COMMUNITY COURT OF JUSTICE, ECOWAS

(2016)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

COMMUNITY COURT OF JUSTICE, ECOWAS

(2016)

COMMUNITY COURT OF JUSTICE, ECOWAS

LAW REPORT

To be Cited as : (2016) CCJELR

2016
COMMUNITY COURT OF JUSTICE, ECOWAS
LAW REPORT

(2016 CCJELR)

Abuja, March 2023

Published by
COMMUNITY COURT OF JUSTICE, ECOWAS
ABUJA, NIGERIA

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

website: courtecowas.org

ISBN - 978-978-55680-4-2

Table of Contents

JUDGES OF THE COURT (2016)

(1) HON. JUSTICE MARIA DO CEU SILVA MONTEIRO

(2) HON. JUSTICE FRIDAY CHIJIOKE NWOKE

(3) HON. JUSTICE HAMÈYE FOUNÉ MAHALMADANE

(4) HON. JUSTICE MICAH WILKINS WRIGHT

(5) HON. JUSTICE JÉRÔME TRAORÉ

(6) HON. JUSTICE YAYA BOIRO

(7) HON. JUSTICE ALIOUNE SALL

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

EDITORIAL BOARD FOR THE ECOWAS LAW REPORT

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN IN ABUJA, NIGERIA

THIS 16TH DAY OF FEBRUARY, 2016

SUIT NO: ECW/CCJ/APP/25/14
JUDGMENT NO: ECW/CCJ/JUD/01/16

BETWEEN
ABOUZI PILAKIWE & 183 ORS - *PLAINTIFFS*

VS.
1. REPUBLIC OF TOGO
2. OFFICE TOGOLAIS DES RECETTES (OTR) *DEFENDANTS*
(TOGOLESE TAX REVENUE OFFICE)

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **JIL BENOÎT KOSSI AFANGBEDJI (ESQ.)**
- FOR THE PLAINTIFFS

2. **TCHITCHAO TCHALIM, (ESQ.)** *AND*
EDAH ABBY NDJELLÉ (ESQ.) *- FOR THE DEFENDANTS*

Human rights violation - Jurisdiction - Administrative Authority - Redeployment - Refusal - Inadmissibility - Article 66 Rules of the Court - Costs.

SUMMARY OF FACTS

By adoption of the law N°. 2012-016 establishing the Togo Revenue Agency (OTR), the Republic of Togo decided to merge the customs and tax administration into a single entity proceeding, also the appointment of the Commissioner General of the new institution.

That insurance would have been given by the Minister of Economy and Finance to the main officers and collaborators at the start of activities, they would be made available to the Ministry of Public Service, with the mission of redeploying them to the different departments of the Togolese administration.

That the Applicants were notified to this effect on 25 September 2014 of the acts taken by the Minister of Public Service to redeploy them to the various departments of the Togolese administration, and not in the staff of the Togo Revenue Office (OTR).

The Applicants, therefore, complain that the respondent State and the new institution (OTR) infringed their rights by refusing to redeploy them to the OTR, bringing the matter before the Community Court of Justice, ECOWAS an application for this purpose on 12 October 2014, which was also subjected to the expedited procedure.

ISSUES FOR DETERMINATION

- *Whether refusal of the respondent State to redeploy the Applicants within the new institution constitutes a violation of their rights?*

- *Whether the decision of the respondent State to redeploy only part of the staff according to specific criteria defined by the administrative authority constitutes a violation of the Applicants' rights and dignity?*

DECISION OF THE COURT

The Court held that:

- *The refusal of the Republic of Togo to redeploy the Applicants to the new institution does not constitute a violation of human rights and the violation of the right to work;*

- *No violation of the right to dignity, cruel, inhuman or degrading treatment can be upheld against the respondent State.*

JUDGMENT OF THE COURT

I - The Parties and their representation

1. The application initiating the proceedings before the Court was filed at the Court Registry on 21 October, 2014 by Mr. Abouzi Pilakiwè and 183 others, all represented by Mr. Jil Benoît Kossi Afangbedji, a lawyer registered at the bar of Lomé (Togo).

2. The Defendants, according to the terms of the application, are the *Office Togolais des Recettes (OTR)*, represented by Maître Tchitchao Tchalim, lawyer registered at the bar of Lomé (Togo) and the State of Togo, represented by Maître Edah Abby Ndjellé, also a lawyer registered at the bar of Lomé (Togo).

II - Presentation of the facts and the procedure

3. It follows from the statements in the application initiating the proceedings and the documents in the file that on 14 December 2012, the Republic of Togo adopted Law No. 2012-016 on the creation of a public administrative establishment called the "*Office Togolais des Recettes*" (OTR), which was to combine the administration of the Customs and that of the Taxes and Domains into a single entity.

4. After the appointment of the Commissioner General of the OTR and his main collaborators, the Minister of Economy and Finance visited the tax department to inform the staff of the effective take-off of the activities of the new institution.

5. On this occasion, the Minister gave an assurance that no customs and tax officers would be dismissed during the implementation phase of the reform, but the Applicants were surprised to learn later that the decision had been taken not to transfer them as staff of the new institution. It is in this context that they received, on 25 September 2014, notification of the actions taken by the Minister of Public Service to redeploy them in different departments of the Togolese administration.

6. Believing that their rights were violated in this way, the Applicants set up a "Crisis Committee of Customs and Tax Officers", which addressed various letters to the Togolese authorities, drawing their attention to the said violations: President of the Republic, Prime Minister, Speaker of the National Assembly, Minister of the Civil Service, President of the Constitutional Court, President of the National Human Rights Commission. Believing that their case was denied, these customs and tax officials then referred the matter to the ECOWAS Court of Justice on 21 October 2014. On the same day, an application for expedited procedure was also filed.

7. On 12 November 2015, the Court, by order, dismissed an application for an extension of time filed by the Applicants, to respond to written submissions filed by the OTR. The order is based on the fact that the Applicants have largely responded to the findings of the Office, and that the need for further written submissions was not demonstrated.

III Arguments of the parties

8. **The Applicants**, Mr Abouzi Pilakiwè and 183 others, who consider that they were unjustly evicted from their jobs, consider that the treatment reserved for them during the establishment of the OTR is characteristic of the authorities' desire to trample on their dignity and to subject them to cruel and degrading treatment, in particular through the publication on the OTR's information website of the list of persons "redeployed" and the "body search" carried out on some of them during meetings with the Togolese authorities. Finally, the Applicants highlighted the specific case of one of them, named Dozen Adado Kokou, who died today, and whose death they attributed to the announcement that he would no longer be a member of the OTR staff.

9. For all these alleged losses, the Applicants request the Court to order the State of Togo and the OTR to pay them the sum of one hundred million (100,000,000) CFA francs in compensation and to allocate to the beneficiaries of Dozen Adado Kokou the sum of one billion five hundred million (1,500,000,000) CFA francs.

10. In addition, in a *Reply* filed at the Court Registry on 28 January 2015, the Applicants invoked the late filing of the pleadings by the State of Togo, and asked the Court to grant them the benefit of their submissions in accordance with Article 90(1) of the Rules of Court.

11. The Republic of Togo considered that the substance of the case is that the rules of the game, the ins and outs of the establishment of the RTO, were clearly defined from the outset. It was specified in Ministerial Circular No. 0206/MEF/CAB/SP of 7 April 2014 that reversion to OTR staff was subject to very specific conditions but that any staff member who was not reversed would be placed at the disposal of the Ministry of the Civil Service, would keep their benefits and salary and would not be deprived of employment.

12. The Republic of Togo also contested the vexatious nature of the "body searches" carried out on the staff before the meeting with the authorities, as such a practice, carried out with respect for individuals, was above all a matter of security. The State of Togo also challenged the connection, established by the Applicants, between the death of Dozen Adado Kokou and his being placed at the disposal of the Ministry of the Civil Service, as no such connection was established by the doctors. In conclusion, the Court is therefore requested to dismiss all the Applicants' claims

13. For its part, **the OTR** noted in its defence that the process of setting up the new institution was, from start to finish and in all its aspects, perfectly transparent. In particular, the conditions for transferring to the staff of the new RTO were very clearly determined. The information published on the website of the Office was also not of a derogatory or even confidential nature and was provided by the agents themselves. Finally, according to the OTR, the connection between the death of agent Dozen Adado Kokou and his employment status was not established. The Office concluded that the application before the Court was unfounded and requested the Court to dismiss the Applicants' claims.

14. In a *Defence in limine litis* filed on 23 December 2014 at the Registry of the Court, the OTR requested the inadmissibility of the application insofar as it referred to it as a Defendant. For this, he cited Article 4 of the 2005 Supplementary Protocol on the Court and Article 4 of the Code of Civil Procedure of Togo.

IV. Analysis of the Court

15. **As regards to the formal presentation,** the Court considers that it must reply to three questions raised by the Applicants.

16. The first relates to the application for an expedited procedure. This was indeed filed with the Registry of the Court on 21 October 2014. However, the Court was unable to act on it because at the time it was filed it was not yet operational for reasons obviously beyond its control. Without pronouncing on the merits of such an application, it simply noted that this application no longer had any purpose since it was ruling on the merits of the case in the present decision.

17. The second issue, also raised by the Applicants, concerns the allegedly late filing of the reply by the State of Togo. On this point, it is appropriate to recall the relevant provisions of the Rules of Court, which are:

    - **Article 35 §1:** *"Within one month after service on him of the application, the Defendant shall lodge a defence;* and
    - **Article 90 §1:** *"If a Defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the Applicant may apply for judgment by default.".*

18. The Court noted in this regard that, in response to an application filed on 21 October 2014, the State of Togo did not file its statement of case until 8 January 2015, *i.e.* almost two and a half months later. In addition, there is no mention in the file of an application for an extension of the time limit for replying, formulated by the respondent State. In

these circumstances, the Court must, in accordance with its established case law, declare the reply inadmissible and declare the State of Togo in default (see Judgment ***"Mamadou Moustapha aka Kakali v. State of Niger"***, December 1 2015, p.5).

19. The third and final issue to be decided by the Court concerns the standing of the *Office Togolais des Recettes* as Defendant. Indeed, in pleadings filed on 23 December 2014, the latter requested the Court to declare the application initiating proceedings inadmissible insofar as it refers to it as Defendant.

20. On this point, the Court must point out that the rules which it applies in the context of litigation concerning violations of human rights - the litigation in question in the present case - remain rules of public international law, resulting in particular from international conventions signed by the States and binding on them. It follows that there can be no mention, in court, of violations committed by entities other than States. The Court does not of course dispute that such violations are likely to be committed by persons who are not strictly confused with the State, but it considers that, formally and principally, only those States can be summoned to answer for a responsibility conferred by international instruments. This is its constant jurisprudence.

21. Thus, it stated in the judgment of 11 June 2010, ***"Peter David"***: *"The international regime of human rights protection before international bodies relies essentially on treaties to which States are parties as the principal subjects of international law"*, and then in the judgment of 8 November 2010, ***"Mamadou Tandja v. Republic of Niger"***: *"It is a generally accepted principle that proceedings for violations of human rights are directed against States (...). Indeed, the obligation to observe and protect human rights is incumbent on States"* (§18.1); finally, in the Judgment of 24 April 2015, *"**Bodjona v. Republic of Togo"***, the Court *"will therefore refer exclusively to norms of international law, norms which are in principle binding on the States which have **subscribed** to them"* (§37).

22. In these circumstances, the Court can only award the OTR the benefit of its claim, and therefore declare it not liable in the present case.

On the merits:

23. The Court must first make it clear that neither the dismissal of the OTR, nor the failure of the State of Togo to act, should alter or call into question its obligation to examine fully the merits of the Applicants' claims. This is a compelling and invariable obligation, which does not depend on the number of Defendants or even on the existence of a single Defendant.

24. In this regard, the Court cannot accept the argument that the State's refusal to redeploy the Applicants within the Office *Togolais des Recettes* constitutes in itself a violation of their rights. The mere fact that the State took the decision to redeploy part of the staff, chosen according to criteria defined by the administrative authority and whose objective nature was never questioned, could not, in the view of the Court, constitute an infringement of the right to work of the persons concerned, nor, obviously, a violation of their right to dignity. The Court also noted that the restructuring of the staff concerned did not result in any loss of jobs or any loss of benefits. The employing state has the right to decide on the appropriateness of assigning its employees to new tasks, as long as these changes do not constitute a breach of their rights. In the case submitted to the Court, there is no acquired right to occupy given functions.

25. Similarly, it is difficult to understand to what extent the mere dissemination of strictly professional information on the OTR website could undermine the dignity and honour of the workers concerned. As for the practice of "body search" which the Applicants complained, the Court is of the opinion that it is not necessarily part of a vexatious approach, and that it is wrongly presented as being systematically based on malicious intent.

26. It is by virtue of the same evidential requirement that the Court **must** reject the argument that Dozen Adado Kokou died following his redeployment to the Ministry of the Public Service. Indeed, no evidence of such an allegation is reported. The medical certificate submitted to the court does indicate the cause of death ("*cardiorespiratory arrest, coma AVC"...),* but it in no way correlates this death with any state of shock resulting from the professional transfer of the deceased. This document is therefore somewhat misleadingly presented as evidence that it was the authorities' decisions that led to the death of the officer in question.

27. For all these reasons, the Court must conclude that the State of Togo cannot be held liable for any cruel, inhuman or degrading treatment, and that the allegations made by the Applicants should be rejected on this point.

As to costs

28. The Court therefore considers it logical that the Applicants should bear the costs in accordance with Article 66 of the Rules of Court.

FOR THESE REASONS:

The Court, ruling publicly, adversarially with regard to the *Office Togolais des Recettes* and by default with regard to the Republic of Togo, in matters of human rights violations, in first and last resort,

As to Formal Presentation

- **Declares** itself competent to adjudicate on the case;

- **Holds** that the application for expedited procedure filed by the Applicants is no longer relevant;

- **Declares** inadmissible the defence filed by the Republic of Togo on 8 January 2015;

- **Declares** the *Office Togolais des Recettes* (OTR) not involved in the present case;

As to the Merit

- **Holds** that no violation of human rights can be attributed to the Republic of Togo;

- Consequently, **dismisses** the Applicants of their claims;

- **Orders** the Applicants to bear the costs.

Thus done, adjudged and pronounced publicly by the ECOWAS Court of Justice in Abuja, the ay, month and year mentioned above.

And the following append their signature:

1. **Hon. Justice Jérôme TRAORÉ -** *Presiding.*
2. **Hon. Justice Yaya BOIRO -** *Member.*
3. **Hon. Justice Alioune SALL -** *Member.*

Assisted By:

Abuobacar Djibo DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON THE 16TH DAY OF FEBRUARY, 2016

SUIT N°: ECW/CCJ/APP/01/15
JUDGMENT N°: ECW/CCJ/JUD/02/16

BETWEEN
KONSO KOKOU PAROUNAM - *PLAINTIFF*

VS
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **CLAUDE KOKOU AMEGAN (ESQ.)** - *FOR THE PLAINTIFF*
2. **TCHITCHAO TCHALIM (ESQ.)** - *FOR THE DEFENDANT*

Human rights violations - Torture - Arbitrary detention

SUMMARY OF FACTS

By an Application dated 8 January 2005, Mr. Konso Kokou Parounam, filed before the ECOWAS Court of Justice for violation of Articles 1 and 2 of the Constitution of Togo, 4 and 5 of the African Charter on Human and Peoples' Rights, 9 of the 1966 Covenant on Civil and Political Rights and provisions of the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1983 by the Republic of Togo.

Mr. Konso Kokou was in charge of the arms store at the armoured regiment of reconnaissance and support of the Togolese army. He was arrested following the disappearance of an automatic pistol found during the handover ceremony with his successor following his transfer.

Mr. Konso was taken to the National Intelligence Agency where he was questioned about his relationship with Colonel Roch Gnassingbé and the events of 12 April 2009. He was then handcuffed against a bed, forced to lie on his back in one position for several days, deprived of food and forbidden visit. During all this time, he was forbidden visitors. The Applicant seeks the Court's conviction of the Republic of Togo for torture and arbitrary detention.

The Republic of Togo asserted that, contrary to the allegations made by the Applicant, the interrogation lasted only four days and that the facts found against the Applicant were considered as constituting breaches of the general duties of the military, repressed by the General Regulations on the Discipline of Armed Forces, and, secondly, by Articles 66, 82, 83 and 85 of Law No. 2007-010 of 1 March, 2007 on the general status of military personnel. The Republic of Togo asked the Court to declare the application unfounded.

ISSUES FOR DETERMINATION

- *Whether the treatment suffered by Mr. Konso Kokou at the National Intelligence Agency constitutes acts of torture?*

- *Whether Konso Kokou's detention is arbitrary?*

DECISION OF THE COURT

As regards the acts of torture, the Court observed that the Applicant did not provide any evidence in support of his allegations.

On the arbitrary detention, the Court observed that the detention of the Applicant exceeded 45 days retained by the military hierarchy. It appeared evident that it is abusive in the sense that the Republic of Togo did not provide any evidence to justify that the gendarmerie could, on the basis of a mere suspicion of an offence, keep a person on its premises for several months before resolving to present him before a judge.

As to merits

The Court ***held*** *that no act of torture, cruel, inhuman or degrading treatment can be taken against the Republic of Togo.*

The Court ***declared*** *that the detention of Mr. Konso Kokou Paronam was arbitrary.*

The Court ***ordered*** *Togo to pay the Applicant 8,000,000 FCFA in compensation for the damage suffered.*

Ordered *the Republic of Togo to bear the entire cost.*

JUDGMENT OF THE COURT

I. PARTIES AND THEIR REPRESENTATION

1. The instant case before the Court was filed at the Registry of the Court on 8 January 2015 by Mr. Konso Kokou Parounam, former Adjutant in the Togolese Armed Forces, who is represented by Maître Claude Kokou Amegan, Lawyer registered with the Bar in Lomé (Togo).

2. The Defendant, which is the State of Togo, is represented by Maître Tchitchao Tchalim, Lawyer registered with the Bar in Lomé (Togo).

II. PRESENTATION OF FACTS AND PROCEDURE

3. Plaintiff/Applicant, Mr. Konso Kokou Parounam, claims that he served in the Togolese Army, and was in post at the Armed Forces' Ammunitions Store, at the *Régiment Blindé de Reconnaissance et d'Appui*, (Armoured Regiment for Reconnaissance and Support) at the Headquarters of the Armed Forces. On 28 July 2009, he was transferred from that post and was made the *Chef de peloton* (Head of Squad) within the same Unit in the Togolese Airforce.

4. After official handing over to his successor, he was summoned on 14 December 2009, by the Head of his Corps, who questioned him about the disappearance of an automatic rifle of the mark «Herstal» and one silencer submachine gun. Despite his explanations seeking to make his interrogator understand that the silencer submachine gun under reference was not among the official equipment in the Armoury of the Regiment, but rather a belonging of Colonel Roch Gnassingbé, who obtained it from his late father General Gnassingbé Eyadéma for training, he was transferred to the *Agence nationale de Renseignement* (State Security Service) for questioning.

5. Plaintiff/Applicant avers that much of the interrogation was, not on the state of the disappeared ammunitions, but on the type of relationship between himself and Colonel Roch Gnassingbé, and the events that occurred on 12 April 2009, during which the home of Kpatcha

Gnassingbé came under attack; he added that the said interrogation was conducted by a Captain and a Commandant, on the instructions of a Lieutenant-Colonel of the Army.

6. Plaintiff/Applicant declares that after the interrogation, he was taken into a cell, where he was handcuffed to a bed, as he was constrained to sleep on his back, and in the same position for several days, deprived of food and was not allowed to receive visitors. During this period, he was severally beaten.

7. Plaintiff claims he was thereafter transferred back to his Regiment, and was put on close arrest at his arrival, upon the instructions of the leader of his corps. He equally claims that after, he was also put under close arrest in his Unit, from 21 December 2009 to 7 February 2011, the date on which the men of the Gendarmerie came to whisk him away to their Office, the *Service de Recherches et d'Investigation* (SRI). There, he claims that he was thoroughly beaten, each time he declared that he had never used the lost arms, to defend Mr. Kpatcha Gnassingbé's home.

8. On 1st August 2011, he was admitted at the Military Infirmary, for treatment, before he was presented, four days later, before an investigating judge, who issued a committal order against him, at the *prison civile* of Lomé.

9. Thereafter, he was made to appear, six times before the examining court, without the Headquarters of the Armed Forces being represented. After sixteen months of incarceration at the *prison civile*, he was returned to the **SRI** and was kept, afresh, for one week before being taken back to **prison**. He could only be released on 16 December 2011, without trial, and without being allowed to draw his retirement benefits, as was promised him, by his superiors.

10. Plaintiff/Applicant claims he is still feeling pains in his hips, eyes, and avers that he is experiencing psychological trauma.

11. It was in these circumstances that he brought the instant case before the ECOWAS Court of Justice on 8 January 2015, seeking from the

Court to sanction the State of Togo for the violation of some of his fundamental rights.

12. On the same day, and in a separate document, Plaintiff/Applicant filed an Application seeking the admission of his main Application to expedited procedure, pursuant to Article 59 of the Rules of Court.

13. On 22 January 2015, the State of Togo sought from the Court, through its Counsel, an elongation of time to file its Memorial in Defence.

    By Order dated 3 March 2015, the Court approved this request, and granted a two-month-period to the Defendant State.

14. On 9 March 2015, the State of Togo filed its Memorial in Defence.

III. PLEAS-IN-LAW AND ARGUMENTS BY PARTIES

15. In support of his claims, **Mr. Konso Parounam** claims that, in order to make him own-up to the accusations brought against him, the agents of the State of Togo have beaten him, deprived him of food, visits, and the use of bathrooms, they also severally tortured him, until he developed arterial hypertension, followed by psychological trauma. Consequently, he claims that the State of Togo violated his rights as enshrined under the Togolese Constitution of 14 October 2012, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the UN Convention against torture and other cruel, inhuman punishments, or degrading treatments, the provisions of all Principles for the Protection of all Persons subjected to all forms of Detention or Imprisonment of 14 December 1988, and the Fundamental Principles on the Treatment of Detainees of 14 December 1990.

16. In addition, Plaintiff/Applicant claims to have been arbitrarily detained, in disregard for the provisions of Articles 1 and 2 of the Constitution of Togo, 4 and 5 of the African Charter on Human and Peoples' Rights, 9 of the International Covenant on Civil and Political Rights of 1966, as well as the provisions of Declaration on the Fundamental Principles of Law on Victims of Criminality and Abuse of Powers of 29 November 1983.

17. For all the above-described facts, Plaintiff/Applicant solicits from the Court, on the one hand, to order the State of Togo, to carry out an investigation, with a view to arresting the authors of the facts evoked by him, and, on the other hand, to order the State of Togo to pay him ''***such an amount of money that the Honourable Court may deem sufficient***'', as reparation for the prejudices suffered.

18. On its own part, **the State of Togo** avers in its Memorial in Defence that it filed on 9 March 2015 that on 5 August 2009, during a stock-taking exercise of the arms and amunitions, Adjudant Konso Parounam presented an incomplete situation, which showed the disappearance of an automatic submarine gun, which was part of the consignment that was under his care. When asked to explain such a situation, he tried to make his interrogators believe that the disappeared arm belonged to Lieutenant-Colonel Roch Gnassingbé, who may have received it from his father, late General Gnassingbé Eyadéma. It was at that moment that the authorities opened investigations, to recover the lost arms.

19. The Defendant State affirmed that, contrary to the incriminating allegations, by Plaintiff/Applicant, the interrogation only lasted four days (from 15 to 18 December 2009), and that the accusations brought against Parounam are considered to be failure towards the General Responsibilities of Soldiers, acts that are provided for, and punishable under the General Disciplinary Rules of the Army, and, on the other hand, under Articles 66, 82, 83 and 85 of Law n°2007-010 of 1st March 2007 on the General Statute of Military Personnel. The State of Togo claims that it was pursuant to these texts that Plaintiff/Applicant was sanctioned, by being reformed from the Army, which is a Military Disciplinary measure, following Order n°110069/MDA/CAB/11 of 25 February 2011, before he was handed over to the Gendarmerie, for a judicial follow- up of the case.

20. Consequently, the State of Togo seeks from the Honourable Court to declare the Application filed before it as inadmissible, as it is unfounded, and to strike out all claims made by Mr. Parounam.

IV. LEGAL ANALYSIS BY THE COURT

21. **As to form**

First of all, the Court must observe that, on the day the initiating Application was filed at the Registry, (8 January 2015), another Application was equally filed, seeking to submit the main case to expedited procedure. However, the Court could not accede to this request, because at the time that Application was introduced, the Court was yet to become operational, owing to obvious reasons, which were independent of its wishes. Without making a pronouncement on the merit of such a request, the Court only observes that, as at today, this Application for expedited procedure is now devoid of any useful purpose, as the Court now examines the case on its merit.

22. Concerning its jurisdiction over the instant case, the Court recalls that pursuant to its settled cased law, it considers such jurisdiction granted, once there is mere allegation of human rights violation, and that such alleged violations were presented to have been committed on the territory of an ECOWAS Member State. In the instant case, as these conditions are met, the Court can examine the case.

As to merit

23. The Court must begin to make two precisions in regard to the various legal norms that are invoked before it by Plaintiff/Applicant.

24. On the one hand, Plaintiff/Applicant invokes national norm, which is the Constitution of Togo, whose Articles 16 and 21, on respect for the human person and the ban on cruel or degrading treatments, were invoked. In this regard, the Court must recall that in human rights violation disputes that it can examine, only the norms of international conventions that are binding on Member States are to be invoked before it.

In principle, the Court does not have remit to ensure the application of national laws, as this is the specific responsibility of national courts. This is the reason why it must set aside the invocation of national norms, as it held in many of its judgments. Thus, in its decision of 24 April 2015, in the case of « **P. A. Bodjona against Republic of**

Togo », it held that: ***« Indeed, the Togolese Constitution was frequently referred to, by parties to the instant case. Whereas it is not the responsibility of the Court to exercise the right of constitutionality, or determine the legality of the decisions taken by the national courts of ECOWAS Member States. This is the duty of the national courts, and the ECOWAS Court cannot be a substitute for the national courts of Member States. Thus, in its analysis, the Court shall refer exclusively to the international instruments in international law, which, in principle, are binding on State Parties, which have ratified them »*** (§37). Then, in its judgment of 13 July 2015, in the case of **« CDP and others against Burkina Faso »**, it indicated that **« (24).** ***The first of these principles, which assumes a particular significance in the case submitted before the Court, is he Court's refusal to assume the role of a judge over the domestic law of the Member States. The Court has indeed always recalled that it is not a body set up with a mandate for settling cases whose subject matter is the interpretation of the law or the Constitution of the Member States of ECOWAS.*** **(25)** ***Two effects arise as result. The first is that the present judicial argumentation must be devoid of every form of reliance on the domestic law, be it on the Constitution of Burkina Faso, or on any norms whatsoever related to the Constitution of Burkina Faso. In their written pleadings, the Applicants indeed made reference to both the Constitution of Burkina Faso (Article 1) and the Charter of Transition (Article 1). Such references shall be deemed as inappropriate before the judges of the ECOWAS Court of Justice.***

As an International Court, its mandate is restricted to sanctioning States' disregard for the obligations arising from the international texts binding on them. » (§24 & 25).

25. For this reason, the provisions relied on, from the constitutional law of Togo must be set aside from the discussions.

26. In support of his claims, Plaintiff/Applicant equally cited a certain number of international legal instruments, whose normative status remains doubtful.

More precisely, these are instruments commonly referred to as (« Soft Law »), they are texts, whose import is simply indicative or having a recommending effect, which may thus intrinsically be devoid of any binding value, hence, not likely to be obligatory on States. Clearly, such instruments are not devoid of any interest to the Court; they can notably constitute precious indices in the examination of a «consensus» in regard to some rules, within the framework of the emergence of an international norm, which may be, undoubtedly, a source of law. But, on their own, these instruments, which are only declarative in nature, are not binding on States, and the Court has always insisted on the fact that allegations of human rights violation must always be based on instruments that are effectively binding on the States. As the Court held in its Judgment **« Peter David »** of 11 June 2010, ***«… the international regime of human rights protection before international bodies relies essentially on treaties to which the States are parties (…) »*** (§42). Likewise, in its afore-stated Judgment of 13 July 2015, **« CDP and others against Burkina Faso »**, the Court holds that ***« (…) its mandate is restricted to sanctioning States' disregard for the obligations arising from the international texts binding on them. »*** (§25).

27. From this consideration, it can be deduced that three other instruments relied on by Plaintiff/Applicant must be set aside, from the discussions, because they are not, as such, instruments that are binding in nature: the *« Principles or the protection of persons subjected to all forms of detention or imprisonment »*, of 19 December 1988; the *« Fundamental Principles on Treatment of Detainees »,* adopted on 14 December 1990, and the *« Declaration on Fundamental Principles of Justice for Victims of Criminality and Victims of Abuse of Power. »*

28. Above all, the initiating Application contains, on the one hand, allegations of torture, and, on the other hand, of arbitrary detention. Each of these two grievances must be examined.

A) On torture

29. Plaintiff/Applicant claims he was severally beaten by the investigating officials, who deprived him of food, the use of bathroom, and refused

visits, during his detention. He equally claims to be a victim of diverse forms of torture, which led to him suffering from arterial hypertension, and complications of psychological disorders.

30. In support of such claims, Plaintiff/Applicant cites Articles 4 and 5 of the African Charter on Human and Peoples' Rights (inviolability of person, respect for his physical and moral integrity, as well as his dignity, prohibition of cruel, inhuman or degrading treatments), 7 and 10 of the International Covenant on Civil and Political Rights of 1966 (which provide for the same rights.)

31. However, the Court notes that Plaintiff/Applicant does not bring any proof for the acts of torture he claims he suffered. There is no trace, in the case file, of witness account, nor especially any scientific or medical observations, which are likely to support the statements contained in the initiating Application. Whereas in this case, just as in others like it, it is the responsibility of Plaintiff/Applicant to submit proofs that attest to the reality of the claims made, for the examination of the Court. In its Judgment **« Daouda Garba against the State of Benin »**, of 17 February 2010, the Court recalled this evidence of truth, when it declared that: ***« (…) The cases of human rights violation must be backed by indications of evidence, which enable the Court to find that such violation has occurred in order for it to prefer sanctions if need be. »*** (§ 34).

    Also, in another case of allegations of torture, the Court reiterated its position thus: ***« The Court observes that Plaintiff/Applicant did not show any proof for this allegation (…) The Court can, therefore, not adjudicate on this claim. »*** (Judgment **« Badini Salfo against State of Faso »**, 31 October 2012, §37).

32. For the simple fact that no proof for the allegation of torture and cruel, inhuman and degrading treatment was brought by Plaintiff/Applicant, the Court must reject the claim made by him on this point.

B) On arbitrary detention

33. Moreover, Plaintiff/Applicant claims that he suffered arbitrary detention. In this regard, he cites Article 6 of the African Charter on Human and Peoples' Rights (right to liberty and security), and Article

9 of the International Covenant on Civil and Political Rights (right to liberty and security, prohibition of arbitrary arrest or detention, right to be tried within a reasonable period.)

34. Plaintiff/Applicant claims that he was detained within the premises of the Reconnaissance and Support Regiment, from 21 December 2009 to 7 February 2011, the date on which he was taken before the Disciplinary Council, where he was later taken away by the Gendarmes to the **Service de Recherche et d'Investigation** (State Investigating Office). He claims that he was retained in that Office till 5 August 2011, the date on which he was taken before the Investigating Judge in the 4th Chamber, who ordered that he be kept in preventive detention at the **prison de Lomé**, where he stayed till his release on 16 December 2011.

35. On its own part, the Defendant State claims that Plaintiff/Applicant's detention is justified by various disciplinary measures taken against him by the Military Authorities, who finally decided that he be reformed from the Army.

36. The documents filed by Defendant in the instant procedure, especially the Minutes of the Disciplinary Committee Sitting before which Plaintiff/Applicant appeared, seem to show that a punishment of close arrest of eight (8) days, which was later prolonged to thirty (30) was recommended, against him, and same was later approved and effected by the Chief of Staff of the Army, in the first instance, and thereafter, to forty-five (45) days, by the Chief of Staff Army Headquarters of the Togolese Army. It can be deduced that the deprivation of liberty meted out against Plaintiff/Applicant cannot exceed the period of forty-five (45) days.

37. Whereas the former Sergeant Parounam claims, without being challenged, that he was kept within the premises of the Regiment for more than one year, i.e. from 21 December 2009, the date of signature of the Minutes of the sitting for the punishment decision, which was filed, to 7 February 2011, the date he was taken before the Disciplinary Council Sitting.

38. In regard to this claim, the Defendant State did not bother to file any document, nor offered any justification for Plaintiff/Applicant's detention at the Armoured Regiment of Reconnaissance and Support, during the period under reference.

39. It should be added that Mr. Parounam was handed over to the Gendarmes from the Research and Investigations Section (SRI), who kept him, for interrogation, with effect from 7 February 2011 to the time he was presented to the investigating judge on 5 August 2011.

40. It therefore seems that Plaintiff/Applicant's detention within the premises of the SRI was abusive, in the sense that the State of Togo neither furnished proof that could justify that, based on mere suspicion of offense, the Gendarmerie could keep a person within its premises for several months, before deciding to take him before a judge.

41. When seised with an allegation of arbitrary detention, the Court always strives to find if the said arrest or detention has a legitimate or legal ground. The Court stated this in its afore-stated judgment of 31 October 2012, in the case of **« Badini Salfo against the Republic of Faso »** *thus*: ***« The Court believes that, according to the African Charter on Human and Peoples' Rights, any arrest that takes place, without legitimate or reasonable ground is arbitrary, and it violates the conditions previously established by law. »*** (§19) Also in its judgment of 3 July 2013, in the case of **« Kpatcha Gnassingbé and others against the State of Togo »**, it has remit, especially, to find if the arrest was premised on legitimate ground: ***« The jurisdiction of the Court simply lies in examining whether the detention and related arrest of the Applicants had a legal basis. »*** (§68). It is precisely because Plaintiff/Applicant Mamadou Tandja was detained ***« outside any legitimate basis »*** that the Court adjudged as ***« arbitrary »*** *the* deprivation of his liberty (Judgment **« Mamadou Tandja against the Republic of Niger »**, 8 November 2010, §19.1 *in fine*).

42. Pursuant to these principles, the Court equally qualified as arbitrary detention, the act of keeping a person for one year (2003-2004) on the strength of a simple decision of indictment (Judgment **« Sikiru Alade against Federal Republic of Nigeria »** of 11 June 2012, §

62), as well as the act of detaining a person for nine (9) months and twenty-one (21) days ***« illegally »*** (Judgment **« Agba Sow Bertin against the State of Togo »**, of 11 June 2013, §34).

43. There is no doubt that, in terms of its settled case law, and in regard to the circumstances of the case, Mr. Konso Kokou Parounam was, at least, for some part of being held, a victim of arbitrary detention, that it behooves the Court to order reparation for him.

On costs:

44. In these circumstances, it is only logical to order the State of Togo to bear all costs, pursuant to Article 66 of the Rules of Court.

FOR THESE REASONS

The Court,

45. Sitting in a public hearing, in a human rights violation matter, in first and last resort, and after hearing both parties,

As to form

- **Holds** jurisdiction over the instant case;
- **Declares** as admissible the initiating Application introduced by Mr. Konso Kokou Paronam against the State of Togo;
- **Declares** that the Application seeking to submit the case to expedited procedure is devoid of any useful purpose;

As to merit

- **Declares** that no act of torture, cruel, inhuman and degrading treatments can be adduced to the State of Togo;
- **Strikes** out all claims made by Plaintiff/Applicant in this regard;
- **Declares**, however that Mr. Konso Kokou Parounam's detention was arbitrary;

Consequently,

- **Orders** the State of Togo to pay Plaintiff/Applicant the sum of eight (08) million CFA Francs, as reparation for all prejudices suffered;

- **Orders** the State of Togo to bear all costs.

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

And the following have appended their signatures:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON THE 16TH DAY OF FEBRUARY, 2016

SUIT N°: ECW/CCJ/APP/22/13
JUDGMENT N°: ECW/CCJ/JUD/03/16

BETWEEN
1. IBRAHIM SORY TOURE
2. ISSIAGA BANGOURA. - *PLAINTIFFS*

VS
THE REPUBLIC OF GUINEA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE JÉRÔME TRAORÉ - *PRESIDING*
2. HON. JUSTICE HAMÈYE F. MAHALMADANE - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. DINAH SAMPIL (ESQ.); MOHAMED TRAORÉ (ESQ.); *AND* **RACHEL LINDON (ESQ.)** - *FOR THE PLAINTIFFS*
2. MAURICE LAMEY KAMANO (ESQ.); JOACHIM GBILIMOU (ESQ.) - *FOR THE DEFENDANT*

Human rights violations - Effective remedy - Adversarial principle - Equality of arms - Reasonable delay - Arbitrary detention - Damages and interests.

SUMMARY OF THE FACTS

On 13 November 2013 the Applicants Ibrahima Sory Touré and Issiaga Bangoura filed an Application for human rights violations at the Registry of the Court;

Ibrahim Sory Touré stated that he was arrested on 19 April 2013 and held in custody, of which the detention was extended on 23 April 2013 and 25 April 2013;

That on 26 April 2013, and on the basis of eight days in custody, the District Attorney of Dixinn Conakry II issued a committal order against him on the presumption of corruption under section 69 of the Code of Criminal Procedure;

That for reasons of lack of jurisdiction of the court of Dixinn, his file is transferred to Kaloum where on 6 May 2013 he was indicted for corruption by the Trial judge.

That on 10 May 2013, he answered questions from the US Federal Bureau of Investigation (FBI), through the Public Prosecutor in the presence of an FBI agent; since then, he was no longer questioned and no act was done in the context of the information opened against him;

He stated that he was arrested on 16 April 2013 for alleged military misconduct and detained.

On 18 April 2013, he was sentenced to one (1) month imprisonment for desertion; that his home and the services of his new employer were searched; that he could not be assisted and could not bring documents for his defence in the context of this military procedure.

That after 3 weeks of military imprisonment, he was transferred to the Court of First Instance of Kaloum, where he was indicted on 9 May

2013 for count of corruption, without further details and placed in detention by the trial Magistrate; questioned on 20 May 2013, he has not undergone any further interrogation since then.

That on 23 July 2013, the trial judge ordered their provisional release with the payment of a caution.

Having appealed this order, in its judgment of 6 August 2013, the Indictment Division ordered their provisional release accompanied by the obligations of judicial review;

That the public prosecutor's office appealed against this judgment on 7 August 2013; that since this appeal in cassation, they remained in detention, with prolongation of their preventive detention on 5 September 2013;

They maintained that these acts constitute violations of their rights, namely the right of defence, the right to an effective remedy; the right to an independent tribunal; the right to a fair trial including the equality of arms and the adversarial principle; the right not to be subjected to inhuman and degrading treatment.

That is why they asked the ECOWAS Court of Justice to admit their application and to order their provisional release; to order the Republic of Guinea to pay the sum of 114,000,000 CFA francs to Issiaga Bangoura and 124,000,000 CFA francs to Ibrahima Sory Touré.

That by additional motion dated 13 March 2015, the Applicants informed the Court of their release on bail on 27 November 2013 and conclude that their application for preliminary ruling on their immediate release was no longer necessary.

That, notwithstanding the previous violations invoked, the Applicants stated that they were once again victims of a violation of their rights to be tried within a reasonable time, to freedom of movement and to freedom to choose their place of residence. They asked the Court to order the Republic of Guinea to pay the sum of 690,000,000 Guinean francs to Issiaga Bangoura and 1,231,000,000 Guinean francs to Ibrahima Sory Barry.

The Republic of Guinea did not file any written plea despite the extension of time it had requested to produce its defence.

ISSUES FOR DETERMINATION:

- *Whether the default judgment is justified against the Defendant who fails to file its defence despite the Court's extension of time.*
- *Whether Issiaga Bangoura is a victim of inhuman and degrading treatment and a violation of the right of defence.*
- *Whether the Applicants are victims of arbitrary detention, breach of the principle of the independence of the courts, violation of their right to freedom of movement and freedom to choose their residence?*
- *Whether the detention of the Applicants during the period from 6 August to 29 November 2013 is arbitrary.*
- *Whether the Applicants' rights to an effective remedy, adversarial principle and equality of arms and the right to be tried within a reasonable time was violated?*
- *Whether the Applicants can claim compensation?*

DECISION OF THE COURT:

The Court found that the violation of the right to defence and the inhuman and degrading treatment invoked by Issiaga Bangoura is unfounded;

Held that the Applicants' claims relating to the arbitrary nature of their arrest on the ground of the violation of the principle of the independence of the judiciary, and the violation of their right to freedom of movement and to the freedom to choose their residence, are ill-founded;

Held that their detention under the titles issued by the trial judge does not constitute a violation of human rights;

Held that their detention became arbitrary over the period from 6 August to 29 November 2013;

Also held that the Republic of Guinea through its judicial authorities violated the Applicants' right to an effective remedy, the adversarial principle and the equality of arms and the right to be tried within a reasonable time;

Ordered the Republic of Guinea to pay the sum of 30 million CFA francs to Ibrahim Sory Touré and 15 million CFA francs to Issiaga Bangoura for all damages

JUDGMENT OF THE COURT

BETWEEN

1. **Mr. Ibrahim Sory Touré,** born in 1972 at Conakry, Lawyer, resident at Quartier Camayenne, Commune de Dixinn, Conakry.

2. **Mr. Issiaga Bangoura,** born in 1975 at Forécariah, Soldier, resident at Quartier Wanindara, Commune de Ratoma, Conakry.

- APPLICANTS

Counsel for the Applicants
Maître Dinah Sampil (President of the Bar Association of Guinea); **Maître Mohamed Traoré** and **Maître Rachel Lindon**, whose address for the purposes of the instant procedure is the address for **Maître Mohamed Traoré**, at Immeuble CCFA/Kaloum, Conakry, Guinea; Tel. (00 224) 664 28 40 11 / (00 224) 655 26 32 33; E-mail : mohamed_reotra66@yahoo.fr

AND

The Republic of Guinea - DEFENDANT

Defence Counsel: **Maitre Maurice Lamey Kamano**, Lawyer registered with the Bar Association of Guinea, resident in Conakry, at Commune de Kaloum, quartier Koulewondy, rue KA-026, Tel. (00224) 631-13-13-68, BP 3860, Republic of Guinea.

Maître Joachim Gbilimou, Lawyer registered with the Bar Association of Guinea, resident in Conakry, at Commune de Kaloum, quartier Koulewondy, rue KA-026, Tel. (00224) 664-22-70-75/622-22-70-75; e-mail: gbilimoujo@gmail.com

I. PROCEDURE

1. On 13 November 2013, the Applicants Ibrahim Sory Touré and Issiaga Bangoura, through their Counsel, lodged at the Registry of the Community Court of Justice, ECOWAS, an Application for human rights violation;

2. On 6 December 2013, the Chief Registrar of the Court served the said Application on the Republic of Guinea; the latter failed to lodge a memorial in defence within the required time-limit of 30 days;

3. On 13 June 2014, the Chief Registrar certified the resulting default against the Republic of Guinea;

4. On 13 January 2015, following a request by Counsel for the Applicants, the Presiding Judge granted them a time-limit of fifteen (15) days to lodge further pleadings;

5. On 13 March 2015, Counsel for the Applicants lodged at the Court Registry an additional complaint and production of evidence;

6. On 5 June 2015, the lawyers constituted by the Republic of Guinea filed their submission before Her Lordship the President of the Court, requesting for extension of time to file their pleading;

7. On 12 June 2015, the Presiding Judge of the panel granted the Republic of Guinea an extended time-limit of one (1) month to lodge its written defence, pursuant to an order made to that effect;

8. On 19 October 2015, the Chief Registrar certified that the Republic of Guinea had not as yet lodged its written defence, despite the extension in time granted it by the Court;

9. The case was called at the hearing of 7 October 2015 and adjourned to 19 January 2016 upon the request of Counsel for the Applicants;

10. At the hearing of 19 January 2016, the Republic of Guinea did not put in an appearance in court. In making their submission, the Applicants asked the Court to enter judgment in default and grant their claims, much more so because their written pleadings had been accepted by the Defendant, the latter having failed to file any pleadings till then. Following these observations, the case was adjourned for deliberation, towards the delivery of the judgement on 16 February 2016.

II. THE FACTS OF THE CASE:

CLAIMS AND PLEAS-IN-LAW OF THE PARTIES

11. By Application dated 13 November 2013, Messrs. Ibrahim Sory Touré and Issiaga Bangoura brought their case before the Community Court of Justice for violation of their rights and asked the Court to:

- ***Admit*** *their Application as duly filed in line with the formal requirements, and within the stipulated time-limits;*
- ***Declare*** *that their Application, thus filed, is well founded;*
- ***Order*** *their immediate provisional release;*
- ***Ask*** *the Republic of Guinea to pay the lump sum of One Hundred and Fourteen Million CFA Francs (CFA F 114,000,000) to Mr. Issiaga Bangoura, subject to modification, as damages, in reparation for the huge harm caused him, and to order as fully enforceable upon delivery of the judgment, at the current legal rate;*
- ***Ask*** *the Republic of Guinea to pay the lump sum of One Hundred and Twenty Four Million CFA Francs (CFA F 124,000,000) to Mr. Ibrahima Sory Touré, subject to modification, as damages, in reparation for the huge harm caused him, and to order as fully enforceable upon delivery of the judgment, at the current legal rate;*
- ***Ask*** *the Republic of Guinea to pay the costs, to the tune of Sixty Six Million CFA Francs (CFA F 66,000,000), subject to modification.*

12. In support of the violations invoked, Mr. Ibrahim Sory Touré asserted that he was called for questioning on 19 April 2013 and then placed in custody, and that the said custody was extended on 23 April 2013 and on 25 April 2013;

13. That on 26 April 2013, at the end of 8 days of arbitrary detention, the Public Prosecutor at the Court of First Instance of Dixinn Conakry II

issued a committal order for presumption of bribery, on the basis of Article 69 of the Code of Criminal Procedure; that on 29 April 2013, a summing up for prosecution was made, upon the alleged charges of bribery, pursuant to Articles 191, 192 and 193 of the Criminal Code; that the Dixinn Public Prosecution Office realised that it lacked jurisdiction to adjudicate on the case and so it transferred Mr. Ibrahima Sory Touré's case-file to Kaloum, where he was brought before the investigating judge on 6 May 2013; that the investigating judge accused him of bribery, without any other details or explanations, and issued a committal order against him.

14. That on 10 May 2013, he was interrogated for the first time on the substance of the case and he answered questions from the United States of America's Federal Bureau of Investigation (FBI), asked by the Prosecutor, in the presence of an FBI agent and his interpreter, and the Guinean lawyer resident in the United States of America; that since then, he has not been interrogated, nor has any other process been carried out in the trial proceedings instituted against him;

15. Mr. Issiaga Bangoura pleads that he was summoned for questioning on 16 April 2013 in connection with a presumed case of military misconduct, and he was placed in custody; that on 18 April 2013, he was sentenced to one (1) month imprisonment for desertion; that on the same day, his home was searched on no legal ground and the following day, 19 April 2013, a search was conducted at the home of his new employer, VBG, who had no connection with the alleged military misconduct; that in the course of the said military procedure, he was not assisted by any counsel, nor could he file any documents for the purposes of putting up his defence;

16. That after three (3) weeks of military imprisonment, he was transferred to the Court of First Instance of Kaloum and accused on 9 May 2013 of bribery, with no further details or explanations, and he was put in detention by the investigating judge;

17. That his wife was also put in custody, on 30 April 2013, for 3 days, and was made to share the same prison cell with men, and was unable to breastfeed her new-born baby;

18. That on 20 May 2013, he was interrogated on the substance of the case by the investigating judge, and that since then, he has not been interrogated any further, nor has he been cross-examined by any witness whatsoever;

19. That all the applications for provisional release, which they lodged through their Counsel, were all rejected by the investigating judge; that they appealed against the orders which refused to grant them a provisional release;

20. That on 23 July 2013, the investigating judge ordered their temporary release, against the payment of a bail sum; that they appealed against that order, and the Criminal Chamber, in its judgment of 6 August 2013, ordered their release subject to the exercise of certain regulatory measures of judicial control;

21. That on 7 August 2013, the *Parquet Général* (Office of the Prosecutor General) lodged an appeal seeking to quash the said 6 August 2013 Judgment of the Criminal Chamber, whereas that application was never served on them;

22. That from then on, they continued to remain in detention and the investigating judge made an order to renew and extend the provisional detention measure on 5 September 2013, without providing reasons, erroneously basing the order on articles of the Criminal Code.

23. That these acts constitute violations of their rights, as spelt out below:

- ***Violation of the rights to defence, in connection with the disciplinary procedure applied against Mr. Bangoura;***
- ***Violation of their right to effective remedy;***
- ***Violation of their right to be tried by an impartial court or tribunal;***
- ***Violation of their right to fair trial, including equality of arms and the principle of adversarial proceedings;***
- ***Violation of their right to be safeguarded from inhuman and degrading treatment.***

24. On 13 March 2015, the Applicants lodged a supplementary Application wherein it was apparent that they had been released on 27 November 2013, against the payment of a guaranteed sum of 150 Million Guinean Francs; and wherein they pleaded that their previous request for an interim decision for their immediate release had become devoid of purpose;

25. Whereas nevertheless, they maintained the violations invoked herein above, and pleaded that they had come under fresh violation of the following rights:

- The right to trial in reasonable time; and
- The right to free movement and free choice of residence.

26. Whereas they asked the Court to:

- Admit their supplementary Application and declare it well-founded;
- Order the Republic of Guinea to:
  - Pay the sum of 690 Million Guinean Francs (GF 690,000,000) to Mr. Issiaga Bangoura, subject to modification, as damages, in reparation for the huge harm caused him, and to order as fully enforceable upon delivery of the judgment, at the current legal rate;
  - Ask the Republic of Guinea to pay the lump sum of One Billion Two Hundred and Thirty One Million Guinean Francs (GF 1,232,000,000) to Mr. Ibrahima Sory Touré, subject to modification, as damages, in reparation for the huge harm caused him, and to order as fully enforceable upon delivery of the judgment, at the current legal rate.
- Ask the Republic of Guinea to pay all costs, to the tune of 200 Million Guinean Francs to each of the Applicants, subject to modification.

27. **Regarding violation of the right to defence**, Mr. Bangoura maintains that the prison term imposed on him related to a criminal

matter and must have been enforced with all the attendant guarantees for fair trial; that he was not fairly and publicly heard and he was not availed the time and resources necessary for preparing his defence and could not communicate with his counsel; that the decision sentencing him to the prison term was never communicated to him and so he was unable to file an appeal;

28. Whereas he concludes upon violation of Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the Universal Declaration of Human Rights (UDHR), Article 7(1) of the African Charter on Human and Peoples' Rights (ACHPR), and Article 9 of the Constitution of Guinea, as well as the principle underlying the judgement in the case concerning *Engel and Others*, in ECHR 8 June 1976, Engel et al, Netherlands, paragraph 82.

29. **Regarding the arbitrariness of the arrest and detention**, the Applicants plead that according to the correspondence of 22 April 2013, they were arrested as witnesses; that on that date however, Mr. Bangoura was under a military sanction, for desertion; that Mr. Touré was still in custody, without any notification regarding his rights or the precise charges against him, till the interrogation by the investigating judge on the substance of the matter, upon a question posed by one of his Counsel; that the nature of the offences committed as well as the dates and places of commission of the alleged offence were unknown to him;

30. That it was not until their interrogation on the substance of the case, on 10 May 2013, that the investigating judge verbally told Mr. Touré that he was under trial for receiving bribe;

31. That Issiaga Bangoura was accused on 9 May 2013 on no count or charge, since he was merely accused of bribery; that it was not until his investigation on the substance of the case, on 20 May 2013, that he was made aware of the reasons for his arrest, and the accusations brought against him;

32. That moreover, they were arrested and detained in violation of the laws of Guinea; that indeed, the procedure instituted against them reposes neither on a complaint nor on an accusation, whereas

according to Article 38 of the Code of Criminal Procedure of Guinea (hereinafter referred to as "CCPG"), the Public Prosecutor may only set public proceedings in motion either upon a complaint or an accusation; that they were held in custody beyond the legal time-limit, in violation of Article 77 of CCPG, which provides for a 48-hour time-limit, which may be extended for the same period of time, and may be doubled in cases of violation of State security;

33. That Ibrahima Sory Touré was held in custody for eight (8) days whereas the offence of bribery is not considered as a violation of State security; that moreover, the Applicants were held in custody in violation of Article 62 and related articles of CCPG, which prescribes that a person held in custody shall be entitled to inform a member of his family thereof, and to consult a doctor, and also that the custody measure shall be recorded in a register; that their being held in custody equally violated the custody procedure as stipulated in Articles 60 or 70 of CCPG, which prescribes that a person may only be placed in custody for the necessities of an inquiry where there are serious and consistent evidences against him; that in the instant case, there was no evidence to prove that the necessities of the inquiry required that they be placed in custody;

34. That the Applicant Ibrahim Sory Touré was detained on the basis of a committal order which may be described as a nullity, because it was made by an incompetent Public Prosecutor, namely the Public Prosecutor at Dixin who issued the committal order in question on 26 April 2013; that pursuant to Articles 131(3), 132 and 138 of CCPG, the second committal order which was issued on 6 May 2013 is equally illegal;

35. That the investigating judge renewed their preventive detention by invoking erroneous articles from the Criminal Code and by failing to provide reasons for his order of 5 September 2013, whereas the Criminal Chamber had ordered their provisional release subject to specified measures of judicial control; that moreover, that renewal was done in contravention of Article 142 of CCPG, in so far as no pleading had been filed in the case-file in the course of four months;

36. That finally, their detention from 6 August 2013 is arbitrary; that they remained under detention even though the Criminal Chamber had ordered their provisional release in its Judgment of 6 August 2013;

37. That for the Applicant Ibrahim Sory Touré, his detention is arbitrary as from 8 May 2013; that Issiaga Bangoura contends that his detention is arbitrary since 11 May 2013;

38. That for them, their arrest and detention were effected in violation of Articles 9, 14(3)(a) of ICCPR, Article 9 of UDHR, Articles 6 and 9 of ACHPR and Article 9 of the Constitution of Guinea.

39. **Regarding violation of their right to effective remedy**, Issiaga Bangoura and Ibrahim Sory Touré maintain that they had appealed against several orders made by the investigating judge; that moreover, they had filed applications seeking to annul those orders; that till today, no court has made any pronouncement on the applications seeking to quash the said orders, and that this constitutes a denial of justice; that the issue of contestation regarding the Republic of Guinea constituting a *partie civile* (i.e. being joined to a criminal procedure as a 'civil party', so as to claim damages) to the trial proceedings was also not settled;

40. Whereas they cite, to buttress that plea in law, Article 9(4) of ICCPR, Article 8 of UDHR and Article 7(1) of ACHPR, as well as the case law of the European Court of Human Rights and of the ECOWAS Court of Justice.

