same procedural rights must be provided to all parties, unless the distinctions are based on law and can be justified on objective and reasonable grounds and do not entail actual disadvantage or other injustice to the defendant. (*See Human Rights Committee, General Comment No. 32 §13,14*).

176. Paragraph 3 (b) provides that accused persons should be given time and facilities for the preparation of his defense and to communicate with the counsel of his own choice. This provision is an important element of ensuring a fair trial and an application of the principle of equality of arms. (*See Human Rights Committee, General Comment no. 32, §32; Comm. No. 282/1988, SMITH v. JAMAICA* , para. 10.4)

177. “Adequate means” must include access to documents and other evidences, and the right to communicate with counsel requires that the accused receive prompt access to his counsel. The counsel must be able to meet his clients privately and communicate with the accused under conditions that fully respect the confidentiality of their communications. (*See Human Rights Committee, General Comment No. 32, §33 e 34*).

178. As can be seen, the articles mentioned refer to the right to a fair trial, which includes the right of defense before the courts.

179. However, as stated above, the facts reported by the Applicant, the non-disclosure of the USB key, the refusal to postpone the hearing within one

week, the refusal to allow a lawyer to assist the Applicant's representative before the special parliamentary committee, occurred in the context of the procedure of the consideration by the Togolese National Assembly of the application for waiver of the Applicant's parliamentary immunity. It is not a judicial proceeding, much less a proceeding designed to decide on the merits of the criminal charge against the Applicant.

180. It is common ground that the procedure for waiver of parliamentary immunity in the Togolese Republic enshrines the right to a hearing of the accused person, a right he may exercise in person or through representation by another colleague. (See Article 79 (3) of the Rules of Procedure of the Togolese National Assembly), and the Applicant opted to be represented by another colleague and admits that he was summoned to such a hearing. Representation by a lawyer is not provided for.

181. The Court does not exclude that this right may become ineffective if the Member prosecuted or the colleague representing him in the proceedings to waive immunity has not had access to the material of the proceedings or is, in one way or another, deprived of the right or opportunity to be heard.

However, in the instant case, the Applicant has not proved that the facts he denounces had the effect of vitiating the procedure for waiving his immunity, with a refusal to hear him, in violation of the guarantees enshrined in the applicable law.

183. In this sense the Court finds that the allegations of violation of the Applicant's rights, based on the non-disclosure of the USB key, the refusal to postpone the hearing within one week or to allow his representative to be assisted by a lawyer, are unfounded, and consequently considers that the Applicant's claim, in this part, is unfounded.

3- The violation of the provisions of Article 9(2) of the Charter and Article 19 of the UDHR

184. To substantiate the violation of the right in question, the Applicant claimed that he is a political personage who has held positions of primary responsibility at the state level - Prime Minister, Speaker of the National Assembly and continues to play an active role at the political level, first, as Chairman of a political party, duly constituted, then Member of Parliament in the National Assembly and Chairman of the National Defense Commission; That the third condition, associated with his release after his prosecution, reads as follows: *“Prohibition from making any statement tending to call into question the results of the last presidential election of February 22, 2020; That since April 24, 2020, the Applicant has lost any freedom to express himself on the February 22, 2020 presidential election, an important political event in the political life of Togo, which concerns all Togolese citizens, and even more so the Applicant as a politician engaged, with full legitimacy, in the competition for power; Moreover, the third condition attached to the Applicant’s release after his indictment prevents him from exercising his right to compensation, insofar as he is considered to be the person who won the February 22, 2020 elections, thus holding legitimacy even if the results officially proclaimed by the Constitutional Court would deprive him of legality.*

185. The Applicant concluded that the State of Togo, through the dean of investigative judges of the Lomé First Class Court of First Instance, by imposing on the Applicant the third condition attached to his release, violated his right to freedom of expression, which includes freedom of opinion and freedom of political engagement, as well as his right to compensation.

186. The Respondent, in turn, submitted that in fact, when the Applicant was accused by the Dean of Investigating Judges of the Lomé First Class Court

of First Instance, the Applicant was released under certain conditions; that it is apparent from the provisions of the Code of Criminal Procedure, namely Articles 112 to 124, that any accused person may be granted simple or conditional provisional release; that in the exercise of his legal prerogatives, the Dean of Investigating Judges released the Applicant provisionally with certain conditions, including a prohibition on making any statement calling into question the last presidential elections of February 22, 2020; that it is this prohibition that the Applicant considers contrary to his freedom of expression; that, in reality, this prohibition was not a prohibition on expressing himself but on announcing acts that would violate the established constitutional order; that after his release on parole, the Applicant continued to make statements on the subject on social media without any concern.