41. **Regarding violation of the principle of independence of the judiciary**, they plead that the mode of access to the investigating judge contravenes the requirement of apparent independence, in the sense that it is the Public Prosecutor (under the authority of the Minister of Justice and *Garde des Sceaux*) who chooses the judge to conduct the trial, and thus the risk of the Public Prosecutor choosing the most pliable judge; that they vividly recall the Office of the Public Prosecutor and the trial judge taking instructions directly from the Minister of Justice, which violates the principle of independence;

42. That the declarations of the Minister of Justice, in criticising their Counsel, constitutes a violation of the Constitution of Guinea;

43. That the investigating judge failed to abide by the principle of independence in the procedures applied against them;

44. That such lack of independence of the judiciary constitutes a violation of Article 14(1) of ICCPR, Article 10 of UDHR, Articles 107 and 111 of the Constitution of Guinea, and the case law of the European Court of Human Rights.

45. **Regarding violation of the principles of adversarial proceedings and equality of arms**, the Applicants maintain that both before the investigating judge and the Criminal Chamber, the principle of adversarial proceedings was not respected; that indeed, they were not served with the process concerning their case and never had in their possession the entire case-file on the case concerning them;

46. Whereas they cite in support of that allegation Article 14 of ICCPR, Article 10 of UDHR, Article 9 of the Constitution of Guinea as well as the case law of the European Court of Human Rights.

47. **Regarding inhuman and degrading treatment Issiaga Bangoura was subjected to**, he (Issiaga Bangoura) maintains that he was brought under preventive detention, irrespective of the fact that his bad state of health was known to the investigating judge; that when he was under detention, he could not consult a specialist doctor; that his health continuously worsened as a result of his detention; that those were instances of inhuman and degrading treatment;

48. Whereas they buttressed that allegation by invoking Article 7 of ICCPR, Article 5 of UDHR, Article 5 of ACHPR, Articles 6 and 15 of the Constitution of Guinea, and decisions of the ECHR.

49. **Regarding violation of the right to be tried in reasonable time**, Issiaga Bangoura and Ibrahim Sory Touré maintain that they received no replies to some of the applications they filed before the investigating judge; that an instance was the two applications, one lodged in the interest of Issiaga Bangoura on 3 December 2013 and 19 May 2014

on health grounds, for the withdrawal of the judicial control measure imposed, and the another, requesting the closure of the trial on 25 February 2014; that moreover, some of their applications were not examined in reasonable time; that their application for withdrawal of the judicial control placed on them, deposited on 17 March 2014 at the chambers of the investigating judge, only received a response on 14 May 2014, *i.e.* two (2) months afterwards, in violation of the provisions of Article 145(2) of CCPG, which provides for a time-limit of five (5) days; that the application for the said withdrawal of judicial control on them deposited at the Criminal Chamber on 12 June 2014 did not receive a response till 18 December 2014 - six (6) months after, in violation of Article 145(2) of CCPG, which provides for a time-limit of twenty-one (21) days for adjudication on such requests; that finally, the Supreme Court, seised with an application dated 7 August 2013 seeking to quash a court decision, made a pronouncement on the matter only on 14 April 2014, declaring the application inadmissible; that in general terms, after the trial began almost two years ago, it has not since progressed after the accusation of the Applicants;

50. Whereas to buttress that claim of violation, the Applicants invoke Articles 9(3) (4) and 14 of ICCPR, Article 7 of ACHPR, Articles 145 and 225 of CCPG of Guinea, Judgments of the ECOWAS Court of Justice: Judgment of 22 February 2013 on **Gbagbo *v.* Côte d'Ivoire**, Judgment of 17 December 2009 (ECW/CCJ/JUD/04/09) in the case concerning **Amouzou Henri and 5 Others**, and the judgment on **Sanchez Reisse *v.* Switzerland** (ECHR, 21 October 1986, Series A No. 164).

51. **Regarding violation of the right to free movement and free choice of residence**, the Applicants partly base their claim, partly, on the fact that they were held in detention between 6 August 2013 and 29 November 2013, on grounds of an alleged pending application from the Public Prosecution Department of Guinea, which was inexistent, and partly by virtue of the fact that they were under a judicial control system which they deemed to be strict and imposing on them the obligations:

    - Not to go beyond certain territorial limits;

- Not to appear in public places, and to abstain from making any statements on private or public radios within the locality;

- To inform the investigating judge of their movements outside Conakry;

- To present themselves before the investigating judge twice a week, on Mondays and Fridays.

52. Whereas they cite Article 12(1) of ICCPR, Article 13(1) of UDHR, Article 12(1)(2) of ACHPR, Article 10(4) of the Constitution of Guinea, and Judgment of the Court (ECW/CCJ/JUD/03/13 of 22 February 2013) on **Simone Ehivet Gbagbo *v.* Côte d'Ivoire**.

53. **Regarding reparations sought**, the Applicants invoke Article 66 and the related provisions of the Rules of the Community Court of Justice, ECOWAS.

III. GROUNDS FOR THE DECISION

AS TO FORMALITY

1. Regarding admissibility of the Application

54. Whereas the Application filed by the Applicants is in conformity with Article 33 (1) and (2) of the Rules of the Court; whereas moreover, their supplementary Application is equally in agreement with the above-cited provisions;

55. Whereas the two Applications having conformed to the conditions of admissibility provided by Article 33 (1) and (2), it is appropriate to declare them admissible.

2. Regarding jurisdiction

56. Whereas in the terms of Article 9(4) of the Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 on the Community Court of Justice: "***The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State***."

57. Whereas in the instant case, the Applications filed by the Applicants seek a declaration from the Court on the violation of their rights; whereas the facts pleaded actually concern acts which they claim to be injurious to their rights;

58. Whereas it is appropriate therefore for the Court to uphold its jurisdiction to examine the said Applications.

3. Regarding default against the Republic of Guinea

59. Whereas in the terms of Article 90 of the Rules of the Court: "***If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply for judgment by default***";

60. Whereas in the instant case, the application initiating proceedings was served on the Republic of Guinea on 6 December 2013; whereas the Republic of Guinea did not respond to the Application within the prescribed time of thirty (30) days allotted to it;

61. Whereas following the Application dated 5 June 2015, the Republic of Guinea asked for extension of time, which was granted to it by virtue of an Order dated 12 June 2015; whereas despite that extension of time, no written pleading was lodged by the Republic of Guinea;

62. Whereas in regard to the foregoing, it is appropriate to apply the provisions of the above-cited Article 90 and deliver a judgement by default against the Republic of Guinea.

AS TO MERITS

1. Regarding violation of Mr. Bangoura's rights to defence

63. Whereas the rights to defence are enshrined in Article 7 of the African Charter on Human and Peoples' Rights, Article 10 of the Universal Declaration of Human Rights, and Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR); whereas those rights comprise the right of every individual accused of a criminal offence

to be defended by a counsel of his choice, and to be informed of the possibility he has for assistance by a counsel and even for obtaining free legal assistance at the expense of the State when required by the interests of the State;

64. Whereas the Court can only find and sanction human rights violations where the one making the allegations of such violations brings evidence;

65. Whereas the Court, in the judgment delivered on 17 February 2010 in *Case Concerning* **Daouda Garba *v.* Republic of Benin** (ECW/CCJ/APP/03/09), held in paragraph 35 of the said judgment that: "***It is a general rule in law that during trial the party that makes allegations must provide the evidence. The onus of constituting and demonstrating evidence is therefore upon the litigating parties. They must use all the legal means available and furnish the points of evidence which go to support their claims. The evidence must be convincing in order to establish a link with the alleged facts***."

66. Whereas in the instant case, the Applicant, Mr. Issiaga Bangoura does not produce any points of evidence which may support allegations of violation of his right to defence; whereas indeed he furnishes neither the decision sentencing him to a one-month imprisonment nor any other pleading of another nature which may attest, on one hand, that he was tried for desertion, and on the other hand, that he was a victim of violation of his rights to defence during the said judgment; whereas there is no pleading in the case-file which may attest to the statements made;

67. Whereas it is appropriate to note that even Counsel for the Applicant did not take the Applicant's statements 'hook, line and sinker', because the Counsel themselves do indicate on page 12 of the first paragraph under point 3.4 of their Initiating Application (French version) that: "*Mr. Issiaga Bangoura was summoned for interrogation ... he was put in custody* (***according to him, since there is no record to that effect in the case-file, nor writ of summons***) … *he was interrogated on charges of bribery* …", and the same Counsel for the Applicant use the verb "… ***seems*** …" in the narration of the facts;

68. Whereas it is ripe to conclude that the claim of violation of Mr. Issiaga Bangoura's rights to defence is ill-founded.

2. Regarding arbitrariness of the arrest and detention of the Applicants Issiaga Bangoura and Ibrahim Sory Touré

69. Whereas the arbitrary arrest and detention of any person are prohibited by Article 6 of ACHPR, Article 9 of UDHR and Article 9 of ICCPR;

70. Whereas for the United Nations Working Group on Arbitrary Detention put in place by the United Nations Human Rights Commission:

"… ***deprivation of liberty is arbitrary if a case falls into one of the following three categories:***

- ***When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I);***
- ***When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);***
- ***When the total or partial non-observance of the international norms relating to the right to a fair trial, spelt out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III)***";

71. Whereas in the instant case, the Applicants do not provide evidence as to the arbitrary character of their detention; whereas they content themselves indeed with the assertion that no reason was given to them as the basis for their arrest at the time they were arrested; whereas no formal evidence exists to enable the Court declare whether that assertion is well-founded or not;

72. Whereas it is incontrovertible that the summoning of the Applicants for interrogation was done upon warrants issued to that effect; whereas the searches were conducted by the Criminal Investigations Department upon authorisation by the Public Prosecutor at the Dixinn Court of First instance, and a police report was made concerning Ibrahim Sory Touré; whereas the latter was brought before the above-cited Public Prosecutor; whereas the said authorisation was made within the context of the execution of a judicial co-operation agreement between the Republic of Guinea and the Government of the United States, for the purposes of an ongoing cross-judicial inquiry on allegations of bribery surrounding the award of mining rights in the Republic of Guinea; whereas it should be surprising, nevertheless, that the Applicants would not be informed of the grounds upon which they were summoned for hearing, consequent to the search which was conducted;

73. Whereas whatever the case may be, the allegations of the Applicants, as to their arrest being arbitrary, are not based on any point of evidence; whereas no pleading in the case enables the Court to find an absence of notification of the grounds upon which they were summoned; whereas as noted above, the Court cannot establish human rights violation upon baseless allegations;

74. Whereas in the absence of such proofs of evidence, it is ripe to conclude that the violation invoked is ill-founded;

75. Whereas regarding the holding of the Applicants beyond the required eight-day time-limit for keeping persons in custody, as invoked by them to justify the arbitrary character of their detention during the preliminary inquiry, they bring no evidence thereto; whereas no pleading in the case-file enables one indeed to find that such limit was exceeded; whereas this claim is thereby ill-founded;

76. Whereas in terms of their detention by the investigating judge of Chamber No.2 of the Court of First Instance of Kaloum, it is apparent from the procedure that the detention in question was based on titles for detention; whereas a committal order was issued against each of the Applicants in the course of their accusation on charges of bribery;

whereas their detention was thus carried out on the basis of an official document issued by a competent authority, in accordance with the prescriptions of the laws of Guinea;

77. Whereas moreover, the renewal of the Applicants' detention was effected by the investigating judge in charge of the trial of their case; whereas, in line with the laws of Guinea, the latter is entitled to extend the duration of such detention, providing reasons thereof;

78. Whereas it is not within the powers of the Community judge to examine the grounds for the extended detention ordered by the investigating judge, given that the Community judge is not an appellate court;

79. Whereas in the light of the points made above, it is appropriate to conclude that the detention of the Applicants, as ordered respectively on 6 and 9 May 2013 by the investigating judge, is not arbitrary.

80. Whereas the Criminal Chamber of the Conakry Court of Appeal ordered the provisional release of the Applicants following the judgment of 6 August 2013; whereas after that judgment, on 7 August 2013, the *Avocat Général* (Advocate General), lodged an appeal seeking to quash the 6 August 2013 judgment of the Criminal Chamber – the appeal relied upon by the Office of the Public Prosecutor at the Appeal Court of Conakry in staying execution of the judgment which had ordered the provisional release of the Applicants – thus maintaining them in detention;

81. Whereas however Law N°. L91/008 of 23 December 1991 on Jurisdiction and Functions of the Supreme Court cannot suspend appeals seeking annulment of judgments delivered by the Criminal Chamber in matters of preventive detention; whereas the suspension of the effects of the judgment delivered by the Criminal Chamber of the Conakry Court of Appeal on 6 August 2013 had no legal basis;

82. Whereas the Applicants must have been released on a provisional basis as from 6 August 2013; whereas continuing to hold them in detention beyond that date without any legal basis, till 29 November 2013, the date they were freed, constitutes arbitrary detention and thereby violates Article 9 of ICCPR and Article 9 of UDHR.

3. Regarding violation of the right to effective remedy

83. Whereas the right to effective remedy is guaranteed by international human rights protection instruments, notably by Article 7 of ACHPR, Article 8 of UDHR and Article 2(3) of ICCPR; whereas Article 2(3) of the ICCPR provides that:

> "***Each State Party to the present Covenant undertakes:***
>
> ***(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;***
>
> ***(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;***
>
> ***(c) To ensure that the competent authorities shall enforce such remedies when granted.***"

84. Whereas effective remedy, according to Pierre Mertens, in his article 'The right to effective remedy before the competent national authority in international conventions relating to human rights protection', is "***that which shall not be of pure formality, but shall offer all the guarantees of efficacy as required and an opportunity for success and result in a decision which is capable of materialising in concrete terms";*** whereas an effective remedy is therefore that which not only enables an applicant to bring his case before the competent authority (whether judicial or administrative), but also to obtain from that authority, a decision that is capable of materialising in concrete terms;

85. Whereas in the instant case, before the Criminal Chamber Conakry Court of Appeal, the Applicants appealed the proceedings instituted against them which had sought to annul the judgment made to release them, and which they considered as violating their fundamental rights;

whereas it is apparent from the case-file that the applications were received under No. 24 on 13 May 2013 by the said Chamber;

86. Whereas they equally filed an application for the closure of the trial on 25 February 2014 at the chamber of the investigating judge;

87. Whereas till date, no decision has been made by these courts regarding those applications; whereas in failing to respond to the applications seeking to annul the unfavourable judgment made against them and to bring the written procedure to a close, the Criminal Chamber of the Conakry Court of Appeal and the investigating judge of the Dixinn Court of First instance violated the Applicants' right to effective remedy.

4. Regarding violation of the principle of independence of the judiciary

88. Whereas UDHR in its Article 10 and ICCPR in its Article 14(1), stipulate that all persons are entitled in full equality to a fair and public hearing by an independent and impartial tribunal;

89. Whereas the independence of the judiciary, which is a sacrosanct principle of democracy, postulates that the Judiciary, in its functioning, shall not interfere with the Executive and Legislature; whereas in other terms, there shall be separation of powers enshrined in the Constitution;

90. Whereas it is apparent from the fundamental principles governing the independence of the courts of law, as adopted by the *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, which was held at Milan from 26 August to 6 September 1985, and confirmed by the United Nations General Assembly in its Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985, that:

    1. The independence of the courts of law shall be guaranteed by the State and enshrined in the Constitution or domestic law. All institutions, Governments and others shall respect the independence of law courts.

2. Jurors and assessors shall handle cases brought before them with impartiality, in line with the facts and in conformity with the law, without restrictions, without external influence, inducement, pressure, threats or undue intervention, whether direct or indirect, from whoever it may be and for whatever reason;

91. Whereas in the instant case, the Constitution of the Republic of Guinea has enshrined the principle of independence of judiciary authority in its Article 107;

92. Whereas it is prescribed by the domestic law of Guinea that the Public Prosecutor may bring a case before the investigating judge; whereas it must be noted that the procedure of the Public Prosecutor bringing a case before the investigating judge shall not compromise in any way the independence of the investigating judge, who is a *magistrat de siège* (a senior judge) and a repository of judicial authority; whereas if it is true that in terms of hierarchy, the Public Prosecutor is a judge placed under the authority of the *Procureur Général* (Public Prosecutor at the Appeal Court), who in turn is under the Minister of Justice, it is appropriate to distinguish him from the investigating judge – the latter being an independent judge who exercises his functions in all independence; whereas it is the investigating judge who is responsible for conducting the trial of the cases brought before him, and not the *Procureur Général,* who brings a case before the investigating judge; whereas hence, one cannot consider the mere act of the *Procureur Général* bringing a case before the investigating judge as violating the independence of the judiciary;

93. Whereas moreover, as the Court has already held in its judgments on ***Hadijatou Mani Koraou* v. *Republic of Niger*** dated 27 October 2008 (Judgment No. ECW/CCJ/JUD/06/08) and ***Abdoulaye Baldé and Others* v. *Republic of Senegal*** dated 22 February 2013 (Judgment No. ECW/CCJ/JUG/04/13), it has no mandate for examining the domestic law of the Member States; Now, in the instant case, the grounds for the *Procureur Général* bringing a case before the investigating judge is well-founded upon Law No. 037/AN/98 of 31 December 1998 on the Guinea Code of Criminal Procedure; whereas

if the Court should give its opinion on that law, it would amount to examining the law on the Guinea Code of Criminal Procedure – which is outside the powers of the ECOWAS Court;

94. Whereas finally, the acts invoked by the Applicants regarding interference of the Ministry of Justice in the procedure are not justified; whereas those are mere allegations not supported by any point of evidence;

95. Whereas in the light of the foregoing, it is ripe to conclude that the violation invoked is ill-founded.

5. Regarding violation of the principle of adversarial proceedings and equality of arms

96. Whereas equality of arms is one of the inherent elements of the concept of fair trial; whereas the concept of equality of arms requires that each party be availed a reasonable opportunity to plead its cause under conditions which do not put one party in an unfavourable situation with respect to the opposing party, and demands an arrangement of fairness and balance among the parties; whereas the principle of adversarial proceedings signifies the possibility for the parties to take notice of, and comment on all the points of evidence produced, and on all the observations submitted, such as to direct the decision of the court; whereas this principle is closely linked to equality of arms, both enshrined in Article 10 of the UDHR and Article 14 of the ICCPR; whereas violation of the principle of equality of arms would thus result in an imbalance caused by a court, among parties at a trial, in the presentation of their cause; whereas violation of the principle of adversarial proceedings would imply that an accused person was not given notice of, and did not make any submission on the points of evidence upon which his accusation was based; whereas ECHR (European Court of Human Rights) in its judgment on *Kuopila* **v**. *Finland* (No. 27752/95 of 27 April 2000) ruled that the non-communication of evidence to the defence can violate equality of arms and the principle of adversarial proceedings; whereas the same court, in its judgment on *Matyjek* **v**. *Poland* (No. 38184/03 of 24 April 2007) ruled that, the fact that the accused had limited access to the case-

file and other documents, constituted violation of equality of arms; whereas again, in the judgment delivered by the said court on *Rowe and Davis* **v**. *United Kingdom* (No. 28901/95 of 16 February 2002), it held that the principle of adversarial proceedings requires that those in charge of the trial proceedings must communicate to the defence all the relevant evidence in their possession, both for proving and for disproving the case;

97. Whereas in the instant case, it is apparent from the case-file that the Applicants were not made to undergo the same conditions as the Defendants, within the context of their defence, during the course of the trial proceedings; indeed, on one hand, certain pleadings of the procedure were not served on the Applicants within the time-limits that would enable them to put up an effective defence, and on the other hand, other pleadings were not communicated to them;

98. Whereas a hearing of the case on its merits, scheduled for 9 May 2013, had to be adjourned to 10 May 2013 because the case-file had not been served on the Applicants; whereas the said hearing held on 10 May 2013 was conducted in the presence of a third-party without the Applicants having been given prior notice thereof;

99. Whereas the report of Divisional Commissioner Condé was not communicated to the Applicants whereas it was an essential pleading of the procedure; whereas the report had to do with acts of inquiry, notably the search carried out at the homes of Ibrahima Sory Touré and Issiaga Bangoura; whereas it was indeed the report on the search thus conducted that gave rise, first of all, to the seizure of certain objects, and secondly, to the summoning of the Applicants for questioning;

100. Whereas serving the said report of the Divisional Commissioner Condé on the Applicants would have been necessary to enable the Applicants argue its contents; whereas in failing to communicate the report to the Applicants in the course of the procedure, the judicial authorities, particularly the investigating judge of Chamber No. 2 of the Court of First Instance of Kaloum violated the principle of adversarial proceedings;

101. Whereas in the light of the foregoing, it is ripe to conclude that the Republic of Guinea, through its judicial authorities, violated the principle of equality of arms and of adversarial proceedings in the procedure instituted against the Applicants.

6. Regarding Issiaga Bangoura having suffered inhuman and degrading treatment

102. Whereas Article 5 of ACHPR, Article 5 of UDHR and Article 7 of ICCPR forbid inhuman and (or) degrading treatment against all persons;

103. Whereas the European Court of Human Rights (ECHR), in its Judgment of 25 April 1978 on the *Tyrer Case*, defined inhuman treatment as that which brings about severe physical pain and mental anguish, with the additional risk of causing acute physical defects; whereas degrading treatment presupposes, according to the same Court, measures which are of such nature as to cause an individual, feelings of fear, nervousness and inferiority, purposely inflicted to humiliate and demean him, and possibly to break down his physical and mental resolve for resistance;

104. Whereas in the instant case, the fact that Issiaga Bangoura was placed under preventive detention irrespective of having declared his state of ill health shall not constitute in itself inhuman and degrading treatment, if, on one hand, the measure of preventive detention is justified, and if, on the other hand, there is no medical certification to enable the investigating judge to rule on the suitability of the state of health of the person in contention vis-à-vis the measure of deprivation of freedom at stake;

105. Whereas moreover, a preventive detention measure does not deprive an accused person of his right to healthcare if his state of health so requires, even if the healthcare has to be received outside the venue of the detention;

106. Whereas there could have been inhuman and degrading treatment if the Applicant had not been availed the possibility of healthcare where his state of health had deteriorated, and if he had even been deprived

of healthcare upon the orders of the investigating judge; whereas that was not the situation in the instant case; whereas indeed, not only was the Applicant seen by the local prison doctor, but he was also given the authorisation to undergo medical examination at a medical centre; whereas measures were thus taken to preserve the Applicant's state of health, particularly by placing him at a medical centre;

107. Whereas in the light of the foregoing, it is ripe to conclude that Issiaga Bangoura was not a victim of inhuman and degrading treatment.

7. Regarding violation of the right to be tried in reasonable time

108. Whereas Article 7 of ACHPR and Articles 9(3) and 14 of ICCPR guarantees that every citizen is entitled to have his cause heard in reasonable time; whereas, according to ECHR, the concept of reasonable time is assessed within the context of the circumstances of the case, notably the complexity of the case, the conduct of the applicant and of the competent administrative and judicial authorities (ECHR, Boddaert v. Belgium, 12 October 1992, Series A. No. 235-D);

109. Whereas for the determination of the length of time of a criminal procedure, the starting point is taken as the date of accusation (ECHR, Judgment on the *Eckel Case*, 15 July 1982, Series A, No. 51) and the endpoint, the date of the final decision;

110. Whereas in the instant case, the Applicants Ibrahima Sory Touré and Issiaga Bangoura were respectively accused on 6 May and 9 May 2013 on the serious presumptive charge of receiving bribe; whereas the investigating judge proceeded to hear them on the merits of the case respectively on 10 May and 20 May 2013; whereas till today, be it two (2) years after their accusation, there is no court decision regarding the charges made against them;

111. Whereas however, it is not established that the charges brought against the Applicants would present a certain complexity necessitating lengthy investigations; whereas indeed, the persons accused in the procedure are two in number and were heard on the merits of the case; whereas searches were conducted and objects seized; whereas the investigative

judge in charge of the case took no step towards the manifestation of the truth after the accused had been heard on the merits; whereas however, the matter at stake concerned criminal offences which do not require, in principle, a long period of trial;

112. Whereas considering thus the nature of the charges brought against the Applicants and the lack of complexity of the procedure, two (2) years of proceedings on the matter without a court decision having been made, does not appear reasonable;

113. Whereas it is ripe to conclude that their right to be tried in reasonable time was violated.

8. Regarding violation of the right to free movement and free choice of residence

114. Whereas Article 12(1)(25) of the ACHPR, Article 13(1) of the UDHR and Article 12(1) of the ICCPR guarantee that everyone is entitled to free movement and free choice of residence;

115. Whereas however, that right is not absolute and may have limitations being imposed thereupon by the law or on other grounds;

116. Whereas in the instant case, the Applicants were put under measures of judicial control, upon the orders of the investigating judge dated 27 November 2013, following their provisional release; whereas judicial control is provided for in the laws of Guinea;

117. Whereas the judicial control measure constitutes a restrictive measure on freedom of movement and free choice of residence, it cannot constitute a violation of that freedom in as much as it was prescribed upon a court decision;

118. Whereas it is ripe to conclude that there is no violation of the Applicant's right to freedom of movement and free choice of residence.

9. Regarding reparation

119. Whereas the jurisdiction of the Court in matters of human rights violation empowers it not only to find the human rights violations in contention but also to order reparation where required;

120. Whereas In *Case Concerning* ***Baldini Salfo*** **v.** ***Burkina Faso*** **(ECW/CCJ/JUD/13)**, the Court held that the measures it orders when it finds that there is human rights violation, are principally aimed at terminating the violations in question, and prescribing reparation. To that end, the Court takes account of the circumstances pertaining to each specific case, so as to proffer suitable measures;

121. Whereas in the instant case, the Court finds that the Applicants were victims of arbitrary detention during the period between 6 August 2013 and 29 November 2013, of violation of the principle of adversarial proceedings and equality of arms, of violation of the right to be tried in reasonable time, and of violation of the right to effective remedy, in the procedure instituted against them;

122. Whereas in so doing, it is appropriate for the Court to order reparation for such violations, by way of compensation for the Applicants;

123. Whereas Ibrahim Sory Touré, before his detention, was on contractual employment with VBG Co. Ltd. as Senior Analyst in Institutional Relations; whereas he was earning Forty Million Guinean Francs (GF 40,000,000); whereas he also lost his employment as a result of his provisional detention;

124. Whereas Issiaga Bangoura, as well, was on permanent employment with VBG Co. Ltd. before his detention; whereas he was earning a monthly salary of about Twelve Million Guinean Francs (GF 12,000,000); whereas he also lost his employment following his detention;

125. Whereas the said two Applicants lost their employments as a result of their provisional detention, the latter being arbitrary in nature;

126. Whereas the loss of their employment inevitably caused them financial harm;

127. Whereas it is therefore appropriate to order reparation of the harm by awarding damages to each of them;

128. Whereas moreover, violation of the principle of adversarial proceedings, of the right to effective remedy, of equality of arms, and of the right to be tried in reasonable time, equally caused them harms which must be repaired.

10. Regarding costs

129. Whereas in the terms of Article 66(2) of the Rules of the Court:

> "**1.** ***A decision as to costs shall be given in the final judgment or in the order, which closes the proceedings.*** **2.** ***The unsuccessful party shall be ordered to pay costs if they have been applied for in the successful party's pleadings***."

- Whereas in the instant case, the Republic of Guinea is the unsuccessful party in the procedure;
- Whereas consequently, it is appropriate to ask the Republic of Guinea to pay all costs.

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, in a default judgment against the Republic of Guinea, in a matter on human rights violation, in first and last resort;

In terms of formality,

- **Declares** the Application admissible;
- **Upholds** its jurisdiction to adjudicate on the matter;

In terms of merits,

- **Declares** ill-founded, violation of the right to defence as well as violation of inhuman and degrading treatment, as invoked by Issiaga Bangoura;
- **Adjudges** that the Applicants' claims as to the arbitrariness of their arrest, violation of the principle of independence of the judiciary, and of the right to free movement and free choice of residence, are ill-founded;

- **Adjudges** that the detention of the Applicants upon the strength of the orders made by the investigating judge does not amount to violation of human rights;

- **Adjudges** however, that their detention turned out as arbitrary during the period from 6 August to 29 November 2013;

- **Adjudges** equally that the Republic of Guinea, through its judicial authorities, violated the Applicants' right to effective remedy, the principle of adversarial proceedings and equality of arms, and the right to be tried in reasonable time;

- **Asks** the Republic of Guinea to pay to Ibrahim Sory Touré the sum of Thirty Million CFA Francs (CFA F 30,000,000) and to Issiaga Bangoura, the sum of Fifteen Million CFA Francs (CFA F 15,000,000) for all the harm done against them;

- **Dismisses** every other claim brought by the Applicant;

- **Orders** the Republic of Guinea to bear all costs.

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

And the following hereby append their signatures:

- **Hon. Justice Jérôme TRAORE -** *Presiding.*
- **Hon. Justice Hamèye-Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by
Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON THE 16TH DAY OF FEBRUARY, 2016

SUIT NO: ECW/CCJ/APP/01/14
JUDGMENT NO: ECW/CCJ/JUD/04/16

BETWEEN

1. KAGBARA BASSABI
2. BABALE PHILOMÉNE } *PLAINTIFFS*

VS

1. THE REPUBLIC OF TOGO
2. MINISTER OF LABOUR
3. LA CAISSE NATIONALE DE SECURITE SOCIALE } *DEFENDANTS*

COMPOSITION OF THE COURT:

1. HON. JUSTICE JÉRÔME TRAORE - *PRESIDING*
2. HON. JUSTICE YAYA BOIRO - *MEMBER*
3. HON. JUSTICE HAMÉYE F. MAHALMADANE - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. JIL-BENOIT KOSSI AFANGBEDJI (ESQ.)
- *FOR THE PLAINTIFFS.*

2. SANVEE OHINI (ESQ.) &
SCP AQUEREBURU & PARTNERS - *FOR THE DEFENDANTS.*

Human Rights violations - Amicable Agreement - Removal of the case from the list pursuant to Article 72 of the Rules of Court

SUMMARY OF FACTS

The Applicants, Mr. KAGBARA BASSABI and Mrs. BABALE PHILOMENE sued the Republic of Togo, the Ministry of Public Service and the National Social Security Fund of Togo before the Community Court of Justice, ECOWAS for violation of their right of ownership, also claiming that Mr KAGBARA was also the victim of arbitrary arrest, detention, violation of his honour and dignity, and violation of his right to employment.

Consequently, they asked the Court to condemn the State of Togo, responsible for the violations of their rights to pay them damages.

In reply, the Defendants ask the Court to declare the application inadmissible, to dismiss the Applicants to go and improve their claims and to order them to pay all the costs.

Following an amicable settlement between the parties, by correspondence dated 21 January 2016, the parties requested the Court to order that the case be struck out in accordance with Article 72 of the Rules of Court and ask each party to bear its own costs.

ISSUES FOR DETERMINATION:

Whether an amicable agreement between the parties terminates the proceedings and expunged the case from the list pursuant to Article 72 of the Rules of Court.

DECISION OF THE COURT

- *The Court* ***acknowledges*** *the agreement of the parties.*
- ***Ordered*** *the removal of the case from the list.*
- ***Held*** *that each of the parties shall bear its own costs.*

JUDGMENT OF THE COURT

The Court thus constituted gave the following Judgment:

- **KAGBARA Bassabi** and **BABALE Philomène - (PLAINTIFFS)**

  Whose Counsel is Jil-Benoit Kossi AFANGBEDJI (Esq.) Lawyer registered with the Court, 99 Rue de l'Entente, BP: 12250 / Tel.: 22.20.64.40 Lomé / Togo.

And

1. **THE REPUBLIC OF TOGO**, taken in the person of its legal Representative, Minister of Justice, Coordinating Minister with State Institutions: **(DEFENDANT)**

2. **MINISTRY OF LABOUR**, taken in the person of the Minister of Labour: **(DEFENDANT)**

   Counsel to the Defendants SANVEE Ohini, Lawyer registered with the Court, 32, Rue des Bergers, BP 6209/ Tel.: 22.20.56.82

3. **LA CAISSE NATIONALE DE SÉCURITÉ SOCIALE**, taken in the person of its Managing Director, **(DEFENDANT)**, whose Counsel is SCP AQUEREBURU & PARTENERS, Société d'Avocats, 777 Avenue Kleber DADJO, Tel.: 22-21-05-05, Fax: 22-22-01-58, BP: 8989

I. NARRATION OF FACTS

1. By Application dated 17 February 2014, Mr. KAGBARA Bassabi and Madam BABALE Philoméne brought a case before the Community Court of Justice, ECOWAS seeking from it to not that their right to own property was violated, on the one hand, and that Mr. KAGBARA Bassabi was a victim of arbitrary arrest and detention, his honour and personal dignity were infringed upon, and that his right to gainful employment was violated as well;

2. Consequent upon the above facts, they request the Court to find the Republic of Togo guilty, as the perpetrator of these violations of their rights, and to order it to pay them damages, and further order that the Republic of Togo refunds them the payment made by them, in respect of a property they bought from the CNSS;

3. In its Memorial in defence, filed at the Registry of the Court on 10 April 2014, the **Caisse Nationale de Sécurité Sociale** requested the Court to declare the Application filed by Plaintiffs/Applicants as inadmissible, in regard to it, absolve it from any wrongdoing;

4. In its defence filed at the Registry of the Court on 29 April 2014, the Republic of Togo also requested the Court to declare the case filed by Applicants as inadmissible, and order them to appeal their case appropriately, and further order them to bear all the costs;

5. By correspondence received by the Registry of the Court on 21 January 2016, parties requested from the Court, to strike out the case, pursuant to Article 72 of the Rules of the Court, and to declare and adjudge that each party shall bear its own costs;

II. GROUNDS FOR THE JUDGMENT

I. On the request to strike out the Case

6. Whereas Article 72 of the Rules of the Court provides that: *« If before the Court has given its decision, the parties reach a settlement of their dispute and intimate to the Court the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 66(8), having regard to any proposals made by the parties on the matter. »;*

7. Whereas, in the instant case, parties, through their correspondence dated 11 January 2016, informed the Court that within the framework of the litigation between them, there was an amicable settlement among them;

8. Whereas this settlement was recognised by a Minutes of Meeting of a Reconciliation, to which the President of the **Tribunal de Première Instance de Premiere classe de Lomé** appended his signature on 30 December 2015, thus bringing an end to all claims by Applicants;

9. Whereas in the said Minutes of Meeting, it is stated as follows: *«For the purpose of the settlement of the case among the parties, the*

Caisse Nationale de Securité Sociale (CNSS) *resolves to refund both Mr. KAGBARA Bassabi and Madam BABALE Philoméne, wife to Mr. KAGBARA, the sum of twenty million (20,000,000.00) CFA francs, which represents the balance of the debt owed them, with effect from the date of signature of the present Minutes of Meeting of Settlement…»*

10. Whereas Counsel to both **CNSS and The Republic of Togo** confirmed the content of the above-mentioned correspondence at the Court hearing of 16 April 2016;

11. Thus, it behoves the Court to order that the case be struck out, pursuant to Article 72 of the Rules of the Court;

2. As to costs

12. Whereas pursuant to the provisions of the aforesaid Article 72, it can be deduced that, while ordering the case to be struck out, the President shall make a pronouncement, as to costs, pursuant to Article 66(8), but, owing to the proposal made by parties, in this regard;

13. Whereas in the instant case, it can be deduced from the correspondence dated 21 January 2016 that parties resolved that each of them shall bear its own costs;

14. Consequently, it behoves the Court, to declare that each of the parties shall bear its own costs;

FOR THESE REASONS

The Court, in a public hearing, in a human rights violation case, in last resort and after hearing both parties;

- **Approves** the agreement reached by the parties;
- Consequently, **orders** that the case be struck out;
- **Declares** that each of the parties shall bear its own costs.

Thus made, adjudged and pronounced in a public hearing by the Community Court of Justice, ECOWAS, in the Federal Republic of Nigeria, on the days, months and year above;

And the following have appended their signatures:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Hameye Founé MAHALMADANE -** *Member.*

Assisted by

DIAKITE Djibo Aboubacar (Esq.) - *Registrar.*

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

HOLDEN IN ABUJA, FEDERAL REPUBLIC OF NIGERIA

ON WEDNESDAY, THE 9TH DAY OF MARCH, 2016

SUIT NO: ECW/CCJ/APP/08/14
RULING NO: ECW/CCJ/RUL/02/16

BETWEEN
ALHAJI (DR.) MAN M. B. JOOF - *PLAINTIFF*

VS.
1. THE PRESIDENT OF THE ECOWAS COMMISSION
2. THE ECOWAS COMMISSION } *DEFENDANTS*

COMPOSITION OF THE COURT:
1. HON. JUSTICE FRIDAY CHIJIOKE NWOKE - *PRESIDING*
2. HON. JUSTICE MARIA DO CEU SILVA MONTEIRO - *MEMBER*
3. HON. JUSTICE JEROME TRAORE - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. MUSA NGARY BITAYE (ESQ.) - *FOR THE PLAINTIFF.*
2. OBII ONUOHA; YAOUZA OURO-SAMA; SAMBO ISHAKU - *FOR THE DEFENDANTS.*

- Limitation period

SUMMARY OF FACTS

The Plaintiff is a former legal adviser to the President of the ECOWAS Regional Electricity Regulatory Authority (ERERA) whose employment contract ended on 30th August, 2010. The Plaintiff alleges that from August, 2010 - April, 2011, the ERERA failed to repatriate him back to his country after his contract had been terminated. He alleges that during an extended stay in his place of employment in Ghana, he wrote a report, wherein he raised concerns over the non-professional relationship between the President of the ERERA and a bilingual typist of the same Institution.

He alleges that although the bilingual typist was not copied in his report, the said typist managed to find out about the report and proceeded to institute criminal proceedings against the Plaintiff. He alleges that he was arbitrarily detained by the Police despite having diplomatic immunity. He instituted this action against the Defendants for failing to repatriate him immediately after his contract ended and failing to come to his aid when criminal proceeding was brought against him by the Police.

He therefore, sought a declaration that the removal or withdrawal of his diplomatic immunity was illegal and unjust. He also sought damages against the Defendant for violating his rights. He further sought an order of the Court mandating the Defendants to pay his entitlements. The Defendant on their part lodged a preliminary objection alleging that the suit was statute barred because it was lodged more than 3years after the act complained of occurred.

ISSUE FOR DETERMINATION

Knowledge of the time limit provided for in Article 9, paragraph 3, of Protocol A/SP/1/01/05.

DECISION OF THE COURT

The Court held that all the acts complained of by the Plaintiff are all tied to the expiration of the Plaintiff's contract which expired on 31st August, 2010. The Court thus held that the Plaintiff lost the right to come before it on 1st October, 2013, hence the instant suit was statute barred. As such, the Court dismissed the Application.

JUDGMENT OF THE COURT

I. Identification of parties

- **Applicant:** Alhaji (Dr.) Man M. B. Joof, represented by his Counsel, Musa Bitaye, with professional address at 134 Avenue Kairaba, Fajara, Municipalite Kanifing, Republic of The Gambia;

- **The Defendant:** The President of the ECOWAS Commission (first Defendant) and the ECOWAS Commission (2nd Defendant), whose headquarters is located at Yakubu Gowon Crescent, Asokoro District, PMB 401 Garki, Abuja, Federal Republic of Nigeria.

II. Procedure

1. The initiating application was registered at the Registry of the Court on 16 May 2014 (see Doc. 1);

2. On 16 May 2014, the first and second Defendants requested an extension of time limit to reply (see doc 2.);

3. On 25 May 2015, the Defendants raised a preliminary objection (see doc 04.)

4. The Applicant filed a reply brief in response to this preliminary objection on 10 December 2015.

III. Arguments of the parties

- Issues of facts put forward by the Applicant in his application

5. The Applicant alleged that after being appointed Legal Adviser to the President of the ECOWAS Regional Electricity Regulatory Authority - ERERA on 1 May 2009, in the P category, his contract which was renewed twice ended on 30 August 2010. The employer entity did not wish to proceed with its renewal;

6. That from 31 August 2010 to 1 April 2011, through several correspondence, requested from the President of ERERA, competent staff of this institution and the President of the ECOWAS Commission, that necessary measures should be put in place for his repatriation, but no action was taken in this direction;

7. That during their extended stay in the place of employment in Ghana, he drafted a report dated 26 October 2010, on his assessment of ERERA, which he submitted to the President of the ECOWAS Commission, with particular reference to the non-professional relationship between the President of ERERA and the bilingual typist of this Institution. A copy of this report was also submitted to the President of ERERA, among others.

8. That the bilingual typist, who did not receive a copy of the said report, obtained a copy which she provided to the police, who proceeded to arrest him, even though the Applicant had at the time, claimed his diplomatic immunity;

9. That despite correspondence dated 9 December 2010 addressed to the President of the ECOWAS Commission, informing him of the situation, the latter did not react. As a result, the Applicant was subsequently the subject of criminal proceedings;

10. That his detention, which intervened at the end of his contract with ECOWAS caused suffering, threats, loss of dignity, detention, insults, and additional living expenses in Ghana.

He concluded by seeking the following:

a) That the removal or withdrawal of privileges and diplomatic immunity of the Applicant by the President of the ECOWAS Regional Electricity Regulatory Authority (ERERA), be declared illegal and unjust;

b) A declaration that the removal or withdrawal of privileges and diplomatic immunity of the Applicant has resulted in the violation of his rights, enshrined in international and regional conventions as well as the ECOWAS Staff Rules;

c) That for violating his rights, the civil liability of the Defendants is recognized and that they be ordered to pay compensation;

d) That the Defendants be ordered to pay the sum of US $ 200.000 (two hundred thousand US dollars);

e) That the Defendants be ordered to pay all fees due to the Applicant and inherent to the end of his service, namely:

   i) The price of air ticket to Accra/Banjul for the Applicant and his wife - US $ 1, 208.49.

   ii) Cargo shipping of 126 kg of personal belongings of the Applicant - US $ 29.00.

   iii) The cost of freight of the Applicant's personal effects and furniture, from July 2011 to the present day - US $ 500.00 per day.

   iv) Rents from November 2010 to May 2011; ECOWAS having refused to repatriate the Applicant and the Applicant was prosecuted illegally - US$ 11, 200.

   v) His annual holidays, from March 2009 to 31 August 2010 - US $ 5, 913.52.

   vi) The right to 10% of basic salary and up; 12.5% of the annual basic salary for each year of service as compensation; resettlement allowance and education grants for a child, in accordance with Decision C/DEC/07/08/92, on the conditions of service for contract staff of the Community institutions.

   vii) To order the Defendants to bear the costs, including travel expenses and subsistence, the Applicant's remuneration as well as lawyer fees and his Agent.

   viii) Any other reparation that the Court may deem necessary.

- The Defenders, who did not submit a defence, despite having applied for extension of time, raised a preliminary objection that can be summarized as follows:

  a) The Applicant submitted its initial application before the ECOWAS Court of Justice, three (3) years and eight months (8), after the end of the employment contract that bound him to ERERA, losing the right of remedy before the Court pursuant to Article 9 paragraph 3 of Protocol A/SP/1/01/05.

- Duly notified of the preliminary objection, the Applicant filed his reply to the Registry of the Court on 15/12/2015 (see doc. 5), which is fully transcribed and included herein.

  1) The Court dismisses the preliminary objection raised by the Defendant or alternatively, reserve its decision and thus grant a new procedural period in accordance with the No. 2 of Article 88 of the Rules of Court;

  2) The Court, by order, authorizes that this procedure should be written and not oral.

IV. Legal issues

a) Knowledge of the time limit provided for in Article 9, paragraph 3, of Protocol A/SP/1/01/05;

b) Admissibility of the preliminary objection.

Already, Art. 9, paragraph 3, of Protocol A/SP/1/01/05 states that *"Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose"*

Art. 75, paragraph 1, al. b) the Rules of the ECOWAS Court of Justice provides for the method of calculating the period of legal proceedings when it is expressed in weeks, months or years, as is the case here.

Article 88, paragraph 2 of the same instrument determines that *"The Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it..."*

To this extent, the knowledge of the period of limitation, peremptory, cannot depend on the parties' arguments and opposed the continuation of the proceedings, preventing the substantive analysis of the application.

Furthermore, at the extinction of the legal limitation period, the interested party loses the right to bring his action.

Thus, the assessment of that imperative formal or procedural nature requires the determination of the time of occurrence of the damage alleged by the Applicant.

Consequently, it seems important to highlight two fundamental facts:

1. The Applicant alleges that the Defendants failed to take necessary measures to pay his rights resulting from the end of his employment contract and his repatriation as well as that of his family;

2. The illegal withdrawal of privileges and alleged diplomatic immunity and the subsequent arrest of the Applicant.

Indeed, all these facts are connected with the expiry of the Applicant's employment contract, which occurred 31 August 2010. However, in the light of the above standards and considering the recorded date of the initiating application to the Registry of the ECOWAS Court of Justice, **16 May 2014**, the Applicant lost the right to come before the Community Court on **1 October 2013**, which is, *dies ad quem* he could have asserted his rights through an appeal and that, in the light of the above standard.

As such, the initiating application must be dismissed. Consequently, the analysis of the admissibility of the preliminary objection raised by the Defendants no longer holds ground.

In case N°: ECW/CCJ/APP/02/06, **Qudus Gbolahan Folami against ECOWAS Parliament and its Director of Finance and Administration**, the Court considered that there was no limitation period of the action, since the Applicant had lodged his application the same year the damage was done (paragraph 32).

In another case, ECW/CCJ/JUD/01/09 **Djot Bayi Talbia and others against Federal Republic of Nigeria**, in Article 9.3 provisions states that the prescription is limited to actions against the institutions of the Community or those of the Community institutions against another (paragraph 30), therefore, cannot be applied generally.

V. Decision

The Court adjudicating in open Court and after hearing both parties pursuant to general principles of law, in first and last resort;

1. **Dismiss** the initiating application since it was submitted after the legal deadline;

2. Consequently, **declare** the preliminary objection raised by the Defendant, as it is no longer of any consequence.

3. **Order** the Applicant to bear the cost.

Signed:

- Hon. Justice Friday Chijioke NWOKE - *Presiding.*

- Hon. Justice MARIA do Ceu SILVA MONTEIRO - *Member.*

- Hon. Justice Jérôme TRAORÉ - *Member.*

Assisted by
Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

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

HOLDEN IN ABUJA, FEDERAL REPUBLIC OF NIGERIA

ON MONDAY, THE 14TH DAY OF MARCH, 2016

SUIT NO: ECW/CCJ/APP/18/14
RULING NO: ECW/CCJ/RUL/03/16

BETWEEN

1. MAINU HAMDALILAHI ISLAMIC CENTER LIMITED
2. ALHAJI MOHAMMED ABUBAKAR
3. MALLAM MUSA HAMZA

} *PLAINTIFFS*

VS

1. ATTORNEY GENERAL OF NIGER STATE
2. ATTORNEY GENERAL OF THE FEDERAL REPUBLIC OF NIGERIA
3. HRH. ENGR. UMAR TAFIDA BAGO III (CON), ETSU OF LAPAI

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:

THANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **CHIEF IHEKE SOLOMON (ESQ.)** - *FOR THE PLAINTIFFS*

2. **MUSTAPHA MOHAMMED (ESQ.)**
- FOR THE 1ST & 3RD DEFENDANTS

3. **MRS. SHIRU MAIMUNA LAMI (ESQ.)**
- FOR THE 2ND DEFENDANT

Jurisdiction - Human rights violations - Right to property - Freedom of movement - Dignity of human person - Cause of action - Proper parties.

SUMMARY OF THE FACTS

The 1st Plaintiff was granted a Certificate of Occupancy over a piece of land consisting 208 hectares, by the 1st Defendant for the establishment of an Islamic School having satisfied all the requirements to set up the School.

He averred that the 3rd Defendant demanded from it one-third of the land it acquired which demand he refused to meet. The 3rd Defendant then maliciously wrote to the Governor of the State alleging that the Plaintiffs are carrying out criminal activities and requested a revocation of the Certificate of Occupancy.

Furthermore, the Plaintiffs alleged that the 3rd Defendant hired touts, miscreants and delinquents to invade the school with all manner of offensive weapons, leaving over 257 students brutally wounded and maimed. Subsequently, the Plaintiffs were evicted from their lawful possession and occupation of the said land through the instrumentality of the 1st & 3rd Defendants.

The Plaintiffs therefore, alleged that their human rights have been violated under the African Charter.

The 2nd Defendant filed a Preliminary Objection to the Plaintiff's application on grounds that the suit is premised on the revocation of land not within the jurisdiction of this Court as same can be effectively adjudicated upon by their domestic Courts. It further contends that the Plaintiff has not disclosed any reasonable cause of action against it.

The 1st & 3rd Defendants also filed a Preliminary Objection stating that the 1st Defendant is only a component of a member state and not a member state within the meaning of the provisions of the

Supplementary Protocol of the Court. That the 3rd Defendant is an individual and does not fall under the jurisdiction of the Court.

ISSUES FOR DETERMINATION

1. *Whether the Defendants are proper parties in this suit;*

2. *Whether from the case of the Plaintiff, there is a cause of action against the 2nd Defendant.*

DECISION OF THE COURT

The Court, dismissing the application held:

1. *That it lacks competence over component parts of Member States and the 1st Defendant not being a Member State is not properly before the Court and so is discharged.*

2. *That not having made out any complaint or claim against the 2nd Defendant, the inclusion of the 2nd Defendant as a party in the suit is vexatious.*

3. *That the 3rd Defendant being an individual, the Court lacks jurisdiction over it as a Defendant in human rights violation.*

RULING OF THE COURT

2. COUNSEL FOR THE PARTIES AND ADDRESSES FOR SERVICE

For the Applicants:
Chief Iheke Solomon
Solomon & Co.
Chancery Chambers,
8A Mekness Street,
Wuse Zone 4, Abuja.

For the Defendants
1st and 3rd Defendants
Mustapha Mohammed ESQ.
Deputy Director Civil Litigation,
Abdulkarem Lafene Secretariat,
Ministry of Justice,
Minna, Niger State.

2nd Defendant
Mrs. Shiru Maimuna Lami
Civil Litigation & Public Law Department,
Federal Ministry of Justice Headquarters,
Shehu Shagari Way, Maitama, Abuja

3. SUBJECT-MATTER OF THE PROCEEDINGS

The unlawful destruction of the Applicants' properties, unlawful eviction and dispossession of the Applicants' legitimately acquired land, unlawful arrest and detention of the Applicants by the Defendants, seizure of Applicants' land by the 1st Defendant.

4. ARTICLES VIOLATED

1. Articles 2, 4, 6, 10, 11, 14, 21(1) (2) of the African Charter on Human and People's Rights;

2. Section 5 of the Universal Declaration of Human Rights;

3. Sections 40, 43 and 44(1) of the 1999 Constitution of the Federal Republic of Nigeria;

4. Article 4(9) of the Revised Treaty;

5. Articles 1, 9(4), 11(1) of the Protocol (A/P.1/7/91) and Articles 3, 4 of the Supplementary Protocol (A/SP.1/01/05) and Amended Articles 10(c) (d) of the Protocol of the ECOWAS Court.

5. DOCUMENTS SUBMITTED

1. Pictures of the wanton destruction of the Applicants houses, classrooms, animal farms, and fish ponds by the Defendants.

2. Various Newspaper publications and other correspondences of Solicitors of the Plaintiffs and NGO to the Defendants

6. FACTS AND PROCEDURE

CONTENTIONS BY THE PLAINTIFFS*:*

6.1. That the 1st Defendant, the Attorney General of Niger State is the Chief Law Officer of Niger State, a federating unit or constituent member of the Federal Republic of Nigeria.

6.2. That the 2nd Defendant, Attorney General of the Federal Republic of Nigeria is the Chief Law Officer of the Federation of Nigeria, a Member State within the meaning of Article 1 of the protocol (A/P.1/7/91) relating to the definition of Member State, and a signatory to the Revised Treaty Establishing the Economic Community of West African State (ECOWAS) dated 24th of July, 1993.

6.3. That the 3rd Defendant, Etsu of Lapai is a traditional ruler recognized by and acts as agent of the 1st Defendant.

6.4. That the 1st Plaintiff is a corporate body, recognized by the Community Court of Justice of the Economic Community of West African States through Article 4 of Supplementary Protocol and Amended Article 10 (c) of the Protocol of Community Court of Justice, and a legal entity deriving its lawful existence from the Companies and Allied Matters

Act, Laws of the Federation of Nigeria 1990, and observing and complying with every due process necessary for its lawful operation as a legal abstraction.

6.5. That the 2nd Plaintiff is the Secretary of the 1st Plaintiff, and a citizen of Nigeria, a Member State and he is recognized by the Community Court of Justice of Economic Community of West African States through Article 4 of the Supplementary Protocol (A/SP.1/01/05) and Amended Article 10 (d) of the Protocol of Community Court of Justice.

6.6. That the 1st Plaintiff, on the 29th day of May 2013, pursuant to a diligent due process, was granted a Certificate of Occupancy over a piece of land consisting of 208 hectares by the 1st Defendant for the establishment of an Islamic School.

6.7. That the Plaintiffs set up the School with all due diligence and satisfaction of all the requisite standards required of it by the 1st-Defendant.

6.8. That, the 3rd Defendant, out of greed decided to destabilize the Plaintiffs upon the refusal of the Plaintiffs to hearken to and comply with 3rd Defendant's demand for a third of the land acquired by the Plaintiffs to be given to him.

6.9. Plaintiffs complained further that the 3rd Defendant, intent on having his way, went on campaign of calumny, blackmail and downright intimidation of the Plaintiffs, causing disaffection between members of the 1st Plaintiff and other groups. To that end the 3rd Defendant wrote a letter to the Governor of the 1st Defendant alleging all manner of sundry maliciously false criminal activities which are inimical to the Defendants and requesting for the revocation of the aforesaid Certificate of Occupancy granted to the 1st Plaintiff.

6.10. Plaintiffs alleged that consequently, the 3rd Defendant hired touts, miscreants and delinquents to invade the Plaintiffs' property, with all manner of offensive weapons, to attack the Plaintiffs and their students of over 257 in number, brutally wounding and maiming their victims.

6.11. That in response to the 3rd Defendant's maneuvers and manipulations, the Lapai Local Government Council eventually commenced the process of the evicting the Plaintiffs from their lawful possession and occupation of the said land by the 1st and 3rd Defendants.

6.12. The Plaintiffs alleged that their rights have been violated under the African Charter on Human People's Rights and seek an end to the alleged breach or abuse of their rights.

6.13. The initiating Application was filed on September 22, 2014 (document number 1). Subsequently, the Plaintiffs filed a Motion and a new Application (document number 2) on November 06, 2014 seeking permission from this Court to amend their Application. All the papers of this case from this Court were served on the Defendants and they filed separate defences.

6.14. The 2nd Defendant, on November 20, 2014, filed a Motion for extension of time (document number 3) within which to file its Notice of Preliminary Objection to the Plaintiffs' Application dated 24th September 2014 and a Preliminary Objection to the suit (document number 4).

6.15. Likewise, the 1st and 3rd Defendants, on January 06, 2015, filed a Motion for extension of time (document number 5) along with a Preliminary Objection (document number 6) and their substantive defence to the suit (document number 7).

6.16. Subsequently, on April 09th, 2015, the 2nd Defendant filed a Motion for Extension of Time, (document number 8) within which to lodge and serve its Statement of Defense to Plaintiffs' Application dated 04th November, 2014 and a Preliminary Objection to the suit (document number 9), as well as its Statement of Defense to Plaintiffs' Application (document number 10).

6.17. On April 28, 2015, the 1st Defendant filed a Motion for Extension of Time (document number 11) within which to file its Statement of Defence (document number 12) and Notice of Preliminary Objection (document number 13) to Plaintiffs' Application dated November 04, 2014.

6.18. The Plaintiffs filed responses on May 05, 2015, to the Preliminary Objections filed by the 1st Defendant dated November 20, 2014 (document number 14) and the Preliminary Objections filed by the 2nd Defendant dated March 31, 2015 (document number 15).

6.19. The Plaintiffs then filed on May 21, 2015, a Motion (document number 16) to amend their Application for the reasons stated therein.

6.20. The 1st Defendant then filed a Motion for Extension of Time (document number 17) within which to respond to Plaintiffs' Motion for amendment, along with its Counter Affidavit and Written Address responding to said Motion for Amendment (document number 18).

6.21. Finally, the Plaintiffs filed their Written Submission in reply to the 1st Defendant's Counter Affidavit and Written Address dated September 03, 2015 (document number 19).

The pleadings in this case rested at this point.

CONTENTIONS AND CLAIMS OF THE PARTIES:

6.22. In their Application, the Applicants sought the following Reliefs and Orders as herein stated below:

1. A **Declaration** that the destruction of the Plaintiffs' properties by the Defendants amounts to an unlawful violation of the Plaintiffs' rights to own Property.

2. A **Declaration** that the arrest and detention of the Plaintiffs and their students amount to an unlawful and unconstitutional violation of their rights to freedom of movement and dignity of the human person.

3. A **Declaration** that the Defendants are liable to damages for destroying their houses, fishponds, classrooms, farm lands, and other properties of the Plaintiffs.

4. The sum of N2Billion (Two Billion Naira only) as damages against the 1st and 3rd Defendants for the violation of the fundamental rights of the Plaintiffs.

5. An **Order** of this Honorable Court restoring forthwith the Plaintiffs back into possession and occupancy of their land.

6.23. On 25th November 2014, 2nd Defendant filed a Notice of Preliminary Objection raising the following issues, and seeking the following declarations, that:

1. The Plaintiffs have no relationship with the 2nd Defendant/ Applicant on the subject matter of this suit or at all.

2. The subjection matter of this suit is based on revocation of land between the Plaintiffs and the 1st and 3rd Defendants thereof accordingly this Honourable Court lacks the requisite jurisdiction to hear and or adjudicate on the suit.

3. The Plaintiffs' case can be effectively adjudicated upon by the domestic Court in Nigeria having jurisdiction over the subject matter being land matter.

4. The claims of the Plaintiffs did not disclose any reasonable cause of action against the 2nd Defendant/Applicant.

6.24. On 29th December 2014, the 1st and 3rd Defendants likewise filed a Notice of Preliminary Objection also raising the following issues, and seeking the following declarations, that:

1. The 1st Defendant is only a component of a Member State and not a Member State within the meaning of the provisions of Article 9 (4) of the Supplementary Protocol (A/SP.1/01/05).

2. The 3rd Defendant is an individual as such does not fall under the jurisdiction of the Court.

3. The subject-matter of this suit affects individual.

7. ISSUE PRESENTED FOR DETERMINATION

7.0. There are several very important and interesting issues raised in the substantive pleadings of the parties but the Court, in the normal course of things decided to hear the Preliminary Objections before reaching

the merits of the case if the need arises, and because of which, we shall dwell on only those preliminary issues and arguments raised by the Defendants in their respective Preliminary Objections and the Plaintiffs' responses thereto.

7.1. The above claims and counterclaims of the parties thus present the following sole question to be answered by the Court:

7.1.1. Whether or not this Court has *in personam* jurisdiction over the three (3) Defendants?

(a) Whether or not this Court has jurisdiction over constituent entities or component agencies of Member States of ECOWAS (1st Defendant)?

(b) Whether or not the 2nd Defendant is answerable in this suit?

(c) Whether or not this Court has jurisdiction over individuals as Defendants (3rd Defendant) for allegations of violations of human rights of the Plaintiff?

8. DISCUSSIONS

8.0. The three Defendants have thus joined issues with the Plaintiffs, by filing their respective Motions for extension of time, Motions for Preliminary Injunction as well as their substantive Defences, thereby traversing, denying, and or justifying the allegations laid in the complaint of the Plaintiffs.

8.1. The lone question is whether or not this Court has *in personam* jurisdiction over the three (3) Defendants, and the short answer to this question is in the negative.

8.1.1 The jurisprudence of this Honourable Court flows in rich abundance as to who are or can be proper or competent parties before the ECOWAS Community Court of Justice and which cases arc admissible in this Court.

8.1.2 The lone issue in this case is identical in relevant part to that, among others, which confronted this Court in its decision of Wednesday,

October 14th, 2015, in SUIT NUMBER: **ECW/CCJ/APP/04/2015,** JUDGMENT NUMBER: **ECW/CCJ/JUD/19/15,** the case:

HOPE DEMOCRATIC PARTY, AND
ALHAJI HARUNA Y AHAYA SHABA - *PLANITFFS*

VERSUS

1. **FEDERAL REPUBLIC OF NIGERIA**
2. **ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE**
3. **DR. GOODLUCK JONATHAN**
4. **PEOPLES DEMOCRATIC PARTY**
5. **INDEPENDENT NATIONAL ELECTORAL COMMISSION**
6. **INSPECTOR GENERAL OF POLICE** - *DEFENDANTS*

from Pages 13 - 20 of that case.

8.1.3. We observe that the cited case and the instant case are analogous as to this issue and its disposition, and we therefore, reaffirm our previous decision above cited and herein adopt and incorporate same by reference. For that reason, it shall be our major source of legal authority and judicial precedence for this decision.

Coming back to this instant case:

8.1.4. As to the 1st Defendant, Niger State, this Court lacks jurisdiction over component or constituent entities of Member States of ECOWAS. Only Member States of the Community are directly answerable to this Court under the Treaty, the Protocol, the Supplementary Protocol, the Rules of this Court and all other applicable legal texts. Niger State, within the Federal Republic of Nigeria, is not a Member of ECOWAS, rather only the Federal Republic of Nigeria. Thus, this case is inadmissible and hence dismissible as to the 1st Defendant, and it is hereby discharged.

8.1.5. For support of this position, we take recourse to our earlier decision in the HOPE DEMOCRATIC PARTY case, supra, in which we ruled:

"It is a well-established principle of law that a court is competent when:

1. ***It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and***

2. ***The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and***

3. ***The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."***

8.1.6. "The position of law which cannot be overstated is that any defect in competence is disastrous, for the proceedings arc nullities, no matter how well conducted and decided, the defect is extrinsic to the adjudication." **Mr. Olajide Afolabi** vs. **Federal Republic of Nigeria ECW/CCJ/JUD/01/04/04 delivered April 27, 2004, at pages 12-13, paragraphs 32 (1) (2) (3), 33**.

8.1.7. "This suit is brought relying on or pursuant to the African Charter on Human and Peoples' Rights (ACHPR), the ECOWAS Treaty and the Protocol on the Community Court of Justice. It must be remembered that only Member States who are parties or signatories to the said Treaty, Protocol and the Charter are subject to the dictates and effect of these legal instruments and arc liable for violations thereof."

8.1.8. As to the 2nd Defendant, which is the Federal Republic of Nigeria, it is crystal clear that the 2nd Defendant, aforesaid, is indeed a proper party to be sued before this Court for violation of human rights of individuals which occur in the territory of Member States. In fact, the 2nd Defendant is the only proper party sued by the Plaintiffs in this case.

8.1.9. Having thus declared that the 2nd Defendant is a proper party in this case, we shall now turn to the complaint and claims of the Plaintiffs to determine if the 2nd Defendant is liable for the violation of the human rights of the Plaintiffs.

8.1.10. Upon close examination of the Plaintiffs claims and complaint, we observe that none of the allegations of the Plaintiffs refers to any actions undertaken by the officials of the Federal Government of Nigeria. There is absolutely nowhere the name of the Federal Government is even mentioned. Even in the declarations and reliefs sought, the Plaintiffs have not submitted any complaints and claims for compensation against the Federal Government. The inclusion of the name of the 2nd Defendant is therefore vexatious and should be denied. The Federal Government is accordingly hereby discharged from further answering in this case.

8.1.11. As to the 3rd Defendant, who is Mr. (HRH) Engr. Umar Tafida Bago III (CON), Etsu of Lapai, it is observed that this is an individual. The question therefore is, does this Court have jurisdiction over individual Defendants? In other words, who are proper Defendants before this Court? To answer this query, we again revert to our decision in the HOPE DEMOCRATIC PARTY case, wherein we held:

8.1.12. In the case, Suit no. **ECW/CCJ/APP/04/09, Peter David, (Applicant) vs. Ambassador Ralph Uwechue, (Defendant), Ruling no. ECW /CCJ/RUL/03/10, at pages 10-11, paragraphs 40, 42, 44, 45, delivered 11th June 2010,** this Court ruled as follows:

> "40 .... the Court emphasizes that it is an international court established by a Treaty and, by its own nature, it should primarily deal with disputes of international character. Therefore, it essentially applies international law where it has to find out the source of the laws and obligations which bind those who are subject to its jurisdiction."
>
> "42 ....the Court recalls that the international regime of human rights protection before international bodies relics essentially on treaties

to which States are parties as the principal subjects of international law. As a matter of fact, the international regime of human rights imposes obligations on States. All mechanisms established thereof are directed to the engagement of State responsibility for its commitment or failure toward those international instruments."

"44. Even before the African Commission on Human Rights, the closest reference to this Court, only States parties to the African Charter on Human and Peoples' Rights are held accountable for the violation of the fundamental rights recognized in the said instrument."

"45. Up till now the responsibility of the individuals at the international level for the violation of human rights is limited to criminal domain, and even in such circumstances, the international courts intervene only on subsidiary grounds, that is to say, where the domestic courts cannot or fail to hold the perpetrators of such violations accountable."

8.1.13. This Court, as with other treaty-based institutions, is circumscribed by the terms of the treaty which established it, and by the other legal instruments which pertain thereto.

8.1.14. We find and hold that this Court does not exercise jurisdiction over the persons of individuals as Defendants accused of violations of human rights of Plaintiffs, rather, only Member States of ECOWAS, or Institutions of ECOWAS, or legal personalities such as corporations and NGOs. Accordingly, this Court refuses jurisdiction over the person of the 3rd Defendant.

9. CONCLUSIONS

9.1. On the question of jurisdiction, we, again fall back on our basic guide in this decision, the judgment in the HOPE DEMOCRATIC PARTY case:

This Court now holds as follows, just as we ruled in our previous case, **Suit no. ECW/CCJ/APP/04/05, Chief Frank C. Ukor, Applicant** vs. **Mr. Rachad Laleye, 1st Defendant and the**

Government of the Republic of Benin, decided 02nd November 2007 at pages 16 - 22, paragraphs 27- **30:**

"27. Turning to the issues concerning the question of lack of jurisdiction, brings the Court to consider the jurisprudence on jurisdiction which are replete in the decisions of the Court, nationally and internationally as to when the Court may be said to lack it. On that basis, the cardinal principle of law on jurisdiction which never changes is that jurisdiction or lack of it is fundamental to the proceedings. It is trite law that jurisdiction means simply the power of the court to entertain an action."

9.2. We find and declare the following, as we previously did in the case, **Suit no. ECW/CCJ/APP/08/09, The Registered Trustees of the Socio-Economic Rights (SERAP)** vs. **The President of the Federal Republic of Nigeria and 8 Others, Ruling Nº. ECW/CCJ/RUL/07/10, decided 10th December 2010, at pages 20-23, paragraphs 64 and 71:**

"64. But the conclusion on the jurisdiction of the Court over the Federal Republic of Nigeria does not respond to the objection raised by the Defendants who contend that not being parties to the Treaty or other ECOWAS legal instruments, they cannot be sued before the Court."

"71. In the context and legal framework of ECOWAS, the Court stands by its current understanding that only Member States and Community Institutions can be sued before it for alleged violation of Human Rights, as laid down in **Peter David** vs. **Ambassador Ralph Uwechue** delivered on the 11th day of June 2010."

9.3. Coming back to this instant case, the Court, therefore, determines and declares that it was totally unnecessary to have listed the 1st Defendant Niger State of Nigeria and the 3rd Defendant, an individual, HRH Engr. Umar Tafida Bago III, CON, as parties in this suit, contrary to the Protocols establishing and governing the operation of the ECOWAS Court of Justice. Accordingly, the names of the 1st and 3rd Defendants are hereby removed from this case and they are hence dropped as misjoined parties and the case dismissed as to them.

9.4. The Court further declares that even though the 2nd Defendant is a proper party in this Court, the Plaintiff failed to establish a cause of action against the said 2nd Defendant as a party Defendant, when Plaintiff did not allege and has not shown what role 2nd Defendant played in the land dispute or in what way it contributed to the problem which gave rise to this litigation.

9.5. This holding is consistent with our earlier finding in the **Hadijatou Mani Koraou** case, **supra, paragraph 71 at page 16,** wherein this Court, in exonerating the Member State wrongly sued, said:

> "71. The Court finds that even if the complaint drawn from discrimination - to which the Applicant lays claim for the first time before this Court - is founded, that violation is not attributable to the Republic of Niger but rather to El Hadj Souleymane Naroua, who is not a party to the instant proceedings."

9.6. For this fatal failure, the Court hereby dismisses the case as to the 2nd Defendant.

10. DECISION

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

As to Admissibility of the Suit/Competence of the Court

10.1. It is the Ruling of this Court that the Defendants' Motions for extension of time should have been and were properly entertained and granted so as to afford the Defendants the opportunity to appear and adequately defend themselves against the claims laid and contained in the Complaint of the Plaintiffs.

10.2. Secondly, it is further ruled that the Court properly did, as a matter of course, hear and determine the merits of the Preliminary Objections to the suit, considering that the objections border on (a) on the ineligibility of the 1st Defendant being made a party in this case since it is only a component of a Member State of the Community and not

a Member State; (b) on the fact that even though the 2nd Defendant is a Member State and as such a proper party Defendant before this Court, yet, the Plaintiff did not disclose any cause of action against the said 2nd Defendant; (c.) on the ineligibility of the 3rd Defendant, being an individual, to be sued before this Court.

10.3. Thirdly, it was not necessary that this case went to trial for an oral procedure since the Objections are herein granted or sustained and therefore the successful parties Defendant should be awarded reasonable costs of defending this case.

As to Competence of the Parties

10.4. In view of the fact that the three Defendants are not properly before this Court for the reasons stated herein above, it is the ruling of this Court that the Preliminary Objections raised by the Defendants be, and the same are hereby granted and thus the case dismissed ***without prejudice,*** and the Defendants discharged, and allow the Plaintiffs, ***at their sole discretion,*** pursue their rights against the proper Defendants in the domestic Courts of Nigeria.

As to Costs

10.5. The Court rules that costs shall be and are hereby assessed for the Defendants against the Plaintiffs/Applicants in accordance with Article 66 of the Rules of this Court.

10.6. Thus made, adjudged and pronounced in a public hearing at Abuja, this 14th day of March, A.D. 2016 by the Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS RULING:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member.*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

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

HOLDEN IN ABUJA, NIGERIA

ON THIS 18TH DAY OF APRIL, 2016.

SUIT NO: ECW/CCJ/APP/12/14
JUDGMENT NO: ECW/CCJ/JUD/05/16

BETWEEN
DR. MALACHI Z. YORK - *PLAINTIFF*

VS
REPUBLIC OF LIBERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **FREDERICK A.B JAYWEH - COUNSEL**
   WITH **LELA R. HOLDEN** - *FOR THE PLAINTIFF*
2. **CHRISTIANA TAH, COUNSEL,** MINISTRY OF JUSTICE, REPUBLIC OF LIBERIA - *FOR THE DEFENDANT*

- Fundamental Human Rights - Article 2, 3, 4, 5, 6, & 7 ACHRP - No cause of action

SUMMARY OF FACTS

The Plaintiff alleged that the Defendant appointed him as her Consul General to the United States in 1999. He was accredited to the office near Atlanta in Georgia United States of America. According to him on April 8th, 2002, he was arrested, on an indictment for sexually related offences purported committed prior to his appointment and was tried and sentenced to 135 (one hundred and thirty-five) years by a court in the United States of America. He further complained that the Defendant, whom he represents as Consul General, neither intervened, protested nor offered him diplomatic protection by invoking diplomatic immunity on his behalf and securing his release after conviction. He therefore claimed that such omission or negligence by the Defendant amounted to the violation of his human rights as provided for by the African Charter on Human and People's Rights and the Vienna Convention on Diplomatic relations 1961. He therefore claimed for a declaration that his rights have been violated by the Defendant and also claimed damages.

ISSUES FOR DETERMINATION:

Whether the Plaintiff's right to freedom was violated.

Whether the Plaintiff has a cause of action against the Defendant.

DECISION OF THE COURT

In regard to this Application holds that the Defendant has committed no human rights violation against the Plaintiff and that the Plaintiff's claim is hereby dismissed.

JUDGMENT OF THE COURT

1. SUMMARY OF THE FACTS AND PROCEDURE

The Plaintiff alleges that the Defendant appointed him as her Consul General to the United States in 1999. He was accredited to the office near Atlanta in Georgia United States of America. According to him, on May 8th, 2002, he was arrested, on an indictment for sexually related offences purportedly committed prior to his appointment, and was tried and sentenced to 135 (one hundred and thirty-five) years by a Court in the United States.

He further complained that the Defendant, whom he represents as Consul General, neither intervened, protested nor offered him diplomatic protection by invoking diplomatic immunity on his behalf and securing his release after conviction. He therefore, claimed that such omission or negligence by the Defendant amounted to the violation of his human rights as provided for by the African Charter on Human and Peoples' Rights and the Vienna Convention on Diplomatic Relations 1961.

He therefore claimed for a Declaration that his rights have been violated by the Defendant and also claimed damages.

2. THE PLAINTIFF'S CASE

By an application dated the 10th of July 2014 and lodged before this Court on the 18th of July, 2014 the Plaintiff, a naturalized citizen of the Republic of Liberia (the Defendant) alleged that his right as provided for by the African Charter on Human and Peoples' Rights and the Vienna Convention on Diplomatic Relations has been violated by the Defendant. In his narration of facts, he alleged:

1- That the Defendant is a signatory to the Revised Treaty establishing the Economic Community of West African States (ECOWAS), 1993.

2- That he is a citizen, Consul General and Diplomat of the Defendant appointed on the 15th of December 1999, by President Charles Taylor, the then President of the Defendant and accredited near Atlanta Georgia, United States of America. *He further avers that consistent with his appointment and Diplomatic Status,* he immediately took

up his assignment near Atlanta Georgia, United States and conducted his duties and responsibilities until he was violently arrested by the United States authorities on the 8th of May, 2002.

3- The Plaintiff further states that his diplomatic passport bearing No.003828 was renewed by the Government of the Defendant on 07th June, 2006 without reservation by the Government of President Ellen Johnson Sirleaf, the current Government of Liberia.

4- He further contained that to confirm and reconfirm his Community Citizenship and Diplomatic status as Consul General of Liberia, he filed a petition for Declaratory Judgment before the 6th Judicial Circuit, Civil Law Court Liberia and he obtained a judgment in his favour in June 2004; a Judgment that further declared that he is a Citizen of the Defendant Liberia and her Consul General.

5- The Plaintiff also avers that in spite of the fact that both the United States and the Republic of Liberia are signatories to the Vienna Convention on Consular Relations, he was arrested on 8th May, 2002 by the Government of the United States, tried and imprisoned for 135 years without the Government of the Defendant doing anything concrete to secure his release and repatriation back to Liberia as required by diplomatic intercourse.

6- He further stated that his arrest, trial and imprisonment for 135 years at USP Florence ADMX located in Colorado, United States, runs contrary to ECOWAS Convention on Diplomatic Privileges, immunities and Vienna Convention on Consular Relations as well as the United Nations Covenant on Civil and Political Rights and the Constitution of Liberia.

7- The Plaintiff avers further that all Governments of the Defendants including the Government of President Ellen Johnson Sirleaf are fully aware and placed on judicial notice that the Plaintiff is a Citizen of Liberia and Consul General of Liberia. In spite of this, administration after administration of the Republic of Liberia has only simply acknowledged the foregoing facts, but has totally and absolutely done nothing to secure his release and repatriation back to Liberia.

8- According to him, he avers that the States and Member Countries of the Economic Community of West African States (ECOWAS) have jurisdiction over their nationals and in particular Consul General and Diplomats accredited and assigned to foreign Countries to protect their rights and immunities from arbitrary arrest and imprisonment by their receiving States. Since the Government of Liberia has done nothing to protect his rights he brings this complaint.

9- The Plaintiff further avers that the privileges and immunities of a diplomatic agent exempt him from the jurisdiction of the receiving States. Thus, the Plaintiff prays the ECOWAS Community Court of Justice to take Judicial Notice of the foregoing provision of the Vienna Convention on Consular Relations cited supra, and forthwith proceed to order the Government of Liberia to secure his release and repatriation back to Liberia consistent with diplomatic requirements and intercourse.

The Plaintiff consequently sought the following orders from the Court:

A DECLARATION:

a. That he is a citizen of Liberia and Consul General of Liberia, and as such, the Government of Liberia is morally and legally obliged to secure his release from the USP Florence ADMAX Federal Penitentiary in Colorado, United States, and accordingly ensure his repatriation back to Liberia, consistent with the Vienna Convention on Consular Relations of 1963 and 1964 to which Liberia and United States are parties.

b. That being Consul General of Liberia, Liberia is obligated to secure the Applicant's release in line with the Vienna Convention on Consular Relations of 1961 and 1964.

c. That his arrest, trial and conviction on 8th May,2002 and subsequent imprisonment for 135 years at Florence ADMX, Colorado by the United States without Liberia securing his release and repatriation is inconsistent with the 1961, 1963 and 1964 Conventions on Consular Relations and thus, violates the Applicant's human rights.

d. That the Defendant is legally obliged to respect and uphold the rights of all its Heads of Mission and Representatives, including Dr. Malachi Z. York, Applicant, Liberia's Consul General and Diplomat, consistent with the Vienna Convention on Consular Relations.

e. That the Applicant is exempt from arrest and imprisonment by the United States and because Liberia is a party to the African Charter on Human and Peoples' Rights, Your Lordships need to declare that Liberia seeks and secures the release of the Applicant.

f. That Liberia's failure and refusal to secure the release and repatriation of the Applicant back to Liberia, his sending State and Country of origin, violates his human rights, and runs contrary to Vienna Convention on Consular Relations and the African Charter on Human and Peoples' Rights. Applicant prays that the Defendant be ordered to ensure his release and repatriation back to Liberia.

g. And that the sum of N10,000,000 (Ten million Nigerian Naira) or an equivalent of USD 60,000.00 (sixty thousand United States Dollars) as damages from the Defendant.

3. THE DEFENDANT'S CASE.

The Defendant in answer to the Plaintiffs claim, denied liability for all the claims and urged the Court to dismiss same. In further answer, the Defendant stated as follows:

1- That the claims of the Plaintiff have no legal basis as it tended to mislead the Court into believing that the Plaintiff is entitled to rights and privileges accruing to Diplomatic Agents and Consular Officers. Furthermore, that with appointment of the Plaintiff as Consul General to Atlanta Georgia, he did not attain the status of a Diplomatic Agent under the Vienna Convention on Consular Relations 1963 as there was no evidence that he was carrying out his duties as such consul as at then or until he was arrested by the United States authorities. Moreover, there is no evidence that he was issued an **exequatur.**

2- That the Plaintiff surreptitiously and fraudulently obtained Liberia Diplomatic Passport No. 003828 out of his prison cell as there was no evidence of issue of such passport by the Ministry of Foreign Affairs of the Defendant. She further posited that the passport was not renewed by the Government of Liberia under Ellen Johnson Sirleaf as claimed by the Plaintiff.

3- That with regard to the claim by the Plaintiff that the 6th Judicial Court, civil Law Court, Montserrado County, which declared that the Plaintiff as Consul General was entitled to immunity and therefore should be repatriated by the Defendant, that the said judgment lacks foundation judging from the provisions of the Vienna Convention on Consular Relations and other International instruments upon which the Court relied.

4- That as to the Plaintiffs allegation that the Defendant is a signatory to the Vienna Convention on Consular relations, the Defendant concedes to that fact, but argues that consistent with Articles 41 (2) (2) and (3), 42 and 43 of the said Convention, Consular Officers are not immune from criminal proceedings except with respect to acts performed in the exercise of their Consular functions. That as a matter of law, only diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State under Article 31 (1) of the Vienna Convention on Diplomatic Relations 1961.

That the relevant law is Article 41(1), (2), and (3) of the Vienna Convention on Consular Relations which provides as follows:

a. Consular Officers shall not be liable to arrest or detention pending trial except in case of a grave crime, and pursuant to a decision by the competent judicial authority.

b. Except in the case specified in paragraph 1 of this Article, Consular Officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

c. If criminal proceedings are instituted against a Consular officer, he must appear before the competent authorities. Nevertheless,

the proceedings shall be conducted with the respect due to him by reason of his official position and except in the case prescribed in paragraph 1 of this Article, in manner which will not hamper the exercise of Consular functions as little as possible.

d. When in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a Consular officer, the proceedings against him shall be instituted with minimum delay.

e. Similarly, Article 42; in the event of the arrest or detention of Consular Staff, or if criminal proceedings is being instituted against him, the receiving State shall promptly notify the Head of the Consular post, should the latter be himself the object of any such measure, the receiving State shall notify the sending State through diplomatic channels.

f. The Defendant therefore, argued that Consular officers are not immune from criminal prosecution for acts or conducts perpetrated by them, not in the exercise of their Consular functions. In the instant case, the Plaintiff was prosecuted and convicted on account of sexually related offences which have absolutely no bearing or relation to the exercise of his consular relations.

The Defendant further contended that;

g. They have no legal obligation to secure the release of the Plaintiff since he was convicted for a crime unrelated to the exercise of his functions as a Consular Officer.

The fact that the past Government of the Defendant exhibited benevolence in seeking the release of the Plaintiff as evidenced by the Plaintiffs' own admission shown by the note verbal attached to his application, places no duty on the Government as a matter of law to secure the Plaintiffs' release.

h. On the issue of the Plaintiffs entitlement to diplomatic Protection, the Defendant states that while it has the duty to protect its

diplomatic agents, it is obliged to do so if the conduct or the action for which the officer or agent is held to answer was done in the exercise of his or her official function. In the instant case, the Plaintiff has not shown that he was arbitrarily arrested, nor did he plead that he was deprived his right to due process. The Plaintiff rather recognized that he was arrested, tried and convicted. The Defendant contends that the Plaintiff not being a diplomatic agent of the Defendant at the time of his arrest and not being arrested on account of actions or conduct carried out in the exercise of his official duty, is not entitled to immunity from criminal jurisdiction of the United States of America.

i. The Defendant also contends that the ECOWAS Convention on Privileges and Immunities is only applicable to ECOWAS Member States. The issue of the Plaintiffs incarceration in the United States, the subject matter of this proceedings is a matter between the Government of the Defendant and Government of the United States which is not a member of ECOWAS.

j. That the Plaintiff's Counsel in the statement of facts only intended to mislead the Court. According to the Defendant,

> **"Plaintiffs pleas-in-law, specifically on page 6 of the Plaintiffs application recites quotes Article 31 (1) of the Vienna Convention on Diplomatic Relations but cites same as Vienna Convention on Consular Relations being fully aware that the provision of the law grants immunity to diplomatic agents and not Consular Officers".**

k. Furthermore, the Defendant also contended that Articles 2, 3, 4, 5, 6, 7 of the African Charter on Human and Peoples' Rights relied on by the Plaintiff are not supportive of the Plaintiffs theory and the facts and circumstances of this case.

In Conclusion, the Defendant contended that based on the facts and circumstances of the case, the Plaintiff was not arbitrarily arrested, deprived his right to personal liberty, neither was he deprived of his

freedom except for reasons and conditions previously laid down by law. The Plaintiff was tried according to law and afforded due process.

Hence the provisions of the African Charter on Human and Peoples' Rights relied upon by the Plaintiff are not supportive of his case;

AND urged the Court to;

i. **Deny** and **dismiss** the application as same is legally wanting.

ii. **Declare** that Article 31 of the Vienna Convention on Diplomatic Relations is not applicable to Consular officers.

iii. **Declare** that the Defendant is not legally obligated to secure the release of the Applicant/Plaintiff.

4. ANALYSIS OF THE ISSUES FOR DETERMINATION AND LEGAL ARGUMENTS OF THE PARTIES.

As earlier stated, the Plaintiffs case is that he was appointed the Consul General of the Republic of Liberia (The Defendant) on the 15th of December, 1999. He was accredited at Atlanta Georgia in the United States of America. He was issued with Diplomatic Passport No. D/P003828-04 08 (see attachment A and B of the Plaintiff's claim).

On the 08th of May, 2002, the Plaintiff was arrested, indicted, tried, convicted and sentenced to 135 years imprisonment. He argued that his arrest, trial and imprisonment, while he was the Consul General of the Defendant is a violation of his human rights.

In the same vein, the hands-off approach adopted by the Defendant especially their failure to diplomatically secure his release violates his human rights under the Vienna Convention on Consular relations and the Defendant's constitution.

He therefore argued that the Defendant is both morally and legally obligated to seek his release and repatriation back to Liberia.

By an application dated the 10th of July, 2014 and filed on the 18th of July, 2014, the Plaintiff sought the following reliefs from the Court, namely,

A DECLARATION:

1- That the Plaintiff as a citizen of the Defendant, and its Consul General, the Defendant is morally and legally obligated to secure his release from the United States and repatriate him back to Liberia in consonance with the Vienna Convention on Consular Relations.

2- That States have jurisdiction over their nationals, even when they are outside their borders. Accordingly, being the Consul- General of the Defendant, the Defendant is obliged to secure the release of the Applicant in line with the Vienna Convention on Consular Relations of 1961 and 1964.

3- That the arrest, trial and conviction of the Applicant and subsequent imprisonment for 135 years on the 08th of May 2002 by the Court of the United States, without Liberia securing his release and repatriation is inconsistent with the 1961, 1963 and 1964 Conventions on Consular Relations and thus violates the Applicants' human rights.

4- That the Defendant is legally obligated to respect and uphold the rights of all its Heads of Mission and representatives, including the Applicant (Consul General and Diplomat) consistent with the Vienna Convention on Consular Relations.

5- That consistent with Article 6(a) to (g) of the ECOWAS Convention on Privileges and Immunities, the Applicant as Consul-General and Diplomat of the Defendant, is exempt from arrest and imprisonment by the United States, and because the Defendant is a party to the African Charter on Human and Peoples' Rights, thus the Court should declare that the Defendant should seek and secure the release of the Applicant.

6- That the failure and refusal of the Defendant to secure the release and repatriation of the Applicant back to the territory of the Defendant,

his sending State and State of origin, violates his human rights and runs contrary to the Vienna Convention on Consular Relations and the African Charter on Human and Peoples' Rights. AND

7- That the Defendant should pay the sum of N10,000,000 (Ten Million Nigerian Naira) or equivalent of USD 60, 000 (Sixty thousand United States Dollars) as costs damages against the Defendant.

At the expiration of the time required for the Defendant to file a reply, and following the failure of the Defendant to enter appearance and file a reply, the Applicant brought two applications namely:

a. Application for Expedited Hearing in which he sought for an order of this Court granting the Plaintiff expedited hearing of the suit pursuant to Article 59(1) and (2) of the Rules of this Court.

b. An Application asking the Court to enter judgment in default against the Defendant for failure to enter appearance or file a defence to the suit in accordance with Article 90 of the Rules of this Court. However, before the hearing of the two applications, the Defendant filed an application pursuant to Article 35(2) of the Rules of this Court seeking for the order of the Court granting an extension of time within which the Defendant should enter appearance, file and serve a Defence on the Plaintiff and to deem same as properly filed and served.

c. On the 12th of February 2015, the Defendant moved its motion for extension of time. The Plaintiff who had originally filed a motion to strike out the application for extension of time decided to withdraw same. The motion for extension of time was granted by the Court and thus issues were joined between the parties.

d. Foil owing this development, the Plaintiff withdrew his applications for expedited hearing and default judgment and both were struck out on the 12th February, 2015.

In her statement of Defence, the Defendant denied all the claims of the Plaintiff.

Specifically, the Defendant argued that:

i. The entire application should be dismissed for lacking any legal basis and intended to mislead the Court into believing that the Immunities and Privileges accruing to Diplomatic Agents and Consular Officers are the same.

ii. That the Plaintiff is not a Diplomatic Agent of the Defendant and that the purported Liberian Diplomatic Passport N° 003828 exhibited by the Plaintiff was fraudulently obtained out of his prison cell, since there was no record at the Ministry of Foreign Affairs of the Defendant relating to the said Passport.

iii. That although in the Plaintiffs narration of facts he claimed that the 6th Judicial Circuit Court, Civil Law Court, Montserrado County of the Defendant declared the Plaintiff as a Consular General and thus enjoys Diplomatic Immunity and should be repatriated by the Defendant, the said judgment lacks foundation having regard to the provisions of the Vienna Convention on Consular Relations and other International instruments relied upon by the Court.

iv. Consular Officers are not immune from Criminal proceedings except with respect to acts performed in the exercise of their functions, but that the Plaintiff was arrested, tried and convicted of grave crimes of sexual assault unrelated to his functions as a Consular officer.

v. That the Defendant has no legal obligation to secure the release of the Plaintiff having been convicted of a crime unrelated to the exercise of his functions as a Consular officer. The mere fact that the past Government of the Defendant exhibited benevolence in seeking the release of the Plaintiff as evidenced by the admission of the Plaintiff himself shown by the Note verbal attached to his application (Exhibit P/6) places no obligation on the current Government of the Defendant as a matter of law to secure the release· of the Plaintiff.

vi. That while the Defendant has a duty to protect its Consular and Diplomatic Agents, this obligation only extends to cases where the agent is held to answer for acts done in the exercise of his or her official function. This does not apply to the Plaintiff.

vii. That the ECOWAS Convention on Privileges and Immunities which the Plaintiff relies on is only applicable in Member States of ECOWAS. The issue of the Plaintiffs incarceration, the subject matter of the current proceedings is an issue between the Defendant and the Government of the United States which is not a member of ECOWAS.

viii. That none of the action or inaction of the Defendant has violated the Plaintiffs right. That Articles 2, 3, 4, 5, 6 and 7 of the African Charter on Human and Peoples' Rights relied upon by the Plaintiff does not support his case. The Defendant therefore urged the Court to dismiss the case of the Plaintiff.

5. ANALYSIS OF THE CASE OF THE PARTIES.

At the end of pleadings, the Court asked the parties to address it on the import of Article 88 of the Rules of this Court on the propriety of this case. The Parties complied with the request. However, the Court opines that the case can be decided fairly and fully without recourse to the submission of the parties.

6. ISSUES FOR DETERMINATION.

From the pleadings and arguments in law, four major issues can be discerned as the basis of the action and if appropriately addressed, the Court will holistically determine the merits or otherwise of the case. However, it is necessary to mention that the existence or otherwise of a cause of action for which the Court can resolve the dispute between the parties is the claim of the Plaintiff. From the pleadings of the Plaintiff, it is apparent that the claim is grounded on the status of the Plaintiff first as an ordinary Citizen of the Defendant and thus of the Economic Community of West African States (ECOW AS) of which the Defendant is a member and then on his purported position as **"Consul"** of Liberia in the United States when the circumstances culminating in this action arose.

Accordingly, the following issues call for determination:

1- Whether the Plaintiff as a citizen of the Defendant and *mutatis mutandi* of ECOWAS is entitled to diplomatic protection from the Defendant;

2- Whether the Plaintiff by virtue of his purported appointment as the Consul-General of the Republic of Liberia to the United States of America is immune from arrest, indictment, prosecution, conviction and sentence to terms of imprisonment by the host or receiving State, and whether failure to secure the release of the Plaintiff by the Defendant violated any of the rights of the Plaintiff under the African Charter on Human and peoples' Rights particularly Articles, 3, 4, 5, 6, and 7;

3- Whether from the totality of the facts presented by the Plaintiff, there is an indication of a characteristic violation of the human rights of the Plaintiff as to give the Court competence to entertain the suit and if the answer is in the positive, whether in the circumstances of the case, this Court can grant the reliefs sought by the Applicant;

With regard to issue No.1, the Plaintiff claims that every citizen is entitled to protection by his State of origin whenever in a Foreign State. To buttress his argument, the Plaintiff cites two major international human rights instruments against the Defendant, namely:

a. The United Nations International Covenant on Civil and political Rights; and

b. The African Charter on Human and Peoples' Rights.

In contemporary International law, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national or legal person that is the national of the former State with a view to the implementation of such responsibility (see Article 1 of the International law Commission, Draft Article on Diplomatic Protection 2006).

Although a State is under a duty to protect its nationals and it may take up their claims against other States, there is under International law, however no obligation for States to provide diplomatic protection for their nationals abroad (*see* the case of **HMHK *vs.* Netherlands 94 ILR, P.342, Kaunda *vs.* President of South Africa 2004, 2 ALC, 5**). The right of Diplomatic protection is not a right of the individual but that of the State. Thus in **Mavrommantis Palestine Concession** case (**P. C. I. J. series A No. 2 1924) P.12**.

The Permanent Court of International Justice succinctly stated that:

> **By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights, its rights to ensure, in the person of its subject respect for the rules of International law.**

Thus, an individual cannot force his State of nationality to take up a claim for injury done to him against another State. In fact in **Kaunda vs. President of South Africa (Supra)**, the Court rightly stated that diplomatic protection is not recognized in international law as human right, but a prerogative of State to be exercised at its discretion.

The Plaintiff as earlier noted referred to the provision of the International Covenant on Civil and Political rights and the African Charter on Human and Peoples' Rights to buttress the fact that his right has been violated but none of these texts make provisions for such right. The right to diplomatic protection is not a human right as the concept is understood, and it is not enshrined in any international text on Human rights.

The Court finds that when the Plaintiff cites a text, he refers to provisions which deal with legally recognized rights like, freedom from arbitrary arrest, freedom of association, the right to a fair hearing and fair trial, the right to the security or physical integrity of the person etc. and not provisions which deal with a right which an individual may claim in order to demand from his State, as of right, to intervene in his favour. Accordingly, the Plaintiffs argument on this plank must fail and the Court so holds.

On issue No.2, it is obvious from the evidence submitted, that the Plaintiffs case also hinges on the alleged fact that:

> **"He was a Diplomatic Agent at all times material to this suit and therefore inviolable"**

Accordingly, the Plaintiff argues that the Defendant is legally bound to assert his diplomatic Status so that he would not have been tried, convicted and sentenced to imprisonment by the Receiving State; in this case, the United States of America. In claiming immunity, the Plaintiff copiously quoted the provision of the Vienna Convention on Diplomatic Relations 1961. The relevant provision is Article 31(1) which provides:

> **A Diplomatic Agent shall enjoy immunity from the criminal jurisdiction of the receiving State.**

However, Article 1 of the same convention is apposite to the determination of the status of the Plaintiff. This is because it provides for the category of persons who qualify as diplomatic agents as envisaged by Article 13(1) (supra). It provides the definitions of officers who are diplomatic officers. Thus:

a. The "head of mission" is the person charged by the sending state with the duty of acting in that capacity.

b. The "member of the mission" are the head of the mission and members of the Staff of the mission.

c. The "members of Staff or Staff of the mission" are members of the diplomatic Staff of the administrative and technical Staff of the service Staff of the mission.

d. The members of the "diplomatic Staff' are members of the Staff of the mission having diplomatic rank.

e. A "diplomatic agent" is the head of the mission or a member of diplomatic Staff of the mission.

f. The members of the "administrative and technical Staff' are the members of Staff of the mission employed in the administrative and technical service of the mission.

g. The "members of the service Staff' are members of the Staff in the domestic service of the mission.

In the same vein, Article 3 on its part stipulates the functions of a diplomatic mission thus;

1. The functions of a diplomatic mission consist *inter allia* in:

   a. Representing the sending State in the receiving State.

   b. Protecting in the receiving State the interest of the sending State and of its nationals, within the limits permitted by international law.

   c. Negotiating with the Government of the receiving State.

   d. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.

   e. Promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations.

However, nothing in the Convention shall be presumed as precluding or preventing the performance of Consular functions by a diplomatic mission.

It is obvious from the above provisions that diplomatic Agents are Ambassadors or High Commissioners, and other diplomatic officers and Staff who are appointed by the sending State and deal directly with the receiving or host State.

In this case, the Applicant claims that he was appointed Consular General by the Defendant and by virtue of his position his arrest, indictment, trial and conviction by the host State without the Defendant intervening on his behalf is contrary to international law. He interchangeably invokes the Vienna Convention on Diplomatic Relations and the Convention on Consular Relations and the Optional Protocols 1963.

It is obvious from Article 31(1) of the Vienna Convention on Diplomatic Relations 1961 (Supra) that a Consular General is not one of the recognized persons to be accorded privileges and immunity because he is not a diplomatic Agent. The Defendant has rightly argued that the Plaintiff has surreptitiously presented the matter as if he is a diplomatic Agent. The Defendant has equally contested the status of the Plaintiff as even a Consul by maintaining that the Plaintiff is not a member of the Consular and diplomatic Corps of the Defendant. Above all, that his diplomatic passport may have been fraudulently obtained.

For the avoidance of doubt, the issue to be clarified is whether the provision of the Vienna Convention on diplomatic Relations are applicable to Consular Officers as to afford them the same immunity as afforded diplomatic agents. In order to clarify the issue, one needs to look at the provisions of the Vienna Convention on Consular Relations which deals specifically with Consular Officers. The Vienna Convention grants limited privileges and immunities to Consular Staff or personnel in the receiving State. They can be arrested and prosecuted for criminal offences and other offences, except ones committed in the course of the performance of their duties.

Article 41 provides that consular officers may not be arrested or detained except in case of grave crimes and following a decision by the competent judicial authority of the receiving State. If criminal proceedings are instituted against a Consul, he must appear before the competent authorities.

Under Article 43 of the Convention on Consular Relations, the immunity of Consuls including the Consul General is restricted in both criminal and civil cases to acts done in the official exercise of their Consular functions. In **Koeppel and Koeppel** Vs. **The Federal Republic of Nigeria,** it was held that the provision of refuge by the Nigeria Consul- General to a Nigerian national was an act performed in the exercise of a Consular function within the meeting of Article 43 and thus attracted consular immunity.

There is no evidence that the offences for which the Plaintiff was convicted were acts done in the performance of his consular duties rather they are **"grave crimes"** committed by him for which he was afforded due process. The law also is that Consuls must possess a commission from sending State and the authorization (EXEQUATUR) from a receiving State.

As rightly posited there is no evidence that the Plaintiff was issued with exequatur by the receiving State and this further shows that his status as Consul General of the Defendant at the time of incarceration is questionable.

In the light of the foregoing, it is obvious that the Plaintiff being a Consul-General of the Defendant is not covered by the inviolability provisions afforded to Diplomatic Agents under international law.

Above all, it is the sending State which grants the status of **"Consul"** to individuals in accordance with Article 10, of the Convention on Consular Relations which provides that:

> **"Heads of consular posts are appointed by the sending Sate and admitted to exercise their functions by the receiving State".**

If the Defendant contests the status of the Plaintiff as a Consul, he cannot lay claim to it.

Furthermore, assuming the status of the Plaintiff as Consul was established (which in our opinion is not the case) an arrest and detention is possible by virtue of the provisions of Article 43 of the Convention on consular Relations which permits immunity only in connection with one's consular functions, as Consul, which is not the case with regard to the charges against the Plaintiff in the instant case, but the charges were for sexual offences and racketeering and we consider these offences grave crimes covered by Article 41 of the Convention on Consular Relations.

With regard to issue No. 3, whether there has been a violation of the human rights of the Plaintiff as provided for by international human rights instruments to which the Defendant is a party.

As earlier noted, the Plaintiff's claim is based on the alleged failure of the Defendant to honour its obligation towards him under the Vienna Convention on Consular Relations by her failure to stop the arrest, prosecution, conviction and incarceration of the Plaintiff as well as failure to secure his release thereafter. His Contention is that being a Consul General of the Defendant, he is immune from criminal prosecution by the host State by virtue of his diplomatic status. In the same vein, he alleged that the Defendant's failure to intervene and stop his prosecution and conviction and secure his release from prison is a violation of his rights under Articles

2 to 7 of the African Charter on Human and Peoples' rights. His Contention is predicated on the alleged inaction of the Defendant to call to play in his favour the relevant provisions of the 1963 Vienna Convention on Consular Relations to secure his release.

The question to be asked in practical terms is whether there is a legal obligation on the Defendant to intervene on behalf of the Plaintiff to secure his release.

We have already stated above that the 1963 Convention on Consular Relations which guides the operation of Consular officials, grants very limited privileges and immunities in that it limits their inviolability to acts done in performance of their Consular duties. Accordingly, since the protection accorded Consular officers is not absolute but limited to acts in performance of their official functions, Is the Defendant in a position to claim on behalf of the Plaintiff immunity from Prosecution in the circumstances of this case? In other words, is the Defendant under an obligation to take diplomatic or other measures to secure the release of the Plaintiff from prison and repatriate him to the Defendant State? The answer is simply in the negative. First, because the offence for which the Plaintiff was charged, prosecuted and convicted has nothing to do with his employment as Consular General of the Defendant. In committing those acts he was on a frolic of his own.

We had already noted that the basis underlying the grant of diplomatic immunity under customary law and treaties is to ensure the doctrine of sovereign equality of States and allow representatives of foreign States to carry out their functions in the receiving State without hindrance, usually referred to as the doctrine of functional necessity. It is not meant to benefit individuals directly, but rather a right appurtenant to their State.

Accordingly, the Court declares that the Defendant has no legal duty to secure the release of the Plaintiff from Prison in the United States of America.

This naturally leads us to the determination of issue No.3 i.e.

Whether taking into consideration the facts and circumstances of the case any known human rights of the Plaintiff has been violated?

Article 9(4) of the Supplementary Protocol of this court, 2005 creates the human rights jurisdiction of this Court and allows it to determine cases of human rights violation that occur in any member State. For a claim for violation of human rights to be sustained, the suit in question must be predicted on a claim for human rights recognized by international human rights instrument to which the Member State is a party. Such right must have been violated by an act of the Defendant Member State within its territory and other conditions for seising the Court with competence must have been satisfied.

Applying the above elementary criteria to privileges and immunities granted to consular officers (which the Plaintiff claimed to be one) do they have the character of human rights? The answer is in the negative. They are not recognized by any known human rights instruments both locally and internationally.

Accordingly, their claims as one of the rights envisaged by Articles 2, 3, 4, 5, 6 and 7 of the African charter on Human and Peoples' Rights in particular on any other international human rights instrument in general, cannot be sustained.

In the circumstances, the Plaintiffs case has not disclosed any characteristic violation of his human rights to ground the Court jurisdiction to entertain the same.

In **Alhaji Hammani Tidjani vs. Federal Republic of Nigeria & 4 Ors (2004-2009) CCJLR,** the Plaintiff alleged a breach of his right to freedom from arbitrary arrest and detention provided for under Article 6 of the African Charter on Human and Peoples' Rights. This Court copiously laid down general conditions for the exercise of its human rights mandate thus:

> **The combined effect of Article 9(4) of the Protocol of the Court as amended, Article 4(g) of the Revised Treaty and Article 6 of the African Charter on Human and Peoples' Rights is that the Plaintiff must invoke the Court's jurisdiction by;**
>
> **1. Establishing that there is a right recognized by Article 6 of the African Charter on Human and Peoples' Rights;**

2. **That this right has been violated by the Defendant;**

3. **That there is no action pending before another international Court in respect of the alleged breach of his right; and**

4. **That there was no previously laid down law that led to the alleged breach or abuse of his rights and freedom from arbitrary arrest.**

Similarly, **in Moussa Leo Keita** vs. **The Republic of Mali (2004),** this Court also refused to assume jurisdiction where the Applicant did not identify the exact violation alleged or specified the particular right allegedly violated.

Applying the principles established in the above cases, this Court is of the view that the Plaintiff in the instant case, has not identified the specific right violated by the Defendant in relation to him.

He has purported to state that his rights under Articles 2, 3, 4, 5, 6 and 7 of the African Charter on Peoples' and Human Rights have been violated by the Defendant, but the right to Diplomatic or Consular protection is not one of the human rights recognized by those Articles.

In this regard, the entire action of the Plaintiff is incompetent, must fail and is hereby dismissed.

FOR THESE REASONS

Adjudicating in a public session, after hearing both parties, in the first and last resort,

THE COURT

IN TERMS OF MERITS

In regard to this Application holds that the Defendant has committed no human rights violation against the Plaintiff and that the Plaintiff's claim is hereby dismissed.

AS TO COSTS

Ask each party to bear its Costs.

And the Following hereby append their signatures.

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:
Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, 20TH DAY OF APRIL, 2016

SUIT NO: ECW/CCJ/APP/05/15
JUDGMENT NO: ECW/CCJ/JUD/06/16

BETWEEN
MONSIEUR SAMBA BARRY - *PLAINTIFF*

VS
THE REPUBLIC OF COTE D'IVOIRE - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JEROME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:

ABOUBACAR D. DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **ISSA DIALLO (ESQ.)** - *FOR THE PLAINTIFF.*
2. **MR. BONY ALBERT,** *JUDICIAL OFFICER OF THE TREASURY* - *FOR THE DEFENDANT*

- Violation of the right to property
- Violation of the right of access to justice.

SUMMARY OF FACTS

Applicant Barry Samba, a cattle breeder in Kanangonon, testified that on 1 July 2013 one hundred (112) oxen were killed by a group of young people armed with shotguns. Subsequently, he indicated that he filed a complaint with the Gendarmerie of Katiola against the perpetrators of this destruction, the Ministry of Defence against the commander of the said Gendarmerie and finally he said he seized the Minister of Animal and Halieutic Resources of the behaviour of the Regional Director of Livestock. He also added that the minutes of the Gendarmerie were transmitted to the Public Prosecutor at the Court of First Instance of Bouaké and nothing was undertaken for the purpose of rehabilitating him. He then seized the ECOWAS Court with an application to condemn the Republic of Côte d'Ivoire for violation of his right of property by the inaction of its services.

The Republic of Cote d'Ivoire in response does not dispute the killing of the property of the Applicant but raises doubts about their number. He then added that the facts mentioned are of the order of the offences and that the action is not yet prescribed and therefore the referral to the Court of Justice is premature.

That it is necessary to declare the action wrong and to dismiss the Applicant of all his claims.

ISSUES FOR DETERMINATION:

1. *Is the principle of exhaustion of local remedies operative in the ECOWAS Court?*

2. *Did the Republic of Côte d'Ivoire interfere with the Applicant's right of access to justice?*

DECISION OF THE COURT

In its decision, the Court pointed out that the non-exhaustion of local remedies and the non-expiration of the national limitation periods for public prosecution are not operative before it.

The Court added that the Republic of Côte d'Ivoire violated the Applicant's right of access to justice and to have his case heard because of the inaction of its judicial authorities to assess the Applicant's case in a court within a reasonable time. Also, since the proceedings are pending before the domestic courts, the Court reserves the right to rule on the violation of the right of property but orders the State of Côte d'Ivoire to bring the case to justice as soon as possible.

JUDGEMENT OF THE COURT

Delivers the following judgment in the case, **Mr. Samba Barry against the Republic of Cote d'Ivoire**, in matter of human rights violation with request for an order to pay compensation and indemnity:

I. THE PARTIES

I.1 **PLAINTIFF: Mr. Samba Barry**, born in 1940 at Villibango (Burkina Faso), a Burkinabe, domiciled at Souroukaha Sous-Prefecture of Fronan, District of Katiola in the Humbol Region, Republic of Côte d'Ivoire. C/o Brahima Barry, born 16 November 1975 at Kanangonon domiciled at Katiola in the Hambol Region, Computer Scientist domiciled at Gbedekaha on first road leading to *College de Katiola*, Tel: (00225): 09 32 88 16/05 25 10 15.