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187. The right to freedom of expression is guaranteed by Article 9 of the African Charter, which states that:

*“1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.”*

188. Similar consecration is found in law in Articles 19 of the UDHR and 19 of the ICCPR.

189. Freedom of expression is a basic human right, vital to an individual's personal development and political awareness and to his contribution in the government of his country's public affairs. According to the African Charter, this right includes the right to receive information and to express one's opinion.

190. The norm of Article 9 of the African Charter, with regard to freedom of expression, contains a clause that refers the exercise of this right to the legal system of the States Parties, by stipulating that the exercise of the right must occur “*in accordance with the law*”.

191. This means that the right to freedom of expression is not absolute and it is up to the Member State to define the conditions for its exercise.

192. From the analysis combined with the norm of Article 27 (2) of the African Charter, it follows that the right to freedom of opinion and expression should be exercised within the framework of the law and with due respect for the rights of others, collective security, morality and common interest.

193. This Court underlined in the case *FEDERATION OF AFRICAN JOURNALISTS AND OTHERS v. REPUBLIC OF THE GAMBIA*, Judgment No. ECW/CCJ/JUD/04/18, of February 13, 2018, p. 32, that: “*Freedom of expression is a fundamental human right and full enjoyment of this right is central to achieving individual freedoms and to developing democracy. It is not only the cornerstone of democracy, but indispensable to thriving civil society.*” (See also the African Court in the case *INGABIRE VICTOIRE UMUHOZA v. REPUBLIC OF RWANDA*, Application No. 0003/2014, of November 24, 2017, §132 and 133).

194. The Human Rights Committee, in its Comment No. 34 Article 19 on freedom of opinion and expression, noted that Article 19 (2) requires that: “*States parties to guarantee the right to freedom of expression including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission*

to others ... ”(Paragraph 11); that paragraph 2 “protects all forms of expression and the means of their dissemination.” And that the exercise of the right to freedom of expression entails special duties and responsibilities and therefore, “two limitative areas of restrictions on the right are permitted which may report either to respect of the rights or reputations of others or to the protection of national security or of public order (order public) or of public health or morals.” (paragraph 21)

195. It also underlined that the No. 3 of the Article 19 (3) sets out the specific conditions under which restrictions must be imposed. That is: “*the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3. And they must conform to the strict tests of necessity and proportionality*” (paragraph 22).

196. And it highlighted, however, that when the State party imposes certain restrictions on the exercise of freedom of expression, such restrictions should not undermine the right itself (paragraph 21).

197. Thus the African wrote Commission in its Communication No. 140/94-141/94-145/95, *CONSTITUTIONAL RIGHTS PROJECT, CIVIL LIBERTIES ORGANISATION AND MEDIA RIGHTS AGENDA/NIGERIA*: “*In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27.2, that is, that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interest”. The justification of limitations must be strictly proportionate with and absolutely*

necessary for the advantages, which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.”

198. Also, the African Commission, in its Declaration of Principles of Freedom of Expression and Access to Information in Africa, adopted at its 65th Ordinary Session, held from 21 October to 10 November 2019, in Banjul, Gambia, and which replaced the previous Declaration of 2002, established, as Principle 9, the conditions for a justifiable limitation of the exercise of the right to freedom of expression and access to information, prescribing the following:

“1. States may only limit the exercise of the, if the limitation:

a. is prescribed by law;

b. serve a legitimate aim; and

c. is a necessary and proportionate means to achieve the stated aim in a democratic society.

2. States shall ensure that any law limiting the rights to freedom of expression and access to information:

a. is clear, precise, accessible and foreseeable;

b. is overseen by an independent body in a manner that is not arbitrary or discriminatory; and

c. effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.

3. A limitation shall serves a legitimate aim where the objective of the limitation is:

a. to preserve respect for the rights or reputations of others; or

b. to protect national security, public order or public health.

4. *To be necessary and proportionate, the limitation shall:*

a. originate from a pressing and substantial need that is relevant and sufficient

b. have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanctions authorized.”

199. This Court wrote in the same vein in the case *ILLIA MALAM MAMANE SAIDAT v. REPUBLIC OF NIGER*, Judgment No. ECW/CCJ/JUD/17/2021 of June 22, 2021, paras. 77 to 90).