Counsel:

Maître Issa H. Diallo, Lawyer registered with the Bar Association of Burkina Faso, in Naba at *Secteur 28 du 6e Arrondissement de la Commune de Ouagadougou*, Rue 16.273, Immeuble des cailloux 1er etage au dessus de Ruben's Pressing, 01 BP 6529, Ouagadougou 01 Tel: (00225): 25 50 16 00 / 70 72 58 68 / 76 66 44 64, Email: *mishamadoudial@yahoo.fr* (Burkina Faso);

I.2 **DEFENDANT: The Republic of Côte d'Ivoire**, legally represented by the State Judicial and Public Accounts Officer with an address in Abidjan, BP: V98/ Tel: 20 25 38 48 / 07 56 40 12;

II. FACTS AND PROCEDURE

II.1 Mr. Samba Barry dragged the Republic of Cote d'Ivoire before this Honourable Court for a breach of his right to property by the residents of the *sous-préfecture* of Fronan, in *Département de Katiola*, Hambol Region, former Commander of the Katiola Gendarmerie Brigade and Katiola Regional Director of Livestock;

He justified this violation by the inaction of the administrative and judicial authorities against the alleged perpetrators and accomplices of the behaviours which he was victim;

II.2 The Application of Mr. Samba Barry dated 30/01/15 registered in the Registry of the Court on 9 February 2015 with reference No. ECW/CCJ/APP/05/15 and served on the Defendant on 16 February 2015;

II.3 The Republic of Cote d'Ivoire filed its statement of defence on 17 March 2015, registered in the Registry of the Court on 24 of the same month;

II.4 The Plaintiff filed his reply on 24 April 2015 and it was registered in the Registry of the Court on 22 May 2015;

The said reply was served on the Defendant on 27 May 2015;

In a bizarre circumstance, the Registry issued on 19 June 2015 an affidavit for failing to file the reply within the stipulated time;

II.5 Finally, the Registry registered on 13 July 2015, the lodgement of reply of the Defence dated 25 June 2015;

II.6 The matter was admitted and argued during the hearing of 16 February 2016;

The Plaintiff was absent; His counsel in a letter dated 30 September 2015, informed the Court that he will not be available that he stood by his earlier pleadings;

The Defendant was represented by Mr. Albert Bony, the State Judicial and Public Accounts Officer;

II.7 The case was adjourned for judgment on 20 April 2016;

III. ARGUMENTS AND CLAIMS OF THE PARTIES

III.1 The Plaintiff, Mr. Samba Barry, stated that he is a cattle farmer settled in Kanangonon in the Katiola Region, in the Republic of Cote d'Ivoire, since 1960s; that he had a herd of cows of more than ten thousand (10, 000) heads of cattle according vaccination report card; that he became an integrated member of the village community; that he was regularly paying for the destruction of crops by his animals;

III.2 He added that, on 1 July 2013, a group made up of youths, armed with hunting guns attacked the 3 grazing fields; that the attackers, all from Kanangonon, intentionally killed one hundred and twelve (112) cattle solely on the basis that they hate Samba Barry, because his two (02) children were preventively locked up for suspicion of arm robbery, an allegation they were however released by the Bouaké Criminal Court; that they went ahead to sell the meat of the animals they killed; that in addition they offered the meat to the gendarmes who were in charge of the preliminary investigation and to the regional Director of livestock who had full knowledge of the fraudulent source and went ahead to accept it;

III.3 Mr. Samba Barry stated that he brought a complaint to the Katiola Gendarmerie Territorial Brigade against the perpetrators for voluntary destruction of properties, Ministry of Defence against the Katiola Commander of the Brigade as well as the Ministry of Animal Resources and Fisheries for the actions of the regional Director of Livestock; that the preliminary investigation was sent to the Deputy Public Prosecutor at the Katiola Court who in turn sent the same to the Public Prosecutor at the Court of First Instance in Bouake, who sent the same to the Public Prosecutor at the Court of Appeal, Bouaké who in turn sent it to Minister of Justice, Keeper of the Seals, Human Rights and Public Freedom for directive and a follow-up; that up to now, neither the Public Prosecutor attached to the Court in Katiola nor the Public Prosecutor attached to the Military Tribunal, Abidjan reacted against the condemned despicable actions by the villagers, gendarmes and the officials of livestock directorate; that that indicates unequivocal expression of will by the Republic of Côte d'Ivoire to gloss over the legality and protection of Samba Barry that are its obligations;

III.4 The Plaintiff then affirmed that these actions constitute breaches within the meaning of the Ivoirian Criminal Code especially in its Articles 354, 393, 433 and 414; despite that, all the Ivoirian authorities did not deem it fit to exercise public right of action;

III.5 He however argued that the Republic of Cote d'Ivoire being signatory to the African Charter on Human and Peoples' Rights of 1981 through Article 3 of the UEMOA Treaty prescribing that: **"The Union shall**

respect in its actions the fundamental Human Rights as outlined in the Universal Declaration of Human Rights of 1948 and African Charter on Human and Peoples' Rights of 1981"; that a member of the Union, the Republic of Côte d'Ivoire had the obligation to ensure his protection and that of his properties; that the right to property is a human right guaranteed and protected by this Charter in its Article 14;

III.6 Regarding the admissibility of his Application, the Plaintiff argued that unlike other Community Courts, access to the Community Court of Justice of the Economic Community of West African States is not subject to exhaustion of local remedies at the national Courts of a Member State of the Economic Community of West African States, the only requirement being to come before the Court within a maximum period of (3) three years starting from the day the incident occurred and stating the subject matter of the case so that the application will be admissible; that he also has *locus standi* and sufficient interest to bring his action before the Court;

III.7 In support of his claims, the plaintiff invoked the violation of the African Charter on Human and Peoples' Rights, in its Articles 1, 3, 7 and 14, the Ivoirian Criminal Code, in its Articles 354, 433, 414 and 393 and the Ivoirian Criminal Procedure Code;

III.8 He stated that in accordance with Article 7 of the African Charter on Human and Peoples' Rights:

> *"1. Every individual shall have the right to have his cause heard. This comprises:*
>
> *(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force…";*

III.9 He explained that Article 1 of the Ivoirian Criminal Code provides that: *"Public right of action for the enforcement of sentences can be initiated and exercised by the judges and public servants who are permitted by law to do so. This action can also be initiated by the injured party through the conditions established*

by the this Code"; that the authorities that are empowered by law to initiate action in a criminal trial remains the Public Prosecutor's Office both in respect of the residents of Kanangonon for intentional destruction to properties, slaughtering without need, of domestic animals and theft with regards to the former Commander of the Katiola Gendarmerie Brigade and the Director of Livestock in the Department of Katiola for stealing;

That the Republic of Cote d'Ivoire should have therefore, exercise public right of action against the above mentioned, through the Public Prosecutors' office in order to bring the matter before a competent Court; for not doing it, the Republic of Cote d'Ivoire failed in one of its primary obligations to protect all its citizens by guaranteeing them peaceful enjoyment of their properties; that thus the Republic of Cote d'Ivoire is liable for the malfunctioning of its administration of justice system;

III.10 Finally, the Plaintiff asked the Court:

As to formal presentation of the Application,

- To **declare** the Application of Samba Barry admissible because it complies with the requirements for formal presentation and within the permitted time limit;

As to the merits of the case,

- To **declare** that the Republic Côte d'Ivoire is to blame for the offences committed by the locals of Kanangonon, in the *sous-préfecture* of Fronan, *Département de Katiola* in the Hambol Region, as well as the offences committed by the former Commander of the Katiola Gendarmerie Brigade and the Regional Director of Livestock in Katiola, together with the authorities of the *préfecture*;
- Consequently, to **order** the Republic of Côte d'Ivoire to pay him a total sum of fifty-seven million and forty thousand (57, 040, 000 CFA F) CFA Francs broken down as follows:
  - Compensation for harm (112 x 420) = 47,040,000 FCFA
  - Damages: = 10, 000,000 FCFA

III.11 In response, the Defendant explained that even if it is undisputable that the residents of Kanangonon killed the cows belonging to the Plaintiff, there is doubt on the figure he stated; that the report on the Preliminary Investigation No. 381 dated 7 July 2013, made by the Katiola Gendarmerie and that of the Report No. 65/DD/Katiola dated 6 July 2013 by the officials of the Ministry of Animal Resources and Fishery, that about ten animals were actually killed and two (2) were wounded in the tendon;

III.12 The Defendant recalled that it has protective legislative arsenal of human rights in general, and especially the right to property;

III.13 The Republic of Cote d'Ivoire stated that at no time, it failed in its obligations which flow from Article 1 of the African Charter on Human and Peoples' Rights; that it was surprise to be dragged before the Honourable Court, at a time when its Government, through the Ministry of Justice, Human Rights, Public Freedom is not leaving any stone unturned to resolve this matter once and for all;

III.14 It stated that the offences committed are all crimes; that public action shall not be time-barred except after three (3) years; that in the instant case, the crimes were committed on 1 July 2013, the matter was brought before the Community Court of Justice on 9 February 2015, only one (1) year and seven (7) months after; that since public action shall not yet be time-barred, the Plaintiff cannot validly argue that the inaction of the Judicial Authorities of the Republic of Côte d'Ivoire to assume its responsibility resulted in the violation of his fundamental rights; that consequently, bringing the action before the Honourable is premature;

III.15 The Defendant then argued that the Plaintiff merely said that public officials who are subject of his complaint benefited from the meat of the animals that were killed whereas they have knowledge of the fraudulent source without providing any proof;

III.16 The Republic of Cote d'Ivoire stated that in administrative matters, the Government is vicariously blamable for the offences of its public servants (Administrative Chamber, Supreme Court CSCA, 21 January 1972: **Judgment KRIPKA Amoin**, RID 1974 No. 34, p19-20 or

TC 11 November 1953; Judgment **Oumar Samniang Harane**, Rec 218); that in the contrary, it is answerable to criminal liability of the residents of Kananogon;

III.17 The Republic of Cote d'Ivoire, refuted any violation of Articles 1, 3, 7, and 14 of the African Charter on Human and Peoples' Rights;

In support of its claims, the Republic of Cote d'Ivoire invoked Articles 7 (2) of the Ivoirian Criminal Procedure Code and 1382 of the Ivoirian Criminal Code;

III.18 The Republic of Cote d'Ivoire finally asked the Honourable Court in its statement of defence:

As to formal presentation of the case

The Republic of Côte d'Ivoire relies on the wisdom of the Court.

As to the merit of the case

The Defendant herein asks the Court to:

- **Declare** that the action is legally baseless;
- **Declare** that in the instant case, the Republic of Côte d'Ivoire did not violate any human right;
- **Find** that the public proceedings is not time-barred and therefore to declare the action of Mr. Samba Barry premature;
- **Declare** that in civil terms, the Republic of Côte d'Ivoire cannot be held liable without evidence, for crimes its administrative officers are blamable for on their own, as individuals, even if they committed the crimes as citizens of the Republic of Côte d'Ivoire;
- **Dismiss** the Applicant's action for human rights violation brought against the Republic of Côte d'Ivoire;
- Consequently, **dismiss** the application for compensation and any others;
- **Order** Mr. Samba Barry to bear all costs in the instant case.

IV. LEGAL ANALYSIS

- Regarding the admissibility of the Application filed by the Plaintiff

IV.1 The Republic of Cote d'Ivoire by relying on the wisdom of the Court asked the Court to find that the public right of action is not time-barred and declare that the action of Samba Barry is premature;

IV.2 The Plaintiff stated in his reply dated 24 April 2015 that the difference between other Community Courts and the ECOWAS Court of Justice is that access to the Court is not subject to the exhaustion local remedies; that in any case, he has the *locus standi* and sufficient interest to bring an action before the Court;

IV.3 The Court notes pursuant to the combined provisions of Articles 9(4) and 10(d) of the Supplementary Protocol (A/SP.1/7/05) of 19 January 2005 amending Protocol (A/P.1/7/91 on the Community Court of Justice, that it has jurisdiction to adjudicate on human rights violation in Member States of the Community; that the only objective obstacles to its access in similar circumstance remain that the application shall not be anonymous and be made whilst the same matter has been instituted before another International Court for adjudication;

IV.4 However, the examination of the facts of the case allows the Court to maintain that:

- The Application filed by Mr. Samba Barry is not anonymous;

  In fact, it was instituted in his name and his behalf and signed by his Counsel Maître Issa H. Diallo, lawyer registered with Bar Association of the Burkina Faso;

- The matter is not pending before another International Court for adjudication;

In any case, there is no evidence submitted alongside the pleadings, of possible Court action before another International Court;

IV.5 The Court affirms its jurisdiction in human rights violation in the Judgment N°: ECW/CCJ/JUD/01/12 - **El Hadji Mame Abdou Gaye against the Republic of Senegal** of 26 January 2012 in these terms:

> ***"The Court holds that, it is true, it does not have jurisdiction to review the decisions rendered by the national Courts of Member States, yet it is of the opinion that a case that is pending before the national Court of a Member State does not have any influence on its jurisdiction on cases of human rights violations; it declares that the only limit to this jurisdiction is as prescribed under Article 10 (d) (ii) of the Supplementary Protocol on the Court, which bars it from entertaining a case which is already taken before another competent International Court;"***

IV.6 The Court reiterates this position by noting that the principle of exhaustion of local remedies before bringing any matter before an International Court is not obtainable before it;

However, concerning the instant case, it notes that the non-expiration the period required to initiate a public right of action internally, neither does it constitute an obstacle to access the court;

Mr. Samba Barry, is not at all held back by the period required to initiate public right of action in order to bring action before the Court on human rights violation which was a victim;

Therefore, the order sought by the Republic of Cote d'Ivoire requesting a declaration of the action of Mr. Samba Barry premature cannot succeed;

- As to merit of the case

IV.7 Consideration of the Application shows that Mr. Samba Barry invoked the violation of two (2) fundamental rights: the right to access to justice on one hand, and right to property on another hand;

He finally sought for compensation for the loss as a result;

a) - <u>Regarding the violation of right to access to justice</u>

IV.8 Mr. Samba Barry declared that following the acts of aggression perpetrated on 1 July 2013, by the residents of the Kanangonon village against his grazing fields, he filed a complaint at the gendarmerie against the attackers; that he through correspondences lodged a complaint at the Ministry of Animal Resources and Fishery and the Ministry of Defence concerning the actions of the Departmental Director of Livestock of Katiola and the former Brigade Commander of the Katiola Gendarmerie, the actions consisting of accepting from the attackers meats from his cows;

IV.9 He stated that his complaints were instituted during the months of July, August and September 2013; that as at the date the ECOWAS Court of Justice was approached, the Republic of Cote d'Ivoire's judicial system did not consider it necessary to consider his complaint against the attackers; that concerning the former Brigade Commander of Katiola Gendarmerie, the Government Commission of the Military Tribunal, Abidjan wrongly declined jurisdiction on the basis that it is not a Court; that as for Katiola Departmental Director of Livestock, the Minister responsible did not respond;

IV.10 Thus, Mr. Samba Barry believed that he did get any protection from the Ivorian State as a result of inaction of its judicial system and administrative services;

IV.11 The Republic of Cote d'Ivoire explained in its statement of defence to have sent to the crime scene, the very day the incident happened, a team made up of gendarmes and a representative from the Ministry of Animal Resources and Fishery with a view of firstly, drawing up a preliminary report and secondly drawing up report establishing the facts;

That in order to resolve the dispute, its government through the Ministry of Justice, Human Rights and Public Freedom, asked the Office of the Public Prosecutor in Bouake to forward the case file to it for directive;

IV.12 It indicated in its statement of defence, dated 25 June 2015 that the expected directive was issued and the initial indictment dated 19 June 2015 signalling the opening of judicial inquiry against the accused for slaughtering of cows without need and theft of meat, offences provided for and punishable under Article 392 393, 397, and 433 of the Ivoirian Criminal Code; that one cannot validly argue the inertness of the its judicial authorities;

IV.13 It however, argued that the matter before the Honourable Court are criminal offences; that the right of public action shall lapse after three (3) years; that the Plaintiff did not wait for the running of the limitation period in order to come before the Court; that the approach to the Court was premature; consequently, the Application should be rejected;

IV.14 The question for the Court on this head of claim are whether:

- The Republic of Cote D'Ivoire did it violate the right to access to justice of Mr. Samba Barry?

- The Application of the Plaintiff, was processed within a reasonable time?

IV.15 The African Charter on Human and Peoples' Rights states in its Article 7(1a) that: *"right to an appeal to competent national organs against acts of violating his Fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force*;" (…);

IV.16 Article 8 of the Universal Declaration of Human Rights provides that: *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law";*

IV.17 The right to access to justice must be understood, in accordance with the combination these two texts, the right which provides every citizen, who claims victim of violation of his fundamental rights to approach a Court and more especially, to have his case considered

by the said Court; Access to Court cannot be theoretical; it must be concrete and effective;

IV.18 Examination of the case file shows that the Plaintiff complained of inertness of judicial and administrative authorities of the Republic of Cote d'Ivoire in the treatment of his different applications;

V.19 In order to refute Mr. Samba Barry's allegations, the Defendant, relied on statute of limitation of three years required for the exercise of public right of action concerning the said crimes;

One cannot therefore accept that it believed not to have acknowledged any delay in judicial processing of the application of the Plaintiff;

IV.20 The Court observes that the three-year statute limitation invoked by the Defendant is a notion that comes from its internal law;

However, it is important to note that national guidelines are not applicable before the Court;

In fact, the Court only makes reference to these guidelines arising from international legal instruments in its decisions which the ECOWAS Members States are parties;

This position results from settles case of the Court;

That was the case, in the case **Pascal A. Bodjona against the Republic of Togo** - Judgment N°. ECW/CCJ/JUD/06/15 of 24 April 2015;

The Court indicated in its analysis that:

> ***"Thus, in its analysis, the Court shall refer exclusively to the international instruments in international law, which in principle, are binding on States Parties, which have ratified them…"***

It was the same in the case **Mr. Bourarma Sininta and 119 others against the Republic of Mali** - Judgment N°. ECW/CCJ/UD/13/15 of 30 June 2015;

The Court noted that:

"only international legal instruments which the respondent State is a party, are applicable before the Court"

IV.21 The right to have one's cause heard within a reasonable time is one of element of general law of access to justice;

It is a right for every party in a trial to be informed of the trial and judgment or any other decision within a reasonable time;

The notion of reasonable time, in a judicial proceeding aims to remove any attitude that can hinder the progress of the trial;

It tends to make the right to access to justice effective;

IV.22 The Court believes that the attitude of the public service of the Republic of Cote d'Ivoire in the processing of the complaint of Mr. Samba Barry is not consistent with the respect of texts and good practice which must govern all legal proceeding;

In any case, the Court noted that the destination of a report of a preliminary investigation cannot be an office of a Ministry rather than, that in charge of justice;

By behaving this way, the judicial authorities of the Defendant prolonged a trial phase that is not sanctioned by law;

They thus, unfairly prolonged the period of the proceeding;

Furthermore, the judicial authorities of the Defendant only felt obliged to judicial follow-up to steps taken by the Plaintiff on 19 June 2015, being nearly two years after commission of the offence, referred to in the complaint of Plaintiff and nearly six (6) months after the matter was brought before the Honourable Court;

In fact, it was only on 19 June 2015 that the Public Prosecutor attached to *Tribunal de Premiere Instance de Bouake,* through his initial indictment dated same date, seeking the opening of judicial inquiry against the accused for *"slaughtering of cows without need and theft of meat".*

It should be recalled that this initial indictment founded on the report No. 318 drawn up on 20 July 2013 by the Katiola Brigade;

IV.23 It therefore appears that, irrefutably, the judicial authorities of the Republic of Cote d'Ivoire were not diligent in the consideration of the case of the Plaintiff by a competent Court within a reasonable time;

IV.24 The Court concludes under these circumstances that the Republic of Cote d'Ivoire violated the right to access to justice of the Plaintiff and the right to have his cause considered within a reasonable time; that hence, its liability is established as a result of inertness of its judicial authorities to consider the matter of the Plaintiff within a reasonable time;

b) - <u>Regarding the violation of right to property</u>

IV.25 The Plaintiff invoked also the violation of his right to property;

IV.26 He explained that on 1 July 2013, the youths of Kanagonon village appeared in his grazing fields and killed some of his cows; they did not only made away with the meat of the cows, but they also, gave to the Regional Director of Livestock in Katiola and former Commander of the Katiola Gendarmerie Brigade; that the latter having full knowledge of the fraudulent source of the gifts, accepted them all the same;

IV.27 The Defendant, argued that it adopted legislative or other measures to enforce rights, duties and freedoms recognized by the Member States of the African Union who are equally parties to the African Charter on Human and Peoples' Rights, such as prescribed in Article 1 of the said Charter; that it did not in any way failed in its obligation; that proof of culpability of its officials is not provided; that as for the youths of Kanangonon, they are individually and financially answerable for their actions and failings which cause harm to other persons;

IV.28 Can one argue that the Republic of Cote d'Ivoire the right to property of Mr. Samba Barry?

In order to respond to this question, it is important to examine the position of African Charter on Human and Peoples' Rights on this and refer to the obligations covered by the Defendant in this area;

IV.29 The African Charter on Human and Peoples' Rights provides in its Article 14 that: *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws";*

IV.30 Property right appears as a fundamental right can only be called into question for well-defined purposes: these include public interest or general interest;

In the instant case, none of the two purposes is met;

IV.31 The Republic of Cote d'Ivoire gave as reason the legislative measures adopted in this regard to exonerate itself from any liability vis-à-vis Mr. Samba Barry;

But the obligation covered by the Republic of Cote d'Ivoire does not only consist of the adoption of legislative or regulatory texts in order to guarantee property right;

The Republic of Cote d'Ivoire must ensure the effective application of the said texts and the respect of property right throughout its national territory;

It is not enough for the State to classify behaviours as offences in order to escape from the obligation proscribed by the African Charter on Human and Peoples' Rights (ACHPR);

IV.32 In the instant case, the Defendant did not dispute the fact that on 1 July 2013, at Kanangonon, it national territory, animals belonging to Mr. Samba Barry were without legitimate reason, killed by the members of the said village; that the complaints filed by the victim were not conclusively considered;

The Republic of Cote d'Ivoire therefore cannot validly argue that it has fulfill all the obligations arising from the provisions of Article 14 of the African Charter on Human and Peoples' Rights;

Mr. Samba Barry is entitled to expect from the Republic of Cote d'Ivoire, through the application of the provisions of Article 14 of the African Charter on Human and Peoples' Rights, the guarantee of his right to property;

IV.33 The consideration of the exhibits submitted alongside the pleadings shows that the legal actions instituted by Mr. Samba Barry are pending before the national Courts;

How the said proceedings will be handled will allow the Court to evaluate whether or not the Republic of Cote d'Ivoire provided to Mr. Samba Barry the guarantee prescribed by the provisions of Article 14 of the African Charter on Human and Peoples' Rights;

IV.34 In the light of the foregoing; the Court believes that it would be wise on its part to stay ruling on this head of claim until the national Courts conclude their case;

It appears however necessary the order the Republic of Cote d'Ivoire to bring the case to trial as soon as possible;

c) - <u>Regarding application for damages</u>

IV.35. Mr. Samba Barry in his initiating application sought for an order of Court asking the Republic of Cote d'Ivoire to pay him:

- Forty-seven million, and forty thousand (47, 040,000) CFA F as compensation for the loss;

- Ten million (10, 000, 000) CFA F as legal fee;

IV.36 Clearly, the Plaintiff based his principal head of claim on the number of heads of animals that were lost during the events between him and the Kanagonon residents;

IV.37 The Court observes that its jurisdiction stems from the human rights violations arising from the sluggishness and the inertness of the Republic of Cote d'Ivoire, through its public judicial and administrative services, in the trial of various application instituted by Mr. Samba Barry;

IV.38 The Court believes that for this reason, a compensation be paid to the Plaintiff;

This compensation must however, be based on the violation of his fundamental rights and not on the loss arising from the loss of animals, as this aspect in pending before the national Courts;

Likewise, the Court decided not to rule on the allegation of violation of right to property after having considered the fate of the said application before the national Courts;

IV.39 In the light of the foregoing, the Court believes it is entitled to order the Republic of Cote d'Ivoire to pay damages to Mr. Samba Barry for the violations of the rights of the Plaintiff to access justice and the right to have his cause heard within a reasonable time;

Therefore, the Republic of Cote d'Ivoire should be ordered to pay the Plaintiff, the sum of Eight million, Five hundred thousand (8, 500,000) CFA F as damages;

d)- <u>Regarding Application for Damages</u>

IV.40 Mr. Samba Barry also asked for a reparation as compensation in respect of legal fee;

IV.41 The Court recalls the provisions of Article 69 (b) of its Rules;

Article 69 (b) of the Rules of the ECOWAS Court of Justice states that: *"Expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers";*

IV.42 The Court notes that in order to benefit from this compensation, the party that is asking for it must justify the costs incurred in respect of legal fee;

However, the in the instant case, Mr. Samba Barry did not provide any documentary evidence relating to costs incurred;

IV.43. It appears that the claims of the Plaintiff on request for compensation are not justified;

It should therefore be dismissed;

V. REGARDING COSTS

V.1 Article 66 (2) of the Rules of the ECOWAS Court of Justice, provides that: *"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings"*

V.2 In the instant case, it appears that the Defendant will is not going to be successful;

Furthermore, expressly, the Plaintiff asked for the Republic of Cote d'Ivoire to be ordered to bear the costs;

The request therefore should be granted;

FOR THESE REASONS

Adjudicating in open Court, after hearing the parties, in respect of human rights violation in first and last resort;

As to formal presentation of the Application:

- **DECLARES** admissible the Application filed by Mr. Samba Barry;

As to merit of the case:

- **RULES** that the rights to access to justice of the Plaintiff and the right to have his cause heard within a reasonable time were violated;

- **RULE** that the Republic of Cote d'Ivoire is liable through the services of its administrative and judicial authorities;

- **ORDER** the Republic of Cote d'Ivoire to pay the sum of Eight million, Five hundred thousand (8,500,000) CFA F as compensation;

- **ORDER** the Republic of Cote d'Ivoire to bring the case to trial as soon as possible;

- **DISMISS** compensation claim by the Plaintiff;

- **ORDER** the Republic of Cote d'Ivoire to bear the costs;

THUS MADE, DECLARED AND PRONOUNCED IN A PUBLIC HEARING AT OUTSIDE COURT SITTING HOLDEN IN ABIDJAN (THE REPUBLIC OF COTE D'IVOIRE), ON THIS DAY, THE 20TH DAY OF APRIL 2016;

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

Assisted by:

Aboubacar DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, THE 21ST DAY OF APRIL, 2016

SUIT N°: ECW/CCJ/APP/02/13 REV
RULING N°: ECW/CCJ/RUL/05/16 REV

BETWEEN
L'ASSOCIATION DES TRAVAILLEURS PARTANTS VOLONTAIRES A LA RETRAITE, DITE ATVR
(THE ASSOCIATION OF VOLUNTARILY RETIRED WORKERS KNOWN AS ATVR) } *PLAINTIFF*

VS.
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MARIAM DIAWARA** - *FOR THE PLAINTIFFS.*
2. **M. IBRAHIMA TOUNKARA**
   GENERAL DIRECTORATE, STATE LITIGATIONS DEPARTMENT, BAMAKO, MALI - *FOR THE DEFENDANTS.*

- Admissibility - Discovery of new facts

SUMMARY OF FACTS

The Plaintiff who is a body having the legal capacity to act as a representative for its members (402 members), and for and on behalf of the Chairman of the Executive Board of ATVR, brought an action before the Court alleging that in 1985, the Republic of Mali, with the financial support of the World Bank, initiated a programme for the voluntary retirement of certain civil servants, with a view to reduce the financial burden of the civil service.

ATVR via an application dated 4 April 2012 asked the Court to declare that the Republic of Mali violated its rights, notably, the right to equality before the law and the right to information, in that the Republic of Mali had not honoured its commitments as contained in the framework agreement reached with the World Bank. The Applicant asked the Court amongst other reliefs to order the Republic of Mali to produce the Framework Agreement in the case file and order for investigative measures.

The ECOWAS Court in its judgment, had declared that it had jurisdiction to adjudicate on the matter, that the application for expedited procedure is purposeless and admitted the order for estoppel sought by the Defendant on the ground that the Plaintiff lacked locus standi. The Court also declared that the order sought by the Defendant, as to the action brought by the Plaintiff being foreclosed, is well grounded, proceeded to declare, that the action brought by ATVR was inadmissible and dismissed the request by the Republic of Mali seeking damages. The applicant, brought the instant application for revision, requesting that the Court should declare that the application for revision is admissible for being filed within the legal requirements and within the legal requirements and time allowed, that the alleged new facts are real and that they are such as to justify the revision and the admissibility of the application and withdraw the previous judgment and reopen the proceedings between the parties.

On its own part, the Republic of Mali asked the Court not to admit the application on the ground of the existence of the previous judgment already given by the Court.

ISSUES FOR DETERMINATION

- *Whether the application before the Court is admissible.*
- *Whether any new facts were discovered.*

DECISION OF THE COURT

The Court admits the Republic of Mali in its preliminary objection and declared that the preliminary objection is founded. The Court, declared inadmissible the application for revision by the Association of Voluntarily Retired Workers (ATVR) against the impugned judgment No. ECW/CCJ/JUD/14/15 of 30 June 2015 and Ordered the Plaintiff to bear the costs.

JUDGMENT OF THE COURT

Between

I- THE PARTIES

The Association of Voluntarily Retired Workers known as (ATVR), **Plaintiff,** a body having the legal capacity to act as a representative for its members (402 members), and for and on behalf of the Chairman of the Executive Board of ATVR, Mr. Mohamed EL Béchir Ben Abdallah, whose headquarters is located at *Bourse de Travail*, Bamako.

***Plaintiff Counsel*: Maître Mariam Diawara**, Barrister-at-Law, Darsalam, rue 603, Porte 116, BP 696 Bamako, Republic of Mali.

And

The Republic of Mali, Defendant, represented by the General Directorate, State Litigations Department, Bamako, Mali.

THE COURT,

Having regard to the 24 July 1993 Revised Treaty establishing the Economic Community of West African States (ECOWAS);

Having regard to the Protocol of 6 July 1991 and the Supplementary Protocol A/P.1/7/91 of 19 January 2005 on the ECOWAS Court of Justice;

Having regard to the Rules of the ECOWAS Court of Justice of 3 June 2002;

Having regard to the Universal Declaration of Human Rights of 10 December 1948;

Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;

Having regard to the application dated 12 September 2015 registered at the Registry of the Court of Justice on 30 September 2015, filed by ATVR of Mali seeking the revision of the judgment of 30 June 2015 delivered by the Court;

Having regard to the statement of defence of the Republic of Mali dated 28 October 2015, registered at the Registry of the Court on 5 November 2015;

II - FACTS AND PROCEDURE

Whereas it is established from the pleadings filed in connection with the procedure before the Court, that during the course of the year 1985, the Republic of Mali, with the financial support of the World Bank, initiated a programme for the voluntary retirement of certain civil servants, with a view to reduce the financial burden of the civil service; that to that end, Act No. 91-002/ANRM of 24 January 1991, creating a system of voluntary retirement for civil servants in the civil service, was passed into law, under General Civil Service Act, the Judicial Act and the Labour Act, for the benefit of civil servants;

To encourage the civil servants to subscribe to this programme, the Republic of Mali made certain commitments, notably regarding:

- Paying back the social security contributions of voluntarily retired workers who had not been in continuous active service for 15 years before their voluntary retirement;

- Payment of retirement benefits using the legal age limit as the starting point;

- Payment of additional amounts for beneficiaries on levels A, B and C, in accordance with the measures of assistance provided for under the framework of the national social security;

In the year 2000, the ATVR dragged the Republic of Mali before the Industrial Court, and thereafter, before the Bamako Court of Appeal. Each of these Courts ordered the Republic of Mali to produce the framework agreement which was signed between the World Bank and the Republic of Mali, but to no avail.

On 20 December 2012, confronted with delays in the proceedings of the domestic Courts, ATVR brought their case before the ECOWAS Court of Justice, via an application dated 4 April 2012 asking the Court to find that

the Republic of Mali violated its rights, notably, the right to equality before the law and the right to information, in that the Republic of Mali had not honoured its commitments as contained in the framework agreement reached with the World Bank.

By the above-mentioned Applications, ATVR asked the Court:

As to form

- Declare that it has jurisdiction over the violation of the human rights invoked by the Applicant
- Appoint, by preliminary ruling, a national or international expert to determine the rights and privileges of its members (principals) under the Framework Agreement signed by the Malian State and the World Bank;
- Order the Republic of Mali to produce the aforementioned Framework Agreement in the case file and order for investigative measures;

As to merit

- Find that the Republic of Mali violated the human rights invoked by the Plaintiff, notably the right to equality before the law as guaranteed by Article 3 of the African Charter on Human and Peoples' Rights;
- Order the Republic of Mali to cease the violation of the rights of the ATVR members, especially by availing them of the benefits provided for in the framework agreement signed with the World Bank;
- Pay to each ATVR member the sum of 10,000,000 CFA Francs, for all the harms suffered by them;
- Order the Republic of Mali to bear all costs;

By Judgment N°. ECW/CCJ/JUD/14/15 of Thursday, 30 June 2015, the ECOWAS Court of Justice decided as follows:

"For these reasons The Court, adjudicating publicly, after hearing both Parties, in a matter on human rights violation, in first and last resort;

As to formal presentation,

- Declares that it has jurisdiction to adjudicate on the case;
- Adjudges that the application for expedited procedure is purposeless;
- Admits the order for estoppel sought by the Defendant on the ground that the Plaintiff lacks *locus standi*, and declares that the order sought by the Defendant, as to the action brought by the Plaintiff being foreclosed, is well-grounded;
- Declares, consequently, that the action brought by ATVR is inadmissible;
- Dismisses the request by the Republic of Mali seeking damages;
- Orders the Plaintiff to bear the costs."

By its application cited above, dated 12 September 2015, ATVR asked the Court the following:

- To declare that the application for revision is admissible for being filed within the legal requirements and within the legal requirements and time allowed;
- To declare unequivocally that the alleged new facts are real and that they are such as to justify the revision and the admissibility of the application;
- Consequently, withdraw the above judgment and reopen the proceedings between the parties;

On its part, the Republic of Mali asked the Court to not admit the action of ATVR on the ground of the existence of the above-mentioned final judgment between the parties;

III- ANALYSIS OF THE COURT

I- Regarding the admissibility of the application for revision

Whereas before any defence on the merit, the Republic of Mali evokes the inadmissibility of the application filed by ATVR. In support of its defence, the Republic of Mali argues that the Plaintiff relied its application for revision on the basis of Article 25 of the Protocol A/P-1/7/91 of 6 July 1991 and on the basis of Articles 92, 93, and 94 of the Rules of the ECOWAS Court of Justice and that an analysis, even if superficial, of these texts, makes it possible to know that the opening of a revision is essentially subject to two conditions, namely;

1- The discovery of a fact unknown to the Court and the Plaintiff;

2- Complying with the three-month time limit from the discovery of the unknown fact;

In the instant case, according to the defendant, in order to highlight the fact that the fact is unknown to the Court, the ATVR merely states that *"it was not a party to the agreement of 18 July 2007, through the Union nationale des travailleurs du Mali (UNTM) (Mali workers Union) and that the Republic of Mali did not implement all the provisions of framework agreement enshrined in Act. No.91-002/ANRM of 24/01/ 1991..."*

However, according to the Republic of Mali, these facts were submitted to the Court's appreciation in the judgment under appeal, in which it clearly stated that *"The Court notes first and foremost that it has been admitted in the course of the proceedings that the Memorandum of Understanding dated 18 July 2007, signed within the framework of implementation of Act No. 91-002/ANRM of 24 January 1991, which created a voluntary retirement system for the civil service, as a result of a tripartite negotiation between the Government of the Republic of Mali, the Employers' Council of Mali and the Labour Union of Mali, with the latter playing the role of legal representatives of ATVR, so as to terminate the claims made by ATVR";*

Regarding the documents produced by ATVR in support of its application, especially decision No. 001/0103/MEPERI OF 30 January 2007 regarding the establishment of a negotiation Commission for a social aid to voluntarily retired workers, the recommendations of the Commission for the examination of the claims of the Coordination of associations affected by the structural adjustment programme, the memorandum of understanding of 18 July 2007 and the document entitled: "*the problem of associations affected by the structural adjustment programme"*. The Republic of Mali believes that it should be excluded from the discussion for the simple reason that they exist and are known to the members of the ATVR even before the impugned judgment and that some of them (e.g. the Memorandum of Understanding of 18 July 2007 and the Decision of 30 January 2007) were included in the case-file of the first proceeding, which was the subject matter of the appealed judgment.

Whereas ATVR objects through their counsel by arguing that it bases its application on the provisions of Article 25 of the above cited Protocol of 6 July 1991 and Article 92 of the Rules of the Court which determine the conditions of admissibility of an application for revision of a judgment of the Court, as well as Article 10 of the African Charter on Human and Peoples Rights on the freedom to form an association.

In support of its application, ATVR produced the above-mentioned documents by the defendant through which it attempts to demonstrate that it was never a party to the agreement of 18 July 2007 on which the latter relies, nor satisfied in accordance with the commitments of the Republic of Mali. It believes that the National Workers Union, although being a legally recognised association, has had no legal or written authority to act on its behalf or for its interest.

Whereas it follows from the combination of the provisions of Article 25 of Protocol A/P.1/7/91 of 6 July 1991 and of the Court Rules of 3 June 2002 on ECOWAS Court of Justice, that the application for revision is admissible only within a period of three (3) months from the day on which the Plaintiff became aware of a real new fact which is the basis for the revision as well as for the admissibility of his action, and the discovery of which is of such a nature as to have a decisive influence on the impugned decision.

In the instant case, the Plaintiff does not produce any evidence or any new exhibit of such a nature as to justify the occurrence of a new and real fact, within the meaning of the aforementioned texts, likely to have a decisive influence on the impugned decision;

It merely maintains that it was never a party or represented in the agreement of 18 July 2007, let alone satisfied as the Republic Mali claims, pretending to forget that these arguments had been widely discussed during the proceeding, and were the subject matter of the impugned judgment.

In addition, it is a fact, on one hand, that some of the abovementioned exhibits produced in the proceedings, known as "Recommendations of the Commission... dated 3 February 2004" or "Problematic of the associations... without date", are the work of the Plaintiff itself and were therefore known to it before the impugned judgment of 30 June 2015 and that, on the other hand, other exhibits cited above, namely the decision concerning the establishment of a negotiation Commission as well as the Memorandum of Understanding of 18 July 2007, are already filed and analysed before the Court during the examination of the proceedings leading to the judgment contested by the Plaintiff.

Taking the above into account, the Court believes that the application for revision by ATVR against the impugned judgment cited above should be rejected as inadmissible.

2- Regarding costs

Whereas ATVR must bear the costs pursuant to Article 66 of the Court's Rules since it is unsuccessful;

FOR THESE REASONS,

Adjudicating in closed session, after hearing the parties, in matters of revision, in first and last resort;

As to form,

- **Admit** the Republic of Mali in its preliminary objection;

- **Declare** that the preliminary objection is founded;

- Consequently, **declare** inadmissible the application for revision by the Association of Voluntarily Retired Workers (ATVR) against the impugned judgment No. ECW/CCJ/JUD/14/15 of 30 June 2015;

- **Order** the Plaintiff to bear the costs.

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

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, THE 21ST DAY OF APRIL, 2016

SUIT N°: ECW/CCJ/APP/24/12 REV.
RULING N°: ECW/CCJ/RUL/06/16 REV

BETWEEN
MR. BOURAMA SININTA & 119 ORS. - *PLAINTIFF*

VS.
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMEYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:

ABOUBACAR DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MARIAM DIAWARA (ESQ.) &**
   ISSA K. COULIBALY (ESQ.) - *FOR THE APPLICANTS*

2. **IBRAHIM TOUNKARA** - *FOR THE DEFENDANT*

- Human rights violations
- Inadmissibility of the Revision Appeal to the Court

SUMMARY OF FACTS

On 12 September 2015, the Applicants, Mr. Bourama Sininta and 119 others brought the Republic of Mali before the ECOWAS Court of Justice for the purpose of revision of Judgment No. ECW|CCJ|JUD|13|15 of 30 June 2015.

The Applicants contended that their application is admissible for having been made within the time limits and in accordance with the legal provisions. They consider that the letter from the Governor of French Sudan, the cadastral plan and the letter from the Attorney General are elements likely to contradict the land rights of the Republic of Mali and likely to influence the meaning of the judgment at issue.

Responding, the Republic of Mali argued that the conditions for the initiation of the application for revision were not met, that the facts relied on had already been introduced into the proceedings leading to the judgment in dispute and could as a result constitute new facts.

ISSUE FOR DETERMINATION

Whether the application for revision is admissible?

DECISION OF THE COURT

The Court finds that the alleged new facts are not real or justified, declares, therefore, inadmissible the Applicants' application for revision of Judgment No. ECW/CCJ/JUD/13/15 of 30 June 2015 and orders the costs to be borne by them.

JUDGEMENT OF THE COURT

THE COMMUNITY COURT OF JUSTICE - ECOWAS delivered the following judgment in the case of **Mr. Bourama SININTA and 119 Others** against **the Republic of Mali**, in an appeal for revision against Judgment N^{O}: ECW/CCJ/JUD/13/15 of 30 June 2015, the content of which follows:

I- PARTIES

1.1 **APPLICANTS: Mr. Bourama SININTA, Mama FOFANA, Sinaly KONTA, Lassiné NIARE, Karim FOFANA, Sékou Amadou KONTA, Ba Moulaye FOFANA, Ba Zoumana NIARE, Mady FOFANA, Séko MININDIOU, Mady TANGARA, Bachaka NIARE, Tiémoko KONATE, Mamoutou DIANE, Ousmane SAMAKE, Bachaka NIARE, Mamoutou NIARE, Seko NIONO, Ba Oumarou KOITA, Mama SININTA, Papou TOURE, Issa KONTA, Sénou SANGALE, Karim DEMBELE, Kassim TRAORE, Yassouma TRAORE, Lassina TRAORE, Yamadi TRAORE, Bassidi DIAKITE, Bakary TOMOTA, Modibo TOI IOTA, Ousmane TOMOTA, Dramane SANOGO, Adama NABO, Bakira TRAORE, Bakira KANE, Bakira CAMARA, Mamadou SININTA, Djikiné COULIBALY, Bakoroba COULIBALY, Ninkora COULIBALY, Sétigui COULIBALY, Ali TOMOTA, Boureima TOMOTA, Amsa TOMOTA, Moussa NIADJE, Balla DIARRA, Bakary TOMOTA, Alassane DJENEPO, Yacouba NIONO, Modibo DIARRA, Solomane DIARRA, Adama MAIGA, Sory DIENTA, Konoba DIENTA, Bazoumana DIENTA, Zoumana KOITA, Bana O TRAORE, Bouba TRAORE, Bakoroba BERTHE, Madou TRAORE, Aguibou KOITA, Sékou DJENEPO, Baba NIARE, Mady KANE, Bachaka FOFANA, Kassim SININTA, Moussa KEITA, Seko FOFANA, Sékou CAMARA, Boubacar BALLO, Yaya SENGO, Salia DIARRA, Siaka Niaré, Mady KANTE, Ibrahim SINITA, Mamadou DIANE, Bakou DIARRA, Karim FOFANA, Bakary TOMOTA, Nama TRAORE, Yakou BALLO, Mady SACKO,**

Mamadou TRAORE, Adama COULIBALY, BAKARY DJENEPO, Souleymane TANGARA, Mamadou SYLLA, Bamayi TRAORE, Mama DIAR Aba TRAORE, Dogoni TRAORE, Drissa SANOGO, Moh TANGARA Abdoulaye TANGARA, Sidiki KONYA, Bayani KONTA, Madou BERTHE, Mamou SYLLA, Boubacar SAMAKE, Zoumana SININTA, Karamoko NIARE, Modibo DJIRE, Bakary NIARE, Baba FOFANA, Moussa SININTA, Koti DIARRA, Papa CISSE, Alou DEMBELE, Alassane KEITA, Kotié DIARRA, Sidiki Konta, Nlamadou BALLO, Kassim TRAORE, Adama TIENTA, Békéné DIAKITE, Chaka NIARE, Salia DIARRA, Mamoutou SYLLA, and Bakary NIARE, all domiciled in Badalabougou (Bamako) and represented by Maitre Mariam DIAWARA, lawyer, with office located at Rue 603, Porte 116, BP 696, Darsalam Bamako, MaIi, Tel/fax: 00223 20228133- 0022366748123 all domiciled in Badalabougou (Bamako) represented by Maitre Mariam Diawara, lawyer ;

1.2 **DEFENDANT: The State of Mali** through the Ministry of Housing, Land Affairs and Urban Planning, represented by the Directorate General of State Litigation;

II- FACTS and PROCEDURE

II.1 The Applicants have, by application dated 12 September 2015, filed at the Registry on the 30th of the same month, sued the Republic of Mali before the Court of Justice for the purpose of revising judgment No. ECW/CCJ/JUD/13/15 of 30 June 2015 rendered in response to their application, dated 5 December 2012, for the purpose of finding a violation of their rights, in particular their rights to property, to the equality of all before the law and to the equal protection of the law;

11.2 By a second application bearing the same date as the main application, also filed with the Registry on 30 September 2015, they requested the Court to have their case heard under the expedited procedure in accordance with article 59.1 of the Rules of Procedure of the Court;

11.3 Finally, in a third application bearing the same date and filing references as the first two, they asked the Court for provisional measures;

11.4 The three applications were served on the Republic of Mali on 05/10/2015;

11.5 The Republic of Mali filed its statement of defence dated 23 October 2015 but filed with the Registry on 05 November 2015;

11.6 The admissibility of the appeal was discussed in chambers at the hearing held in Abidjan (Republic of Côte d'Ivoire) on 21 April 2016;

The Plaintiffs were represented by their Counsel Mariam DIAWARA and Issa K. COULIBALY;

Mr. Ibrahima TOUNKARA of the Directorate General of State Litigation represented the defendant;

The decision was rendered on the same day.

III- PLEAS-IN-LAW AND CLAIMS

III.1 On the admissibility of their application, the Applicants relied on Article 25 of Protocol A/P.1/7/91 relating to the Court and Article 92 of the Rules of Procedure;

III.2 They stated that it follows from the combined provisions of article 25 of the 1991 Protocol, in its paragraph 4, and the Rules of Procedure of the Court that an application for revision is admissible only within a period of three months from the discovery of the fact that gives rise to the application for revision, provided that this discovery occurs before the expiry of the period of five years from the date of the decision appealed against; that in the present case the contested judgment dates from 30 June 2015 and the facts on which their application for revision is based were only discovered in the month of the application for revision; that they do not incur any foreclosure;

III.3 Addressing the merits, the Applicants recalled that according to article 25 (4) of the 1991 Protocol, an application for revision of a decision may be made to the Court only if it is based on the discovery of a

fact which is of such a nature as to be a decisive factor and which, at the time when the decision was rendered, was unknown to the Court and to the Applicant, provided that such ignorance was not due to negligence;

III.4 They specified that they are challenging the contested judgment in its points IV.20, IV.21 and IV.22;

III.5 They indicated that they hold a right of occupation based on a letter from the Governor of the French Sudan dated 17 April 1948.

III.6 The Applicants therefore relied on the said letter as well as on the decisions of the African Commission on Human Rights relating to the application of the African Charter on Human and Peoples' Rights in its articles 8, 14, 21 and 22;

III.7 They explained that the African Commission on Human and Peoples' Rights in its work, interpreted article 14 as protecting the right to individual and collective property and specified that the possession of land by indigenous people as well as the existence of a title deed are not necessary conditions for the recognition of a property right of an indigenous people; that again according to this Commission in its decision involving the Endorois People of Kenya: *"Traditional possession of their lands by indigenous people is equivalent in effect to title granted by the State"*; that traditional possession implies that indigenous people have the right to demand official recognition and registration of title;

III.8 They added that according to article 14 of the African Charter on Human and Peoples' Rights, it is possible to limit the right to property in special circumstances, that the limitation of a property right will be contrary to the African Charter unless the protective measures are respected, that the limitation or restriction is established by law, that it aims to achieve a legitimate objective in a democratic society, that it should be necessary, and that it should be proportional to the objective sought; that, in addition, in order to ensure that the survival of indigenous peoples is not threatened by restrictions imposed by or with the authorization of the State, certain precautions must be

observed, including the preparation of an environmental, social and cultural impact study, the right to free, prior and informed consent of indigenous peoples, and their right to a reasonable share of the benefits generated by the project for which the right of ownership has been restricted;

III.9 The Applicants recalled that although the African Commission interpreted Article 14 of the African Charter on Human and Peoples' Rights in the context of a decision involving an indigenous people, there is reason to believe that this interpretation can also be extended to local communities that have a deep and general collective relationship with their lands and natural resources, and for whom control and ownership of these lands and natural resources are necessary to ensure their physical and cultural survival;

III.10 They further stated that the African Commission made a decision in 2001 concerning the Ogoni people in Nigeria, in which it determined that the Government of Nigeria violated, among other things, Article 21 of the African Charter concerning the right of a people to the free disposal of resources by failing to involve the Ogoni people in the decision-making process regarding oil exploitation in their territory;

III.11 They emphasized that in 2010, a fundamental decision of the Commission was taken in favour of the indigenous people, whose principles could be extended to non-indigenous communities; that the said decision was rendered against the Government of Kenya in a case opposing it to the Endorois people; that the indigenous people (the Endorois) were expelled from their ancestral land in order to create a natural reserve without the planned compensation measures being implemented; that the African Commission found that the Kenyan government violated Articles 8, 17, 14, 21 and 22 of the African Charter on Human and Peoples' Rights relating respectively to the right to religion, the right to culture, the right to property, the right of peoples to dispose of their resources and the right of peoples to development;

III.12 The Applicants argued that the right of ownership of the Republic of Mali over the disputed part as developed in paragraph IV.21 and IV.

22 of the judgment that is the subject of this application for revision is now contradicted by the cadastral plan of the land and the letter from the Attorney General at the Bamako Court of Appeal; that according to the cadastral plan, land title no. 16551 does not correspond to the site that they occupy; that it emerges from this plan that the site they occupy is limited to the East by cement constructions and to the West by the constructions of Mr. DJIGUE; that the land title No. 1456b of 05 May 1949 concerns the Village of N'Torokorobougou situated in Bamako, right bank of the Niger River, limited to the North by the land title 421 and to the West by the public river domain; that their site was never registered by the State of Mali; that title No. 16551 was created by the State in disregard of the general principles of law and of the Land and Property Code in force; that the Public Prosecutor at the Bamako Court of Appeal, in his letter No. V/BE No. b1422/PR-CV of 5 July 2013, expressed reservations about the legality of the process of alienation of the disputed area and instructed the Public Prosecutor not only not to enforce the eviction decision but also to initiate a police investigation;

III.13 They considered that the letter from the Governor of French Sudan, the cadastral plan and the letter from the Attorney General are elements of such a nature as to contradict the land rights of the Republic of Mali and likely to influence the meaning of the disputed judgment;

III.14 Finally, the Applicants requested the Court to:

- declare and adjudge the application for revision is admissible, for having been made within the time limits and according to the legal conditions;
- find unequivocally that the allegedly new facts are real and that they are such as to justify the review and the admissibility of the application;
- consequently, withdraw judgment No. ECW/CCJ/JUD/13/15 of 30 June 2015 and reopen the procedure between the parties;

III.15 The Republic of Mali argued in its defence that the conditions for opening an application for review were not met.

III.16 It stated that the Applicants did not produce any new facts of such a nature as to justify the review in accordance with Protocol A/P.1/7/91 and the Rules of Procedure of the ECOWAS Court of Justice;

III.17 It explained that Article 14 of the African Charter on Human and Peoples' Rights and Article 138 of Law N^{O}: 2012-001 of 10 January 2012 on the Land and Property Code of Mali were all invoked by the Applicants in the proceedings that led to the judgment under appeal; that the Applicants cannot submit legal arguments to the analysis of a judicial body indefinitely that the decisions of the African Commission on Human Rights relating to the Ogoni people in Nigeria and the Endorois people in Kenya cannot be transferred to the present case; that these decisions do not in any way constitute cases of jurisprudence admissible before the Court; that it is established that the Commission is not a court of law and its decisions are not binding on the Court, which is governed by specific texts; that the decisions of the African Commission on Human Rights, which the Applicants rely on, are not produced in the file;

III.18 The Republic of Mali, in responding to the substantive arguments of the Applicants, developed, in its defence, that the letter of the Governor of French Sudan of 17 April 1948 does not have any bearing on these proceedings; that this letter, if it is to be taken into consideration, confirms its ownership of the disputed parcel in these terms: *"I wish to request that you immediately proceed with the work you have begun... the fact that you are established without authorization from the administration on land belonging to the State will not give you any property rights and you cannot claim, moreover, the slightest compensation for eviction..."*; that the letter from the Attorney General dated 10 July 2013, the letter from the Public Prosecutor of 15 July 2013 and Order N^{O}: 142 of 1 March 2015, land titles N^{O}: 1456, 16551 and the cadastral plan were already in the file that led to the judgment of 30 June 2015 and whose revision is requested; that the conditions required by articles 25 of Protocol A/P.1/7/91 and 92 of the Rules of Procedure are not met ;

III.19 He therefore requested the Court to:

- To find that the alleged new fact is not real and that it is not such as to justify the revision and the admissibility of the application,
- declare the application for revision against the judgment N^{O}: ECW/CCJ/JUD/14/15 of 30 June 2015 inadmissible;

IV- MOTIVATION

- On the application for an expedited procedure:

IV.1 By separate application, dated 12 September 2015, the Applicants requested the Court to declare the urgency of their case and to declare that their case will be submitted to the expedited procedure in accordance with Article 59.1 of the Rules of Procedure of the Court;

IV.2 In support of this application, the Applicants alleged that as a result of the judgment under revision, the owner of the disputed site, which is the subject of land title N^{O}: 16551, is threatening them with eviction; that they have no other place to live or other sources of income and risk being homeless with their families and deprived of food;

They considered that the precariousness of their situation explains the urgency to have their application examined under the expedited procedure;

IV.3 The Republic of Mali did not react to this request from the Applicants;

IV.4 It follows from Article 59 (1) and (2) that: "At the request of either the Applicant or the defendant, the President may exceptionally, on the basis of the facts submitted to it, the other party having been heard, decide to submit a case to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court to give its decision as soon as possible.

The request to submit a case to an expedited procedure must be made in a separate document when the application or defence is filed;

IV.5 In the present case, the application of the Applicants was filed with the Registry, by separate document, on 30 September 2015, together with the main application;

Therefore, this application for an expedited procedure was made in accordance with the Rules of Procedure of the Court.

The Court must examine this before considering the merits of the case, should the appeal be declared admissible;

IV.6 However, it should be noted that the reasons put forward by the Applicants in support of their request to have their case examined under the expedited procedure in the present proceedings do not differ in any way from those formulated in their application to institute proceedings of 5 December 2012, which led to judgment N^{O}: ECW/CCJ/JUD/13/15 of 30 June 2015, which is the subject of this application for revision;

IV.7 In addition, the Applicants claimed in their initial application that the Attorney General at the Bamako Court of Appeal in a letter dated 10 July 2013 instructed the Public Prosecutor of the Court of First Instance of Commune V of the District of Bamako "not to enforce the eviction decision";

There appears to be no urgency to justify the use of the expedited procedure;

IV.8 The Court finds that the arguments advanced in support of the application for expedited procedure are inoperative;

In these circumstances, the said application should be rejected.

- On the application for interim measures

IV.9 By an application dated 12 September 2015, registered at the Court Registry on 30 September 2015, the Applicants requested the Court to order the State of Mali to:

- refrain from any action that could aggravate their situation;

- to take the necessary measures to preserve their right to land, right to natural resources and food, and right to housing, right to their social and economic activities, right to protection against forced eviction prescribed by Articles 1 and 27 of the International Covenant on Civil and Political Rights, Articles 1, 11, 12 and 15 (1) (a) of the International Covenant on Economic, Social and Cultural Rights, Articles 14, 19, 20 and 21 of the African Charter on Human Rights;

III.10 They stated that they have filed an application for revision of judgment N^{O}: ECW/CCJ/JUD/13/15 of 30 June 2015 with this Court; that they have filed an application with the same Court for an expedited procedure; that because of the precariousness of their situation, in particular their imminent expulsion and the vital importance of the fishery resources of which they will be deprived and the lack of accommodation and the demographic importance of the members of the victimized families that risks disturbing the public order, they rely on the benefit of the provisions of article 22 paragraph 2 of the 1991 Protocol relating to the Court of Justice, which states that "when a dispute is referred to the Court, the member States must refrain from any action likely to aggravate the dispute or to impede its settlement";

IV.11 The defendant did not consider it necessary to respond to the application;

IV. 12 This application will be subject to the fate that will be reserved for the appeal. Therefore, it does not seem appropriate, at this stage, to rule on the application for interim measures;

On the admissibility of the appeal:

IV.13 The Applicants applied to the Court for revision of Judgment N^{O}: ECW/CCJ/JUD/13/15 delivered on 30 June 2015 in the proceedings between them and the Republic of Mali;

They relied on the provisions of Articles 25 and 92 respectively of Protocol A/P.1/7/91 on the Court of Justice and of the Rules of Procedure of the Court of Justice;

IV.14 They maintained that their application for revision was admissible, as it was formulated within the time limits and in accordance with the legal conditions; they therefore requested that the Court establish unequivocally that the allegedly new facts were real and that they were of such a nature as to justify the revision and the admissibility of the application;

IV.15 The Respondent retorted that the conditions required by the rules of the Court for filing an application for revision of a judgment are not met;

It requested the Court to declare inadmissible the application for revision filed by Mr. Bourama SININTA and others;

IV. 16 Article 25.1 of the Protocol (A/P.1/7/91) on the Community Court of Justice provides that:

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

The next point indicates that the procedure is opened, in the case of an application for revision, when the application is admissible, by a decision of the Court expressly recording that the presumed new fact is real and of such a nature as to justify the revision and the admissibility of the application;

As for the Rules of Procedure of the Court, Article 92 states that the application for revision shall be admissible within three months from the day on which the Applicant became aware of the fact on which the application for revision is based;

IV.17 The Appellants indicated that their appeal concerns points IV.20, IV.21 and IV.22 of the judgment under appeal;

They cited the letter from the Governor of French Sudan, the land registry plan and the letter from the Attorney General as new elements

that would contradict the land rights of the State of Mali and decisions of the African Commission on Human and Peoples' Rights that could influence the meaning of the contested judgment;

IV.18 The points of the judgment are as follows:

IV.20. The Court noted that the Applicants were unable to produce any administrative title recognising their right to the area in which the plot of land covered by Bamako Land Registry N^{O}: 1 6551 is located;

IV.21. The Court noted, however, that the Republic of Mali justified its rights over the parcel by producing proof of its ownership, namely the documents registering the area since 5 October 1928 and 5 May 1949 in the name of the French State, from which it holds its rights;

IV.22. It appears that the Republic of Mali is the owner of the rights relating to the parcel in question;

Consequently, the transfer it made to Moussa Baba TOUNKARA cannot constitute a violation of the Applicants' human rights;

IV.19 However, on analysis, the Court noted that the letter from the Governor of French Sudan of 17 April 1948, the letter from the Attorney General at the Bamako Court of Appeal of 10 July 2013, the letter from the Public Prosecutor at the Court of First Instance of Commune V of the District of Bamako dated 15 July 2013 and the cadastral plan were all known to it at the time of the intervention of the contested judgment;

Indeed, all these documents were included in the proceedings leading to the disputed judgment;

They cannot, therefore, constitute new documents;

IV. 20 The Applicants also invoked the benefit of the interpretation of the provisions of the African Charter on Human and Peoples' Rights by

the African Commission on Human and Peoples' Rights in two decisions relating to indigenous peoples;

These are the cases concerning the Ogoni people in Nigeria and the Endorois in Kenya;

They refrain, however, from producing such decisions;

They provided the website of the African Commission on Human and Peoples' Rights as if to invite the Court to go and find the evidence supporting their allegations itself;

However, the provisions of Article 32.4 of the Rules of the Community Court of Justice - ECOWAS require any Applicant to annex to any procedural document "a file containing the documents relied on in support..."

It is not the responsibility of the Court to make up for a party's failure to produce evidence of its claims;

IV.21 It is apparent that the Applicants do not justify any new fact;

However, Article 25 of Protocol (A/P.1/7/91) on the Community Court of Justice makes the opening of revision proceedings conditional on the discovery of a fact which is of such a nature as to be a decisive factor and which, at the time of the decision, was unknown to the Court and the Applicant;

IV.22 In application of these provisions, the Court, in the preliminary Ruling N°: ECW/CCJ/APP/RUL/03/12 delivered on 7 February 2012 in the case of **Musa Saidykhan against the Republic of the Gambia**, explained the criteria for assessing an application for revision;

In the Judgment, the Court stated that:

"12. ...that there are three preconditions for granting an application for revision of a judgment or decision of this Court. The three requirements are:

a. An application for revision shall be made within five years of the date of delivery of the judgment or decision under challenge.

b. The revision shall be requested at the latest within three months from the day when the Applicant became aware of the fact on which the application for revision is based.

c. The application for revision of a decision must be well-founded on the discovery of a fact of such a nature as to be a decisive influence which, at the time the decision was given, was unknown to the Court and to the Applicant, provided, however, that such ignorance was not due to negligence";

"13. For an application for revision to succeed before the Court, the Applicant must fulfil the three preconditions..."

IV.23 In the light of the above developments, it appears that the admissibility of the Applicants' appeal presents difficulties in respect of at least one of the three preconditions;

It is true that the application was made within the time limit provided for in Article 25 (4) of the Protocol (A/P.l/7/91), but it cannot be said that the facts supporting it meet the qualification required by the texts;

Indeed, the facts that are presented as new are not unknown to the Court for some or are not justified for others;

Consequently, the application for revision of Mr. Bourama SININTA and others cannot be granted;

ON THESE GROUNDS,

Ruling after hearing both parties, in matters of revision, at first and last instance;

- **Finds** that the alleged new facts are not real or justified;

Consequently,

- **Declares** inadmissible the application for revision of Mr. Bourama SININTA and others against judgment N^{O}: ECW/CCJ/JUD/13/15 of 30 June 2015;

- **Orders** the Applicants to pay the costs.

THUS DONE, ADJUDGED AND DELIVERED AT THE EXTERNAL COURT SESSION HELD IN ABIDJAN (REPUBLIC OF CÔTE D'IVOIRE), THIS DAY 21 APRIL, 2016;

THE FOLLOWING APPENDED THEIR SIGNATURE:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

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

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABIDJAN, REPUBLIC OF CÔTE D'IVOIRE,

AT ITS EXTERNAL SESSION

ON THURSDAY, THE 21ST DAY OF APRIL, 2016

SUIT NO: ECW/CCJ/APP/02/15
JUDGMENT NO: ECW/CCJ/JUD/07/16

BETWEEN
MR. AMETEPE KOFFI - *PLAINTIFF*

VS.
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE JÉRÔME TRAORÉ - *PRESIDING*
2. HON. JUSTICE HAMÈYE F. MAHALMADANE - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. AMEGAN KOKOU CLAUDE (ESQ.) - *FOR THE PLAINTIFF*
2. OHINI KWAO SANVEE (ESQ.) - *FOR THE DEFENDANT.*

- Violation of Human Rights - Arrest and Arbitrary Detention -Torture

SUMMARY OF FACTS

The Applicant Ametepe Koffi argued that he was questioned and ill-treated by staff of the F.I.R on 23 August 2013. He also related that he was held for hours at the gendarmerie where he suffered physical violence in the absence of a warrant of detention of the judge of the Court of Lomé. He added that the various acts of violation of his rights caused him pains in his hips, belly and pain in the spine. On the basis of these allegations, he wanted the Court to condemn Togo.

The Republic of Togo in its defence first concluded on the inadmissibility of the application and secondly, that the Court should provide record of the investigation that was immediately opened with the department in question for the establishment of the facts as soon as it was informed.

ISSUES FOR DETERMINATION

1. *Is the arbitrariness of the arrest and detention manifest?*
2. *Is there obvious torture and other cruel, inhuman and degrading treatment?*
3. *Can the State ask for an investigation into the matter when the case is already before the Court?*

DECISION OF THE COURT

The decision of Court stated that, in the absence of any legal basis for the arrest and detention of the Applicant, it must be concluded that they are arbitrary and unlawful.

Also, in the absence of contradiction of the Defendant on the cases of torture and other cruel inhuman and degrading treatment, the Court concluded that the Applicant was victim of acts of torture, inflicted by agents of the State of Togo and ordered her to pay 20,000,000 FCFA

to the Applicant. The Court concluded that pursuant to Article 1 of the United Nations Convention Against Torture it is appropriate to give notice to the Republic of Togo, so that it initiates an investigation into the allegations of torture of Mr. Ametepe Koffi.

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Ruling:

I- PROCEDURE

1. On 8 January 2015, Mr. AMETEPE Koffi, through his Counsel, Maître Claude Kokou AMEGAN, filed a case dated 24 November at the Registry of the Court of Justice, ECOWAS, in which he alleged the violation of his human rights, committed by the Republic of Togo;

2. Through a separate Application dated the same day, he sought from the Court leave to submit his case to an expedited procedure;

3. On 9 January 2015, the Registry notified the Republic of Togo on the two Applications, and gave it fifteen (15) days to react to the request to submit the case to an expedited procedure, before proceeding to file its defence;

4. On 10 February 2015, the Republic of Togo filed its defence at the Registry of the Court;

5. The case was programmed to come up for hearing of parties, at the Court's external session at Bissau in the Republic of Guinea-Bissau on 24 and 25 March 2015. At the said venue, it was postponed to the court's hearing, at its seat in Abuja on 22 April 2015;

6. At that Court session, Plaintiff/Applicant produced exhibits, as proof for his claims, and the case was postponed to the hearing of 24 April 2015;

7. At the hearing of 24 April 2015, the parties made oral submissions, and supported their different claims with facts;

8. The case was billed for deliberations, for judgment to be entered on 19 May 2015.

9. The deliberations were postponed to 6 October 2015, then scaled down, because new facts were brought to the attention of the Court, before

it was later postponed to 16 February 2016, to enable Plaintiff/Applicant to appear personally in court;

10. At that session, the parties appeared, and at the end of their submission, the case was slated for the deliberations, and judgment to be delivered on 20 April 2016.

II- FACTS, CLAIMS AND PLEAS-IN-LAW BY PARTIES

11. Application filed at the Registry of the ECOWAS Court of Justice on 8 January 2015, Mr. AMETEPE Koffi brought a case against the Republic of Togo, and sought from the Court:

    To declare and adjudge that:

    - The actions of the security officers of the Republic of Togo, particularly of the *Force d'Intervention Rapide (FIR)* and the National Gendarmerie constitute acts of torture and other punishments or cruel, inhuman and degrading treatments in flagrant and manifest violation of Articles 16 and 21 (1) and (2) of the Togolese Constitution, the provisions of Articles 4 and 5 of the African Charter on Human and Peoples' Rights (ACHPR), Article 5 of the Universal Declaration of Human Rights (UDHR), Articles 7 and 10 (1) of the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against torture and other punishments or cruel, inhuman and degrading treatments, both in its spirits and letters, Article 1 of the Basic principles on the treatment of detainees and principles 1 and 6 of the Body of Principles for the protection of all persons subjected to any form of detention or imprisonment whatsoever;

    - The circumstances leading to the arrest of Plaintiff/Applicant and his detention within the premises of both the *FIR* and the National Gendarmerie in Lomé, illegally for five days, and on no legal charges brought against him, before he was eventually released constitute flagrant and manifest violation of the provisions of Article 52 of the Code of criminal Procedure of Togo, Article 15 of the Togolese Constitution, Articles 3 and 6 of the ACHPR

and the provisions of Articles 9/1, 10/1 of the ICCPR, and Article 4 of the Declaration on the Fundamental Principles of Justice relating to the Victims of Criminality and Victims of abuse of powers;

Consequently,

The Court,

- Shall order the Republic of Togo to carry out an investigation in order to arrest the authors of the incriminated actions, pursuant to the provisions of Article 12 of the UN Convention on torture of 10 December 1984;

- Shall order the Republic of Togo to pay to Plaintiff/Applicant, the sum that the court shall deem sufficient, as damages, pursuant to the provisions of Article 14 of the UN Convention against torture and other punishments or cruel, inhuman and degrading treatments of 10 December 1984, Article 9/5 of the ICCPR of 16 December 1966 and of Principle 35 of the Body of Principles for the protection of all persons submitted to any form of detention or imprisonment whatsoever of 19 December 1988;

12. In support of his claims, Plaintiff/Applicant claimed that on 23 August 2013, he was arrested and maltreated by the security officers belonging to the F.I.R;

13. He claimed to have been detained for at least one hour in a cell within the premises of the *Service de Recherche et d'Investigation (SRI)* of the National Gendarmerie, and later taken to a judge at the Tribunal in Lomé, by the officers of the National Gendarmerie;

14. While this Judge refused to issue a committal order against Plaintiff/Applicant, he (Applicant) was returned to the *Service de Recherche et d'Investigations (SRI)* of the National Gendarmerie, where he was violently beaten, and was later released in the evening;

15. Following the ill-treatments that he received from the soldiers of the FIR Cantonment, which he qualified to be acts of torture and arbitrary

and illegal detention, he now suffers from many ailments, among which are hip aches, tummy aches, pains in the vertebral column;

16. To support all the above allegations, he cited Articles 16 and 21 (1) and (2) of the Togolese Constitution, Articles 4 and 5 of the ACHPR, Article 5 of the UDHR, Articles 7 and 10/1 of the ICCP, the provisions of the UN Convention against torture and other punishments or treatments, cruel, inhuman or degrading treatments, both in its spirit and in its form, Article 1 of the Fundamental Principles on the treatments of detainees, and Principles 1 and 6 of the Body of Principles for the protection of all persons subjected to any form of detention or imprisonment whatsoever;

17. In regard to illegal and arbitrary detention, he cited the provisions of Article 52 of the Code of Penal Code of Togo, Article 15 of the Togolese Constitution, Articles 3 and 6 of the ACHPR, Articles 9/1 and 10/1 of the ICCPR and Article 4 of the Declaration on the Principles of Justice on the victims of criminality and victims of abuse of powers;

18. Through a separate Application dated 8 January 2015, Plaintiff/ Applicant requested that the case be admitted to an expedited procedure, and cited to this effect, the precarious situation of his health, which was deteriorating by the day, while leaning on the provisions of Article 59 of the Rules of the Court, as legal basis for this request;

19. In its Memorial in defence, filed at the Registry on 10 February 2015, the Republic of Togo did not make any observations on the Application seeking to submit the case to an expedited procedure, but raised, on the one hand, the issue of inadmissibility, and, on the other hand, requested that the Court should give it the benefit of the doubt that it started immediately an enquiry, at the level of the agencies that were fingered in the case, in order to shed light on the matter, as soon as it was brought to its attention;

20. Defendant claimed that Plaintiff/Applicant did not produce any proof to sustain his allegations of torture, and cited, to this effect, Article 33-1 of the Rules of the Court;

21. Furthermore, Defendant averred that pursuant to Article 12 of the UN Convention of 10 December 1948, which prohibits torture, the Republic of Togo has the obligation to quickly order an enquiry, as soon as there were sufficient grounds to believe that a citizen living under its jurisdiction was subjected to torture; and this explains why it ordered an enquiry from the incriminated agencies, in order to establish the truth;

22. In his oral submissions, Counsel to the Republic of Togo cast a doubt on the identity of the person who appeared on the pictures tendered and wondered how it could be possible to ascertain if the person appearing on the said pictures were really Mr. AMETEPE Koffi?

23. He equally doubted the viability of the medical report tendered, which did not show any date, as well as the credibility of the doctor who issued it, since he happens to be a member of the NGO that belonged to Counsel to Plaintiff/Applicant; he therefore sought that the Court should set it aside from the case. It further sought that its summons that was requested by Plaintiff/Applicant be discarded from the case file.

III- GROUNDS FOR THE JUDGMENT.

1- As to form

- On the Application to submit the case to expedited procedure

24. Whereas parties in court have agreed to open the oral phase;

25. Whereas it behoves the Court to grant such request, and declare that the Application for expedited procedure thus becomes irrelevant;

- As to admissibility of the case

26- Whereas Article 9-4 of the Supplementary Protocol (A/SP.1/01/05), amending Protocol (A/P.1/7/91) provides that «*The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.*»; whereas in many of its judgments, the Court has declared as admissible the initiating Application whenever

human rights violation is alleged to have been committed; and indeed, in its judgment dated 28 November 2013, in the case of Amédéo ADOTEVI against the Republic of Benin (N°ECW/, the Court affirmed, in paragraph 36 of the said judgment that:

> ***« the mere allegation by Plaintiff/Applicant, of the violation of international human rights protection instruments, which occurred in an ECOWAS Member State suffices for the Court to declare its jurisdiction, which may not be tied to whether the said violations are real or otherwise*** »;

27. Whereas Article 10-d of the afore-mentioned Supplementary Protocol provides that: « Access to the Court is open to (…) d- *Individuals on application for relief for violation of their human rights;* (…) »

28. Whereas in the instant case, Mr. AMETEPE Koffi has alleged in his initiating Application, the violation of the rights recognised by international human rights protection instruments, before this Honourable Court;

29. Consequently, it behoves the Court to declare his initiating Application as admissible;

2- As to merit

- On the arbitrary nature of the arrest and detention of Plaintiff/ Applicant

30. Whereas Article 6 of the African Charter on Human and Peoples' Rights provides that:

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

31. Whereas the Working Group on arbitrary detention, put in place by the UN Human Rights Commission has enunciated some criteria, which allow to conclude on the arbitrary nature of a detention; whereas that Group posited that a detention is to be taken to be arbitrary, when it is

manifestly impossible to adduce any legal basis whatsoever, which can justify the deprivation of liberty**;**

32. Whereas in the instant case, it is trite to declare that Plaintiff/Applicant was arrested by the soldiers belonging to the *Force d'Intervention Rapide (FIR)* without any reason whatsoever, and no grounds for such an arrest were made known to him; whereas he was subsequently detained within the premises of the said Military Force, on no known legal basis, which could justify such an arrest; whereas indeed such an arrest was not made on a previously legal declaration, which could have justified it;

33. Whereas in the absence of any legal basis for Plaintiff/Applicant's arrest and detention, it should be concluded that both arrest and detention are arbitrary and illegal;

34. It is therefore concluded that Plaintiff/Applicant was arrested and detained illegally and arbitrarily, by the soldiers of the *Force d'intervention Rapide (FIR);*

- ***On acts of torture and other punishments, cruel, inhuman and degrading treatments***

35. Whereas Article 1 of the UN Convention against torture of 10 December 1948 provides that: « *For the purpose of this Convention the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed, or is suspected of having committed or intimidating, or coercing him or a third person, r for any reason based on any discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from or inherent in or incidental to lawful sanction* »;

36. Whereas in the instant case, Plaintiff/Applicant, who came before the Court, and upon enquiry from the Court, related acts of torture, for which he is victim; whereas he described actions, and various treatments meted out on his person within the premises of the *Service de Recherche et d'Investigations* among others;

37. Whereas he indeed recalled that he was arrested and pushed into a Jeep, by the soldiers of the *Force d'Intervention Rapide*, who were about twelve (12); whereas he recalled that he was beaten by one Colonel Katanga; whereas this soldier has used electric light to shaken him, after tying his arms and hands;

38. Whereas he equally claimed that he was put in a 15-metre deep pit;

39. Whereas he claimed that the soldiers who arrested and tortured him evoked that he belonged to the political party known as ANC, and even went further to expressly asked if he will continue attending the said political party's meetings;

40. Whereas he tendered, as proof of torture, healed marks of the wounds that he sustained, due to acts of torture that were meted out on his person;

41. Whereas the Defendant State (The Republic of Togo) failed to counter the claims by Plaintiff/Applicant; whereas the Defendant State indeed failed to produce contrary proof to the claims made by Plaintiff/ Applicant;

42. Whereas, therefore, on the strength of the above facts, there is need to conclude that Plaintiff/Applicant was victim of acts of torture, which were inflicted upon his person by the security forces of the Republic of Togo;

- On the investigation ordered by the Republic of Togo concerning the acts of torture

43. Whereas Article 12 of the UN Convention against torture of 10 December 1984 provides that: « *Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that*

an act of torture has been committed on any territory under its jurisdiction »;

44. Whereas in the instant case, the Republic of Togo filed copies of correspondences, as exhibits, which attest to the fact that, upon directives from the Minister of Justice, the Prosecutor of the Republic ordered the Director General of the National Gendarmerie to investigate the matter, with a view to elucidating the allegations made by Mr. AMETEPE Koffi;

45. Whereas it was equally proven, at the hearings that Mr. AMETEPE Koffi was received twice at the National Gendarmerie; whereas the investigation that was started was not contested by Counsels to Plaintiff/ Applicant, who nevertheless claimed that starting an investigation does not mean the same thing as acknowledging the acts of torture;

46. Whereas from the foregoing, there is need to note that the Republic of Togo has carried out its obligations under Article 12 of the aforementioned UN Convention;

47. Therefore, it must be recognised that the Republic of Togo initiated an investigation on the allegations of torture made by Mr. AMETEPE Koffi;

- As to reparation

48. Whereas it is a general principle in law that *« one is held responsible, not only for the prejudice that one has caused, either by oneself, or, more importantly the prejudice that was caused by persons under one's responsibility, or by the things over which one has responsibility »*;

49. Whereas in regard to the Republic of Togo, it can be held responsible for the actions of its Ministries, or its agents, in the course of their official duties;

50. Whereas in the instant case, Plaintiff/Applicant was arrested by the security officers of the Republic of Togo, and detained within the premises belonging to the State, in an arbitrary and illegal manner;

51. Whereas the State has to be responsible for this illegal and arbitrary detention, which was caused by the security officers of the State;

52. Whereas reparation for human rights violation can be done by awarding costs in favour of the victim; Indeed, when the victim cannot be re-established in his/her rights, reparation can be decided in his/her favour through compensation;

53. Hence, there is need to order the Republic of Togo to pay to Plaintiff/ Applicant the sum of twenty million (20.000.000) FCFA as damages;

3. **As to costs**

54. Whereas Article 66.2 of the Rules of the Court provides that: « 2. *The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.* »;

55. Whereas the Republic of Togo fell in the instant procedure;

56. Consequently, there is need to order it to bear all costs;

FOR THESE REASONS

The Court, sitting in a public hearing, having heard both parties, in first and last resort, and in a human rights violations case,

As to Form

- **Declares** that the Application seeking to submit the instant case to an expedited procedure was of no useful substance;

- **Declares** as admissible the initiating Application filed by Mr. AMETEPE Koffi;

As to merit;

- **Declares** that Mr. AMETEPE Koffi's arrest and detention were arbitrary;

- **Declares** that the allegations of acts of torture are well-founded;

- **Recognises** formally that the Republic of Togo has opened an investigation on the allegations of acts of torture;

- **Declares** that the Republic of Togo is responsible for the prejudices suffered by the Plaintiff/Applicant;

Consequently,

- **Orders** the Republic of Togo to pay to Plaintiff/Applicant, Mr. AMETEPE Koffi the sum of twenty (20) million CFA francs as damages;

- **Orders** the Republic of Togo to bear all costs;

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, at its external Court Session at Abidjan, in the Republic of Côte d'Ivoire on the day, month and year as stated above.

And the following have appended their signatures:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member,*

Assisted by:
DIAKITE Aboubacar Djibo (Esq.) - *Registrar*.

[ORIGINAL TEXT IN FRENCH]

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

SITTING IN AN EXTERNAL COURT SESSION IN ABIDJAN,

IN THE REPUBLIC OF CÔTE D'IVOIRE

ON THURSDAY, THE 21ST DAY OF APRIL, 2016

SUIT NO: ECW/CCJ/APP/30/14
JUDGMENT NO: ECW/CCJ/JUD/08/16

BETWEEN
DAME MADAGBE RITA - *PLAINTIFF*

VS.
REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE JÉRÔME TRAORÉ - *PRESIDING*
2. HON. JUSTICE HAMÈYE F. MAHALMADANE - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. ATA MESSAN AJAVON (ESQ.) - *FOR THE PLAINTIFF*
2. OHINI KWAO SANVEE (ESQ.) - *FOR THE DEFENDANT*

- Admissibility - Right to Equal Access
- Compensation

SUMMARY OF THE FACTS

Dame MEDAGBE Rita, wife to ABALO, filed before the ECOWAS Court of Justice, complaining about the violation of her human rights by the Republic of Togo.

She explains that she was engaged in the Togolese administration as a temporary teacher and then posted to the Prefecture of Avé, to provide courses in mathematics and biology with a fixed monthly salary of 60,000 francs. On 12 December 1991 she applied for integration into the Togolese Civil Service.

In 1995, the State made the decision to integrate 423 contract teachers into the civil service, all degrees and grades combined. However, the Applicant's name was not on any of the public service appointment lists.

The Applicant further notes that two of her colleagues holding the same diploma were appointed by Decree N° 0449/METEP/ of 23 May 1995, teachers of CEG, 3rd stage, trainees (category A2, index 1100) with corresponding salary, while she received only an appointment as a teacher 2nd class, 2nd level, trainee (category B, index 850) with a monthly salary of 67,000 francs, about the same amount she received as a contract teacher.

The steps taken by the Applicant with a view to her regularisation remained unsuccessful, hence the violation, according to her, of her human rights.

The State of Togo denies having committed any violation and claims, on the contrary, to have acted in accordance with the law. It stated that the Applicant, who did not suffer any form of discrimination, could not be appointed to the CEG teachers' category A2 because she did not fulfil the conditions laid down by law.

ISSUES FOR DETERMINATION:

- *Whether the present application is admissible before the Court?*
- *Whether the complainant's right to equal access and treatment in the public service was violated?*
- *Whether the Applicant is entitled to the compensation sought?*

DECISION OF THE COURT

The Court declared the request of Dame MEDAGBE Rita admissible.

It considers that the right of the Applicant to equal treatment in the public service was violated, finds that the respondent State is responsible for it and orders the State to pay the Applicant the sum of ten million FCFA in compensation.

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Judgment:

I- PROCEDURE

1. On 18 December 2014, Mrs. ABALO Rita, née MEDAGBE filed a human rights violation initiating Application at the Registry of the Court of Justice of the ECOWAS Community against the State of Togo;

2. The registry of the Court served a copy of the said Application on the State of Togo, which filed its statement of defence on 27 March 2015;

3. The case was scheduled for hearing on 19 January 2016, but upon an Application by Counsel for the State of Togo, it was postponed to 16 February 2016.

4. On that date, it was scheduled for deliberation, and for judgment to be delivered on 16 February 2016.

II- FACTS-CLAIMS AND PLEAS-IN-LAW BY PARTIES

5. By Application filed at the Registry of the Court on 18 December 2015, Mrs. ABALO Rita, née MEDAGBE brought a case against the State of Togo, before the Court, seeking from the Court:

   - An order on the State of Togo to pay her:

     - the sum of thirty million (30,000,000) FCFA for damages related to the fact of her appointment as a Trainee Teacher for more than twenty-one (21) years while she has always worked as a Secondary School Teacher, and later as a High School Teacher;

     - the sum of twenty million (20,000,000) FCFA for violation of her rights to fair and equal remuneration;

     - the sum of fifty million (50,000,000) FCFA for violation of her rights to draw retirement benefits;

     And to order the State of Togo to bear all costs;

6. In support of her claims, Plaintiff/Applicant stated that she was engaged in the Togolese administration, as a Temporary Lower Secondary School Teacher vide Official memorandum No. 1403 / DEDD dated 23 November 1990, by the Principal of the Djolo Secondary School, in the Avé Administrative District, in this capacity, to teach Mathematics and biology on a Fixed Monthly Salary of sixty thousand (60,000) FCFA; on 12 December 1991, she submitted an application to the Minister of Employment and Labour, seeking integration into the Togolese Civil Service;

7. In 1995, the government of Togo took the decision to integrate into the civil service four hundred and twenty-three (423) Contractual Teachers at all levels, including one hundred and forty-three (143) for Secondary Education, three of whom were holders of Baccalaureate D and a DEUG II;

8. However, she was not included in any of the lists published by the successive Appointment Orders in the Togolese Civil Service, whereas the two other holders of the DEUG II were included in the appointment Order N 499/METFP dated 23 May 1995; she was, however, the subject of a specific appointment order N 0783/METFP-AS dated 18 July 1995, two months after the issuing of the other Appointment Orders;

9. She explained that her two (2) colleagues who also hold a DEUG II were appointed by Order N 0449/METFP of 23 May 1995, Trainee Secondary School Teachers on Grade level 3, (category A2, index 1100) with a salary corresponding to the aforementioned category, while she was only appointed as a Trainee Primary School Teacher on Grade level 2, (category B, index 850) with a net salary almost equal to the one she received as a Temporary Teacher and as a Contractual Employee, that is to say, the sum of sixty-seven thousand (67,000) FCFA, and transferred to CEG Tokoin - Est (Lower Secondary School) in Lomé;

10. She pointed out that she was appointed to a lower category than all her colleagues but assigned, like them, to a CEG, a Lower Secondary School, and was requested to carry out the same functions and duties

as all her colleagues, who were recruited at the same time as her, and holding the same qualifications, but to a lower grade, classification and salary than her two colleagues;

11. She further claimed that all her attempts to obtain the regularisation of her administrative situation from the Togolese authorities have remained unsuccessful, as evidenced by her correspondences dated 3 September 1997, 31 January 2000, 2003 and 2005, all of which received negative responses from the various Ministers concerned;

12. She emphasised that since her appointment into the civil service in Togo, she remained a Trainee Primary School Teacher, *i.e.* for over twenty-one (21) years;

13. She viewed these facts as constituting a violation of her fundamental human rights, such as the right to equal access to, and treatment in the civil service, the right to be appointed to a permanent position in the Togolese administration, the right to a fair remuneration and the right to promotion in the Togolese civil service and the right to draw retirement benefits;

14. In regard to the violation of her right to equal access to, and remuneration in the public service, she cited the violation of the provisions of Articles 2, 11(1), 37(1) and (2) of the Constitution of Togo of 14 October 1992, 3 and 15 of the African Charter on Human and Peoples' Rights of 27 June 1981 and the Universal Declaration of Human Rights of 10 December 1948;

15. On the violation of her right to be appointed to a permanent position in the Togolese administration, she maintained that she actually carried out, as prescribed by the extant legal texts, one year probationary training, at the end of which she has neither been confirmed, dismissed, nor having her probationary period exceptionally renewed, and invoked the violation of the provisions of Articles 31, 62, 63 and 64 of Order N 01 of 4 January 1968 on the General Statute of the Civil Servants in Togo, the provisions of Article 7.c of the International Covenant on Economic, Social and Cultural Rights and the provisions of Article 83, (1) of Decree N ° 69-113 of 28 May 1969 on Modalities of Application

of the General Statute of the Public Service; she further claimed that she should have been integrated into the category of Lower Secondary School Teachers five years following her recruitment, as provided for under Article 38 of Decree No. 69-113 of 28 May 1969; however, despite her multiple correspondences dated 3 September 1997, in 2003, in 2005 and on April 16, 2011, she has never benefited from any career advancement, neither in Steps nor Grade Level, from her recruitment in the Public Service in 1995 till her retirement and even remained a Trainee Teacher, in the lower rung of the Educational Entreprise, in other words, a Primary School Teacher, whereas she was actually transferred as a Lower Secondary School Teacher;

16. As regards the violation of her right to draw retirement benefits, Plaintiff/Applicant alleges the violation of the provisions of Law N°. 91-11 of 23 May 1991 on the Pension Scheme for normal Civil Servants and Military Personnel of the Togo Pension Fund, which provides that upon the completion of Service, after 55, 58, 60 or 65 years, depending on the specific statutes of the parastatals they belonged to, and regardless of their functions or jobs they carried out and the Grade Levels they attained, the Civil Servants in Togo may claim their right to retirement, and draw Retirement Benefit from a Retirement Fund, and the provisions of Decree N 91/208 of 6 September 1991 on the Pension Scheme for normal Civil Servants and Military personnel of the Togo Pension Fund, which provides that the Administration is required to operate a Monthly Deduction of 7% the Basic Indexed Salary received by the civil servant, to be remitted to the Togo Pension Fund; she claimed that the Togolese Authorities never made this deduction and remittance concerning her, and she was retired without enjoying any right to pension;

17. In its statement of defence dated 27 March 2015, the State of Togo concluded that it has not violated Plaintiff/Applicants' rights, and claimed that it acted pursuant to the extant laws on the Togolese Public Service;

18. Defendant argues that Plaintiff/Applicant could not be appointed to the body of Lower Secondary School Teachers, in category A2 because she did not fulfill the conditions set by law, and could neither

be integrated into the mainstream Public Service, for this same reason; that furthermore, since she did not fulfil the conditions laid down by law, she could not lay claim to any retirement benefit;

19. Defendant notes that Plaintiff/Applicant's assertion that her colleagues, Messrs. ABLE Komla, Tohaegoulou and NYUIADZI Kokou Agbénoxévi do not have a DEUG from the INSE, and yet were appointed to category A2 on the basis of the same DEUG as she holds, is not accurate, in the light of the examination of the said colleagues' respective Personnel Files; Plaintiff/Applicant is therefore wrong to consider that an injustice was done to her or that she was discriminated against;

20. Concerning the certificate equivalence established on 4 May 1991, by the Director of Secondary Education in the Avé District, whereby the latter stated in the Special Contract Letter that Mrs. Rita Medagbe's combined Baccalaureate D and DEUG II was equivalent to the required certification of CAP - C.E.G, to justify Plaintiff/Applicant's recruitment, the State of Togo declared that such an equivalence done was a mere exercise done by that Director, and this could not be tendered in lieu of the official requirements for employment into the Civil Service in Togo; this is more so, as Certificate Equivalence is established by a National Body - the National Commission for the Recognition of Equivalences in Studies, Certificates Grades and Titles, which is recognised by law, on this matter.

III- GROUNDS FOR THE JUDGMENT

As to formal presentation

21. Whereas under Article 9 (4) of the Supplementary Protocol A/SP.1/01/05) amending Protocol (A/P/1/7/91) on the Community Court of Justice, ECOWAS: **"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."**

22. Whereas, in the instant case, Plaintiff/Applicant alleges the violation of her rights by the State of Togo in her initiating Application; whereas a close examination of the said Application reveals that she sets out

facts which, in her view, constitute an infringement upon her rights, including the right to equal access to, and treatment in the civil service, the right to equal remuneration...;

23. Therefore, the Application should be declared admissible;

As to merit

1. On the violation of the right to equal access to, and treatment in the public service

24. Whereas under Article 3 of the African Charter on Human and Peoples' Rights:

    "1. Every individual shall be equal before the law.

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

25. Whereas under Article 15 of the aforementioned instrument: *"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work";*

26. Whereas the right to equal access to the public service implies that all citizens within a State must have access, under the same conditions, to the public service; whereas this access cannot be restricted by discriminatory measures such as social status, race, ethnicity, political opinions, religion ....; whereas the violation of the right to equal access would, in principle, result from the application of a discriminatory measure against a citizen in order to deny him or her access to the public service;

27. Whereas in the instant case, it appears from the procedural documents that Plaintiff/Applicant is a holder of the *Diplôme d'Etudes Universitaires Générales DEUG* (Certificate obtained after 2 years of university studies), in Economics and Management, from the *Université du Bénin* in Lomé; whereas shed did not get the equivalence of her certificate done by the national organ recognised by law, in the State of Togo; whereas it was on the strength of her

DEUG II certificate in Economics and Management that she was classified in the Teaching Cadre of Primary School Teachers of Class II, Step 2 (category B, index 850);

28. Whereas however, NUIADZI Kokou Agbénoxevi submitted a Job Application File into the Public Service in 1991, wherein he included a copy of a DEUG II certificate and an Attestation of Provisional Results, in lieu of a Degree in Mathematics and ABLE Komla Tohaegoulou, submitted a Job Application File in 1994, in which he included an Attestation of Provisional Results of a DEUG II certificate, with English and French as Subjects studied, for Teaching in the Secondary Schools, which was issued in June 1983, by the Director of the *Institut National des Sciences de l'Education* (INSE); whereas both were appointed as Trainee Lower Secondary School Teachers of Class 3, Step 1 (Category A2- Index 1100);

29. Whereas, moreover, it also emerges from the documents in the proceedings that only the DEUG II from the National Institute of Educational Sciences is admitted as an equivalence to the Certificate of Completion of Teacher Training Studies (CFEN) from the *Ecole Normale Supérieure of Atakpamé* (the National Teacher Training College), whose certificate gives access to being appointed as a Teacher in category A2;

30. Thus, in the light of the above facts, it must be found that Plaintiff/ Applicant was not discriminated against in her access to the civil service of Togo; whereas she was appointed to the category corresponding to her certificate; thus, there was no violation of her right to equal access to the civil service;

31. Whereas equal treatment in the civil service implies that there can be no discrimination between civil servants who are in an identical situation; indeed, it can only be relied on, by staff belonging to the same corps or service placed in an identical situation; whereas infringement of that equality would result from a differentiation in the treatment of civil servants in the same situation; whereas it may take the form of a differentiation in pay or in the granting of advantages or even in the management of the staff member's career.

32. Whereas in the instant case, Plaintiff/Applicant completed her probationary period; however, at the end of her probationary period, she was neither tenured, nor dismissed, nor having her probationary period renewed, exceptionally; thus she remained a Trainee Teacher for more than twenty-one (21) years;

33. Considering that the Togolese Administration had the obligation to treat Plaintiff/Applicant in the same way as the other staff; yet at the end of her internship, she should either be tenured or dismissed if she did not fulfill the conditions for tenure;

34. Whereas by keeping her in the same position as Trainee Teacher, the Togolese administration treated her differently, even though she had completed her one-year probationary period;

35. It should therefore be concluded that there was a violation of her right to equal treatment in the public service;

2- On the violation of the right to be nominated in the permanent position in the Togolese administration

36. Whereas under Article 6 of the International Covenant on Economic, Social and Cultural Rights:

> *"1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
>
> *2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual ;* "

37. It follows from this provision that the State Parties to this Protocol have the obligation, not only to guarantee for their citizens the right to work, but also to take the necessary measures to ensure that such a right is maintained; it follows that the worker should not find himself in a situation of precariousness which would threaten the enjoyment of his right to work;

38. Whereas, in the instant case, Plaintiff/Applicant alleges the violation of her right to non-appointment to a permanent position by the Togolese administration;

39. Considering that the permanence of the job implies, on the one hand, that it must exist and, on the other hand, that it must be occupied on a permanent basis;

40. Whereas it can be deduced from Order N°0789/METFP-AS by the Minister of Employment, Labour and Public Service and Social Affairs dated 18 July 1995 on the appointment of Plaintiff/Applicant, within the framework of Teachers Employment, as a Primary School Teacher of Class 2, Step 2 (Category B, index 850); that she occupied such a position on a permanent basis, for twenty-one (21) years; whereas there is need to note that the position of Primary School Teacher' position existed, as at the time she was employed, and that she occupied that position on a permanent basis; whereas Plaintiff/Applicant did not establish the fact that during her career, her employment was threatened or interrupted momentarily; whereas she held that position on a permanent basis for twenty-one (21) years;

41. Thus, on the strength of the foregoing, it must be concluded that Plaintiff/Applicant's right to be appointed to a permanent position was not violated by the State of Togo and that Plaintiff/Applicant's claim in this regard should be rejected;

3. On the violation of the right to a fair wage and equal remuneration

42. Considering that under Article 7 (a) (i) of the International Covenant on Economic, Social and Cultural Rights, *"The States parties to this Covenant recognize the right of everyone to enjoy just and favourable conditions of work, which ensure especially:*

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;"

43. Whereas in the instant case, it appears from the procedural documents that Plaintiff/Applicant received a salary equivalent to the category and the index in which she was classified in the Togolese civil service; whereas she was not paid a salary below that of workers classified in the same category and having the same index; whereas the comparison made with the named NUIADZI Kokou Agbénoxevi and ABLE Komla Tohaegoulou was erroneous insofar as they are classified in category A2 with the index 1100; whereas as it has already been demonstrated above, equal pay can only be invoked for workers belonging to the same body or to the same employment framework placed in an identical situation;

44. Thus, in view of the foregoing, it must be concluded that there is no violation of her right to fair wages and equal remuneration;

4. On the violation of the right to career advancement and promotion in the public service and the right to draw retirement benefits

45. Whereas Plaintiff/Applicant alleges the violation of her right to advancement, promotion and retirement;

46. Whereas, however, she did not provide any proof of such violation;

47. Thus, there is need to declare this claim as ill-founded;

5. Regarding damages:

48. Whereas in the general principle of law *"one is responsible not only for the prejudices that one causes by one's own act but also those caused by the act of the persons for whom one must answer or of the things one has under his care"* ;

49. Whereas in regard to the State, it may be held liable for mistakes committed by its agencies or officials in the exercise of their functions;

50. Whereas in the instant case, Plaintiff/Applicant was the victim of a violation of her right to equal treatment in the public service;

51. Whereas this violation is attributable to the State of Togo;

52. Whereas reparation for human rights violations can be made by compensating the victim; whereas indeed, if the victim cannot be restored to his or her rights, he or she can obtain reparation for the rights violated by awarding compensation.

53. Whereas in this regard, the State of Togo should be ordered to pay to Plaintiff/Applicant the sum of ten million (10,000,000) FCFA as damages;

6. As to cost

54. Whereas under Article 66 (2) of the Rules of Court:

> "***1. the unsuccessful party shall be ordered to bear the costs if they have been applied for in the successful party's pleadings."***

55. Whereas in the instant case, the State of Togo fell in the present proceedings;

56. Therefore, it is expedient, to order the State of Togo to bear all costs;

FOR THESE REASONS

The Court, Adjudicating in a public hearing, after hearing both parties, in a human rights violation procedure, in first and last resort

As to formal presentation

- **Declares** as admissible the initiating Application filed by Mrs. ABALO, née Rita MEDAGBE

As to merit

- **Declares** that MEDAGBE Rita's right to equal treatment in the public service was violated;

- **Declares** that the State of Togo is responsible for the prejudices suffered by her;

Consequently,

- **Orders** the State of Togo to pay MEDAGBE Rita the sum of 10,000,000 CFA as damages;

- **Dismisses** all other claims made by Plaintiff/Applicant;

- **Orders** the State of Togo to bear the entire costs.

Thus done, adjudged and pronounced in an open Court in Abidjan in the State of Côte d'Ivoire, by the Community Court of Justice, ECOWAS, on the day, month and year as stated above;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by
DIAKITE Aboubacar Djibo (Esq.) - *Registrar*.

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, 4TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/11/14
RULING NO: ECW/CCJ/RUL/07/16

BETWEEN

1. PLACID IHEKWOABA
2. EBERE UZOWURU
3. AMARAEGBU CHRISTIAN
4. IHEMEMOGU PATRICIA
5. VICTORIA ONYEGBULE
6. HILARY GBAJIA
7. PAULINE ONYI
8. BENEDICT OKORO
9. VICTOR IBE
10. CHARLES ALANEME
11. UGOCHI OSUOHA
12. IHEANACHOR JOHN
13. OHANELE VINCENT
14. NWALA MICHAEL
15. IBEAWUCHI EHIRM
16. FINE BOY IWUANYANWU
17. JOSEPH AMAJU
18. JULIUS ANYADIEGWU
19. PAULIUS DURUJI
20. RAYMOND OKORONKWO

(For themselves and as Residents of New Owerri Residential Layouts and Communities)

} *APPLICANTS / PLAINTIFFS*

VS.

1. **PRESIDENT, FEDERAL REPUBLIC OF NIGERIA**
2. **FEDERAL GOVERNMENT OF NIGERIA**
3. **MINISTRY OF DEFENSE**
4. **R. S. B. HOLDINGS NIGERIA LIMITED**
5. **ATTORNEY-GENERAL OF THE FEDERATION**
6. **DEMINERS CONCEPT NIG. LTD.**
7. **STATE SECURITY SERVICE (SSS)**

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO** - *MEMBER*
3. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **CHIEF NOEL AGWUOCHA C.** *AND*
   BARR. ALEX N. N. WILLIAMS - *FOR THE PLAINTIFFS*
2. **AWUDUMOPU PRINCE ONWA**
   - FOR THE 1ST, 2ND, 6TH & 7TH RESPONDENTS
3. **CHIEF CHARLES H. T. UHEGBU**
   - FOR THE 4TH & 5TH RESPONDENTS

Jurisdiction- Abuse of Court process - Notice of discontinuance

SUMMARY OF FACTS

The Applicants who are citizens of Nigeria, a Member State of ECOWAS instituted an action before this Court on 11th June, 2014 for the violation of their human rights. They are alleging that they were victims of explosive remnants of war, landmines and bombs which were residue of the Nigerian Civil War. Also, that the continuing threat and presence of these explosives in their Communities has affected their source of livelihood mainly Agriculture. The Applicants stated that the Federal Government represented by the Ministry of Defence, 3rd Respondent, hired the services of the 4th Respondent, RSB Holdings Nig. Ltd who started work and stopped midway.

On the 14th September, 2015, the Respondents filed their respective statements of defence in response and also filed Preliminary Objection challenging the jurisdiction of the Court. The case was awaiting hearing of the various Preliminary Objections filed before the Court. Thereafter, the Applicants filed a Motion on Notice seeking the leave of Court to discontinue the proceedings against the Respondents.

ISSUES FOR DETERMINATION

- *Whether the Applicants can withdraw and/or discontinue the entire proceedings at any stage before judgment.*

- *Whether the Applicant's application is an abuse of Court process.*

DECISION OF THE COURT

The Court granting all the Motions filed before it for extension of time and for discontinuance/withdrawal of Suit, held that the Applicant's application does not amount to an abuse of Court process. Cost was awarded to the Defendants

JUDGMENT OF THE COURT

2. COUNSEL FOR THE PARTIES AND ADDRESSES FOR SERVICE

For the Applicants:
Chief Noel Agwuocha C.
Onazaekpere Chambers, House 1,
First Avenue, Federal Housing Estate,
Egbeada, Owerri, Imo State,

Barr. Alex N. N. Williams
c/o A.N.N. Williams & Co.
Plot 3, Kokoma Close
Buchanan Crescent, Behind Banex Plaza
Wuse 2, Abuja

For the Respondents:
1st, 2nd, 6th and 7th Respondents
Awudumopu Prince Onwa
Suite C06, Peace Park Plaza "A",
No. 35 Ajose Adeogun Street,
Peace Micro Finance Bank Building.
Utako District, Abuja

The 3rd Respondent
Ministry of Defense,
Defense Headquarters, Ship House,
Olusegun Obasanjo Way,
Area 10, Garki, Abuja

The 4th & 5th Respondents
Chief Charles H. T. Uhegbu
Lawlink Chambers, Suite 1, 5th floor,
NICON Ins. Plaza, Mohammadu Buhari Way,
Central Business District, Abuja

3. SUBJECT-MATTER OF THE PROCEEDINGS

3.1. Injuries to Applicants and the continuous violations and threatening of the fundamental Human Rights of the Applicants by the continuous presence of bombs, landmines and other Explosive Remains of War in the Applicants' communities and environment.

4. SUMMARY OF PLEAS-IN-LAWS ON WHICH APPLICATION IS BASED

1. Articles 4, 5, 6, 12(1), 16 (1) (2), 18(1) (4), 19, 24 of the African Charter on Human and Peoples' Rights;

2. Sections 33(1), 34(1), 35(1), 38, 41(1) 46(1) Cap IV, Constitution of the Federal Republic of Nigeria, 1999 (as amended);

3. Article 9 of the Supplementary Protocol (A/SP.1/01/05 of the ECOWAS Court;

4. Articles 13(1) (6), 32, 33 of the Rules of Community Court of Justice;

5. Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention 28 November 2003)

5. FACTS AND PROCEDURE

5.1. NARRATION OF FACTS BY THE APPLICANTS

5.1.1. Applicants are victims of Explosive Remnants of War, Landmines and Bombs. The Applicants are those whose Fundamental Human Rights are violated and threatened.

5.1.2. There are more bombs scattered in the Applicants Community/ Environment in Imo State. The Applicants are a class of persons whose Fundamental Human Rights have been violated, and threatened by bombs and landmines in the kitty of the Respondents; and they did not fight the Nigerian Civil War, but were severely injured by landmines explosions, other Explosive Remnants of the War abandoned in their Autonomous Communities/ Environment by

army after the Nigerian Civil War such having not been cleared by the Federal Government of Nigeria.

5.1.3. The Applicants are persons/victims injured after the Nigerian Civil War by landmines or other Explosives Remnants of Nigeria Civil War, who are still living in contaminated communities in Isiala Mbano, LGA, Imo State. Applicants have common interests and will enjoy common benefits by the outcome of this suit. They were affected by non-education and non-clearance of landmines and bombs after the Civil War.

5.1.4. The Applicants state that they have not been going to their farms since their accidents. The continuing threats and presence violate their right to life, right to satisfactory healthy environment and right to freedom of movement, as well as limited their abilities to attain adequate, effective and effectual physical and mental health and development as they are almost perpetually traumatized and disabled.

5.1.5. The Applicants state that the Federal Government represented by the Ministry of Defense, 3rd Respondent, hired the services of the 4th Respondent, R. S. B. Holdings Nig. Limited. They started work between 2009 and 2011 and midway in 2011, the contractors were stopped from clearing and since then they have not returned to work in spite of all pleas by Applicants.

5.1.6. The Applicants state that the 2nd, 3rd, and 5th Respondents have not allowed the 4th Respondent, R. S. B. Holdings Nig. Limited access to facilities to destroy the bombs, but have allowed the Applicants, their communities and environment to continue to live with live bombs.

5.1.7. Applicants aver that their contaminated Lands / Environment / farmlands should be treated for agricultural purposes and sustainable developments.

5.1.8. Applicants aver that Aquinas Secondary School premises were used by both Biafran Army Engineers and Nigerian Army Engineers who abandoned these bombs.

5.1.9. The Applicants state that victims include their families and communities.

5.2. PROCEDURE

5.2.1. The initiating Application **(Document number 1),** though dated June 18, 2014, was lodged in this Court on July 11, 2014, and was accordingly served on the Respondents.

5.2.2. The Respondents filed their respective Statements of Defense in response to the Originating Application, raising several very important issues of both law and fact. In addition to their Statements of Defense, the Respondents respectively filed Preliminary Objections to the suit of the Applicants, challenging this Court's jurisdiction and competence to entertain this suit as well as questioning the Applicants' own ability to bring this suit, and requesting this Court to dismiss this suit.

5.2.3. After pleadings rested and the case awaiting hearing and disposition of the various Preliminary Objections filed by the Defendants, the Applicants filed a Motion on September 14, 2015, praying for leave of the Court to allow the Applicants to withdraw and/or discontinue the proceedings in this Suit against all the Respondents **(Document number 10).**

5.2.4. On October 19, 2015, the 1st, 2nd, 6th and 7th Respondents filed a Motion for Extension of Time **(Document number 11)** within which to file their Counter Affidavit **(Document number 12)** in opposition to the Plaintiffs/Applicants' Motion to Withdraw.

5.2.5. Likewise, the 4th and 5th Defendants on November 30, 2015, filed a Motion for Extension of Time **(Document number 13)** within which to file their Counter Affidavit **(Document number 14)** in opposition to the Applicants/\Plaintiffs' Motion to Withdraw.

5.2.6. Then on November 30, 2015 the Applicants/Plaintiffs filed their Reply on point of Law **(Document number 15)** to the Counter Affidavit of the 1st, 2nd, 6th and 7th Defendants. Finally, on December 02, 2015, the Applicants/Plaintiffs also filed similar Reply on point of Law **(Document number 16)** to the Counter Affidavit of the 4th and 5th Defendants **(Document number 17).**

5.2.7. When this case was called on December 03, 2015, pursuant to a regular Notice of Assignment for hearing of the Preliminary Objections filed by the Defendants, and after the notation of representations/announcement of appearances, the counsel for the Plaintiffs/Applicants brought to the court's attention that he had, on September 14, 2015, filed in the Registry of this Court, a Motion on Notice begging leave of the Court for permission to withdraw and/or discontinue the proceedings in this suit against all the Respondents, **(Document number 10 aforesaid).**

5.3. PLAINTIFFS' MOTION FOR DISCONTINUANCE / WITHDRAWAL

5.3.1. In their Written Address to support their Motion for withdrawal/discontinuance, the Plaintiffs stated:

"FACTS":
"Applicants commenced this Suit by way of the Originating Motion m 2014 against the Respondents.

3.01. Counsel in this matter were privileged to be part of the Lawyers from the Owerri Branch of the Nigeria Bar Association (NBA) who participated in the 7th Judicial Retreat/Seminar of the **ECOWAS COURT OF JUSTICE,** where Counsel learnt a few new things arising from discussions on the Application and Implementation of ECOWAS Court Rules."

"ISSUES FOR DETERMINATION:"
"Whether the Applicants can withdraw and/or discontinue the entire proceedings in this Suit against the Respondents at any stage before judgment."

"ARGUMENT":

"5.01. During the Retreat, a lot of issues were raised and discussed including Practice and Procedure as well as Improved Access to Court wherein Counsel for the Applicants learnt so many new things that made Counsel take steps to regularize innocent mistakes made in the commencement of the Originating Motion arising from

typographical errors and/or mistake of Counsel when Counsel included the word "President"; to Federal Republic of Nigeria as a party while commencing the action. Humbly referred to paragraphs 6, 7, 8 and 9 of the Affidavit in Support."

"5.02. Leave of court as necessary to discontinue at this stage. Though hearing has not commenced but a date has been fixed for hearing. It is further· submitted that where Notice of discontinuance is filed on or after the date the action was first fixed for hearing the judge or court has discretion to grant or refuse the Application. *See* Prof. Edozien & Ors vs. Chief Edozien (1993) I NWLR (Pt. 272) 678 or Abayomi Babatunde v Pan Atlantic Agencies Ltd & Ors (2007) All FWLR (PT. 372) 1721. It is argued that evidence has not been given and issues involve have not crystalized as to make it possible for Court to give a decision on the merits of the case."

"5.03. We submit that this is the mistake of counsel and not that of the Litigants. Humbly referred to paragraphs 9 and 22 of the Affidavit in Support."

"5.04. It is trite and the Courts have consistently held that the inadvertence of Counsel or that the Sins of Counsel should not be visited on the Litigant especially when such a decision would invariably lead the Court to reach a decision which would not or cannot be regarded as being a decision on the merit. In support of this Principle of Law, we humbly refer this Hon. Court to the decision in the case of Messrs Ude Ubaka & Sons V.C.C. Ezekwem & Co. (2000) 10 N.W.L.R. PT. 676 Page 600 - 612 particularly at Page 604 where the Court of Appeal (in Nigeria) stated that:

> ***"An Applicant should not be punished for the mistake or inaction or inadvertence of his Counsel".***

"5.05. It is submitted as trite that the mistake of Counsel cannot be visited on Litigants to vitiate a Suit.

"5.06. 1t is submitted that a Plaintiff in any Suit can discontinue or withdraw his Claims against any Defendant at any time. This is a trite principle of law."