200. However, the burden is on the authorities to justify any restrictions (See *GRYB v. BELARUS* (CCPR/C/103/D/1316/2004), §13.4.), since those must be able to demonstrate that the restrictions meet the requirements of legality, necessity and are proportional. Wherever this burden is not met, this right is violated. (See Human Rights Committee, General Comment No. 37, §36; *CHEBOTAREVA v. RUSSIAN FEDERATION* (CCPR/C/104/D/1866/2009), §9.3 and African Commission, *MALAWI AFRICAN ASSOCIATION AND OTHERS v. MAURITANIA*, Comm 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000), §111)

201. In the instant case, the Respondent admits that the Applicant after having been arrested for disobedience for failing to comply with the summons to appear before the investigating judge, was released subject to certain restrictions; that it is apparent from the provisions of the Code of Criminal Procedure, namely Articles 112 to 124, that any accused person may be granted simple or conditional provisional release; that it was in the exercise of his legal prerogatives that the Dean of Investigating Judges

released the Applicant on parole, with certain restrictions, including among these, *a prohibition on making any statement that calls into question the last presidential elections of February 22, 2020.*

202. One cannot refuse that imposing, on a personage of political life, who has held positions of primary responsibility at the state level - Prime Minister, Speaker of the National Assembly and continues to play an active role at the political level, first, as President of a political party, duly constituted, then, as a Member of Parliament in the National Assembly and Chairman of the National Defense Commission, *the ban on making any statement calling into question the last presidential election of February 22, 2020,* is in fact a way of gagging a politician by restricting the exercise of his freedom of expression, guaranteed by Article 9 of the African Charter.

203. However, it must be verified whether such restriction meets the legality requirements of necessity and proportionality.

In terms of legality

204. The Respondent claims that it follows from the provisions of the Code of Criminal Procedure, namely Articles 112 to 124, that any accused person may be granted simple or conditional provisional release;

205. Indeed, Article 119 of the cited Code of Criminal Procedure states that: *“Dans tous les cas où elle n’est pas de droit la mise en liberté peut être subordonnée à des obligations particulières fixées par le juge telles que:*

1- le versement d’un cautionnement destiné à garantir le paiement des réparations civiles et des frais de justice ou la représentation de l’inculpé.

2- l’obligation de résider dans un lieu déterminé,

3- l’interdiction de fréquenter certains lieux ou certains établissements.

4- l’exercice d’un travail régulier,

- 5- *l'obligation de suivre un traitement médical ou une cure de désintoxication,*
- 6- *la suspension provisoire du droit de conduire un véhicule à moteur,*
- 7- *la suspension provisoire d'un permis de chasse ou d'un permis de port d'arme."*

206. Taking a look at Articles 112 to 124, one does not find in any of them a provision that allows the investigating judge, on a provisional release, to impose a specific obligation or prohibition on an accused in the sense of restricting his freedom of expression.

207. Therefore, the Court found that the Respondent fails to demonstrate the legality of the obligation imposed on the Applicant.

208. And failing to demonstrate such requirement, the need to demonstrate the other requirements is prejudiced, insofar as such failure is sufficient to establish the illegality of the restriction imposed on the exercise of the right in question.

209. Still it should be recalled that the restriction on the exercise of freedom of expression must not jeopardize the right itself and that the general limitation clause in Article 27(2) of the Charter requires that "*The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*"

210. As the African Court underlined in the case *ISSA KONOTÉ V. BURKINA FASO, Application No. 004/2013*: restrictions on freedom of expression can be imposed to safeguard the rights of others, national security, public order, public morals and health (see paragraph 128).

211. Therefore, restrictions on the exercise of the right to freedom of expression can only be based on the reasons provided for in Articles 27 (2) of the Charter and 19 (3) of the ICCPR, which were not established herein.

212. In other words, the Respondent, on whom the burden falls, has failed to prove to what extent the restriction imposed on the Applicant's right to freedom of expression meets the requirements of legality, necessity and proportionality as required by the aforementioned legal provisions. (See the cited case *ILLIA MALAM MAMANE SAIDAT v. REPUBLIC OF NIGER*, paras. 127 and 128).

213. Accordingly, the Court finds that the Respondent violated the Applicant's right to freedom of expression guaranteed by Articles 9(2) of the African Charter, 19 of the UDHR and 19 of the ICCPR.