"5.07. 1t is argued that the essence of the 7th Judicial Retreat is to ensure and facilitate improvements in the Application and implementation of ECOWAS Court Rules to enable the Hon. Court do Substantial Justice and not Technical Justice to the development of the Community law and improved access to Justice in ECOWAS Court. *See* paragraph 17 of Affidavit. Notice of Discontinuance is not collateral but part of Counsels implied authority as an Agent of his Client- the Applicant. *See* BAYKAM VENTURES LTD VS. OCEANIC BANK INTER. LTD (2005) ALL F.W.L.R (Pt. 286) 648 at 668 C.A."

"5.08. 1t is contended that hearing has not commenced in this Suit but a Hearing date has been fixed this is notwithstanding that the Hon. Court was gracious enough to grant the 1st, 2nd, 3rd, 6th, and 7th Respondents leave to file their Statement of Defence after a prolonged time. Also, the 4th and 5th Respondents are yet to file their Statement of Defence. Humbly referred to paragraph 18 of the Affidavit."

"5.09. It is submitted that there is no Litis Contestatio between the Applicants and the 3rd Respondent."

"6.00. It is submitted that this Application is primarily to enable the Applicants repair their case in time and in line with Counsels new experiences and knowledge acquired at the 7th Judicial Retreat of the ECOWAS Court held in Owerri see paragraph 4 and 5 of the Affidavit and paragraph 17 of the Affidavit."

"6.01. This is strongly contended that this will enable the Hon. Court to do substantial Justice and preserve the Res which subject matters anchors on the need for save Humanity from extinction. See paragraphs 28. It has become necessary to effect these corrections at this stage as there is no provision for appeal when the Court takes a decision. *See* paragraphs 13, 14 and 15 of the Affidavit."

"6.02. Punishment if any will be visited on Counsel if the Hon. Court refuses this Application. However, Article 28 of the ECOWAS Court Rules provides some privileges and immunity to actions of

Counsel in a Suit pending before this Hon. Court while appearing as Counsel before it. *See* paragraph 26."

"6.03. The Applicants faced the misfortune of again losing all the case files when thieves broke into the vehicle of one of the Applicants Counsel at Owerri in June, 2015 which act necessitated a letter informing this Hon. Court and their Counsel of the development through a Sworn Affidavit of loss. *See* paragraphs 19, 20 and 21 of the Affidavit in Support."

"6.04. We therefore, contend that Applicants have made out cogent reasons in the body of the Affidavit which the Hon. Court can lean towards in exercising its discretion in favour of the Applicants. This would be in line with doing Substantial Justice."

"CONCLUSION:

"The Hon. Court is urged to resolve the sole issue in the affirmative and grant the Applicants prayer. May it please the Hon. Court."

5.4. RESPONSES OF THE DEFENDANTS/RESPONDENTS

5.4.1. CONTENTIONS OF THE 1ST, 2ND, 6TH AND 7TH RESPONDENTS

As stated earlier, on October 19, 2015, the 1st, 2nd, 6th and 7th Respondents filed a Motion for extension of time (Document number 11) within which to file their Counter Affidavit and supporting Written Address (Document number 12) in opposition to the Plaintiffs/ Applicants' Motion to Withdraw. In their written Address the said Defendants said

"INTRODUCTION"

"The Respondents received the Applicants' motion on notice and a 24-paragraph affidavit praying the Honorable Court to withdraw and/ or discontinue the suit which they filed against the respondents. We have filed our counter affidavit of 21 paragraphs and written address praying this Honorable Court to dismiss the suit."

"ISSUES FOR DETERMINATION"

"Whether the Applicants can withdraw and/or discontinue the suit before this Honorable Court after exchange of pleadings and arguments thereon?"

"OUR ARGUMENT "

"It is trite principle of law that innocent errors can be corrected if they be the same as claimed by the Applicants. It would be procedurally defective at this stage for the Applicants to seek withdrawal and/or discontinuance after brief of arguments have been filed, and preliminary objection argument set down for ruling."

"In **YOUNG SHALL GROW MOTORS LTD V. OKONKWO & ANOR**. **(2010) 3-5, S.C. (Pt III) 124**, the Supreme Court succinctly made a clear distinction between the following:

> "Withdrawal of a brief before argument, and Withdrawal of a brief after arguments are settled/exchanged/filed by parties that is "litis contestation."

"...the principle governing withdrawal of an appeal on the date fixed for Hearing or any time thereafter, must take a cue from the principle of Discontinuance of Action at the Trial Court after the action has been fixed for hearing. In other words, after Briefs of Argument have been exchanged by the parties whereby issues between them became crystallized "litis contestatio" can be deemed to have been reached. A withdrawal of an appeal from that point in time must, as an inflexible rule, lead to the dismissal of the appeal." "(Underlining mine.)"

"We therefore submit most humbly that the appropriate order for this Honorable Court to make in the circumstance is dismissal of the suit. The Applicants cannot be allowed to withdraw and/or discontinue a suit at a point when "litis contestatio" had been reached and we urge Your Lordships to so hold. *See*: YOUNG SHALL GROW MOTORS LTD V. OKONKWO & ANOR, supra."

"2.1. Therefore, it is crystal clear that Applicants' counsel are on a sticky wicket journey shopping around this court in multiplicity and duplicity of actions looking for whichever that might favour them and we urge this court to resist same."

"Further, the Applicants contended in their written address in support of their motion that mistake or sin of the counsel cannot be visited on the litigants. We submit that such argument of counsel in that regard can only hold water where the purported "mistake of counsel" is one bothering on statements of fact or facts alone and in which case the courts are enjoined to allow amendment in respect thereof at any time before judgment is delivered, but certainly not on matters law, practice and procedure as in the instant case."

"It is clear from the affidavit of the Applicants that the alleged mistake of counsel is one of law, practice and procedure and therefore the case of **Ubako V Ezekwem** cited by the Applicants cannot come to their aid as same is manifestly inapplicable. The purported mistake of counsel came about as a result of limited knowledge of the law, practice and procedure or insufficiency of common law rules of practice, and thus cannot avail the Applicants and we urge the court to so hold."

"2.2. We further submit that even if the Applicants' application ought to be given any consideration at all, the law requires that cogent and convincing materials must be placed before the court as evidence of the alleged mistake of fact and not of law (if any) to enable them be entitled to any relief whatsoever."

"Again, the pertinent question that comes to the mind of any right-thinking person at this point would be: whether parties can frivolously file an action before any competent court of law and withdraw same at will without recourse to any laid down rules of procedure? To the above question we answer in the negative."

"We submit that Applicants' counsel having been properly briefed and retained are deemed to have full knowledge of the rules and

practice of the court in respect of that case. It behoves counsel to acquaint themselves with the said rules of court before invoking the jurisdiction of the court."

"Consequently, we urge this Honourable Court to answer the lone issue submitted by the respondents in the negative and dismiss the Applicants' application in its entirety as lacking in merit and constituting an abuse of the process of this court and award heavy cost against the Applicants and their counsel."

5.4.2. CONTENTIONS BY THE 4th and 5th RESPONDENTS

5.4.2.1. Just like the other Respondents, the 4th and 5th Respondents/ Defendants also filed their own Motion for Extension of Time, Counter Affidavit, and Written Address, opposing the Plaintiffs' Motion to Withdraw and/or Discontinue their suit. Similarly, we herein reproduce the full texts of the Motion and the Counter Affidavit of the 4th and 5th Defendants:

5.4.2.2. In their Written Address in support of the Counter Affidavit, the 4th and 5th Defendants stated:

"INTRODUCTION":

"My lord, the Applicants filed this Suit NO: ECW/CCJ/APP/11/14 and have 17 months after brought this motion praying the court for leave to withdraw/and or discontinue proceedings against all the Respondents in the suit. The 1st, 2nd, 4th, 5th, 6th and 7th Respondents have filed their Statements of Defence and the Applicants have in fact filed their Replies to the defences so far filed."

"ISSUE FOR DETERMINATION:"

"We have formulated only one issue for the court's determination:

"*WHETHER THE COURT SHOULD NOT DISMISS THE APPLICANTS' SUIT AS ISSUES HAVE BEEN JOINED BY THE PARTIES?* "

"ARGUMENT:"

"In the case of THE YOUNG SHALL GROW MOTORS LTD. V. OKONKWO (2002) 38 WRN 98, the Nigerian Court of Appeal made reference to some Supreme Court cases and held;

"In SOETAN V TOTAL NIGERIA LTD. (1972) 1 ALL NLR (PT 1) 1, 3, the effect of withdrawal of an action under sub-rule 1 (2) of order 28 of the Western Nigeria High Court Civil Procedure Rules was considered by applying the test of litis contestation, meaning the process of coming to an issue. The test denotes the stage when the party withdrawing his action is deemed to have lost his dominus litis, i.e. mastery of the suit and has, therefore, lost the privilege of moving the court for the particular final order to be made which in the changed circumstances is dictated by the justice of the particular case. In ERONINI V IHEUKU (1989) 2 NWLR (PT 101) 46, (1989) 1 NSCC 503, the doctrine was expounded by the Supreme Court where, at page 520, Nnaemaka-Agu, JSC, opined that:

"In my view the rationale of the rule" *i.e. in Soetan's case,* ***"is that once issues have been joined to be tried and the stage set for the conflict, then once a certain stage has been reached the Plaintiff is no longer dominis litis and cannot be allowed to escape through the back door to enter again through another action. "***

"The facts of Eronini's case amply vindicate the merit of the doctrine. At the trial, after a few halting steps with the first witness for the Plaintiff the Plaintiff's Counsel who was taken aback by the witnesses evidence that was at variance with the Plaintiff's pleading stopped the witness from concluding his evidence and applied to the court to discontinue the case; the application was granted and the case was struck out. On appeal against the order striking out the action the Court of Appeal of Appeal affirmed the decision of the learned trial Judge. On a further appeal to the Supreme Court the decision was reversed and an order dismissing the action substituted therefore on the ground that at the time the Plaintiff discontinued his action litis contestatio had been reached."

"In the instant case, the Respondents have filed their defences and some have gone further to file preliminary objection and the stage is set for conflict only for the Applicants to bring this application for withdrawal so that they can escape through the back door enter again and bring another action. We submit that at this stage of the case ***litis contestatio*** has been reached and the Applicant cannot be allowed to re-file after withdrawal. Consequently, we humbly but strongly urge the court to dismiss the Applicants' suit after withdrawal."

"We further refer My Lord to the case of OMO V. AMANTU (1993) 3 NWLR (Pt. 280) 149 *where the court held;* ***"There are several decided cases to the effect that any suit withdrawn after issues have been joined should be dismissed and not merely struck out.*** *(See the case of ERONINI & ORS. V. IHEUKU (1989) 2 NWLR (PT 101) 46, OLAYINKA RODRIGUES & ORS V. THE PUBLIC TRUSTEE & ORS. (1977) 4* S.C. *29; AND A.F. SONEKAN V P.G. SMITH (1967) 1 ALL NLR 329)."*

"In ERONINI V. IHEUKU supra, the Supreme Court held;

> ***"In such circumstances, withdrawal of the suit from court could never be nor could it ever be conceived as of right or automatic. It was not for the learned counsel in the court below to appear to dictate to the court what order to make in consequence of his application for leave. That was a matter exclusively for the court in due deliberate exercise of its judicial discretion which naturally and inevitably must entail the weighing of all the circumstances of the case in the interest of justice and the balancing of the interest of the parties involved including the balance of convenience and disadvantages which might be suffered by any of the parties concerned. It is after the court shall have given consideration to such matters that it can arrive at what is undeniably a difficult decision which must appear reasonable in all the circumstances of a particular case. It is then the duty of the court on the principles stated above to decide: to grant leave for the suit to be withdrawn simply on terms that the same be struck out subject to payment of***

> ***costs; or to grant leave for the suit to be withdrawn subject to the imposition of certain conditions to be fulfilled before a fresh suit concerning the same subject matter and the same parties may be instituted in the court; or to refuse such leave in which case the suit must be dismissed also on terms as to costs."***

"We humbly submit that the case of the Applicant is no longer ***dominis litis*** because parties in the suit have joined issues by filing their defences to the suit. The proper order for the court to make in the circumstance is dismissal. It is settled law that there has to be an end to litigation. If every litigant is allowed to withdraw his suit at will and file another afterwards even when issues are joined, then there will be no end to litigation."

"In the case of ATTORNEY GENERAL OF RIVERS STATE V. UDE (2001) SC 423, the Supreme Court of Nigeria per Aloysius Iyorgyer Katsina-Alu, J.S.C. held;

> ***"I cannot agree more. It seems to me that if every party who is given ample opportunity to prosecute his case, contemptuously ignores the Court, he cannot turnround on appeal and claim that he was not given a fair hearing. Such a party does not deserve further indulgence. There must be an end to litigation."***

"CONCLUSION:"

"In conclusion, the 4th and 5th respondents have proved that issues have joined in the suit and as such the proper order to make in the circumstance is dismissal. The Respondents have filed the various defences to the suit. There has to be an end to litigation. The Applicants filed the suit 17 months before they purportedly discovered they made a mistake. The Applicants are being economical with the truth because they cannot claim not to have noticed their mistakes after going through the various defences filed by the Respondents. The Supreme Court has in a plethora of authorities severally held that when issues have been joined, the proper order to make in an

application by a Plaintiff or counterclaimant for withdrawal is dismissal."

"The Applicants' application is an Originating Application brought under the African Charter on Human and Peoples Rights and the Constitution of the Federal Republic of Nigeria 1999 as amended where all documentary evidence have been front loaded and oral evidence may not be called."

"We humbly urge the court to exercise its discretion in favour of the Respondents in this case by dismissing the suit with substantial cost."

5.5. PLAINTIFFS' REPLY ON POINTS OF LAW

5.5.1. In response to the various Counter Affidavits of the Respondents opposing the Applicants right to withdraw and/or discontinue their suit, the Plaintiffs/Applicants then filed two separate but similar (almost repetitive) responses/REPLIES on POINTS of Law, in rejoinder to the issue raised by the said Respondents. Likewise, we herein reproduce the full texts of the Applicants rejoinder / *i.e.* REPLY on POINT of LAW:

"REPLY ON POINT OF LAW TO APPLICATION OF THE 1ST, 2ND, 6TH AND 7TH RESPONDENTS AGAINST APPLICANTS' MOTION FOR LEAVE TO DISCONTINUE THIS SUIT"

"INTRODUCTION"

"On the 14th- day of September 2015, the Applicants filed their application for LEAVE of this Honorable Court to allow them withdraw/discontinue this suit based on the reasons stated therein including but not limited to the awareness or better understanding garnered by Counsel from the 7th Judicial Retreat of this Honorable Court at Owerri, Imo State as it concerns proper parties before the Court. On the 19th day of October, the 1st, 2nd, 6th and 7th Respondent their "COUNTER AFFIDAVIT IN SUPPORT OF ARGUMENT AGAINST THE APPLICANTS MOTION ON NOTICE FOR WITHDRAWAL/OR DISCONTINUANCE" Obviously, the 1st, 2nd,

6th and 7th Respondents do not understand Applicants' application as they misconstrued it to be withdrawal/discontinuance simpliciter. It is not, it is application for leave....."

"The term leave is defined by the Nigerian Supreme Court in the case of Broad Bank Nigeria Limited Vs Olayiwola & Sons Limited (2005) 4M.J.S.C 133 at 143 paragraph E per I. C. Pats-Acholonu, JSC thus:

> ***"The term "leave" in judicial context imports the exercise of the court's discretion either positively or negatively as it would be outside the bounds of reason to take for granted that the court would willingly grant an application"***

"The Court of Appeal of Nigeria defined leave as spelt out in the case of ASONIBARE v. MAMODU & ANOR (2013) LPELR-22192(CA) (P. 22 paras. D- E) Per DANIEL-KALIO, J.C.A. thus:

> ***"Leave of Court" according to Black's Law Dictionary, 9th Edition means "Judicial permission to follow a non-routine procedure". According to that dictionary, it is often shortened to "Leave,"***

"The Supreme Court of Nigeria also made it clear the consequences of failure to seek the leave of Court to do an act where leave is required. In the case of Ekanem Ekpo Otu Vs ACB International Bank PLC (2008) 3M.J.S.C. 191 at 206 paragraph G.

"Where leave is required either in the Constitution or in the rules of Court and leave is not sought and granted, the Court has no jurisdiction to grant the motion as it is incompetent"

"A communal reading of paragraphs 1.0.1 to 1.0.3 above will reveal among other things that a party seeking "leave" of court for a relief has on his own admitted that the relief sought is not expressly granted by court but derivable through the court's discretion exercised judiciously and judicially."

"It is settled law that there is no dichotomy between error of counsel based on fact and error of counsel based on law in the long settled principle of not visiting the sins/inadvertence of counsel on the litigant.

Contrary to the erroneous submission of Counsel for 1st, 2nd, 6th and 7th Counsel, the position of the law is that litigants are masters of facts while counsel is master of the law. It therefore follows that errors/inadvertence of Counsel is more likely to occur in the realm of law and rules and not of facts. The Honorable Court is humbly invited to discountenance the argument of Counsel for 1st, 2nd, 6th and 7th Respondents with regard to Court not visiting the sins of Counsel on the litigants. We are not ashamed to admit our error as Counsel and urge this Honorable Court to incline itself to substantial justice and not visit our errors/inadvertence on the litigants. We pray for striking out of this suit and not dismissal."

"The Nigerian Supreme Court of Nigeria held as follows in the case of LEONARD ERONINI & ORS. V FRANCIS IHEUKO (1989) LPELR-1161(SC) (P. 13, Paras. C-F) PER OBASEKI J.S.C.

"It is clear therefore, that a Plaintiff and or a Defendant who counterclaims may withdraw his claim or counter-claim at any stage of the proceedings before judgment. In some cases (no leave is required), these are mainly in circumstances where no date has been fixed for hearing. No leave is required."

"However, where the case has been fixed for hearing, leave to withdraw is required as the Rule gives power to the court to allow discontinuance. Leave may be granted on terms as to costs and as to any subsequent suit and otherwise as to the court may deem just. In other words, the court must consider the justice of allowing subsequent suit and otherwise."

"It is in clear understanding of the above that the Applicants sought the **LEAVE** of the Honourable Court to discontinue this suit for reasons so stated."

"It is trite law that the Court exercises her discretion based on the facts disclosed by the party seeking to benefit from the discretionary jurisdiction of the court. The case on hand is one where the Applicants seek to benefit from the discretionary powers of this Honourable Court by asking for permission to discontinue this suit and for this suit to be struck out instead of dismissal."

"The core reason behind the application for leave to discontinue is that we, Applicants' Counsel have come to the undeniable realization that this honourable Court lacks the requisite jurisdiction to hear and determine this action based on the fact disclosed on the face of all the processes filed by the parties that the Plaintiffs herein have been proceeding against wrong Defendants/wrongly described Defendants. "Wrong Defendants" in the sense that 1st, 3rd, 4th, 5th, 6th and 7th Defendants herein are not state parties as required by the law governing the Honourable ECOWAS Court and "wrongly described Defendant" in that the 2nd Defendant herein, though may pass for a state party in local and national understanding and practices in Nigerian Municipal and Federal Courts does not qualify as STATE PARTY under the ECOWAS Court understanding and practices hence the need to discontinue and start afresh based on clearer understanding of the ECOWAS Court practices and procedure."

"The reason for our application for leave to withdrawal/discontinuance is not because the Applicants lack cause or right of action or that the suit is Statute Barred as contended by the 1st, 2nd, 6th and 7th Respondents in Document 3. This suit is not statute barred because the threat complained of is in continuum."

"The 4th and 5th Defendants (Field Experts and agents of 1st, 2nd, 3rd, 6th and 7th Defendants never denied the injuries of the Applicants but simply stated at paragraph 13 of page 6 of their defence (Document 2) that "4th and 5th Respondents aver that they are not in a position to state where and when the Applicants sustained their injuries or where they come from"

"The 4th and 5th Defendants never denied the presence of unexploded bombs and threats associated thereto but gave excuses why they have continued to disobey the orders of this court made on the 7th day of November 2013. The earliest excuse on record was that the Nigerian Police and Ministry of Mines and Power denied them permit to acquire and deploy dynamites to destroy the bombs and the said agencies of Government had long given them all their requested permits and nothing has been done by the contractors till date. Now their latest excuse is

that they are storing those lethal items because of their reasons stated at paragraph 27 of page 8 of their defense that "their case will be jeopardized if the bombs which are part of their evidence were destroyed before the court's visit is carried out"

"The 4th and 5th Respondents, (agents of 1st, 2nd, 3rd, 6th and 7th Respondents) stated on oath and admitted at paragraph 6 that they actually found objects of threat; "war relics such as Abandoned Armored Vehicles, Gun Boats, Fixed Anti-Aircraft Machine Guns, One crashed Military Aircraft FROM WHICH the 4th and 5th Respondents removed unexploded bombs, bomb sites in many places, in public building" In other words only bombs among the threats enumerated by the field experts has been removed. The Applicants contends that bombs are still found in their communities."

"The reason for our application for leave to withdrawal/discontinuance is not because the Applicants' failed to exhaust local remedies before coming to this Court."

"The same field experts and agents of 1st, 2nd, 3rd, 6th and 7th Respondents at paragraph 11 of the same Document 2 admitted on oath and stated as follows: "The 4th and 5th Respondents partly deny paragraph (1.0.1) of page (4) of the Applicants' pleadings and state that the 4TH AND 5TH RESPONDENTS ARE AWARE that some individuals in the past have made COMPLAINTS to various quarters about the PRESENCE OF BOMBS IN THEIR COMMUNITIES/ ENVIRONMENT."

"The Applicants exhausted local remedies through COMPLAINTS about the presence of BOMBS in their communities/environment but nothing came out of it and they approached this court for justice. The bombs have not been removed."

"The above averments of the field agent of 1st, 2nd, 3rd, 6th and 7th Defendants conclusively annihilated the points raised in Document No. 3 by the Counsel to 1st, 2nd, 6th and 7th Defendants with regard to THIS SUIT BEING STATUTE BARRED."

"We urge the Honorable Court in exercising her discretion to take judicial notice of the fact that as averred at paragraphs 4 and 5 of Document 10, the Applicants' Counsel in a bid to better themselves attended the 7th Judicial Retreat of this Honorable Court held at Owerri, Imo State of Nigeria from 6th to 7th July 2015 and imbibed the lessons learnt from there. Considering how thorough the Honorable Court is, this suit if allowed to proceed as presently constituted will still come to the inevitable stone wall of jurisdiction arising from suing a wrong person."

"Even if the parties elect to waive the issue of jurisdiction arising from wrong Defendants just because the said wrong Defendants have joined issues; that will not remedy the fact that they are not state parties. It is trite law that parties cannot waive issues of substantial jurisdiction like proper parties."

"It is trite law that the Court lacks jurisdiction when wrong Defendants are sued as in this case and it will serve the immediate and enduring interest of justice to terminate this suit on the grounds of want of jurisdiction due to wrong parties than to occupy the time of the Court in vain after the awareness that accompanied the said 7th Judicial retreat of this Honorable Court. It is also trite law that the proper order to make when Court lacks jurisdiction due to suing a wrong party is striking out and not dismissal."

"We, therefore, urge the Court to grant the Applicants' reliefs sought in Document 10 and strike out the suit and not dismiss it."

"REPLY ON POINT OF LAW TO APPLICATION OF THE 4TH AND 5TH RESPONDENTS AGAINST APPLICANTS' MOTION FOR LEAVE TO DISCONTINUE THIS SUIT"

"INTRODUCTION"

"On the 14th day of September 2015, the Applicants filed their application for LEAVE of this Honorable Court to allow them withdraw/ discontinue this suit based on the reasons stated therein including but not limited to the awareness or better understanding garnered by

Counsel from the 7th Judicial Retreat of this Honorable Court at Owerri, Imo State as it concerns proper parties before the Court. On the 19th day of October, the 1st, 2nd, 6th and 7th Respondent their "COUNTER AFFIDAVIT IN SUPPORT OF ARGUMENT AGAINST THE APPLICANTS MOTION ON NOTICE FOR WITHDRAWAL/OR DISCONTINUANCE" Obviously, the '1st, 2nd, 6th and 7th Respondents do not understand Applicants' application as they misconstrued it to be withdrawal/discontinuance simpliciter. It is not, it is application for leave ....."

"The term leave is defined by the Nigerian Supreme Court in the case of Broad Bank Nigeria Limited Vs Olayiwola & Sons Limited (2005) 4M.J.S.C 133 at 143 paragraph E per I. C. Pats-Acholonu, JSC thus:

> "The term "leave" in judicial context imports the exercise of the court's discretion either positively or negatively as it would be outside the bounds of reason to take for granted that the court would willingly grant an application"

"1.0.2. The Court of Appeal of Nigeria defined leave as spelt out in the case of ASONIBARE v. MAMODU & ANOR (2013) LPELR-22192 (CA) (P. 22 paras. D - E) Per DANIEL-KALIO, J.C.A. thus:

> "Leave of Court" according to Black's Law Dictionary, 9th Edition means "Judicial permission to follow a non-routine procedure". According to that dictionary, it is often shortened to "Leave,"

"1.0.3. The Supreme Court of Nigeria also made it clear the consequences of failure to seek the leave of Court to do an act where leave is required. In the case of Ekanem Ekpo Otu Vs ACB International Bank PLC (2008) 3M.J.S.C. 191 at 206 paragraph G.

> "Where leave is required either in the Constitution or in the rules of Court and leave is not sought and granted, the Court has no jurisdiction to grant the motion as it is incompetent"

"1.0.4. A communal reading of paragraphs 1.0.1 to 1.0.3 above will reveal among other things that a party seeking "leave" of court for a

relief has on his own admitted that the relief sought is not expressly granted by court but derivable through the court's discretion exercised judiciously and judicially."

"1.0.5. The distinguishing factor in all the cases cited and relied on by the respondents and Applicants' application here is that while the parties who withdrew or discontinued those cases made applications to withdraw/discontinue, the Applicants chose the path of **"Judicial permission to follow a non-routine procedure."** The Applicants are seeking leave of the Honorable Court. Also, the procedure involved in those cited cases is entirely different from the procedure of the ECOWAS Court. Furthermore, oral evidence in proof of the facts contained in the writs and statements of claim in the cases cited and relied on had commenced; in other words, the Plaintiffs therein withdrew/discontinued on the realization that their case as constituted had no merit and threw in the towel without leave. In the Applicants' case here, the Applicants are seeking "leave" to discontinue the case because of lack of proper Defendants recognized by the ECOWAS Court, otherwise the Applicants will not change one punctuation from the originating processes as presently constituted before the Court."

"1.0.6. The Applicants firmly stand by their submission before this Honourable Court with regard to pleadings as to fact and law. The only setback which we have over flogged is that we, Counsel discovered after the 7th Judicial Retreat of this Honourable Court that we were wrong concerning proper parties and not on real or perceived shortcoming on the cause/right of action and the case is not statute barred. The reality of the said 7th Judicial Retreat and lessons imbibed therefrom cannot be ignored with the wave of the hand. The retreat took place, Counsel participated, and the issues of improper or wrongly designated parties and implication formed part of the retreat."

"1.0.7. It is settled law that there is no dichotomy between error of counsel based on fact and error of counsel based on law in the long-settled principle of not visiting the sins/inadvertence of counsel on the litigant. The position of the law is that litigants are masters of facts while counsel is master of the law. It therefore follows that errors/ inadvertence of counsel is more likely to occur in the realm of law

and rules and not of facts as in this case where we designated the 2nd Respondent here as "FEDERAL GOVERNMENT OF NIGERIA" instead of FEDERAL REPUBLIC OF NIGERIA. We are not ashamed to admit our error as Counsel and urge this Honourable Court to incline itself to substantial justice and not visit our errors/inadvertence on the litigants."

"The Supreme Court of Nigeria held as follows m the case of LEONARD ERONINI & ORS. V FRANCIS IHEUKO (1989) LPELR-1161(SC) (P. 13, Paras. C-F) PER OBASEKI J.S.C."

> "It is clear therefore, that a Plaintiff and or a Defendant who counterclaims may withdraw his claim or counter-claim at any stage of the proceedings before judgment. In some cases (no leave is required), these are mainly in circumstances where no date has been fixed for hearing. No leave is required."

"However, where the case has been fixed for hearing, leave to withdraw is required as the Rule gives power to the court to allow discontinuance. Leave may be granted on terms as to costs and as to any subsequent suit and otherwise as to the court may deem just. In other words, the court must consider the justice of allowing subsequent suit and otherwise."

"It is in clear understanding of the above that the Applicants sought the LEAVE of the Honourable Court to discontinue this suit for reasons already stated."

"It is trite law that the Court exercises her discretion based on the facts disclosed by the party seeking to benefit from the discretionary jurisdiction of the court. The case on hand is one where the Applicants seek to benefit from the discretionary powers of this Honourable Court by asking for permission to discontinue this suit and for this suit to be struck out instead of dismissal."

"To dismiss this suit based on the inadvertence of Counsel will go against the driving and core intendment of the framers of the Nigeria Fundamental Rights (Enforcement Procedure) Rules 2009, the principal

instrument upon which this application is brought. The Court is by the Nigeria Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP2009) expected to constantly and conscientiously seek to give effect to the overriding objectives of the FREP 2009 at every stage of human rights action especially when it exercises any power given it by the rules of PREP 2009 or any 6ther law and whenever it applies or interprets any rule. We humbly refer the court to Article 3 of the Preamble of the PREP 2009 and urge Milords to lean towards substantial justice and away from technical justice as espoused by the Respondents."

"1.12. The reason for our application for leave to withdrawal/ discontinuance is not because the Applicants lack cause or right of action or that the suit is Statute Barred as contended by the 1st, 2nd, 6th and 7th Respondents in Document 3. This suit is not statute barred because the threat complained of is in continuum."

"1.13. The 4th and 5th Defendants (Field Experts and agents of 1st, 2nd, 3rd, 6th and 7th Defendants never denied the injuries of the Applicants but simply stated at paragraph 13 of page 6 of their defence (Document 2) that "4th and 5th Respondents aver that they are not in a position to state where and when the Applicants sustained their injuries or where they come from"

"1.14. The 4th and 5th Defendants never denied the presence of unexploded bombs and threats associated thereto but gave excuses why they have continued to disobey the orders of this court made on the 7th day of November, 2013. The earliest excuse on record was that the Nigerian Police and Ministry of Mines and Power denied them permit to acquire and deploy dynamites to destroy the bombs and the said agencies of Government had long given them all their requested permits and nothing has been done by the contractors till date. Now their latest excuse is that they are storing those lethal items because of their reasons stated at paragraph 27 of page 8 of Document 2 that "their case will be jeopardized if the bombs which are part of their evidence were destroyed before the court's visit is carried out."

"One wonders what the case of the 4th and 5th Respondents are before this Court because they are not here as Plaintiffs and did not Counter-claim on record."

"1.15. The 4th and 5th Respondents, (agents of 1st, 2nd, 3rd, 6th and 7th Respondents) stated on oath and admitted at paragraph 6 of Document 2 that they actually found objects of threat; "war relics such as Abandoned Armored Vehicles, Gun Boats, Fixed Anti-Aircraft Machine Guns, One crashed Military Aircraft FROM WHICH the 4th and 5th Respondents removed unexploded bombs, bomb sites in many places, in public building" In other words only bombs among the threats enumerated by the field experts has been removed. The Applicants contends that bombs are still found in their communities and the bombs they removed are still stocked in an open place under the elements in a densely populated mixed residential and commercial district of Owerri, Imo State."

"1.16. The reason for our application for leave to withdrawal/ discontinuance is not because the Applicants' failed to exhaust local remedies before coming to this Court. The same field experts and agents of 1st, 2nd, 3rd, 6th and 7th Respondents at paragraph 11 of the same Document 2 admitted on oath and stated as follows:- "The 4th and 5th Respondents partly deny paragraph (1.0.1) of page (4) of the Applicants' pleadings and state that the 4TH AND 5TH RESPONDENTS ARE AWARE that some individuals in the past have made COMPLAINTS to various quarters about the PRESENCE OF BOMBS IN THEIR COMMUNITIES/ENVIRONMENT."

"The Applicants exhausted local remedies through COMPLAINTS about the presence of BOMBS in their communities/environment but nothing came out of it and they approached this court for justice. The bombs have not been removed."

"1.17. The above averments of the field agent of 1st, 2nd, 3rd, 6th and 7th Defendants conclusively annihilated the points raised in Document NO. 3 by the Counsel to 1st, 2nd, 6th, and 7th Defendants with regard to THIS SUIT BEING STATUTE BARRED. The threats are real, present and continuous."

"1.18. Even if the parties elect to waive the issue of jurisdiction arising from wrong Defendants just because the said wrong Defendants have joined issues; that will not remedy the fact that they are not state parties. It is trite law that parties cannot waive issues of substantial jurisdiction like proper parties. It is trite law that the Court lacks jurisdiction when wrong Defendants are sued as in this case. It is also trite law that the proper order to make when Court lacks jurisdiction due to suing a wrong party is striking out and not dismissal."

"1.19. We therefore urge the Court to grant the Applicants' reliefs sought in Document 10 and strike out the suit and not dismiss it."

6. OBSERVATIONS

6.1. We observe that this instant case is a sister case or companion case to that of **Dr. Sam Emeka Ukaegbu and Others,** which we disposed of recently; *See* **RULING Number ECW/CCJ/RUL/29/15, delivered on December 02, 2015.** The two cases are identical in every respect, except as to the Plaintiffs; that is to say, the subject matter is the same, the Defendants are all the same; the issues raised as well as the claims for relief are all the same; the setting is the same, as well. The Motion to withdraw/discontinue, as well as the responses in opposition thereto, are equally identical. The Legal Counsel on both sides are the same, and their arguments are all the same. The only difference between the two cases is that of the Plaintiffs in both cases.

6.2. In the cited case, the Plaintiffs/Applicants applied to this Court for leave to be allowed to withdraw and/or discontinue their case against all the Defendants. This Court granted the Application/Motion of the Plaintiffs/Applicants and ordered that the case be withdrawn and/or discontinued against all the Defendants/Respondents. The justification by the Plaintiffs for seeking the discontinuance in the cited case are the same reasons stated in this instant Motion, now subject of this Ruling.

6.3. On the basis of **judicial precedence** and that of ***stare decisis,*** we are constrained and inclined to similarly rule granting the Motion of

the Plaintiffs for the same legal reasons stated by us in our previous Ruling in the cited case. Accordingly, the Ruling in the cited case is herein incorporated by reference and adopted as the Ruling in this instant case, as it stands on all fours.

6.4. As stated earlier, when the case was called for hearing on December 03, 2015, legal representations were respectively announced for all the parties, and immediately thereafter, the Counsel for Plaintiffs/ Applicants informed the Court that he had filed a Motion seeking the special leave of court for permission to withdraw and/or discontinue their case against all the Defendants/Respondents.

6.5. ORAL ARGUMENTS BEFORE COURT

6.5.1. After listening to the information of Counsel for Plaintiffs as to his desire to withdraw or discontinue his suit against all the Defendants, the Counsel for the 1st , 2nd, 6th and 7th Defendants responded by informing the Court that in essence, he does not oppose the withdrawal or discontinuance of the suit by the Plaintiffs so long as the Plaintiffs will not re-file or come back in a new suit.

6.5.2. Counsel argued that it is the duty of counsel to professionally conduct the business of his client, and where the counsel blunders, he must bear the consequences of his action (and/or in-action) Counsel strenuously argued that the case had now reached a determinant factor to decide whether or not to dismiss the case or have it withdrawn. He continued that all pleadings had been filed, exchanged - rested, and that the Defendants had filed Preliminary Objections to the suit awaiting disposition by the court only for the Counsel for Plaintiffs to come at that crucial moment to say he wants to withdraw or discontinue the suit. Counsel argued that this court cannot be reduced to a kindergarten school.

6.5.3. Counsel for 1st, 2nd, 6th and 7th Defendants argued that for the Plaintiffs to withdraw this suit and re-file another suit would amount to abuse of court process. The 1st, 2nd, 6th and 7th Defendants further argued that a trial court has the jurisdiction to strike out a case with an order barring Plaintiffs from coming back with the same action. 1st, 2nd, 6th

and 7th Defendants also contended that where issues have been joined in a case, the proper order to make in an application for discontinuance of an action is dismissal. Therefore, 1st, 2nd, 6th and 7th Defendants prayed the court to dismiss Plaintiffs' case in its entirety. Counsel then prayed to be awarded costs in an amount equal to 10% of the damages claimed by the Plaintiffs in their originating application.

6.5.4. The 4th and 5th Respondents, by and through their counsel made a similar submission to that made by the 1st, 2nd, 6th and 7th Defendants and stressed or emphasized that once issues have been joined in a case, a party is not allowed to withdraw or discontinue his case but rather the trial court should properly dismiss and not merely strike out the suit.

6.5.5. Counsel for the 4th and 5th Defendants reminded the Court that this suit is a further abuse of court process, in that there is already a suit filed in this Court, bearing Suit N°. ECW/CCJ/APP/06/12 (**Vincent Agu and 19 others**), by the same lawyers for the Applicants against the same Defendants, involving the same subject matter, and presenting the same issues for determination.

6.5.6. In defense of his Motion to withdraw or discontinue his case, Counsel for the Applicants contended that the granting or denial of an application depends on the reliefs sought. Plaintiffs further argued that there is a difference between withdrawing or discontinuing a case as of right and doing so by special permission or leave of the court.

6.5.7. Counsel said it is unethical and deceptive to the Plaintiffs for counsel to continue pursuing this case and it constitutes a waste of time and money. He said this discontinuance is not based on the fact that their case is statute barred.

6.5.8. Plaintiffs argued that the cases cited by the Defendants are not relevant or analogous to this instant case in that, in the cited cases, the cases had been heard on the merits and the withdrawal or discontinuance was as of right; whereas, in this case, the case has not yet been heard on the merits and the withdrawal or discontinuance sought is not one of right but by special leave of Court.

6.5.9. Therefore, Plaintiffs' counsel prayed the court to overrule the objections of the Defendants and grant his prayer and permit the Plaintiffs to withdraw or discontinue their case. He also prayed that costs be disallowed because none of the parties specifically claimed or demanded costs in their pleading, as required by the Rules of this Court.

7.A. QUESTIONS SUBMITTED

7.1. The Defendants/Respondents have contended that after issues have been joined in a case, the said case cannot be withdrawn or discontinued by the Plaintiff.

7.2. The Respondents have also contended that this Motion to withdraw or discontinue will amount to an abuse of court process if the Plaintiffs are allowed to subsequently re-file the same suit after its discontinuance.

7.3. The 4th and 5th Respondents have also contended that this suit of the Plaintiffs is an abuse of court process considering the existence of the prior suit of Vincent Agu, et al and therefore incompetent.

7.B. ISSUES TO BE RESOLVED

7.4. The basic legal question this Court shall answer is whether or not after issues have been joined in a case, the said case can be withdrawn or discontinued by the Plaintiff?

7.5. A secondary issue which is not necessarily decisive of this case 1s, what constitutes an abuse of court process, and does it exist in this instant case?

8. DISCUSSIONS

8.1. The first question this Court shall answer is whether or not after issues have been joined in a case, the said case can be withdrawn or discontinued by the Plaintiff?

8.1.1. To answer this question, we shall look to the Rules of Procedure governing this Court for guidance.

The **Rules of Procedure, Title II Procedure, Chapter 7 Discontinuance,** provide as follows:

"Article 72

"If, before the Court has given its decision, the parties reach a settlement of their dispute and intimate to the Court the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 66(8), having regard to any proposals made by the parties on the matter."

"Article 73

"If the Applicant informs the Court in writing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 66(8) of these Rules."

8.1.2. We observe that the Rules provide two ways by which a case in this Court can be discontinued: (a.) by the parties reaching a settlement, and (b.) by the Applicant informing the Court in writing. We note that the Rules are silent on whether the joinder of issues is a prerequisite or if there are other conditions forming the bases of a party to be allowed to withdraw or discontinue his case.

8.1.3. For this, we shall look to the jurisprudence of this Court for possible guidance.

8.1.3.1. In the case, **Suit N°. ECW/CCJ/APP/01/09 AMOUZOU Henri & 5 Others** vs. **Cote d'Ivoire, Ruling N°: ECW/CCJ/JUD/04/09,** this Court allowed the withdrawal of three of the Plaintiffs, and ruled as follows: "The Court accedes to the first request, since the Applicants are at liberty to withdraw from the case at any stage of the procedure." *See* page 15 of the Judgment delivered 17 December 2009.

8.1.3.2. Further, in the case, **Suit N°. ECW/CCJ/APP/13/08 El-hadji Tidjani Aboubacar** vs. **Etat du Niger & BCEAO, Ruling N°. ECW/CCJ/JUD/01/11,** this Court allowed the Applicant, Mr. Tidjani

Aboubacar to discontinue his suit against the 1st Defendant Bank BCEAO without the approval or intervention of the 2nd Defendant, Republic of Niger. *See* pages 6-7 of the Judgment delivered 08 February 2011.

8.1.4. The Defendants have argued that once issues have been joined, the Plaintiffs are not allowed to withdraw their case against the Defendants; whereas, the Plaintiffs have countered that they can withdraw or discontinue their suit either as of right or by special permission or leave of the Court.

8.1.5. We resolve this dispute by referring to our Rules, and as we have seen above, a Plaintiff is allowed to discontinue his case either (a.) by consensus or agreement of the parties in which case, they will jointly inform the court of their decision to abandon their claims and their determination as to costs, or, (b.) by the Plaintiff informing the court in writing of his desire to do so, and the President in both instances, shall give an order to have the case removed from the register.

8.1.6. Based on the above, we resolve this issue by conceding to the position of the Plaintiffs in this case to the effect that they have the right to withdraw or discontinue their case against all the Defendants. Accordingly, the application of the Plaintiffs is hereby granted and the case against all the Defendants is hereby discontinued.

8.1.7. In opposing the withdrawal or discontinuance of the suit by the Plaintiffs, the Defendants argued that if it is allowed, the Plaintiffs will come back in a new suit on the same subject matter and in that case, it would amount to an abuse of court process. To this, we say that in the event the Plaintiffs elect to come back with a new suit on this same subject, the Court will, at that point, decide whether on the basis of what is (re)filed, there is an abuse of process and thus take the appropriate action under the circumstances; we should not pre-empt the Plaintiffs. Thus, for the sake of clarity, we grant the Plaintiffs' Motion for Discontinuance/Withdrawal of their action against all the Defendants and herein declare that we determine that this Motion does not amount to an abuse of court process.

8.1.8. Even in the cases **AMOUZOU Henri,** and **El-hadji Tidjani Aboubacar** cited above, we observe that the Court has been liberal in allowing Applicants to withdraw or discontinue their cases. Further, our Rules provide for the award of costs of the parties in prosecuting their respective sides of the case, so that they do not incur unnecessary expenses or experience financial losses. For one thing, the withdrawal or discontinuance of a case saves/reserves the time and resources of the court and the parties to engage in other endeavours; further, it lessens the burden and strain on them; most importantly, it speaks to the honour and ethics of the party withdrawing or discontinuing the case if he knows it is no longer worth the effort, time and exercise to continue in a bad case, or an illegal venture, or a fruitless and frivolous exercise. We, therefore, follow the tradition of our predecessors to grant an application of the Plaintiffs to withdraw or discontinue their case. (*See* **ECW/CCJ/RUL/29/15**, delivered December 02, 2015, supra.)

8.3. The second and final issue we shall address ourselves to is what constitutes an abuse of court process, and does it exist in this instant case?

8.3.1. Abuse of Court process is a term generally applied to a proceeding which is wanting in bona fide, and is frivolous, vexatious and oppressive. Abuse of court process is when a party improperly uses judicial processes to the harassment, annoyance and irritation of his opponent and to interfere with the administration of justice. **Saraki vs. Kotoye (1992) 9 NWLR (pt 280) 131; Amaefuna** vs **State (1988) 2 NWLR (pt 75) 156 at 177**.

8.3.2. The 4th and 5th Defendants /Respondents have contended that this suit is an abuse of court process because it is similar in all respects to three prior cases already filed involving the same parties, the same subject matter and the same source and transaction. The cases are:

- ECW/CCJ/APP/06/12 between **Vincent Agu** and 19 Others vs. Federal Republic of Nigeria, Ministry of Defense, R.S.B. Holdings Nigeria Ltd., Deminers Concept Nigeria Ltd., and the Attorney General of the Federation;

- FHC/OW/CS/93/2014 between **Dr. Ignatius Nnanna Onyenekwu and Mrs. Chinyere Onyegekwu** vs. R.S.B. Holdings Nigeria Ltd., Deminers Concept Nigeria Ltd., Dr. Emeka Uhegbu, Attorney General of the Federation, and Minister of Defense.

- ECW/CCJ/APP/11/14 between **Placid Dr. Sam Emeka Ukaegbu** and Others vs. President, Federal Republic of Nigeria, Federal Government of Nigeria, Ministry of Defense, R.S.B. Holdings Nig. Ltd., Deminers Concept Nig. Ltd., Attorney General of the Federation, and State Security Services. (SSS).

8.3.3. The Defendants/Respondents have contended that a multiplicity of suits which involves the same parties and the same subject matter amounts to an abuse of court process, and this Court has the duty to strike out or dismiss the said suit.

8.3.4. In review of the three prior cases referred to by the Defendants/ Respondents, the Court takes judicial notice that they all have the subject matter of landmines, war relics, unexploded bombs and other such remnants of the Nigerian civil war which occurred between 1967-1970 in the various States in the South-East and South-South Zones of Nigeria. The Applicants in all these cases complained of abandoned war relics, remnants of the civil war, unexploded ammunitions, injuries to their persons, damage to their environment and communities, deprivation of rights and freedoms, etc.

8.3.5. The facts are that the Federal Republic of Nigeria accepted to assume responsibility to identify, clear, demine, remove and destroy all such war relics and remnants of the Nigerian civil war and contracted the services of Messrs. R.S.B. Holdings and Deminers Concept, respectively, to carry out these tasks. The functionaries of the Government are those persons listed as Respondents along with the private contractors.

8.3.6. Therefore, it is not in dispute that the parties are the same, the subject matter and transaction and sources are all the same, the reliefs sought

in all the suits are the same, the Respondents sued are all the same and even the counsel for the Applicants are the same in all the other cases as well as this.

8.3.7. The Supreme Court of Nigeria held inter alia: ***"It is settled law that generally, abuse of process contemplates multiplicity of suits between the same parties in regards to the same subject matter and on the same issues. This manner of using court process which is obviously lacking in bona fide leads to the irritation and annoyance of the other party and this impedes the administration of justice"*** **R Victor Umeh vs. Iwu (2008)** 8 NWLR (PT 1089) 225 at 243-244. Thus, we declare that to institute an action during the pendency of another action claiming the same relief is an abuse of court process and the only course open to the court is to put an end to the subsequent suit. *See* **Okorodudu vs. Okoronodu (1977) SC2; Abubakar vs. B.O & AP Ltd. (2007) 18 NWLR PT 1066, 319 at 377; NTUKS vs. NPA (2007) 13 NWLR (PT 1051) 392 at 419-420; Ibok vs Honesty 11 (2007) 6NWLR (PT 1029) 55 at 70**.

8.3.8. The law frowns on multiplicity of suits, and rather favours consolidated or joint actions which would bring closure to matters in a comprehensive manner and not in piece meal. A party is expected to bring all his claims belonging to the same subject matter at once and at the same time. If he chooses to bring them by piece meal, he may be faced with the doctrine of *res judicata*. See the case, **Yakubu vs. ASCO Ltd. (2010) 2 NWLR (pt 1177) 167.** To sustain a charge of abuse of court process, there must coexist inter alia (a.) a multiplicity of suits (b.) between the same opponents (c.) on the same subject matter and (d.) on the same issues. Also, the court will consider the contents of both suits and determine whether they are aimed at achieving the same purpose. *See*, **Agwasim vs. Ojichie (2994) 10 NWLR (PT 992) 613.** From a careful examination, these criteria are all present in this instant case.

8.3.9. We observe that the Applicants in the previous suits sued for themselves and all the members of the communities affected by landmines except where a person opposes the suit; in this case, are

we to take it that these Applicants are or were opposed to the previous suits herein referred to? We think not; that is, they were certainly aware of these suits and did not join in, but have elected to bring their claims in this separate suit, which we find to be very vexatious and will not be countenanced by this Court.

8.3.10. The Respondents have contended that the Applicants in this case were aware of the filing of these prior suits and did nothing to join in and pursue their own interests but have waited until these other suits have been filed before coming forward. In the one instance, the Respondents have said that these Applicants are part of the Applicants in the other cases and are only trying to extort money from the Respondents and benefit more than once. The Respondents specifically cite case of **Vincent Agu and 19 Others** which has progressed to an advanced stage where the parties entered into negotiating a settlement, which is to be reported to this Court on the progress of the terms of their agreement and settlement.

9. CONCLUSION

9.1. It is a matter of historical fact and public knowledge, of which this Court takes judicial notice, that there was a civil war in Nigeria between 1967 and 1970 and obviously there were damages and destruction on all sides to the war, with a lot of remnants left behind. It is also not deniable that there is need to clean up the environment and restore the communities to a habitable state. It has not been controverted by the Applicants that the Government undertook to do just that and proceeded to set up the Task Force to evaluate and assess the impact and extent of the environmental damage and degradation. It is also not denied by the Applicants that when the Government carried out this assessment and enumeration that they, the Applicants herein were not among those enumerated; also, they have not said what prevented them from participating or from benefitting.

9.3. Lest we forget, as has been stated earlier in this RULING, we do not comment on the question of whether or not the fundamental human rights of the Applicants were violated and if so by whom. Our

comments in this RULING only deal with the preliminary questions of the propriety of the withdrawal or discontinuance of this suit by the Plaintiffs after issues had been joined.

9.4. One final comment to make is that during oral argument before this BENCH, Counsel for the Plaintiffs contended that costs should not be awarded to the Defendants because they did not specifically pray for costs in their pleadings. Counsel cited the Rule of this Court to support that argument.

9.5. We hereby hold that yes, the Rules do provide that the party(ies) must request for cost to be awarded cost, but that requirement is in contemplation of the case being disposed of in the ordinary course of things, that is, the case going through to its logical conclusion. We do not believe that the framers of the Rule intended that a party can wait until pleadings have rested, issues joined, and then unilaterally withdraw or discontinue his case with no regard to the situation of the other party(ies).

9.6. The Court will not lend itself to such practices. If the Plaintiffs had allowed the case to go to its logical ending in a judicial determination on the merits of the case or even on the legal issues as raised in the respective Preliminary Objections, then a conclusive decision would terminate the case one way or the other. Therefore, the argument of the Plaintiffs' Counsel is unreasonable, unjust, unfair, and hence untenable, and accordingly overruled.

10. DECISION

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

As to Motions for Extension of Time

10.1. Declares that all the Motions for Extension of Time filed by all the parties be granted and the same are hereby granted.

As to granting the Motion on Notice for Withdrawal or Discontinuance

10.2. Declares further that the Plaintiffs' Motion or prayer for the discontinuance or withdrawal of the Application against all the Respondents be and the same is hereby granted.

As to the case being an abuse of court process

10.5. Lastly, on the suit being an abuse of court process, the Court rules that Motion for Discontinuance/Withdrawal is not an abuse of court process; as to the instance where another action is subsequently filed on this same subject matter, the Court rules that the arguments of the Defendants/Respondents is not sustained and is considered premature and presumptive; as regards the existence of a prior suit on the same subject matter between the same parties as seen in the case of Vincent Agu, et al, the Court rules that indeed this instant case is an abuse of court process, and were it not for the withdrawal or discontinuance filed by the Plaintiffs which is herein granted by this Court, this case ought to properly be dismissed as to the 4th and 5th Defendants.

As to costs

10.6. The Court rules that costs are hereby awarded to the Defendants m the discontinuance of this case by the Plaintiffs at this juncture.

Thus made, adjudged and pronounced in a public hearing at Abuja, this 04th day of May, A.D. 2016 by the Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS RULING:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Maria do Ceu Silva MONTEIRO** - *Member.*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member.*

Assisted By:
Aboubakar Djibo DIAKITE (Esq.) - *Registrar*.

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON THIS THURSDAY, 17TH DAY OF MAY, 2016

SUIT N°: ECW/CCJ/APP/21/15
RULING N°: ECW/CCJ/RUL/08/16

BETWEEN
AGRILAND CO. LTD. ***(SOCIETE AGRILAND)*** - *PLAINTIFF*

VS.
THE REPUBLIC OF CÔTE D'IVOIRE - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMEYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **SONTE EMILE (ESQ.)** - *FOR THE PLAINTIFF*
2. **JUDICIAL OFFICER OF THE STATE, SCPA AMBAOULÉ-DOUMBIA & ASSOCIATE** - *FOR THE DEFENDANT*

-Violation of human rights -Failure to rule on incidents of hearings and violation of the right to an effective remedy.

SUMMARY OF FACTS

The Societé AGRILAND in its writings argues that the Court failed to rule on the requests concerning the dysfunction of the judicial system, the incidents of hearing. It also claims that the judgment of the Court of 24 April 2015 remained silent on the case of violation of the right to an effective remedy before the courts.

It applied to this Court with an application for failure to rule in order to provide answers to the violations suffered and the Court has remained silent.

The Ivorian State replies that the omission to give a decision cannot be a way of reformation to the point of asking the court, which has concluded its referral by an unsuspecting decision to annul it. And as a result, the respondent requests that the motion be declared inadmissible and regarding on the merits of the case to declare it unfounded.

ISSUES FOR DETERMINATION

1. *Whether the application is admissible?*

2. *Whether the Court failed to rule on a claim in isolation of the claim?*

DECISION OF THE COURT

In its Decision, the Court declared that the claim was made within the legal period that is to say within the month following the notification of the Judgment. Consequently, it must be declared admissible.

Whereas the analysis the Court indicates that the claims of the Societe AGRILAND are neither more nor less than a decision initiated procedure that could allow him to make the Court to rule again on its

initially formulated application and which was the subject of a decision dated 24 April 2015.

In addition, the Court considers it appropriate to specify that the omission to rule provided for in Article 64 of the Rules cannot be initiated by a litigant as a remedy that may enable him to obtain the annulment of a final decision and, above all, lead the Court to re-adjudicate claims arising from its originating application.

That it is important that the Applicant's motion on failure to rule is unfounded and its claims unsuccessful.

RULING OF THE COURT

Delivers the following Ruling:

I. PROCEDURE

1. On 12 June 2015, Agriland Co. Ltd. filed an Application before the ECOWAS Court of Justice, asserting that the ECOWAS Court of Justice omitted to adjudicate on certain heads of claim in the Judgment it delivered on 24 April 2015.

2. On 13 July 2015, the Republic of Côte d'Ivoire, through its Counsel, SCPA Bambaoulé-Doumbia and Associates, lodged its Defence at the Registry of the Court, upon receiving the Application of Agriland Co. Ltd.

3. On 29 July 2015, Agriland Co. Ltd. filed a Reply to the Defence of the Republic of Côte d'Ivoire.

4. The case was scheduled for the hearing of the Parties on 20 April 2016.

5. On that date, the Court adjourned its deliberations, so as to deliver its Ruling on 17 May 2016, after hearing the arguments of both Parties.

II- THE FACTS OF THE CASE:

CLAIMS AND PLEAS-IN-LAW OF THE PARTIES

6. By Application dated 25 August 2014, Agriland Co. Ltd. brought its case before the Community Court of Justice, ECOWAS, asking the Court to:

   "***As to formal presentation***,

   - **Declare** that the Application it brought before the Court was duly filed and that it is admissible;

   As to merits,

   - **Declare** that the Application is well founded;

- **Adjudge** and declare that the steps taken and the judgments delivered by the courts of the Republic of Côte d'Ivoire in the case against Agriland Co. Ltd. constitute serious violations of the human rights of Agriland Co. Ltd.;

- **Declare** that the violations in question are attributable to the Republic of Côte d'Ivoire, as responsible for the acts of its judicial authorities;

- **Find** that the widespread human rights violations, perfectly established, caused great harm to Agriland Co. Ltd.;

- **Order** the Republic of Côte d'Ivoire to pay to Agriland Co. Ltd. the sum of Two Billion CFA Francs (CFA F 2,000,000,000) in reimbursement for its colossal investments;

- **Order** the Republic of Côte d'Ivoire to bear all the costs relating to the proceedings, including the legal fees due Maître Emile Sonté, barrister-at-law."

7. By Judgment No. 07/15 of 24 April 2015, the Court, adjudicating in a public session, after hearing the two Parties, in a matter on human rights violation, in first and last resort, decided in the following terms:

"*As to formal presentation*

- **Declares** that the Application brought by Agriland Co. Ltd. is admissible, for satisfying the legal requirements;

As to the merits of the case

- **Adjudges** that the human rights violations claimed by Agriland Co. Ltd. are ill-founded;

- Consequently, **dismisses** the Application, with all its intents and purposes;

- **Adjudges** that there is no ground for adjudicating on the issue of incompetence of the Court as raised by the Republic of Côte d'Ivoire;

- **Asks** Agriland Co. Ltd to bear the costs."

8. By Application for omission to adjudicate on certain heads of claim in the Judgment of 24 April 2015, as delivered by the ECOWAS Court of Justice, Agriland Co. Ltd asked the Court to:

"***As to formal presentation*****,**

- **Declare** that the Application it brought before the ECOWAS Court of Justice was duly filed, and that it is admissible, in accordance with Article 64 of the Rules of Procedure of the Community Court of Justice, ECOWAS;

As to merits**,**

- **Declare** that the Application is well founded;
- **Find** the indicated omissions of adjudication contained in the Judgment cited;
- **Adjudge** that the omissions in question constitute the basis for the present Application filed against the Judgment of 24 April 2015;
- Consequently, **annul** purely and simply;
- **Adjudicate** afresh;
- **Make** a new pronouncement on all the requests made by the Parties and to grant in totality the requests made by Agriland Co. Ltd, by declaring, notably, that Agriland Co. Ltd was a victim of violation of its human rights, as committed by the Republic of Côte d'Ivoire;
- **Adjudge** and **declare** that the said human rights violations caused great harm to the Republic of Côte d'Ivoire;
- **Order** the Republic of Côte d'Ivoire to pay to Agriland Co. Ltd. the sum of Two Billion CFA Francs (CFA F 2,000,000,000) as damages and also ask the Republic of Côte d'Ivoire to bear all the costs relating to the proceedings."

9. In its written pleadings, Agriland Co. Ltd maintains that the omission to decide on its requests manifests itself in two ways. Firstly, in the form of a malfunction of the judicial apparatus of the Republic of Côte d'Ivoire and in defects in the hearing procedure, whereas the Judgment did not make any reference to those incidents, even though clearly pleaded. Secondly, that the Judgment was silent on the complaint made regarding the Applicant's right to effective remedy, which constitutes a claim of violation of the fundamental human rights of the Applicant. That in the same breath, the Judgment complained of did not make any pronouncement on violation of the Applicant's right to effective remedy, whereas the Applicant emphasised the fact that the order for getting the case ready for hearing, and for the closure of proceedings, was not subject to appeal.

10. On the omissions to decide, regarding the heads of claim filed by the Republic of Côte d'Ivoire, Agriland Co. Ltd maintains that the Judgment complained of carefully avoided making a pronouncement on the incompetence of the Court, as raised, and that the Court did not provide any response to the request concerning inadmissibility of the Application, which was one of the points of argument arising between the two Parties. Agriland Co. Ltd prays the Court to adjudicate afresh, and declare that, the Court not deciding on all the heads of claim brought by Agriland Co. Ltd, constitutes a serious case of violation of the rights of Agriland Co. Ltd, and order the Republic of Côte d'Ivoire to pay to Agriland Co. Ltd the sum of Two Billion CFA Francs (CFA F 2,000,000,000) as damages.

11. In its Defence, the Republic of Côte d'Ivoire asked the Court to:

"*As to formal presentation*,

- **Declare** the Application asking the Court to adjudicate on certain principal points of claim in the Judgment of 24 April 2015 inadmissible, on the ground that the Application in question does not concern a "***specific head of claim***", and also, for the reason that an instance of omission to decide on a specific head of claim does not provide a ground for any form of outright annulment of a judgment not subject to appeal;

Alternatively, as to merits,

- **Declare** that the Application is ill-founded;
- **Dismiss** the Application;
- **Order** Agriland Co. Ltd to bear the costs relating to the instant proceedings."

12. Regarding inadmissibility, the Republic of Côte d'Ivoire argues, by recalling the provisions of Article 64 of the Rules of Procedure of the ECOWAS Court of Justice; that the points which the Applicant alleges the Court may have omitted to adjudicate upon do not constitute specific heads of claim in any way whatsoever. The Republic of Côte d'Ivoire emphasizes the point that from the Judgment, it can be deduced that the Court was unable to conclude on the allegations of human rights violation, as made by the Applicant, because the Applicant, throughout its argumentation, was unable to adduce evidence in support of the principle of equal access to the public service of the Judiciary, the right to fair trial, and the right to impartiality before the courts and tribunals.

13. The Republic of Côte d'Ivoire further argues that the recusal procedure of any of the panels of judges in the domestic courts of the Republic of Côte d'Ivoire is an avenue of defence which it invoked against the claim regarding violation of the right to effective remedy, and that the Court even cited it as an existing possibility for a litigant to take a judge to task, for any serious default on his or her duties and obligations. That the so-called omission to decide, as invoked by the Applicant, regarding the heads of request by the Republic of Côte d'Ivoire, has to do with a key claim by the Republic of Côte d'Ivoire upon which the Court had already adjudged, and that in the absence of violation, there was no ground for the Court to decide specifically on that very claim.

14. The Republic of Côte d'Ivoire asserts that the omission to decide on a specific point of claim shall not be a ground for revising an entire judgment, to the extent of asking the Court to annul a judgment it has made upon the closure of an entire procedure, more so when the

judgments of the Court are not subject to annulment. That, as a result, the Application by Agriland Co. Ltd, claiming omission to adjudicate, shall be declared inadmissible.

15. On alternative grounds, as to merits, the Republic of Côte d'Ivoire requests the Honourable Court, where it considers that the Application by Agriland Co. Ltd was admissible, to adjudge that it is ill-founded in law, for the reason that the order for the closure of proceedings at the domestic court is not subject to appeal, and is not founded on the powers of the judge under Community law of ECOWAS, but on the powers wielded by the judge of the Republic of Côte d'Ivoire, under the domestic law. The Republic of Côte d'Ivoire again contends that the Community Court of ECOWAS had already concluded that due to the non-existence of violation of human rights, as alleged, it did not appear necessary for the Court to examine that head of claim.

III. GROUNDS FOR THE DECISION

AS TO FORMAL PRESENTATION

- ***Regarding admissibility of the Application***

16. Whereas it can be deduced from the pleadings produced that Agriland Co. Ltd received on 8 June 2015 service of copy of the Judgment of the ECOWAS Court of Justice, in the case between Agriland Co. Ltd and the Republic of Côte d'Ivoire. That by Application for omission of the Court to decide on specific requests, Agriland Co. Ltd lodged its case at the Registry of the Court on 12 June 2015.

17. Whereas the said Application was filed within the month the Judgment was served on Agriland Co. Ltd, it is ripe and appropriate therefore to declare the Application admissible for satisfying the legal and formal requirements of time-limit prescribed under Article 64(1) of the Rules of the Community Court of Justice, ECOWAS.

AS TO THE MERITS OF THE CASE

18. Whereas in the terms of Article 64(1) of the Rules of the Court: "*Where the Court omits to give a decision on a specific head of claim or*

on costs, any party may within a month after service of the judgment apply to the Court to supplement its judgment." Whereas Article 64(3) states that: "*After these observations have been lodged, the Court shall decide both on the admissibility and on the substance of the application".*

19. Whereas cases brought for omission to decide are treated exhaustively under Article 64(1). Whereas such cases shall be considered as embodying some form of substance only when the omission to adjudicate is centered on a specific head of claim or on costs.

Regarding alleged omissions relating to specific heads of claim made by Agriland Co. Ltd.

- **As to the head of claim relating to malfunction of the judicial apparatus of the Republic of Côte d'Ivoire and defects in the hearing procedure, as pleaded in the Application and in subsequent pleadings**

20. Whereas Agriland Co. Ltd recalls that it has clearly indicated that, the Ivorian courts before which the two Parties appeared, made court decisions and took highly contestable steps constituting "acts and actions amounting to serious human rights violations".

21. Whereas the Court finds that in its Initiating Application dated 25 August 2014, the first plea-in-law submitted by Agriland Co. Ltd concerned violation of the principles of equality before the courts and tribunals, the right to fair trial, and the right to impartiality in court.

22. Whereas in regard to this head of claim, the Court based its decision on the fact that Agriland Co. Ltd failed to provide evidence of violation by the Republic of Côte d'Ivoire of the principle of equal access to the public service of the Judiciary, nor of violation of the right to fair trial, since the procedures conducted before the Ivorian courts did respect the principle of hearing both Parties, and enabled each of the Parties to put up its defence appropriately. Whereas Agriland Co. Ltd failed to prove as well the alleged impartiality in the decisions made by the Ivorian courts.

23. Whereas the Court concluded by declaring the allegations of the Applicant ill-founded with regards to the pleas-in-law advanced.

24. Whereas, as such, the so-called omission to decide invoked by Agriland Co. Ltd cannot constitute one, since the Court has already made a decision on that specific head of claim.

- **As to the head of claim related to the recusal procedure of judges employed as a means of ensuring effective remedy**

25. Whereas upon a careful look at the Judgment complained of, it becomes clear that the Court did not omit to make a decision thereupon, since it is stated in points 49 and 50 of the Judgment by the Court, that: "... ***the right to effective remedy before the domestic courts implies the opportunity available to everyone to defend his cause before the national courts; whereas that presupposes that the State shall put in place effective and efficacious judicial structures before which every citizen may defend his cause".***

26. Whereas the Court stated that such judicial mechanisms exist before the Ivorian courts.

27. Whereas the Court further stated that the procedure for recusal of judges, as invoked by the Applicant, was provided for under the Ivorian legislation, a procedure the Applicant could have made use of.

28. Whereas in the light of the foregoing, the Court finds that within the meaning of Article 64 of the Rules of the Court, there is no omission to decide on the indicated head of claim.

- **As to violation of the right to effective remedy against the order for closure of the procedure for getting the case ready for hearing.**

29. Whereas Agriland Co. Ltd., in its Reply to the Defence filed by the Republic of Côte d'Ivoire dated 14 November 2014, on the point relating to the steps taken by the First Civil Chamber of the Abidjan Court of Appeal, *"... merely gave a description of the procedure before the said Court without proving what human rights violation consisted of."*

30. Whereas the ECOWAS Court of Justice finds that this head of claim relating to violation of the right to effective remedy before the Ivorian courts (refer to page 19 and related pages of the French version of the Judgment) was responded to by the Court in the following terms:

> "***Whereas in the instant case, it is apparent from the pleadings of the procedure that Agriland Co. Ltd. did file its case before the Ivorian courts in connection with the dispute between it and CGP; whereas it even filed an appeal before the Daloa Court of Appeal and an application before the Supreme Court aimed at quashing a judgment; being able to institute those proceedings attests to the existence of a judicial structure enabling the Applicant, not only to file its case before the Ivorian Judiciary, but also to file for appeal before the various structures made available by the Ivorian laws."*** Whereas the ECOWAS Court concluded that the claims of human rights violation filed by Agriland Co. Ltd were ill-founded, and consequently dismissed those claims.

31. Whereas it is appropriate to adjudge that there is no omission to decide on this specific head of claim.

Regarding alleged omissions relating to specific heads of claim made by the Republic of Côte d'Ivoire

32. Whereas it is appropriate to recall that regarding objections raised by the Republic of Côte d'Ivoire in respect of lack of jurisdiction of the ECOWAS Court of Justice over the case filed by Agriland Co. Ltd, in relation to reimbursement requested by Agriland Co. Ltd, the Court made a decision in the following terms (paragraphs 56 and 57 of the Judgment):

> "***Whereas it is not proved that there is any human rights violation whatsoever, it does not appear necessary any more to examine this head of claim brought by the Republic of Côte d'Ivoire. Whereas it is ripe to conclude that there is no ground for adjudicating on the said request***."

33. Whereas in the light of this reasoning, the alleged omission to decide, as invoked by the Applicant, is ill-founded and does not constitute a

specific head of claim or plea-in-law within the meaning of Article 64 of the Rules of Procedure of the Court.

34. Whereas the above-cited Article 64(1) clearly states the instances where an omission to adjudicate may be well founded in the law. Whereas these instances concern situations where the Court may have omitted to decide on either a specific head of claim or on costs.

35. Whereas in the instant case, upon careful scrutiny, the Court finds that the omissions claimed by Agriland Co. Ltd do not satisfy the requirements fixed by the said Article.

36. Whereas Agriland Co. Ltd has indeed received a response to all its claims, through the clear and precise points of reasoning by the ECOWAS Court of Justice.

37. Whereas probably the Applicant does not concur with the points of reasoning adopted by the Court, it is appropriate to remind the Applicant that whatever the case may be, the Court is not bound to follow the Applicant's way of reasoning in examining the case brought before the Court.

38. Whereas the Court finds that the approach adopted by the Applicant consists of urging the Court to reverse the reasoning it has followed in the Judgment of 24 April 2015, so as to adopt that of the Applicant, and to revoke the decision already made. Whereas such position shall not be the stand to be adopted while bringing a case for omission to adjudicate on a specific point of claim.

Regarding annulment of the Judgment of 24 April 2015

39. Whereas it is trite that where a court finds that it has omitted to make a decision on a key point of request, it may supplement its judgment, without prejudicing, at any rate, the authority of the decided case, in terms of the other heads of claim.

40. Whereas it is the view of this Honourable Court, that a judgment arising from an omission to adjudicate, is a court decision which seeks to fill a gap previously left by the Court, in the form of a response to a

specific question which was raised during the procedure whose end-product was the previous or original judgment.

41. Whereas an application for omission to provide a decision on a particular head of claim shall not therefore be confused with an appeal procedure seeking to annul or overturn the original judgment.

42. Whereas this is the reason why the Community lawmaker strictly confined the said procedure for omission to decide to the purpose ascribed to it within the provisions of Article 64 of the Rules of Procedure of the Court.

43. Whereas Agriland Co. Ltd, in its Application herein, for omission to decide, asks the Court to find various allegations of omission to decide in the judgment it referred to, so as to obtain an annulment of that judgment, purely and simply. Whereas thereby, Agriland Co. Ltd was asking the Court to go over all the points of request made by the Parties in the original case and make a pronouncement on each of them, and from that, grant its requests, by declaring, notably, that the human rights of Agriland Co. Ltd were violated by the Republic of Côte d'Ivoire. Whereas Agriland Co. Ltd restates its claim for damages against the Republic of Côte d'Ivoire in the sum of Two Billion CFA Francs (CFA F 2,000,000,000), for the harm it has suffered.

44. Whereas upon a careful look at the matter, the Court declares that the claims sought by Agriland Co. Ltd are, no more and no less, a procedure initiated by Agriland Co. Ltd to seek a fresh adjudication on requests which had been previously filed, and which have already been decided upon in the delivery of the Court's Judgment of 24 April 2015.

45. Whereas it is appropriate to indicate here that an application for omission to decide on a point, as provided for under Article 64 of the Rules of the Court, shall not be initiated by an applicant as a means for enabling him or her to obtain an annulment of a judgment delivered in last resort, much less as a means of urging the Court to rule afresh on claims which have already been featured in the Initiating Application.

46. Whereas in the light of the forgoing, it is ripe and appropriate to adjudge that the request for omission to decide, as filed by Agriland Co. Ltd, is ill-founded.

47. Whereas consequently, all the claims brought by Agriland Co. Ltd, as embodied in its Application, are hereby dismissed, in all their intents and purposes.

Regarding costs

48. Whereas in the terms of Article 66(2) of the Rules of the Court: "*The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.*"

49. Whereas in the instant procedure, Agriland Co. Ltd is the unsuccessful party.

50. Whereas Agriland Co. Ltd shall bear all costs.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing the two Parties, in a matter on omission to decide on specific heads of claim, in first and last resort;

As to formal presentation

- **Declares** that the Application brought by Agriland Co. Ltd. is admissible, for satisfying the legal requirements prescribed under Article 64(1) of the Rules of the Court;

As to the merits of the case

- **Adjudges** that the Application for omission to adjudicate, as brought by Agriland Co. Ltd, is ill-founded;

***Consequently*,**

- **Dismisses** the said Application, in all its intents and purposes;

- **Asks** Agriland Co. Ltd to bear all costs.

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

And the following hereby append their signatures:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

Assisted by
Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/18/15
JUDGMENT NO: ECW/CCJ/JUD/09/16

BETWEEN
ABDOULAYE KOBA - *PLAINTIFF*

VS
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JEROME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MR. LAOUALI MADOUGOU** - *FOR THE PLAINTIFF.*
2. **SECRETARY GENERAL OF THE GOVERNMENT** - *FOR THE DEFENDANT.*

Claim for damages - lack of jurisdiction - dismissal of claim

SUMMARY OF FACTS

The Applicant alleged that he had a credit account of 17,257,167 FCFA with the BDRN bank, and that he was only reimbursed the sum of 2,272,760 FCFA when the latter was liquidated. He is claiming the remaining 14,984,407 FCFA. This is denied by the Republic of Niger, claiming that the Court lacks jurisdiction and asking that the applicant be dismissed.

ISSUES FOR DETERMINATION

- *Whether the Court has jurisdiction in a non-human rights case that is purely civil?*

- *Whether the Application is admissible?*

DECISION OF THE COURT

- ***Declared** that it has no jurisdiction to hear the Application filed by Mr. Abdoulaye Koba;*

- ***Order** the Applicant to bear the entire cost.*

JUDGMENT OF THE COURT

1- The parties and their representation

By application filed at the Registry of the Court on 18 May 2015, **Mr. Abdoulaye Koba**, a citizen of Niger, brought a case before the ECOWAS Court of Justice for violation of human rights. He is represented by Maître Laouali Madougou, lawyer at the Niger bar, residing at 293, boulevard de la jeunesse, Quartier Yantala in Niamey (Republic of Niger).

The Defendant is the **Republic of Niger**, represented by the Secretary General of the Government, assisted by the *Société Civile Professionnelle d'Avocats* (SCPA) "Thémis", located at 380 avenue du Kawar, Niamey (Republic of Niger).

II- Facts and proceedings

The Development Bank for the Republic of Niger (BDRN) was liquidated pursuant to a decision of the Commercial Court dated 26 October 1994.

As a result of banking operations that made his account abnormally debit, Mr. Koba sued the Bank before the courts in Niger: Niamey Regional Court, Court of Appeal, Court of Cassation, courts before which he could not win his case.

Subsequently, and in view of the fact that the Bank was a state-owned company, the Republic of Niger itself decided to proceed with the payment of the sums that BDRN still owed to some of its clients. In this context, Mr. Koba was awarded the sum of two million, two hundred and seventy-two thousand, seven hundred and sixty (2,272,760) CFA francs, as the remainder of his credit balance.

It is this amount that the applicant is now contesting, as he believes that the sum owed is in fact seventeen million, two hundred and fifty-seven thousand, one hundred and sixty-seven (17,257. 167) CFA francs, taking into account the errors that were made on his bank account, and that consequently, the Republic of Niger, which replaced the BDRN, still owes him the balance of fourteen million, nine hundred and eighty-four thousand four hundred and seven (14,984,407) CFA francs.

It is in these circumstances that he referred the matter to the Court, seeking to have the Court:

- *"**Order** the Republic of Niger (BDRN-Liquidation) to reimburse El hadji Abdoulaye Koba the sum of 14,984,407 FCFA;*
- *To **award** interest at the legal rate from the date of the summons of 7 November 2000;*
- ***Order** the Republic of Niger to pay the applicant the sum of 100,000,000 CFA francs as damages;*
- ***Order** the Republic of Niger (BDRN-Liquidation) to pay the costs."*

The Republic of Niger replied in a memorandum filed on 30 June 2015, in which it asked the Court to declare that it had no jurisdiction and, if it were to hear the case on the merits, to dismiss the claims of the applicant and to order him to pay the costs.

III- Arguments and submissions of the parties

The Applicant submits that the Republic of Niger acted wrongly and should be compensated. In this respect, he invokes articles 1343 paragraph 2 and 1349 of the Civil Code of Niger. He asked the Court to order the Republic of Niger to reimburse him the above-mentioned balance, together with "*interest at the legal rate",* as well as the sum of one hundred million (100,000,000) CFA francs as damages. The file submitted to the Court also includes various decisions rendered by the courts of Niger already seised.

For its part, **the Republic of Niger** argues that the Application lodged tends to make the ECOWAS Court a court for the reversal of national judicial decisions, which should lead it to decline jurisdiction. On the merits, and in the event that the Court were to retain jurisdiction, he argues that no wrong was done to the applicant's bank account, and that in fact the applicant is seeking discriminatory treatment in relation to all other customers of the Bank who have had to be paid. Consequently, the Court is asked to dismiss his claims.

IV- Analysis of the Court

As to formal presentation

The Court must first address the issue of its jurisdiction to entertain the present case.

On the jurisdiction of the Court

It notes in this respect that the dispute concerns the payment of a sum of money allegedly due in connection with banking transactions. Moreover, the application, which purports to fall within the scope of Article 9 of the 2005 Protocol, not only fails to allege, *expressis verbis,* a "violation of human rights", but also fails to cite any provision of an international instrument on which it is based.

In these circumstances, it is questionable whether the trial in question really falls within the jurisdiction of the Court. In this respect, it is worth recalling other judgments that have been handed down by the Court.

In the judgment of 2 November 2007, ***« Chief Frank C. Ukor v. Rachad Laleye and Republic of Benin »***, the Court, after recalling that **"*the two parties were in a business relationship*", noted that "*there was no question of human rights violations but simply of contractual relations*"** (§28) and thus concluded that it lacked jurisdiction.

In the case of ***« Mrs. Alice Rapheal Chukwudolue and Others v Republic of Senegal »*** (Judgment of 22 November 2007), the Court also declared that it lacked jurisdiction on the grounds that ***"the present dispute does not concern human rights"*** (§54).

More recently, in its 2016 judgment, ***« Société du Pont de Kaye v. The Republic of Mali »***, the Court further stated ***that Assuming that the applicant had indeed suffered a loss of earnings, such damage does not necessarily amount to a "violation of human rights", the concept of "human rights" being more precise and referring to a catalogue of given prerogatives. The Court is obliged to note, like the respondent State, that the dispute brought before it does not in any way fall within the scope of "human rights", but remains contractual in nature, and***

is not appropriate for referral to the Court under Article 10 of the 2005 Protocol (...) Not every economic loss, not every loss of earnings, translates into a "human rights violation". It must be concluded that the dispute in question must be brought before courts other than this Court, which obviously does not have to indicate those courts.

The present dispute undoubtedly falls into this category. The Court must then, without going any further, decline jurisdiction to entertain it.

As to cost

In accordance with the provisions of Article 66 of the Rules of Court, the Court considers that the applicant should bear the costs.

FOR THESE REASONS

The Court, ruling publicly, adversarially, in matters of human rights violations, in the first and last resort,

As to formal presentation

- **Declares** that it has no jurisdiction to hear the application lodged by Mr Abdoulaye Koba;

- **Order** the applicant to bear the entire cost;

Thus adjudged and pronounced publicly by the Community Court of Justice, ECOWAS in Abuja, on the above-mentioned day, month and year.

And the following append their signature:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/27/15
JUDGMENT N°: ECW/CCJ/JUD/10/16

BETWEEN
BODJONA AKOUSSOULELU PASCAL - *PLAINTIFF*

VS.
REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT

1- **HON. JUSTICE JEROME TRAORÉ** - *PRESIDING*
2- **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3- **HON. JUSTICE ALIOUNE SALL** -*MEMBER*

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

REPRESENTATION TO THE PARTIES:

1- **ROBERT AHLONKO DOVI (ESQ.)** - *FOR THE PLAINTIFF*

2- **LEGAL REPRESENTATIVE,**
LE GARDE DES SCEAUX,
MINISTER OF JUSTICE, - *FOR THE DEFENDANT*

-Jurisdiction

SUMMARY OF FACTS

Following a complaint for organised fraud filed on 2 March 2011 by Mr. Abass Al Youssef, Abudabian businessman against Mr. Agba Sow Bertin and others, the Applicant, Mr. Bodjona Pascal, then Minister of the Territorial Administration was arrested for complicity in this crime on 18 March 2011. On 31 July 2012, following a ministerial cabinet reshuffle, Mr. Bodjona was ousted from the government and was arrested on 1 September by the national gendarmerie. The Applicant was granted provisional bail on 9 April 2013 before being re-arrested on the order of the trial judge. Thus, on 4 September 2014, Mr. Bodjona through his lawyers seized the ECOWAS Court of Justice for violation of his human rights by virtue of his detention on remand. He was successful, thus by judgment dated 24 April 2015, the Court ordered the Republic of Togo to organise as soon as possible the trial of Mr. Bodjona or, in the absence of evidence against him to release him. In addition to his arrest and detention for the period of 1 September 2012 to 9 April 2013, is arbitrary.

Following the delay of the decision by the Republic of Togo, Mr. Bodjona again appealed to this court on 28 August 2015 for violation of his right to enforcement of court decisions, violation of his right to liberty and security from the decision of this Court of Justice of 24 April 2015 and finally breach of his right to an effective remedy.

ISSUE FOR DETERMINATION:

Whether the Court has jurisdiction to entertain an application concerning the non-implementation of a decision made by it?

DECISION OF THE COURT

The Court held that it was not for it to interfere in the implementation of a court decision by it. It upheld the Defendant's objection to jurisdiction and declared itself incompetent.

JUDGMENT OF THE COURT

BETWEEN

PARTIES

Bodjona Akoussoulelu Pascal former Minister of the Republic of Togo, and former Ambassador of Togo to the United States of America. He is represented by Maître Robert Ahlonko Dovi and others, all Lawyers registered with the Bar Association of Togo. **- (PLAINTIFF)**

AND

STATE of Togo, with its Headquarters within the *Palais de la Presidence* (State House), 2, Avenue du General De Gaule, Lome - Togo, represented by its Legal Representative, *Le Garde Des Sceaux*, Minister of Justice, and Minister in charge of relationships with State Institutions, living in Lome, Rue de L'OCAM. **- (DEFENDANT)**

The Court

- Having regard to the Treaty establishing the Economic Community of West African States (ECOWAS) of 24th July 1993;
- Having regard to 6th July 1991 Protocol, and the Supplementary Protocol of 19th January 2005 on the Community Court of Justice, ECOWAS;
- Having regard to the Rules of Procedure of the ECOWAS Court of Justice of 3rd June 2002;
- Having regard to the Universal Declaration of Human Rights of 10th December 1948;
- Having regard to the UN Convention against torture and other cruel, inhuman punishments or degrading treatments of 10th December 1984;
- Having regard to the African Charter on Human and Peoples' Rights of 27th June 1981;
- Having regard to the initiating Application dated 25th August 2015 filed by the afore-mentioned Applicant;

- Having regard to the Memorial in Defence dated 2nd October 2015, filed by The State of Togo;
- Having regard to the pleadings filed;
- Having heard the parties through their respective Counsels;

II. FACTS AND PROCEDURE

1. Following a complaint on swindling by organised criminals filed on 2nd March 2011 by Mr. Abass Al Youssef (businessman, and an Abu Dhabi citizen) against Messrs. AGBA Sow Bertin and Others, Mr. BODJONA Pascal Akoussoulelou, who was then the Minister of Territorial Administration, and the then Spokesperson for the Togolese Government, was arrested on 18th March 2011, by the Togolese National Gendarmerie, for complicity in this charge, upon instructions from the Prosecutor General in the Tribunal of First Instance in Lomé.

2. On 31st July 2012, following a Government reshuffle, Mr. Bodjona was relieved of his functions. On 10th August 2012, he was summoned before an investigating judge of the said Tribunal, and on 1st September 2012, he was arrested in his house by the officers of the Togolese National Gendarmenrie.

3. On 9th April 2013, Mr. Bodjona was provisionally released, before he took his case before the investigating chamber in the Court of Appeal of Lomé, which ordered the annulment of the proceedings initiated against him for procedural flaws. On 21st August 2014, he was arrested afresh, by the same investigating judge.

4. On 4th September 2014, through his Counsel, Mr. BODJONA Pascal Akoussoulelou filed a case before the Honourable Court, for the violation of his fundamental human rights, due to his preventive detention.

5. By Judgment dated 24th April 2014, this Honourable Court delivered the judgment, whose operative part reads as follows:-

"***In terms of the merits of the case,***

- ***Orders*** *the Republic of Togo to try Mr. Bodjona Akoussoulélou Pascal within the shortest possible time, or*

else, failing any evidence of wrongdoing against him, order his release;

- ***Adjudges** that the arrest and detention of Mr. Bodjona Akoussoulélou Pascal, from 1 September 2012 to 9 April 2013 are arbitrary;*

- ***Asks** therefore that the Republic of Togo shall pay to Mr. Bodjona Akoussoulélou Pascal the following sums of money:*

  - *Ten (10) Million CFA Francs, in reparation for the harm done, as a result of his arbitrary arrest and detention;*

  - *Five (5) Million CFA Francs, for the moral damage done him;*

  - *Three (3) Million CFA Francs, for the psychological harm done him;*

  Totalling Eighteen (18) Million CFA Francs;

- ***Dismisses** any other additional claims brought by Mr. Bodjona Akoussoulélou Pascal;*

- ***Asks** the Republic of Togo to bear the costs."*

6. Owing to the lateness by the State of Togo to enforce the above-referred judgment, Mr. BODJONA Pascal Akoussoulelou approached the Honourable Court, once again, through an Application received at the Registry of the Court on 28th August 2015, seeking from the Court:

   - **A declaration** that the State of Togo violated his right to freedom and security of the human person, for refusing to enforce the above-referred judgment delivered by the ECOWAS Court of Justice;

   - **An order** on the State of Togo, to pay him the following sums of money:

     - 300,000,000 CFA Francs representing the prejudices suffered, resulting from the various violations pointed out;

- 75,000,000 CFA Francs representing non-pecuniary prejudice;
- 50,000,000 CFA Francs for psychological prejudice;
- Everything totalling 425,000,000 CFA Francs, and,

- **An order** on the State of Togo to bear all costs.''

III. PLEAS-IN-LAW BY PARTIES

7. In order to render fruitful his orders sought, Applicant weaves his arguments around three points, such as: i) violation of his right to have his favourable court decision enforced, ii) violation of his right to freedom and security of the human person, with effect from the date the said judgment was entered, *i.e.* 24th April 2015, and, iii) violation of his right to effective remedy.

8. In regard to the first point on the non-enforcement of court decisions, Applicant cites the provisions of Articles 10 of the Universal Declaration of Human Rights, and 14 (1) of the same instrument, which provide, respectively 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.*"; *"Every individual has the right to have his cause heard in a fair and public hearing by an independent and impartial tribunal established by law, in the determination of his rights and of any criminal charge against him."*

9. Plaintiff/Applicant claims that the above-referred provisions relate to the right of every individual to fair hearing, which finds its accomplishment in the enforcement of court decisions, and that the EU Court shares this line of reasoning, when it held, in its judgment dated 28th July 1999 (Case of **Immoboliare Saffi *v.* Italy**), that: ***"enforcement of a judgment or ruling, of whatever court should be considered as an integral part of the judicial proceedings."***

10. Plaintiff/Applicant further claims that in the instant case, the Honourable Court has already established, in its Judgment dated 24th

April 2015, his right to have his favourable court judgment enforced, when the Court declared that: ***"…it was the duty of the judicial authorities to see to the execution of the decisions made by the courts…"***, a declaration which, to him, must also be true of the Honourable Court.

11. On the second issue relating to violation of his right to freedom and security of person, Applicant points out that various of his rights are violated in regard to Article 9 (1) of the international Covenant on Civil and Political Rights, and Article 6 of the African Charter, which provides, substantially that freedom and liberty are rights inherent in the human person, and as such, no one can be deprived of his liberty, or be detained arbitrarily, except on legal grounds and pursuant to laid down legal procedure.

12. Among these violations are arbitrary arrest and detention, for which he has been a victim since 21st August 2014, in total disregard for the afore-stated legal provisions, in the spectacular proceedings initiated against him, and during which his right to honour, reputation, image and dignity was infringed upon.

13. Owing to all these prejudices that he suffered, Applicant claims that since the publication of the afore-mentioned judgment of the Honourable Court dated 24th April 2014, his continued detention has become purely arbitrary, and that his release from detention has become obligatory, more so as the facts as presently contained in the case file in Togo do not allow for his trial to be conducted within reasonable period, as can be attested to by a reply from the Togolese Minister of Justice dated 24th July 2015 (copy filed as exhibit), following a request dated 13th July 2015, for Applicant's release, which the said Minister seemed as recognising as a simple criminal procedure, which would come underway, "as soon as the minimum conditions are met."

14. In regard to the third issue, the Applicant invokes the violation of Article 2 (3) (a) of the International Covenant on Civil and Political Rights, which provides that: *"State Parties to the present Covenant undertake (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons*

acting in an official capacity", to support his argument that the appeal filed by him on 17 October 2014 against Judgment n°. 163/14, by the investigating chamber of the Court of Appeal in Lomé was not examined and it took the publication of the Judgment delivered by this Honourable Court on 24th April 2015, i.e. more than eight (8) months after, before the judicial chamber at the Supreme Court of Togo relaunched the case, by requesting his Counsels to file their pleas-in-law.

15. This behaviour of the Supreme Court of Togo is contrary to the provisions of **Law No. 97 – 05** on the Organisation and Functioning of the said Court, especially under its Articles 23 (1), 24 and 25 (1), which provide, among other things that:

> "*Once the pleadings are filed and received, the Chief Registrar in the Supreme Court shall effect the enrolment of the case on the Cause List of the Chamber and inform the president of the Chamber, who will instantly designate a Judge Rapporteur."*

16. In its arguments, the State of Togo objects to the filing of the this Application, and submits that pursuant to the provisions of **Article 24 of the Supplementary Protocol A/SP.1/01/15 dated 19th January 2005**, except the discussion on suspension of enforcement process relates to the one started by the judicial authorities within the ECOWAS Community, it is not the responsibility of this Honourable Court, to take charge of the enforcement of its own Judgments, but rather, that of the National Authorities of each ECOWAS Member State.

17. According to the State of Togo, unlike the submission by Plaintiff/Applicant, the Judgment dated 24th April 2015, by the Honourable Court never ordered for his release, but only enjoined the Togolese Justice to comply with its own Penal Law, by organising a trial within reasonable period, effective from the date of the said Judgment.

18. The State of Togo further submits that the delay in the examination of the case concerning Plaintiff/Applicant was due to the various judicial procedures he initiated, and that as at today, the totality of all these procedures were still pending before the Supreme Court in Togo.

19. On the strength of the above submission, the State of Togo argues the lack of jurisdiction of the Honourable Court to examine all orders sought by Plaintiff/Applicant. Togo makes an accessory claim as to strike out the case filed by Plaintiff/Applicant, as ill-founded in law.

IV. LEGAL ANALYSIS BY THE COURT

As to form

1. On the materiae rationae jurisdiction of the Court

20. To start with, the Court recalls that by Application received at the Registry of the Court on 28th August 2015, Mr. BADJONA Pascal Akoussoulelou sought the leave of the Court to admit his case to an expedited procedure, and that the presiding Judge in the panel appointed to examine the said case had, via Order No. ECW/CCJ/ORD/01/16 dated 21st January 2016, did justice to his request, by fixing the first hearing date on 10th February 2016.

21. In regard to the lack of jurisdiction *materiae rationae* of this Honourable Court, as raised by the State of Togo, due to the difficulties in the enforcement of the Honourable Court's referred Judgment of 24th April 2015, the Court is of the opinion that it is not part of its responsibility to get involved in the enforcement of its own Judgment delivered, and that it is the responsibility of each party at cause to explore the ECOWAS Community Legal avenue open for it, especially the relevant Articles as contained in the Supplementary Protocol A/SP.1/01/15 dated 19th January 2005, and the Supplementary Act A/SA.13/02/12 of 17th February 2012.

22. The Court is of the opinion that in the instant case, it has brought its procedure to an effective end, by delivering a judgment concerning both parties, pursuant to Article 19 (3) of the 6th July 1991 Protocol on the Court, which provides that: *"The Court shall give only one decision in respect of each dispute brought before it. Its deliberations shall be secret and its decisions shall be taken by a majority of the members.*"

23. This is a settled case law of the Honourable Court, and as such, it has rejected Plaintiffs/Applicants in various cases, among which are: Judgments ECW/CCJ/APP/15/14 of 24th April 2015 delivered in the case of **Kpatcha GNASSIMGBE and others against the State of**

Togo; and ECW/CCJ/JUD/19/13 delivered in the case of **Karim Meissa WADE against the State of Senegal**.

2. On claims as to compensation

24. Whereas the Court withholds jurisdiction over the instant case, it will not examine the claim as to compensation.

3. As to costs

25. Whereas Plaintiff/Applicant fell, there is need to order him to bear all costs, pursuant to Article 66 of the Rules of Court.

FOR THESE REASONS

The Court,

Sitting in a public hearing in a human rights violation matter, in first and last resort and after hearing both parties

As to form

- **Declares** as admissible the preliminary objections as to the lack of jurisdiction of the Court over the instant case;
- **Declares** as the said objections as well-founded, and declares its lack of jurisdiction over the instant case;
- **Orders** the Plaintiff/Applicant to bear all costs.

Thus made, adjudged, and pronounced in a public hearing in Abuja, on the day, month, and year stated above.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN IN ABUJA, FEDERAL REPUBLIC OF NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY 2016

SUIT NO: ECW/CCJ/APP/39/15
JUDGMENT N°: ECW/CCJ/JUD/11/16

BETWEEN
FARIMATA MAHAMADOU & 3 ORS - *PLAINTIFFS*

VS
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JEROME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** -*MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **MARIAM DIAWARA (ESQ.) & MODIBO T. DOUMBIA (ESQ.)** - *FOR THE PLAINTIFFS*
2. **THE STATE LITIGATIONS DEPARTMENT** - *FOR THE DEFENDANT*

Violation of human rights - Review of legality - Community Judge - Estate devolution - Infringement of property rights - Discrimination and violation of the right to equality before the law - Articles 1, 2, 3, 5 and 24 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) - Right to effective remedy - Admissibility Article 33 (1) and (2) of the Rules of Court - Jurisdiction - Article 9-4 of the Supplementary Protocol (A/SP.1/ 01/05) of 19 January 2005 - Damages and interests.

SUMMARY OF FACTS

By application received at the Registry of the Community Court of Justice, ECOWAS, on 18 December 2015, the Applicants, all Malian citizens, brought an action before the Court to find that their human rights was violated, and to seek the payment of damages.

The Applicants maintain that, on the death of their father, Oumar Mahamadou, on 11 February 1993 in Bintagoungoun, Goundam district, Timbuktu region, they were recognized as the sole heirs by hereditary judgment No. 5 dated 18 February 2010, established by the Justice of Peace with extended jurisdiction of Goundam, and concluded that Mr. Ibrahim Alabass, a relative of their deceased father did not have this quality.

However, that the court entrusted Ibrahim Alabass with the management and cultivation of the farmland, enjoining him to meet the needs of the Applicants whenever they were in need, which was intended to deprive them of their legacy claiming that a woman cannot and must not inherit a property in Bintagoungoun.

Applicant's appeal to the Mopti Court of Appeal, the latter in its judgment No. 35/bis of 14 April 1999 partially confirmed the judgment conferring the cultivation of the farmland to the Applicants but under the control of Mr. Ibrahim Alabass according to local custom.

According to Ibrahim Alabass's appeal, the Supreme Court of Mali, in its judgment No. 52 of 18 March 2003, quashed the case and remitted the parties to the Bamako Court of Appeal, which otherwise composed,

by judgment No. 90 of 18 February 2004 stated that the estate devolution of the lands by the Applicants will be subject to the prescriptions of Muslim custom. Asked to interpret its own judgment, the Court of Appeal of Bamako ruled in Judgment No. 444 of 14 July 2010 in the following terms: ***"Holds that judgment No. 90 of 14 February 2004 shall be interpreted as follows: will be made in accordance with the Muslim custom of the family of the late Ibrahim Alabass where the woman does not inherit a farmland."***

The Applicants filed an appeal against that decision of the Court of Appeal, the Supreme Court by Judgment No 250 of 3 October 2011, dismissed that appeal and the application for the purpose of closing the judgment, in the end, by judgment no. 338 of 27 December 2012 to establish a case law according to which the daughter, the wife and the sister of a deceased cannot and should not inherit a property by reason of their sex, anything which is not only without legal foundation but also clearly violates all the international conventions ratified by Mali.

The respondent State submits that the Applicants, by their application request the ECOWAS Court of Justice to assess the decisions of the Malian court, and to find that they constitute violations of rights which entitle to reparation, which is outside the jurisdiction of the Court.

ISSUE FOR DETERMINATION

- *Can the Court validly review the lawfulness of a judicial decision by a Member State of the Community when it clearly violates human rights?*

DECISION OF THE COURT

The Court in its decision states that where a judicial decision is, in itself, detrimental to human rights, the Community judicature which has been mandated to protect the rights of the citizens of the community, cannot have any other choice than to intervene and denounce this blatant violation of human rights, regardless of the act that gave rise to the violation.

JUDGMENT OF THE COURT

1-PROCEDURE

1. On 18 December 2015, Farimata MAHAMADOU, Baradjangou MAHAMADOU, Farimata OUMAR and Farimata KOLA, all Malian citizens, through their Counsel, filed an Application before the Community Court of Justice, ECOWAS for human rights violation and payment of damages;

2. On the same date, they filed an application for expedited procedure;

3. On 11 January 2016, the Registry of the Court asked the Republic of Mali to file a defence brief within one month;

4. On 3 February 2016, the Republic of Mali lodged its statement of defence at the Registry of the Court;

5. The case was called for hearing at the external court sitting at Abidjan on 20 April 2016;

6. At the end of the hearing, the case was adjourned for judgment on 17 May 2016 at the seat of the Court at Abuja,

II- THE FACTS OF THE CASE:

CLAIMS AND PLEAS-IN-LAW OF THE PARTIES

7. By Application received at the Registry of the Community Court of Justice ECOWAS, Farimata Mahamadou, Baradjangou Mahamadou, Farimata Oumar and Farimata Kola (all women) requested the Court to adjudge and declare that the Republic of Mali:

   - **Violated** the Convention on Elimination of All Forms of Discrimination against Women, as ratified by Mali in 1985;

   - **Infringed** on their right of ownership, notably their right not to be unfairly deprived of their property:

   - **Breached** their right to equality before the law;

Consequently:

- **Order** the Republic of Mali to put an end to the violation of their rights, and take all appropriate measures to safeguard their property and rights of inheritance;

- **Order** the Republic of Mali to pay to each Applicant the sum of Two Hundred Million CFA Francs (CFA F 200,000,000), totalling Eight Hundred Million CFA Francs (CFA F 800,000,000), in compensation for the material and moral damage they have suffered from the grievous violation of their human rights, resulting from the unfairness of their trial;

- **Order** the Republic of Mali to pay the lump sum of Ten Million CFA Francs (CFA F 10,000,000) to each Applicant in refund for all legal costs combined, occasioned by the multiple proceedings before the national courts, resulting from violation of their human rights:

- Furthermore, **Order** the Republic of Mali to pay all due costs legally liable before this Court by virtue of this suit in accordance with Article 69 of the Rules of the Court;

- Finally, **Order** the Republic of Mali to bear all costs.

8. The Applicants pleaded that they were recognised by Judgment of 18 February 2010, on inheritance, delivered by the *Justice de Paix a Competence Etendue de Goundam* (a system of lay Magistrates in Goundam), as the only heirs from their father OUMAR MAHAMADOU, who died on 11 February 1993 in Bintagoungoun (Goundam *Cercle,* in the region of Timbuktu):

9. A few months after the death of their father, a man named Ibrahim ALABASS and close to their late father intervened to deprive them of their inheritance on the ground that a woman cannot and would not inherit the property in Bintagoungoun, namely the twenty-four (24) farmlands left behind by their deceased father. The said Ibrahim Alabass died in 2002 without any court decision for backing his claims;

10. After the death of Ibrahim ALABASS, a certain Mahamadou SALL emerged on the scene posing as the representative of the heirs of the late Ibrahim ALABASS, even though he had no mandate, and his representation was challenged by the heirs of Ibrahim ALABASS through legal acts;

11. On 13 January 1994, the Goundam Civil Court, by Judgment N°. 11 of 13 January 1994, explicitly recognised the Applicants as heirs of the late Oumar MAHAMADOU and concluded that Ibrahim ALABASS was not qualified as a heir to their late father. However, the said Court entrusted him with the management and exploitation of the farmlands, and asked him to provide for the needs of the four Applicants during their times of need or in circumstances of helplessness;

12. Following an Appeal against this Judgment by Farimata MAHAMADOU, the Mopti Court of Appeal, in its Judgment N° 35/ bis of 14 April 1999 partially upheld the Judgment in these terms:

> *"Invalidates the judgment made, on the ground that it entrusted the management and exploitation of the lands to Ibrahim ALABASS with the obligation to take care of the needs of the heirs;*
>
> *Delivering a new ruling on the same matter:*
>
> *Rules that the exploitation of the lands will remain in the hands of the heirs, under the supervision of Ibrahim ALABASS, in order to guarantee the maintenance of the said lands as an integral part of the heritage of the family of the deceased, in accordance with the local customs."*

13. Upon the appeal of Ibrahim ALABASS, the Supreme Court in its Judgment No. 52 of 18 March 2003, quashed the said judgment by referring the matter back to the Bamako Court of Appeal, which constituted another panel and delivered Judgment N°. 90 of 18 February 2004 as follows:

"On the merits of the case, quashes the previous judgment delivered, on the ground that the Mopti Court of Appeal adjudicated ultra petita;

Adjudicating afresh on the same matter:

- *Admits the application filed by Farimata MAHAMADOU, Baradjangou MAHAMADOU, Farimata KOLA and Farimata OUMAR as formally presented.*

- *Rules that inheritance of the lands as claimed by the applicants shall be subjected to requirements of Muslim customs ...*";

14. They appealed against this judgment, and the Supreme Court, by Judgment N°. 207 of 23 June 2008, dismissed the said appeal on the ground that the Court of Appeal "simply decided that the inheritance of the lands shall be subject to the prescriptions of Muslim customs without making any specific mention as to the pattern of sharing."

15. Due to the inability to execute Judgment N°. 90 of 18 February, 2004 by the Court of Appeal Bamako, (inability, deliberately caused by the ambiguity of the content of this decision of the Court), Mr. Mahamar Mahamdou SALL (the alleged representative of the heirs of Ibrahim Alabass, who could not however produce any legal document to that effect), by an application dated 22 April, 2010, applied to the said Court for the interpretation of its own Judgment N°. 90 of 18 August 2004. By Judgment N°. 444 of 14 July 2010, the Bamako Court of Appeal ruled in the following terms: *"Adjudges that Judgment N°. 90 of 14 February 2004 shall be interpreted as follows: the inheritance shall be made in accordance with the Muslim customs of the family of the late Ibrahim ALABASS wherein a woman shall not inherit a farmland."*

16. In furtherance of their plea, they stated that it is nowhere established that the Sonrhai local custom, which was made reference to in the reasoning of Judgment N°. 444 of 10 July 2010, excludes women from inheriting any kind of property; and that contrary to the substance of

the decision, Islam has always recognised the right of women to inherit property (farmlands, buildings or parcels or land); As proof all the experts of Islamic law judicially requested to make a statement on that particular point of law did declare that the said court decision (Judgment N°. 444 of 10 July 2010) was in flagrant contradiction with Islamic Law, and that Islamic Law has never excluded women from any form of inheritance:

17. Owing to the flagrant illegality of this court decision, the heirs filed an appeal, but the Supreme Court of Mali, by Judgment N°. 250 of 3 October 2011, dismissed the appeal in the following terms: -*Whereas except in the event of an attempt by the application to question the content of Judgment No. 90 of 14 February 2004, it is difficult to imagine that the Court (Appeal Court) may violate the custom by interpreting its own judgment: that the second plea regarding violation of the Muslim custom not being more relevant than the first, it follows that latter must be dismissed for its irrelevance";* whereas the Supreme Court of Mali equally dismissed the application for stay of execution of Judgment N°. 338 of 27 December, 2012 filed by the heirs, on the ground that the heirs questioned the reasoning of the legal analysis of the judgment by the Supreme Court:

18. Finally, Judgment N°. 33 of 27 December, 2012 of the Supreme Court of Mali which henceforth served as case law under which a daughter, a wife or a sister of a deceased person may not or shall not be entitled to inherit a property on grounds of sex, is not only legally ill-founded but also obviously violates all the international conventions ratified by Mali;

19. In support of their claims, as to the jurisdiction of the Court and admissibility of their claims, they rely on Articles 9 (4) and 10 (d) of the 2005 of the Supplementary Protocol and the case-law of the Court, especially as laid down in ECW/CCJ/APP/13/08 **El Hadj Tidjani Abouhocar v. BECEAO and Niger** and ECW/CCJ/JUD/05/10 of 8 November, 2010 **Mamadou, Tandja v. Niger***;*

20. Regarding violation of the Convention on the Elimination of All Forms of Discrimination against Women, the Applicants claim that the

Republic of Mali violated Articles 1, 2, 3, 5, 24 of this Convention, ratified by Mali in 1985, and further argue that the Republic of Mali, which is required to ensure the legal protection of women on same measure of equality with the men and guarantee, via the Slate inheritance laws, effective protection of women against acts of discrimination, in accordance with the tenets of the said Convention, rather defaulted in its obligation to protect women against every form of discrimination. This, the Applicants claim, the Republic of Mali did by way of acting rather in line with the State inheritance laws, which endorses discrimination upon the ground of inferiority of women, as compared to men, thus manifestly violating the relevant provisions of the above-cited Convention;

21. Regarding violation of their right to property and their right to equality before the law, the Applicants aver that the Republic of Mali violated Articles l, 2, 7 and 17 of the Universal Declaration of Human Rights (UDHR) and Articles 3 and 14 of the African Charter on Human and Peoples' Rights (ACHPR), which recognise the equality of all citizens before the law and the right to property;

22. The Applicants contend that following Judgment N°. 444 of 14 July 2010 of the Bamako Court of Appeal, a woman, under Muslim law, cannot or should not inherit a farmland; also, the various appeals brought before the Supreme Court of Mali to denounce these violations of human rights have all been dismissed by the said Supreme Court through Judgments N°. 250 of 3 October 2011 and N°. 338 of 27 December 2012 of the same Supreme Court, in disregard for the international commitments of the Republic of Mali;

23. For the Applicants therefore, it cannot be disputed that the Republic of Mali, through its inheritance laws and through the attitude of the Supreme Court of Mali (which disregarded the international texts protecting the rights violated), had clearly sanctioned discrimination or exclusion on the basis of the gender of the Applicants; and that as has just been sufficiently proved, it was on the grounds of gender and ethnic considerations that they were denied the inheritance of the landed properties which previously belonged to their father, in disregard for the articles cited above;

24. They aver that the Malian lawmakers, pursuant to Article 7 of the UDHR, were under obligation to protect their rights; and the Supreme Court of Mali should have taken into account the international commitments it has entered into, which prohibit discrimination as part of the laid down rules for the written inheritance law of the Republic of Mali;

25. As to monetary compensation, the Applicants claim that the Republic of Mali is responsible for the violation of their rights, namely violation of equality before the law, equality of gender, and the right to property; and they asked the Court to award them, as it deemed just, damages in reparation for the violation of their rights;

26. Further, the Applicants request that Republic of Mali refund the legal costs they have incurred, but do they do concede that they cannot produce the relevant supporting documents, given the length of the proceedings, which was of more than twenty (20) years duration;

27. In its statement of defence, the Republic of Mali asks the Court to:

    - Adjudge and declare that the Republic of Mali did not violate any human right;

    - Dismiss the Application as ill-founded.

28. The Republic of Mali argued that the Applicants, by their request, are asking the ECOWAS Court of Justice to make determinations on decisions already made in the Malian domestic courts and thereby find that the decisions in question constitute violations of their rights, which will thereon open the avenue for reliefs to be granted the Applicants; that such an act does not however fall within the jurisdiction of the Court;

29. For the Republic of Mali, it was in full sovereignty that its courts delivered the judgments in contention, and that they were done on behalf of the people of Mali, and that those court decisions do endorse the sovereignty of the Republic of Mali;

30. No other court therefore, not even a regional court, may amend the decisions already made by the national courts of Mali;

31. The Republic of Mali further argues that the Applicants, under the pretext of bringing a ease on "human right violation", are attempting to make the ECOWAS Court of Justice a third-tier court which may overturn judgments of the courts and tribunals of the Republic of Mali; however, this attempt clearly contravenes the settled case-law of the Honourable Court which has unambiguously reiterated that it is neither an appeal court nor a *cour de cassation* (court for quashing the decisions of lower courts) over the decisions made by the national courts.

32. The Republic of Mali cites, to illustrate its point, the judgment of Suit N°. ECW/CCJ/APP/05/13 of 23 October 2005 on *Case Concerning* ***Republic of Mali* v. *Mamadou Baba Diawara*** and Judgment No. ECW/CCJ/JUD/02/10 of 4 March 2010 on *Case Concerning* ***Republic of Mali* v. *Dr. Seid Abazene***;

III- THE REASONING FOR THE DECISION

As to formal presentation

1. Regarding admissibility

33. Whereas the Applicants' request complies with the requirements of Article 33(1) and (2) of the Rules of the Court;

34. Whereas it is appropriate and ripe to declare the Application admissible;

2. Regarding jurisdiction

35. Whereas in the terms of Article 9 of the Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 on the Community Court of Justice: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State".