4. The arbitrariness of the Applicant's arrest and detention in the premises of the Criminal Intelligence and Investigation Service, in violation of the provisions in Article 9(2) of the ICCPR, Article 9 of the UDHR and Article 6, *in fine*, of the Charter

214. The Applicant alleged that he was arrested at his home, under circumstances of unprecedented violence and brutality, while he did not put up any resistance to his arrest, the law and order enforcement agents and security did not immediately notify him of any charges. In effect, he was arrested and taken to the SCRIC facility, without being informed of the reasons for his arrest;

215. Even during his hearing, which began around 10:00 a.m. on April 21, 2020, it was at 3:15 p.m. that the investigators notified him of the charges, which was the subject of an observation by one of his lawyers, who, incidentally, requested that his observation be entered into the records, which was not submitted for the Applicant's signature until the afternoon of

Thursday, April 23, 2020, whereas, his hearing ended the day before, around 4:30 p.m., with all due reservations;

216. By failing to notify the Applicant of the charges brought against him without delay upon his arrest at his home, the investigators failed to comply with a substantial constitutional formality which renders his arrest arbitrary and, therefore, his detention at the investigators' premises also arbitrary.

217. The Respondent, on its turn, claimed that in fact, following the requisitions of the Federal Attorney, the judicial authority responsible for criminal prosecution in accordance with the Code of Criminal Procedure, the Central Bureau for Criminal Research and Investigations invited the Applicant to appear on three (3) consecutive occasions, but the latter did not deign to appear, which constitutes disobedience to judicial authority; that it was following this refusal that the Central Bureau of Investigation and Criminal Investigations proceeded to arrest the Applicant in order to further investigate the facts of aggravated disturbance of public order, violation of the internal security of the State and dissemination of false news of which he was accused, in accordance with the requisitions of the Federal Attorney that the Applicant was heard, kept in police custody in accordance with the Code of Criminal Procedure and was presented to the Public Prosecutor, who opened a judicial information with the Dean of Investigating Judges, who in turn charged him with aggravated disturbance of public order, violation of the internal security of the State and dissemination of false news, offenses provided for and punishable by Article 495 (3), Articles 497, 663 and 664 of the Togolese Criminal Code; that it is apparent from all the foregoing that it was on the basis of the judicial proceedings that the Applicant was arrested and charged with various offenses and placed on probation; that given the

existence of the judicial proceedings, it is clear that the Applicant's arrest is not arbitrary; that the plea should be dismissed.

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218. Article 9 of the UDHR establishes that: "*No one shall be subjected to arbitrary arrest, detention or exile.*"

219. Article 9 (2) It provides in of the ICCPR that: "*Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*"

220. Also the African Charter in its Article 6, *in fine*, provides that: "*(...) In particular, no one may be arbitrarily arrested or detained.*"

221. Article 9 of the ICCPR recognizes and protects both the liberty of the person and the security of the person. The Universal Declaration of Human Rights Article 3 proclaims that everyone has the right to life, liberty, and personal security. This is the first substantive right protected by the Universal Declaration, which indicates the profound importance of Article 9 of the Covenant for both individuals and society as a whole.

222. The provisions of Article 9 (1 and 2) of the Covenant and those of Article 6 of the African Charter apply in principle to any form of arrest or detention decided and carried out by a public authority, whatever its legal basis and whatever the objective to be pursued (See International Court Of Justice, *AHMADOU SADIO DIALLO, (REPUBLIC OF GUINEA V. DEMOCRATIC REPUBLIC OF THE CONGO)*, Judgment of 30 November 2010, p.10).

223. The cited Article 9 (2) imposes two requirements for the benefit of persons deprived of liberty. First, they must be informed, at the time of arrest, of the reasons for detention. Second, they must be promptly informed of any charges against them. The first requirement applies broadly to the reasons

for any deprivation of liberty. The second additional requirement applies only to information about criminal charges (*See Human Rights Committee, General Comment No. 34 §24*).

224. One of the main purposes of requiring that all persons arrested be informed of the reasons for arrest is to allow them to seek release if they believe the reasons given are invalid or unfounded. The reasons should include not only the general legal basis for the arrest, but also sufficient factual details to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim. The “reasons” concern the official basis for the arrest, not the subjective motivations of the police officer who made the arrest. This information should be provided immediately after the arrest. However, in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be necessary for an interpreter to be present, but this delay should be kept to an absolute minimum. (*See Human Rights Committee, General Comment No. 32 §25 e 27*).

225. The second requirement in paragraph 2 concerns the notification of criminal charges. Persons detained for the purpose of investigating crimes they might have committed or for the purpose of detention for criminal trial shall be promptly informed of the crimes of which they are suspected or accused of. (*See Human Rights Committee, General Comment No. 32 §29*).

226. Paragraph 2 requires that the arrested person be “promptly” informed of any charges, not necessarily “at the time of arrest”. If there are already specific charges, the arresting officer can inform the person of the reasons for the arrest and the charges, or the authorities can explain the legal basis for the arrest a few hours later. The requirement for notice of charges under paragraph 2 serves to facilitate the determination of whether provisional detention is appropriate, and therefore paragraph 2 does not require that the

arrested person receive as much detail about the charges as would be needed later to prepare for trial. (See Human Rights Committee, General Comment No. 34 §30, 32, §31).

227. As to the Applicant's allegation that he was arrested at his home on April 21, 2020 and detained at the Criminal Intelligence and Investigation Service (SCRIC) premises without being informed of the reasons for his arrest; that even during his hearing, which began at around 10:00 a.m. on April 21, 2020, it was at 3:15 p.m. that the investigators notified him of the charges, the Court notes that the Respondent has not disputed such claims.

228. The Court further notes that no explanation was provided to the Applicant about the reasons for his detention, that he was notified of the indictment only after 6 hours, after the start of the hearing of the Applicant and the Respondent did not provide any reason to justify such delay.

229. The Respondent has only admitted that following the requisitions of the Federal Attorney, the Central Bureau of Investigations and Criminal Investigations invited the Applicant to appear on three (3) consecutive occasions, but the latter did not deign to appear, which constitutes disobedience to judicial authority; that it was following this refusal that the Central Bureau of Investigation and Criminal Investigations proceeded to arrest the Applicant in order to further investigate the facts of aggravated disturbance of public order, violation of the internal security of the State and dissemination of false news of which he was accused, in accordance with the requisitions of the Federal Attorney.

230. As can be seen, the Respondent has neither claimed nor proven that it notified the Applicant of the facts leading to his detention at the beginning of his hearing, and the Applicant was heard for more than 6 hours without knowing the reason for his detention. (See Human Rights Committee,

ESSONO MIKA MIHA v. EQUATORIAL GUINEA, Comm. No. 414/1990, para. 6.5; *PAUL KELLY v. JAMAICA*, Comm. No. 253/1987, para. 5.8).

231. Based on the information presented, the Court finds that the Respondent violated the Applicant's right to liberty and security guaranteed by Articles 6, *in fine*, of the African Charter, 9, paragraph 2 of the ICCPR, and 9 of the UDHR.

XII – REPARATION

232. The Applicant seeks to be compensated in the symbolic amount of 01 CFA franc for the damage he suffered.

233. The Respondent said nothing in connection with this relief sought.

234. In the instant case, it was established that the Respondent State, through its agents, violated the Applicant's rights to freedom of opinion liberty and security, which grants the Applicant the right to reparation, according to the principle of international law, which establishes that “*everyone who is a victim of a violation of his human rights has the right to fair and equitable redress*”, whereas in terms 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)).

235. Now, considering the seriousness of the violated rights and their consequences for the Applicant, making a global and equitable assessment, the Court attributes to the Applicant, as compensation for immaterial damages that he suffered in the amount of 1 (one) FCFA, as he claims.

XIV. COSTS

236. The Applicant sought that the Respondent be ordered to pay the costs.

237. The Respondent, in turn, seeks from the Court to order the Applicant to bear the costs of the proceedings.

238. Article 66 (1) of the Court's Rules of Procedure provides that “*A decision as to costs shall be given in the final judgment or in the order, which closes the proceedings.*”

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

240. 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.

XV. OPERATIVE CLAUSE

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

As to jurisdiction:

i. The Court declares it entertains jurisdiction;

As to admissibility:

ii. Declares that the application is admissible.

As to merit:

iii. Declares **as established** the violation of the Applicant’s right to freedom of expression by the Respondent provided for in Articles 9 of the African Charter, 19 of the (UDHR) and 19 of the ICCPR.

iv. Declares that the Respondent's arrest and detention by the Respondent was arbitrary and illegal under Articles 6 of the African Charter, 9 (1) of the ICCPR, 3 and 9 of the UDHR.

vi. Declares the remaining form of order sought by the applicant as unfounded.

AS TO REPARATION

vii. Orders the Respondent to pay the Applicant the amount one (1) FCFA as reparation for immaterial damages suffered for the violation of his rights.

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.

XVII. COMPLIANCE AND REPORTING

ix. 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.

Signed by:

Hon. Justice Dupe ATOKI – Presiding _____

Hon. Justice Keikura BANGURA – Member _____

Hon. Justice Januária T.S.M. COSTA - Member/Rapporteur _____

Assisted by:

Mr. Tony Anene MAIDOH-Chief Registrar _____

242.Done in Accra, on the 24th day of March 2022, in Portuguese and translated into French and English.