36. Whereas in the instant case, the request submitted by the Applicants asks the Court to find violation of their rights; whereas the facts

narrated indeed concerns acts the Applicants consider prejudicial to their rights;

37. Whereas it is therefore appropriate for the Court to uphold its jurisdiction as to its power to examine the Application in accordance with the above-mentioned provisions and in conformity with the case law of the Court;

As to the merits of the case

1. Regarding violation of Convention on the Elimination of All Forms of Discrimination against Women

38. Whereas the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits every form of gender based discrimination; Whereas it its Article 1 contains the provision that:

"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

39. Whereas in accordance with Articles 2 and 5 of this Convention, States Parties must not only abstain from discrimination based on gender but also, and above all, provide judicial protection to women's rights and guarantee the effective protection of their rights through competent courts and other institutions;

40. Whereas this Convention further recommends that States Parties take appropriate measures to eliminate discrimination between men and women;

41. Whereas, the Republic of Mali ratified CEDAW in September 1985 after having signed it in February of the same year; whereas the Republic of Mali is therefore party to this Convention;

42. Whereas in the instant case, the Malian courts, especially the Bamako Court of Appeal and the Supreme Court of Mali, made decisions by which they excluded the Applicants from the inheritance of their father, with respect to land, precisely farmlands; whereas these decisions were based on Islamic custom;

43. Whereas the Court, in its case-law, has always refused to make pronouncements on judgments already delivered by the national courts, on the ground that it has no power to re-examine such decisions; whereas such prerogative is reserved for the domestic higher courts of judicature in the Member States;

44. Whereas however, the Community Court's refrain from re-examining the decisions of national courts shall not be interpreted in absolute terms;

45. Whereas indeed, where a court decision, in itself, violates human rights, it goes without saying that the judge at the Community Court, whose mandate it is to protect the rights of the citizens of the Community, shall have no other option than to intervene and criticise the violation; whereas the Community judge cannot remain unconcerned before a flagrant human rights violation, regardless of the instrument from which the violation may have originated;

46. Whereas here, the duty of the Community judge does not consist of appraising the decision already delivered, but in finding a manifest violation of the human rights contained in the court decision;

47. Whereas one must distinguish between exercising checks on the legality or otherwise of a decision of the national court, and finding an instance of human rights violation which originates from a court decision;

48. Whereas if the Community judge cannot make appraisals as to whether the national judges are correctly applying the national law, he all the

same remains competent to point out human rights violations, even if they originate from a decision of a judge in the national court of the Member States;

49. Whereas in his capacity as human rights protector, the Community judge will not be fulfilling his role if he were to turn a blind eye to flagrant violations of human rights which may be contained in a decision of the national courts;

50. Whereas moreover, court decisions cannot constitute an open door for the violation of human rights; whereas such decisions may be regarded as instruments made by the judicial authorities, and as such, like any other instrument, may be of such nature as to violate human rights; whereas under such conditions, the human rights judge shall find the manifest violation resulting from those acts;

51. Whereas in the instant case, the Malian courts, particularly the Bamako Court of Appeal and the Supreme Court of Mali, prevented the Applicants from inheriting their estate; whereas they were denied their portion of the inheritance, on account of being women, as is apparent from the Court Judgment N°. 444 of 14 July 2010;

52. Whereas the Republic of Mali is party to the aforementioned CEDAW and other texts such as the ACHPR or the CDHR, which prohibit every form of discrimination based on gender; whereas these texts form an integral part of the codified law of the Republic of Mali, and are binding on the Malian courts of law;

53. Whereas the Malian courts, in excluding the Applicants from the inheritance of their due estate, on the basis of their gender, made them victims of discrimination;

54. Whereas it shall be appropriate therefore for the Court to find that the Applicants were victims of discrimination;

2. Regarding violation of equality before the law

55. Whereas equality before the law is enshrined in Article 3 of the ACHPR and in Articles 1, 2(1) and 7 of the UDHR; whereas these

provisions provide that all citizens are born free and equal before the law, and shall enjoy full equality before the law and have equal protection of the law;

56. Whereas equality before the law also implies that a person shall not be discriminated against based on criteria such as race, ethnicity, religion, sex, etc.;

57. Whereas in the instant case, before the Malian courts, the Applicants were not brought under equal protection of the law; whereas indeed, they did not have the same rights as the men, as far as the proceedings for the inheritance of the property before the said courts of Mali are concerned;

58. Whereas as such, there are grounds for concluding that there was inequality among the heirs over the inheritance of the land;

3. Regarding compensation

59. Whereas the jurisdiction of the Court in matters of human rights violations empowers it not only to find such violations but also to order reparation for violations where appropriate:

60. Whereas in the instant case, the Applicants stated that: "Being neither civil servant nor traders, the mother of an orphan (Farimata KOLA) and two sisters of the deceased (Farimata MAHAMADOU and Baradjangou MAHAMADOU) have engaged in all kinds of odd jobs and slave labour for 22 years (from February 1993, date of death of the deceased Oumar MAHAMADOU, to February 2015, the date of the present Application) to ensure their own survival as well as that of the orphan in a locality where the majority of the population derive their source of sustenance mainly from farming. This situation has seriously affected them; and Farimata OUMAR, owing to her tender age, has only received the education of a semi-literate, due to severe lack of means of livelihood, a situation likely to generate its own effects *ad vitam aeternam,";*

61. Whereas it follows from this statement of facts that the exclusion of the Applicants from the right to inherit the land belonging to their

deceased father, has not only caused them material injury but moral injury as well; whereas indeed, the exclusion from their right to inherit the land has prevented them from making use of the resources of the said land for 22 years, not only for feeding themselves but also to earn income from the exploitation of the lands; whereas moreover, their exclusion from the inheritance has significantly contributed to the deterioration of their living conditions, rendering them inferior to men;

62. Whereas, in view of the nature of the injuries suffered by the Applicants, it shall be appropriate to hold the Republic of Mali fully responsible for the said damage and order the Republic of Mali to pay compensation to the Applicants;

63. Whereas thus, the sum of CFA 10,000,000 shall be awarded to each of the Applicants as fair compensation for the harms suffered;

4- Regarding claims for reimbursement of legal costs incurred by the Applicants

64. Whereas the Applicants request the Court to order the Republic of Mali to refund the sum of Ten Million CFA Francs (CFA F 10,000,000) for all legal cost arising from the multiple proceedings before the national courts, as a result of the violation of their human rights;

65. Whereas they do not file any pleading in the case file to back up the costs they claim to have incurred; whereas not even the minimal attempt is made to provide evidence in that direction;

66. Whereas, in the absence of any evidence that may prove the costs incurred by the Applicants, it shall be appropriate to dismiss all the claims brought by the Applicants in that respect;

5- Regarding costs

67. Whereas in the terms of Article 66(2) of the Rules of the Court:

    1. *"A decision as to costs shall be given in the final judgment or in the order, which closes the proceedings";*

2. The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings."

68. Whereas in the instant case, the Republic of Mali is unsuccessful in the instant proceedings;

69. Whereas it is appropriate, therefore, to order the Republic of Mali to bear all costs;

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, after hearing both Parties, in a matter on human rights violation, in first and last resort.

As to formal presentation

- **Declares** the Application of Farimata Mahamadou and the three others admissible;

- **Declares** that it is competent to hear the case;

As to tile merits of the case

- **Adjudges** that the Applicants are victims of discrimination and of violation of their right to equality before the law;

- **Declares** that the Republic of Mali is liable for the injurious consequences of the said violations;

Consequently:

- **Orders** the Republic of Mali to pay to Farimata Mahamadou, Baradjangou Mahamadou, Farimata Oumar and Farimata Kola, the sum of Ten Million CFA Francs (CFA F 10,000,000) each, for all the harms suffered;

- **Dismisses** all other claims brought by the Applicants;

- **Orders** the Republic of Mali to bear all costs;

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

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/06/15
JUDGMENT NO: ECW/CCJ/JUD/12/16

BETWEEN
GENERAL AMADOU HAYA SANOGO & ORS. - *PLAINTIFFS*

VS.
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JEROME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **MARIAM DIAWARA (ESQ.); DJIBRIL COULIBALY (ESQ.); TIÉSSOLO KONARÉ (ESQ.), HAMIDOU DEMBÉLÉ (ESQ.); SALOUM S. TABOURÉ (ESQ.); MOHAMED DIOP (ESQ.); ISSA K. COULIBALY (ESQ.)** - *FOR THE PLAINTIFFS*

2. **MR. IBRAHIMA TOUNKARA** - *FOR THE DEFENDANT.*

Fair trial - Right to the moral health of the family - Torture - Arbitrary detention

SUMMARY OF FACTS

By a motion, General Amadou Haya Sanogo and Others seized the ECOWAS Court of Justice for violation of their right to be tried by the competent courts and their right to a fair trial.

The Applicants were arrested and charged following a complaint filed by human rights associations and the beneficiaries of the abduction and disappearance victims. By judgment no. 0668 of 27 May 2014, the Indictment Division of the Bamako Court of Appeal dismissed their motions for the annulment of pleadings filed by Amadou Haya Sanogo and others before ordering the continuation of the judicial investigation.

The Applicants requested the Court to declare that:

- *The Trial Judge of the Court of First Instance of Commune III of the district of Bamako is not competent to try them;*
- *The independence of the judiciary was trampled by the participation of the Minister of Justice in the judicial transport operations and that the impartiality of the trial judge was seriously tainted by a conflict of interest and the Applicants' right to a fair trial was compromised;*
- *their right to the presumption of innocence was violated;*
- *their right to family health and the legal recognition of their violated personality;*
- *their right to a fair trial was violated;*
- *Their detention was arbitrary;*
- *Their release must be ordered.*

In a second separate Application, the complainants request expedited procedure

The Republic of Mali pointed out that the Court of Justice has no jurisdiction to hear the case and seeks the Applicants' dismissal of all their claims, in the absence of evidence. The Republic of Mali further submitted that the Applicants were regularly indicted before being put in custody by a trial judge regularly seised by an introductory indictment.

ISSUES FOR DETERMINATION

- *Whether the ECOWAS Court has jurisdiction?*
- *Whether the Applicants' rights in the proceedings in Mali were violated?*

DECISION OF THE COURT

***As to form**,*

The Court:

- ***Rejected** as unfounded the objection raised by the Republic of Mali based on the lack of jurisdiction of the Court to hear the case;*
- ***Held** that the Court has jurisdiction;*
- ***Held** that the motion for expedited procedure is not applicable;*
- ***Admitted** the orders sought by the Applicants.*

As to merits

- ***Declared** not established the human rights violations alleged by the Applicants against the Republic of Mali;*
- ***Dismissed** the claims of the Applicants for damages accordingly;*
- ***Ordered** the Applicants to bear the costs.*

JUDGMENT OF THE COURT

In the case,

Between

I. PARTIES

General Amadou Haya SANOGO, Captain Amassongo Dolo, Christophe Dembélé, Colonel Blonkoro Samaké, Sub-Lieutenant Cheickna Siby, Sub-lieutenant Mady Oulen Dembélé, Sub-Lieutenant Soiba Diarra, Captain Issa Tangara, Major Mamadou Cissé, Adjudant-Chief Fousseni Diarra, Adjudant-Chief Oumarou Sanafo, Sergent Tiémoko Diarra, Pilot Ibrahim Keita, Police Officer Siméon Keita, Lieutenant Tahirou Mariko, Sub-Lieutenant Lassana Singaré, Sergent-Chief Lamine Sanogo, Sergent-Chief Yaya Sanogo, Corporal Seyba Lamine Sangaré, Mamadou Youba Diarra, Sergent Fodé Samba Diallo, Sergent Aly Mahamane Touré, and Corporal Hamedi Sissoko.

All of whom are members of the Malian Armed Forces, having as Counsels:

- **Mariam Diawara**, Lawyer at the Court, rue 603 Porte 116 Darsalam, Email: mediawaramariam@yahoo.fr. BP 696, Tel: 20 22 81 33/ 66 74 81 23 / 66 80 04 67;
- **Djibril Coulibaly**, Lawyer at the Court, BP 3189, Tel: 66 72 19 66, Email: djibicoul2@yahoo.fr, 76 04 65 97;
- **Tiéssolo Konaré**, Lawyer at the Court;
- **Hamidou Dembélé**, Lawyer at the Court, Email: maitrehamidou@yahoo.fr;
- **Saloum S. Tabouré**, Lawyer at the Court, Emai1: sasoutab@yahoo.fr. Tel: 66 87 10 27
- **Mohamed Diop**, Lawyer at the Court, Email: diopmohamed91@yahoo.fr;
- **Issa K. Coulibaly**, Lawyer at the Court, Email: issak.coulibaly@yahoo.fr. Tel 78 25 81 62 / 67 62 17 64.

- APPLICANTS

And,

The Republic of Mali represented by Mr. Ibrahima TOUNKARA, a judge in the State Litigations Office of Mali, having its Headquarters at Bamako, Bâtiment 12 -3 è étage, tél. +223-44-90-19-32 BP 97 Bamako-Republic of Mali;

- DEFENDANT

The Court

- Having regard to the Revised Treaty establishing the Economic Community of West African State, ECOWAS of 24 July 1993;
- Having regard to the July 6, 1991 Protocol and the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;
- Having regard to the Rules of procedure of the ECOWAS Court of Justice of 03 June 2002;
- Having regard to the Universal Declaration of Human Rights of 10 December 1948;
- Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;
- Having regard to the initiating Application of the above-named Plaintiffs/Applicants dated 10 February 2015, pleading with the Court to find the violation of their human rights by the Defendant State;
- Having regard to the two Applications dated 10 February 2015 filed by Plaintiffs/Applicants, seeking respectively to submit their case to an expedited procedure, and provisional measures, namely on the suspension of the procedure against, and their provisional release, while the proceedings run their full course;
- Having regard to the Memorial in defence dated 10 March 2015, filed by the Republic of Mali;
- Having regard to the exhibits filed before the Court;

- Having regard to the submissions of the Counsels to the parties;

- After deliberating according to the law;

II- FACTS AND PROCEDURE

1. Considering that a coup-d'état took place on 22 March 2012 at Bamako, in the Republic of Mali. And following an insurrection led by Captain Ahmadou Haya Sanogo, a group of soldiers invaded the Presidential Palace. In the circumstances, the former Head of State Ahmadou Toumani Touré fled the country, leaving behind the ***Comite National de Redressement de la Démocratie et de l'Etat*** **(CNRDRE),** in charge of affairs.

2. Sequel to an Agreement signed by the ECONOMIC COMMUNITY OF WEST AFRICAN STATES, and the CNRDRE, Mr. Dioncounda Traoré, the then President of the National Assembly was designated to take charge of affairs, on an interim basis, with the help of the Transitory Government headed by the Prime Minister, Mr. Cheick Modibo Diarra.

3. On 30 April 2012, soldiers belonging to the Air Force of Mali, who were close to former President Ahmadou Toumani Touré, on exile at Dakar, tried in vain to dislodge the members of the CNRDRE from the Military Cantonment at Kati, with an aim of capturing Mr. Amadou Haya Sanogo, with help from other loyalist soldiers.

4. During the months of July and August 2013, the Transitional Government organized Presidential Elections, which saw the victory of candidate M. Ibrahim Boubacar Keita.

5. Following persistent rumor of kidnapping, and people disappearing, some heirs to the victims of such occurrences, as well as associations for the defence of human rights filed a case against unknown persons, and judicial investigations were carried out, by the Government in power, which led to the arrest of Plaintiffs/Applicants in the instant case, and charges of kidnapping, sequestration, murder, assassination and complicity in these crimes were brought against them. Committal orders were issued, successively against Plaintiffs/Applicants between

27 November 2013 and 24 June 2014, before they were transferred into different prisons of Mali, among which were those at Manantani, Sélingué, and Kadiolo.

6. Following Judgment N°0668 dated 27 May 2014, the investigation chamber of the Appeal Court at Bamako rejected the Applications seeking the annulment of the proceedings initiated against Messrs. Amadou Haya Sanogo and company, before ordering the continuation of the judicial proceedings.

7. It was in the despair of that case that Plaintiffs/Applicants decided to file the instant case before this Honourable, seeking among other things that:

   - The investigating judge in the ***Tribunal de 1ère Instance de la Commune III*** of the District in Bamako, was not competent to examine the case filed against them;

   - The independence of the judiciary was trampled upon, due to the involvement of the Minister of Justice in the judicial process, and that the impartiality of the investigating judge was seriously soiled by a conflict of interest, and the rights of Plaintiffs/Applicants to fair hearing was compromised;

   - Their right to the presumption of innocence was violated;

   - Their right to family well-being, and their right to the recognition of legal status of their persons were violated;

   - They were subjected to inhuman and degrading treatments, while in prison, which no State that respects human rights could tolerate;

   - The investigations carried out in their case was devoid of equity, they were detained in conditions that were not compatible with human dignity;

   - Their freedom should be ordered without delay;

   - The Republic of Mali should be ordered to pay to each of them the sum of five hundred (500) million CFA francs, as reparation for the prejudices that they suffered.

- Plaintiffs/Applicants equally solicited their provisional release as well as their case being admitted to an expedited procedure, due to their deteriorating health.

III- PLEAS BY PARTIES

8. Plaintiffs/Applicants argue their case around four pleas, namely: the lack of jurisdiction on the part of the Malian courts of common law, to examine the case; infringement upon freedom of movement; the violation of the principle of presumption of innocence, and the right of every individual to fair trial.

9. Concerning the objection as to the lack of jurisdiction by the Malian courts of common law, Plaintiffs/Applicants claimed that they are all military personnel, and that the charges against them were acts that occurred in the Republic of Mali, precisely in the military cantonment at Kati, the airport, and within the national broadcasting station in Bamako.

Whereas, pursuant to the relevant provisions of Article 16 of Military Code of Justice of Mali:

> "Whether during war time or normal time, the Military Courts have jurisdiction to examine cases and try soldiers for acts of common law committed by them ..."

Article 17 of the same code provides that:

> "All senior as well as junior officers of the Malian Armed Forces, whether serving at home or abroad, shall be tried by the military tribunal ..."

Article 34 of the said Code provides that:

> "It is the responsibility of the Ministry in Charge of the Armed Forces to initiate proceedings against the indicted soldiers ..."

10. Concerning the second issue, Plaintiffs/Applicants claim they have been victims of arbitrary arrest and detention, with disregard to the Malian Constitution, which guarantees freedom for all its citizens, as well as various other international human rights protection instruments, such as:

- Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), which provides that: "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty, except on such grounds and in accordance with such procedure as are established by law…"*

- Article 6 of the African Charter on Human and Peoples' Rights (ACHPR) which provides that: *"Every individual shall have the right to liberty and to the security of person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

- The UN Human rights Commission, which considered as arbitrary the deprivations of liberty as contrary to the provisions of international human rights protection instruments.

11. In regard to the presumption of innocence, Plaintiffs/Applicants claimed that the Government's excessive communiques, the high profile media coverage for the procedure and the pro-government declarations of the National Radio and Television outfit (ORTM) constitute an infringement upon the presumption of innocence, as guaranteed under Article 9 of the Malian Constitution, which provides substantially that no one may be arrested except on such grounds, and in accordance with such law, and that every indicted person shall be presumed innocent until proven guilty by a competent court of law.

12. Thus, Plaintiffs/Applicants relied on the jurisprudence of the European Court of Human Rights (ECHR), which declared that *"a press release concerning a pending criminal case, (**Allenet de Ribemont v. France**, § 39 to 41), and the media coverage of the procedure, in a way as to sway public opinion, constitute an infringement upon the principle of the presumption of innocence." "The same Court equally held that the doubt concerning the infringement upon the presumption of innocence are legitimate since the declarations made in the press are not sufficiently moderate, or are targeted at certain characteristic traits of the indicted person, and go beyond the usual procedural exigencies."*

13. Concerning the last issue on lack of fairness during the criminal proceedings initiated against them, Plaintiffs/Applicants averred that they were victims of abuse of power on the part of the investigating judge in the case, because the said judge, within the framework of the procedure, had to go to Diago, in the company of the Minister of Justice, who, upon reaching there, behaved as if he was the judge in charge of the case, rather than being seen as a political authority, all this has seriously infringed upon the independence of the judiciary, and violated Articles 1 and following of the Malian Code of criminal procedure, and various other international human rights protection instruments, such as:

    - **Article 14 § 1** of the ICCPR, whose provision as a cardinal principle, apart from the equality of all before the law, the right of everyone to have his cause heard fairly, and by an independent, impartial and a competent tribunal.

    - **Article 10** of the Universal Declaration of Human Rights, which provides that: *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

14. Considering that the State of Mali raised an objection as to the lack of jurisdiction of this Honourable Court, to entertain the case, and eventually sought the rejection of all claims made by Plaintiffs/ Applicants, for lack of any tangible proof;

15. On the first issue, Defendant State argues that the Honourable Court lacks jurisdiction to entertain the instant case, since it is not an Appeal Court, nor a Court of Cassation for the judgments rendered by the courts of Member States; and that in the instant case, the procedure was initiated by the national.

16. On the second plea, the Defendant State claimed that Plaintiffs/ Applicants were duly indicted before a committal order was issued against them, by an investigating judge, to whom a request on same was forwarded, and that in any case, the investigating Chambers of the Appeal Court in Bamako has, via Ruling N°. 283 of 27 May 2014, rejected their Application seeking the annulment of the procedure

initiated against them. That it should be mentioned that the procedure was first initiated following a complaint brought against unknown persons, and that its handling has enabled the authorities to identify the above-named Plaintiffs/Applicants.

LEGAL ANALYSIS

As to form

17. Considering that the Court must first examine the objection as to lack of jurisdiction raised by the State of Mali, before examining the admissibility of the Application filed by Messrs. Amadou Haya Sanogo and others, as well as the Application on expedited procedure, filed by same Plaintiffs/Applicants.

18. On the issue of jurisdiction, the Court recalls it settled case law, according to which *"if in principle it does not examine the grounds for a judgment delivered by a national court of a Member State, because it is neither a judge, in general terms, over the legality of national laws of Member States, nor a Court of Cassation, this does not prevent it from having the right to draw the consequences of the judgment from a national court, in the field of human right."*

19. In the instant case, the issue for determination is not to know whether the arrest and detention of Plaintiffs/Applicants were made sequel to a judicial pronouncement, but rather to examine if in principle, and generally speaking, this deprivation of liberty is justified within the purview of human rights protection.

20. Hence, the Court is of the opinion that it has jurisdiction over the case, and that there is need to reject the objection raised by Defendant, as lack of jurisdiction.

21. On the second issue, the Court holds that the Application filed by Plaintiffs/Applicants is pursuant to the provisions of Articles 33 and following of the Rules of the Honourable Court, and therefore, it should be declared admissible.

22. On the third issue concerning the expedited procedure, the Court holds that the case was first filed on 19 April 2016, and was later slate for

deliberations the same day, for judgment to be entered on 17 May 2016, therefore the request seeking to admit it to an expedited procedure is of no useful purpose any longer.

As to merit

1. - On the violation of the of Plaintiffs/Applicants

23. Considering that in the initiating Application filed before the Court by Messrs. Amadou Haya Sanogo and others they evoked the Malian legal norms (such as the Malian Constitution, the Code of criminal procedure and the Code of Justice of the Malian Armed Forces) and other international norms, among which are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

24. Considering that Plaintiffs/Applicants supported the violation of their right with the internal norms of Mali, namely those, on the one hand, that can only be examined by military tribunal, and not the national courts of Mali on common law, and, on the other hand, that they are victims of a null and void criminal procedure, the Court points out that this issue was finally resolved by the investigating chamber of the Appeal Court in Mali Through Ruling N°. 283 of 27 May 2014.

25. Considering therefore that it is certain that any attempt to revisit such a ruling would definitely lead the Court to interfere in the national procedures of Mali, or to erect itself in an Appeal or Cassation Court, something that is contrary to its settled case law. For this, examples abound in the judgment dated 7 October 2005 in the case of **Jerry Ugokwe v. Federal Republic of Nigeria**, wherein the Court declared that: ***"Appealing against the decisions of the National Courts of Member States does not form part of the powers of the Court."***

26. Considering that in regard to the other grievances raised by Plaintiffs/ Applicants, especially the lack of independence of the judges that examined the case in Mali, the deprivation of the right to fair hearing, the disregard for the principle of the presumption of innocence, as *w*ell as the arbitrary arrest and detention that they allegedly are victims, the Court holds that they lack pertinence, considering the circumstances of the case.

27. Considering that, as it were, the Court noted, through the exhibits filed, in the course of the procedure, especially the above-mentioned Ruling of the investigating chamber and the final partial order of dismissal of re-appraisal and transmission of the case file to the General Prosecutor at the Appeal Court of Bamako, that Plaintiffs/ Applicants were indicted, a committal order was issued against them, they were interrogated, pursuant to the provisions of the international instruments ratified by Mali.

28. Considering that Plaintiffs/Applicants have enjoyed, and continue to enjoy the services of their Counsels; Considering that they have exercised their right to effective appeal freely, and that the investigating chamber has examined, within reasonable period, their request seeking annulment of the procedure initiated against them, and without any proof whatsoever, even with the slightest indices, that the said court was influenced by any external intervention, which could have compromised its independence, its impartiality or its neutrality.

29. Thus, as the Honourable Court held in its Judgment in the case of **Hadijatou Mani Koraou v. the Republic of Niger** that ***"It is not within its jurisdiction to examine abstract human rights violation, but concrete cases of human rights violation."*** Thus, in principle, the violation of human right is noted, with proof that such violation had already taken place.

30. From the foregoing, the Court is of the opinion that Plaintiffs/Applicants failed to bring any proof for the violation of their rights, in regard to the afore-mentioned instruments referred to by them.

2- As to reparation

31. Considering that Plaintiffs'/Applicants' order as to reparation is to be rejected for failing to bring any proof, in support their grievances against the Republic of Mali.

3- As to costs

32. Considering that Plaintiffs/Applicants have not succeeded, and that there is need to order them to bear the costs, pursuant to Article 66 of the Rules of the Court.

FOR THESE REASONS

The Court, sitting in a public hearing, having heard both parties, in first and last resort, and in a human rights violations case;

As to form

- **Rejects** the objection raised by the Republic of Mali, as to the lack of jurisdiction of the Court to entertain the case;
- **Declares** that it has jurisdiction over the instant case;
- **Equally declares** that the Application seeking to submit the case to expedited procedure has become of no useful purpose;
- **Declares** as admissible the Application filed by Plaintiffs/ Applicants;

As to merit

- **Declares** as ill-founded the allegations of human rights violation made by Plaintiffs/Applicants against the Republic of Mali;

Consequently,

- **Rejects** the order sought by Plaintiffs/Applicants as to reparation;
- **Orders** Plaintiffs/Applicants to bear all costs.

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

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/24/14
JUDGMENT NO: ECW/CCJ/JUD/13/16

BETWEEN
THE HEIRS OF LATE AISSATA CISSÉ & ORS - *PLAINTIFFS*

VS.
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE JEROME TRAORÉ - *PRESIDING*
2. HON. JUSTICE YAYA BOIRO - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **MOUSSA MAIGA (ESQ.);**
   MAGATTE A. SEYE (ESQ.); *&*
   BELLA SEYE (ESQ.) - *FOR THE PLAINTIFFS*

2. **MR. IBRAHIMA TOUNKARA**
   DIRECTORATE OF PUBLIC PROSECUTION,
   REPUBLIC OF MALI - *FOR THE DEFENDANT*

Post-election violence - Protection of persons in times of trouble -Right to life -Right to physical integrity - Effective remedy before the Courts - Fair trial -Failure of the justice civil service - Damages and interests.

SUMMARY OF THE FACTS

During 1977, the Republic of Mali was confronted with a serious political crisis, provoked by the favourable presidential mobility, the renewal of the basic political authorities and the political opposition which considered that no condition was met to organise credible municipal and democratic elections;

On 28 June 1998 the elections took place despite the resistance of the collective of opposition parties known as COPPO;

The day following the elections around 3:30 am a fragmentation grenade exploded in Ségou in the compound of Boureima Sidi Cissé, vice-president of the independent regional electoral commission; this attack had 10 victims of which 2 died including Aissata Cissé and Hama Arabo Touré respectively daughter and friend of Boureima Sidi Cissé, eight were seriously wounded including Salimata Sidibé and Boubacar Sissoko (wife and grandson of Boureima Sidi Cissé) who were evacuated to Bamako hospital where they were kept for care for 4 months. The investigations conducted by the Gendarmerie of Segou led to the arrest of 16 people who were charged with undermining the security of the State, criminal conspiracy, illegal possession of weapons and ammunition followed by assassination, attempted murder, aggravated assault and wounding and complicity.

In 2003 the trial judge of the Court of First Instance of Ségou pronounced dismissal against the accused.

Following the appeal of Boureima Sidi Cissé the indictment division of the Court of Appeal of Bamako annulled the order of dismissal before ordering additional information by judgment No. 111 of 5 July 2005;

On 3 January 2011, the Public Prosecutor at the Court of First Instance of Segou issued a final indictment in order to forward the documents to the Public Prosecutor at the Court of Appeal of Bamako; on 27 December 2011, the Examining Magistrate of the second chamber of the Court of Segou also issued another order of non-suit in favour of the defendants.

Boureima Sidi Cissé seised the Court of Justice, which by Judgment No. ECW/CCJ/JUD/13 dated 12/2/2014 declared the Application admissible, solely on what concerns him;

Held that, since he does not have a mandate to represent the other co-petitioners, the application as far as he is concerned is not in compliance with the relevant provisions of the texts relating to the Court; Consequently, declares the application inadmissible on behalf of the other Applicants;

Following this decision, the above-mentioned Applicants filed an appeal on 6 June 2014 for violation by the State of Mali of international legal instruments protecting the fundamental rights of the human person and to order the full reparation of the damages suffered by them by the granting of a total amount of 250 000 000 CFA francs.

They point out that this is a violation of their right to an effective remedy before the courts, as well as the right to a fair and independent trial of their case within a reasonable time. They also criticise the failure of the public service of justice.

For the respondent State the Court is not competent to assess the decisions made by the national courts;

The state also maintained that the Applicants received a fair trial and found the amount of 250 million CFA francs claimed to be excessive; it emphasises that in order to avoid the condemnation of States to the payment of astronomical sums the Community legislator adopted the CIMA code;

In the end, the State of Mali concluded that it did not commit any human rights violations;

ISSUES FOR DETERMINATION.

- *Does the jurisdiction of this Court to hear an application emanating from a person who is a victim of human rights violations in an ECOWAS Member State are comparable to an assessment of the decisions made by the national courts of these states?*

- *Is the Republic of Mali through its services guilty of violating the Applicants' rights to protection, security and justice as well as the right to a fair trial within a reasonable time?*

DECISION OF THE COURT

The Court rejects as unfounded the objection raised by the Republic of Mali drawn from the lack of jurisdiction of the Court to hear the case;

Held that the Republic of Mali violated the Applicants' rights to protection, security, justice and their right to a fair trial within a reasonable time;

The Court ordered the reparation of these violations by awarding the following amounts to the rights beneficiaries and victims:

20 million to the heirs of Aissata Cissé, 20 million to the heirs of the late Hama Toure, 15 million to Salimata Toure, 10 million to Fatouma Toure, 10 million to Traoré Djaba Hamadou Touré, 10 million to Boubacar Sissoko, 10 million to Almoustapha Touré, 10 million to Ousmane says Kangueye Cisse, 10 million to Abdou Toure.

In total, the sum of 115 million FCFA.

JUDGMENT OF THE COURT

I- PARTIES

The heirs of late Aissata Cissé, heirs of late Hama Touré, Mrs. Cissé Salimata Sidibé, Mrs. Fatoumata Touré, Mrs. Touré Djaba Hamadoun Touré, Mr. Boubacar Sissoko, Mr. Almoustapha Touré, Mr. Ousmane popularly known as Kangaye Cissé and Abdou Touré all represented by **Boureima Sidi Cissé**, retired secondary school teacher, aged 82 years, living in Angoulême, Ségou;

Counsel for the Plaintiff:

- **Barrister Moussa Maiga**, Barrister-at-Law, Cabinet SEYE located at Hamdallaye ACI 2000, 12 Cité des Villas, BP 605, Bamako, Republic of Mali.
- **Barrister Magatte A. Seye**, Advocate at the Court, Former President of Bar Association of Mali, lives in the Republic of Mali;
- **Barrister Bella Seye**, PhD in law, Lecturer/Researcher, lives in the Republic of Mali;

- Plaintiffs, on one hand,

AND

The Republic of Mali, represented by the Directorate of Public Prosecution of the Republic of Mali with its Head office in Bamako, acting through Mr. Ibrahima Tounkara, Magistrate,

- Defendant, on the other hand;

THE COURT,

Having regard to the Revised Treaty of the Economic Community of West African States (ECOWAS) of 24 July 1993;

Having regard to the Protocol of 6 July 1991 and the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;

Having regard to the Rules of the ECOWAS Court of Justice dated 3 June 2002;

Having regard to Universal Declaration of Human Rights of 10 December 1948;

Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;

Having regard to the initiating application of the Plaintiff mentioned above, dated 6 June 2014 for violation of human rights by the Defendant which they are victims;

Having regard to the statement of defence of the Republic of Mali dated 5 November 2014;

Having regard to other exhibits submitted alongside the application especially the additional submissions by each of the parties;

II- SUMMARY OF FACTS AND PROCEDURE

1. In 1997, the Republic of Mali got embroiled in political crisis, giving rise to the emergence of two political trends, one in favour of organising elections whereas the other believed the time was not conducive for organising credible elections.

2. On 28 June 1998, the said elections took place despite the opposition of the *Collectif des Partis Politiques de l'Opposition*, COPPO (Coalition of Opposition Political Parties). The next day at about 3:30am, grenade explosions sounded in Angoulême area of Ségou, precisely at the home of Mr. Boureima Sidi Cissé, the Vice-Chairman of Ségou Regional Independent Electoral Commission. Ten (10) persons were victims of the attack, including two (2) deaths, namely Aissata Cissé (daughter of Boureima Sidi Cissé) and Hama Arabo Touré (friend of Boureima Cissé), eight (8) persons were seriously injured including among others, Salimata Sidibé and Boubacar Sissoko (spouse and younger son of Boureima Cissé), who were evacuated to *Hôpital Gabriel Touré* in Bamako on 22 June 1998 where they were hospitalised for four (4) months.

3. The investigations carried out by *Brigade de gendarmerie de Segou* led to the arrest of sixteen (16) persons who were immediately indicted of breach against internal security of the State, criminal association, illegal possession of arms and ammunitions, murder, attempted murder, bodily harm, injuries and complicity.

4. By Order No.015 dated 1 August 2003, the trial judge of the *Tribunal de Premiere Instance (TPI) de Segou* dismissed the case against the accused persons mentioned above, in accordance with the submissions of the Public Prosecutor attached to the said Court. Following an appeal by Mr. Boureima Cissé, the indictment chamber of the Court of Appeal Bamako annulled the Order dismissing the case mentioned above, before ordering that more information should be made available by Judgment No.111 of 5 July 2005.

5. On 3 January 2011, the Public Prosecutor attached to the *Tribunal de Premiere Instance* (Court of First Instance) in Ségou made his final submissions for the transfer of the case- file to the Public Prosecutor of the Bamako Court of Appeal. By Order No.104 of 27 December 2011, the trial judge of the 2nd Chamber of the *Tribunal the Premiere Instance de Segou* re-affirmed the Order dismissing the case in favour of the accused persons.

6. By judgment No. ECW/CCJ/JUD/13 dated 12 February 2014, on the application of Mr. Boureima Sidi Cissé against the Republic of Mali, the ECOWAS Court of Justice ruled in these terms: "In a public sitting, after hearing both sides, in first and last resort, in a matter concerning human rights violation,

As to formal presentation of the Application,

- **Declares** the application by Boureima Sidi Cisse admissible, only as it concerns him.

- **Adjudges** that having no mandate to represent the other co-Plaintiffs, the request for what concerns them does not comply with relevant provisions of the texts relating to the Court, consequently,

- **Declares** the application on behalf of the other Plaintiffs inadmissible.

As to merit

- **Adjudges** that Boureima Cisse's right to security has been violated;

- That State of Mali has **violated** the right to protection of the Applicant, as well as his right to security of his person and the safety of his property have been violated;

- **Adjudges** also that his right to justice and to have his case heard within a reasonable time was violated;

- Consequently, **order** the reparation of these violations;

- However, **adjudges** that being that the Court does not obviously have elements of assessment to assess all damages suffered by the Applicant, *inter alia* , that in the absence of criteria for determining the pecuniary damage, the Court arbitrating the moral and psychological damages suffered over 15 years by the Applicant, awards him the sum of 15 million CFA F, all causes of damages;

- **Adjudges** that this sum shall be paid by the State of Mali, due to the violations suffered by the Applicant.

- The State of Mali shall **bear** the cost.

7. Following this decision, the Plaintiffs mentioned above filed an appeal dated 6 June 2014 for the ECOWAS Court Justice, to decide on the following:

   - **Find** the violation of international legal instruments mentioned above safeguarding the fundamental rights of the human person;

   - **Order** the Republic of Mali to pay full compensation for the damage suffered by the victims by awarding the sum of:

- Forty Million CFA Francs (CFA F 40, 000, 000) to the heirs of the late Aissata Cissé.

- Sixty Million CFA Francs (CFA F 60, 000, 000) to the heirs of the late Hama Touré

- Thirty Million CFA Francs (CFA F 30, 000, 000 FCFA) to Mrs. Salimata Sidibé.

- Twenty Million CFA Francs (CFA F 20, 000, 000) to Fatouma Touré

- Twenty Million CFA Francs (CFA F 20, 000, 000) to Mrs. Traoré Djaba Hamadoun Touré.

- Twenty Million CFA Francs (CFA F 20, 000, 000) to Boubacar Sissoko.

- Twenty Million CFA Francs (CFA F 20, 000, 000) to Almoustapha Touré.

- Twenty Million CFA Francs (CFA F 20, 000, 000) to Ousmane known as Kangaye Cissé.

- Twenty Million CFA Francs (CFA F 20, 000, 000) to Abdou Touré.

Being a total of 250, 000, 000 CFA F

- In addition, **order** the Republic of Mali to bear all costs.

III- ARGUMENTS OF THE PARTIES

8. The Plaintiffs argue that during the municipal elections organised in an atmosphere of high social tension, the Republic of Mali did not take any measure to protect the citizens of Segou as well as Mr Boureima Sidi Cissé's family who was at that time the Vice- Chairman of the Ségou Regional Electoral Commission. By this failure, the Plaintiffs argue that the Republic of Mali violated the international legal instruments duly ratified by the Republic of Mali, among others,

Articles 3, 4, 6, and 7 of the African Charter on Human and Peoples' Rights, Article 8 of the Universal Declaration of Human Rights, Article 2, (3) of the International Covenant on Civil and Political Rights.

9. The Plaintiffs also argue that the Republic of Mali violated their rights to legal recourse, as well as the right to have their cause heard within a reasonable time by an impartial and independent court wherein:

   - The sponsors of acts of violence which they are victims of, even were named in the summary report of the Ségou Chapter of COPPO, dated 28 January 1998 stating the nature of the quantity of the rams seized from those accused, were neither arrested, heard nor investigated;

   - The trial judge of the Ségou Court chose to hear only three out of eight surviving victims;

   - The medical certificates disappeared from the files of the victims evacuated to *Hôpital Gabriel Touré* (Gabriel Touré's Hospital);

   - The trial judge is hiding the authentic version of the summary report of the Ségou Chapter of COPPO;

   - There is a non-executed warrant of arrest issued on the accused persons, Cheick Oumar Sangeré, better known as Barou, and Sibiry Traoré, better known as Dakorobo Sibiry, and whereas they were never heard, but benefited from the dismissal order issued by the trial judge of the Ségou Court on 1 August 2003;

   - The inability to find exactly where the case-file is, despite all the efforts made in that direction;

   - The Plaintiffs also argue that the indifference by the Republic of Mali and the dysfunction of the Malian judicial system is another proof of violation of international legal instruments mentioned above, of human rights.

10. Whereas in its defence, the Republic of Mali relies on four pleas-in-law which centred around lack of jurisdiction of the ECOWAS Court of Justice to adjudicate on the decisions of the national Courts, non-

interference of the Executive in the function of the judicial system, non-violation of the right to fair trial and non-justification of compensation requested by the Plaintiffs.

11. On the first point, the Defendant argued that the ECOWAS Court of Justice, does not have power to adjudicate on the decisions of national Courts, in the instant case, according to the Republic of Mali, several decisions have be given at the level of national Courts within the framework of the case between the parties, these include Judgement No.111 of 5 July 2005 by which the Criminal Chamber of the Court of Appeal, Bamako setting aside the no-case judgment delivered on 1st August 2003 by the Segou trial Court before ordering for further information to be made available and the dismissal order No. 104 of 27 December 2011 (delivered by the said Judge) which appealed by the Plaintiffs before the Criminal Chamber of the Court of Appeal, Bamako where the matter is still pending.

12. In support of its argument, the Republic of Mali recalled that in Judgement No. ECW/CCJ/JUD/02/10 in *Case* **Concerning Seid Abazène v. Republic of Mali**, this Honourable Court thus held that:

> ***"The Court is not an Appellate Court of the decisions of the national Courts of Member States of ECOWAS…"***

13. On the second plea-in-law, the Republic of Mali argued that the Malian Justice system must assume its responsibilities in all independence and that no one has the right to interfere in the functioning of the Malian judicial arm in respect for the principle of separation of powers, the cornerstone of Statecraft.

14. It also underlined that the grievance that it is alleged of, that the trial judge did not hear, arrest or investigate the so-called sponsors of acts of violence perpetrated against Boureima Sidi Cisse's family is not justified given that most of the accused persons were arrested and placed under detention warrant or subject of arrest warrant.

15. The Defendant also recalled that it did its best with regards to the protection of the Plaintiffs during the elections even if it was impossible for it to protect each private home like that of the Plaintiffs. The

presence of police officers and gendarmes in all the polling units at Ségou is a perfect example.

16. On the third plea-in-law, the Republic of Mali argued that contrary to theirs statements, the Plaintiffs benefited from a fair trial as evidenced by the decisions mentioned above by the trial Judge of Segou and that of the Criminal Chamber of the Court of Appeal, Bamako. It added that the duration of the trial (since June 1998) was caused by the complexity of the offences committed and by the judgment delivered by the Criminal Chamber of the Court of Appeal Bamako, setting aside the decision mentioned above.

17. Thus, in accordance with the judgment of the said Chamber, the trial judge requested for further information particularly, further interrogations, search and verification of the crime scene, warrants of seizures, and even warrant of seizure and letters rogatory in order to unravel the truth. According to the Republic of Mali, these legal processes are time-consuming and are of such nature as to prolong proceedings. It noted that the Plaintiffs benefited from continuous help from their counsel named above throughout the trial.

18. On the last plea-in-law, the Republic of Mali affirmed that the compensation claimed by the Plaintiffs, being a total sum of 250 million CFA Francs requested for compensation has no legal basis, therefore, the Plaintiffs did not provide any evidence supporting the allegation which they claim, especially lack follow up of their case before the Malian Courts and the inaction of the Republic of Mali.

19. That in any case, no international legal instrument provided for an award of an amount that so outrageous what the Plaintiffs claimed in a situation where the liability of the Republic of Mali is established.

20. According to the Republic of Mali, in order to avoid an astronomical sentence, it should be recalled that "Community legislator decided to avoid such situations by legislating on area of compensation through the Inter- African Conference on Insurance Markets (CIMA) following the Treaty signed on 10 July 1992 in Yaoundé".

21. Consequently, the Defendant requested that the Court should declare that:

    - The Republic of Mali did not commit any human rights violations against the Plaintiff.

    - There is no ground for adjudicating on the other issues raised.

IV- ANALYSIS OF THE COURT

The analysis of the Court focuses on the formal presentation of the application and the merit of the case.

As to formal presentation of the application

22. Whereas concerning the jurisdiction of the ECOWAS Court of Justice, it should be recalled that this Court is not a Court over the legality of the decision of a national Court in broad sense, nor Court of Appeal or Cassation Court. However, it is apparent from the combined provisions of Articles 9 and 10 of the Supplementary protocol of 19 January 2005 that the Court of Justice has jurisdiction to determine cases of violation of human rights that occur in any ECOWAS Member State.

23. That the ECOWAS Court affirmed its case law in plethora of case such as in the case **Mamadou Tandja v. Republic of Niger** or that concerning **Kpatcha Gnassigbe and others v. Republic of Togo**. In these cases, the Court clearly declared that mere allegation of violations of human rights committed in a Member State of the Community suffices to formally confer upon its jurisdiction

24. It follows therefore, that the Application should be declared admissible.

As to merit of the case

25. The Court believes that the substance focuses on the examination of the merit of the claims of the Plaintiffs regarding the violation of their rights and possibly, on the compensation of proven harms.

I- Regarding the merit of the alleged violation by the Plaintiffs

26. Whereas, the Plaintiffs relied essentially as pleas, the violation of their right to life, physical well-being, equal protection of the law, effective remedy before the Courts as well as the violation of their right to fair trial. In order to support these pleas, the Plaintiffs referred to the following authorities:

Articles 3, 4, 6, and 7 of the African Charter on Human and Peoples' Rights which respectively provide that: "Every individual shall be equal before the law."

> "Every individual shall be entitled to equal protection of the law."; "Human beings are inviolable"; "Every human being shall be entitled to respect for his life and the integrity of his person"; "No one may be arbitrarily deprived of this right." "Every individual shall have the right to the respect of the dignity inherent in a human"; "Every individual shall have the right to have his cause heard.

Article 8 of the Universal declaration of Human Rights which reads as follows:

> **"**Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Article 2, (3) of the International Covenant on Civil and Political Rights which provides that: "Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that competent authorities shall enforce such remedies when granted;

27. Whereas in the instant case, the Court notes that during the hearing and from the documents submitted alongside the Application, is apparent in organising the municipal elections in an atmosphere of high social tension, without any guarantee of public order of the population and especially that of Boureima Sidi Cisse (and his family) as the Vice-Chairman of the Ségou Regional Electoral Commission, the Republic of Mali failed in its obligations of protection, safety and social security arising from the above mentioned texts.

28. That this negligence, is increasingly sufficient to hold the Republic of Mali accountable for it contributed to the violence acts suffered by the Plaintiffs, especially, the grenade explosion at the home of Boureima Sidi Cisse, which ten (10) persons were victims of the attack, including two (2) deaths, namely Aissata Cissé (daughter of Boureima Sidi Cissé) and Hama Arabo Touré (friend of Boureima Cissé), eight (8) persons were seriously injured including among others, Salimata Sidibé and Boubacar Sissoko (spouse and younger son of Boureima Cissé) who were hospitalised at *Hôpital Gabriel Touré* Gabriel Touré's Hospital on 22 June 1998 for four (4) months.

29. It is also understood during the hearing that the Malian judicial system experienced failure in the management of the case of the Plaintiffs, by depriving them their right to effective and useful remedy as well as fair trial in line with international standards mentioned above.

30. Even so, it is an undisputable fact the Malian judicial authorities were approached for the matter in question since 1998 and till date, the matter still pending at the Court of Appeal, Bamako, thus depriving the Plaintiffs the right to have their case heard within a reasonable time.

31. The Court also notes that, there is a non-executed warrant of arrest issued on the accused persons, Cheick Oumar Sangeré, better known, and Sibiry Traoré, better known as Dakorobo Sibiry, and whereas they were never heard nor arrested, but benefited from the dismissal order issued by the trial judge of the Ségou Court on 1 August 2003.

32. Since the setting aside of the Order by Judgment No.111 of 5 July 2005, the Criminal Chamber of the Court of Appeal, Bamako and an order to make available further information on the matter, and the matter is still pending before the said Court.

33. That this failure on the part of the Malian judicial system makes the Republic of Mali liable and it can rely on its argument which according to it, Justice system must assume its responsibilities in all independence, in respect for the principle of separation of powers.

34. Furthermore, the Court takes note that it already delivered a judgment mentioned earlier, on 12 February 2014 in which it affirmed the liability of the Republic of Mali concerning the grenade explosion in Segou before awarding compensations to Boureima Sidi Cisse for violation of his right to protection, security, justice as well as the security of his property;

2- Regarding Compensation

35. Whereas the Republic of Mali argued that the total amount of 250, 000, 000 CFA F claimed by the Plaintiffs, is unjustified and unreasonable and that in order to avoid an astronomical sentence, it should be recalled that "Community legislator decided to avoid such situations by legislating on area of compensation through the Inter-African Conference on Insurance Markets (CIMA) following the Treaty signed on 10 July 1992 in Yaoundé".

36. That the Court notes that there is sufficient evidence above that the allegations by the Plaintiffs against the Republic of Mali is justified and that the Plaintiffs have proved considerable psychological, moral and bodily injuries, following the painful death of their loved ones mentioned above and serious injuries suffered by many among them.

37. That however, if the amount claimed is justified in principle, it is overstated as per the amount.

38. Taking into account the facts of this case, the Court has sufficient evidence to award on lump-sum basis an amount of money to the Applicant.

39. However, contrary to the claims of the Plaintiffs, compensation of harm they suffered cannot have as legal basis the provisions of CIMA Code, signed on 10 July 1992 in Yaoundé by other African countries, falls outside of ECOWAS.

40. Thus, the Court fixes the amount as follow:

- Twenty Million CFA Francs (CFA F 20, 000, 000) to the heirs of the late Aissata Cissé.
- Twenty Million CFA Francs (CFA F 20, 000, 000) to the heirs of the late Hama Touré
- Fifteen Million CFA Francs (CFA F 15, 000, 000 FCFA) to Mrs. Salimata Touré.
- Ten Million CFA Francs (CFA F 10, 000, 000) to Fatouma Touré
- Ten Million CFA Francs (CFA F 10, 000, 000) to Mrs Traoré Djaba Hamadoun Touré.
- Ten Million CFA Francs (CFA F 10, 000, 000) to Boubacar Sissoko.
- Ten Million CFA Francs (CFA F 10, 000, 000) to Almoustapha Touré.
- Ten Million CFA Francs (CFA F 10, 000, 000) to Ousmane known as Kangaye Cissé and
- Ten Million CFA Francs (CFA F 10, 000, 000) to Abdou Touré;

3. Regarding Cost

41. Dismiss the additional claims by the Plaintiffs

42. Whereas the Republic of Mali is the unsuccessful party, and that pursuant to Article 66 of the Rules of the Court, the Republic of Mali should bear the costs.

FOR THESE REASONS

Adjudicating publicly, after hearing both Parties, in a matter on human rights violation, in first and last resort;

As to formal presentation of the Application

- **Dismiss** as unfounded, the preliminary objection raised by the Republic of Mali on the ground of lack jurisdiction of the Court to adjudicate on the matter;

- **Admit** the claims of the Plaintiffs;

As to merit of the case

- **Notes** that within the framework of the examination of the above facts, the ECOWAS Court of Justice, delivered the above judgment dated 12 February 2014 by which it affirmed the liability of the Republic of Mali and awarded compensation to Boureima Sidi Cisse.

- **Declares** that the Republic of Mali violated the rights claimed by the Plaintiffs especially the right to protection, security, justice as well as the right to fair trial within a reasonable time;

- Consequently, **orders** the reparation of these violations by awarding the following amounts:

  - Twenty Million CFA Francs (CFA F 20, 000, 000) to the heirs of the late Aissata Cissé.

  - Twenty Million CFA Francs (CFA F 20, 000, 000) to the heirs of the late Hama Touré

  - Fifteen Million CFA Francs (CFA F 15, 000, 000 FCFA) to Mrs. Salimata Touré.

  - Ten Million CFA Francs (CFA F 10, 000, 000) to Fatouma Touré

  - Ten Million CFA Francs (CFA F 10, 000, 000) to Mrs. Traoré Djaba Hamadoun Touré.

  - Ten Million CFA Francs (CFA F 10, 000, 000) to Boubacar Sissoko.

- Ten Million CFA Francs (CFA F 10, 000, 000) to Almoustapha Touré.

- Ten Million CFA Francs (CFA F 10, 000, 000) to Ousmane known as Kangaye Cissé and

- Ten Million CFA Francs (CFA F 10, 000, 000) to Abdou Touré;

- Being 115, 000,000 CFA F in total;

- **Declares** that these amounts must be paid by the Republic of Mali;

- **Dismisses** additional claims by the Plaintiffs;

- **Orders** the Republic of Mali to bear the costs;

Thus made, declared and pronounced in a public hearing at Abuja, on the day, month and the year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/35/15
JUDGMENT NO: ECW/CCJ/JUD/14/16

BETWEEN
LA SOCIETE DU PONT DES KAYES - *PLAINTIFF*

VS.
REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **BAKOH KOSSI APOW (ESQ.)** - *FOR THE PLAINTIFFS*
2. **IBRAHIM TOUNKARA** - *FOR THE DEFENDANTS*

Violation of human rights - Concession contract - Toll - Lack of Jurisdiction.

SUMMARY OF FACTS

The Applicant, the Société du Pont de Kayes, on 16 November 2015, applied to the ECOWAS Court of Justice with a main application for the violation of its rights by the Republic of Mali. The Applicant stated that on 03 April 1996 it entered into a contractual agreement with the Republic of Mali for the concession of the 420-meter Kayes toll road bridge at an estimated cost of two billion eight hundred million francs CFA. On that basis, the Applicant took a bank loan of 2,800,000,000 CFA francs and completed the bridge which was opened to traffic on 23 April 1999.

Then, the Republic of Mali brutally stopped the toll, and gave no response to the successive challenges of the Applicant. That this breach of contract caused the Applicant a shortfall of nine billion nine hundred million eight hundred and forty million francs CFA. It therefore considers that the non-performance by Mali of its contractual obligation seriously and dangerously compromises its economic situation.

In response, the Republic of Mali argued that the Court lacks jurisdiction to hear the case before it. Mali considers that the dispute in question relates to the performance of contractual obligations, subject to Malian national law. More specifically, the respondent State relied on Article 55 of the concession contract binding it to the Applicant, which gives jurisdiction, for all disputes arising from the performance of the contract, to the Malian court.

ISSUES FOR DETERMINATION

- *Whether the Court has jurisdiction to hear this case?*
- *Whether the rights of the Applicant have been violated?*

DECISION OF THE COURT

- *On the form, the Court **declares** itself incompetent.*
- ***Ordered** the Applicant to bear the entire cost.*

JUDGMENT OF THE COURT

I - THE PARTIES AND THEIR REPRESENTATION

The Court was seised by application received in its Registry on 16 November 2015. This application was filed by the **"Société du Pont de Kayes" (S.P.K.)**, a public limited company under Malian law with its registered office in Kaye (Republic of Mali) and represented by the law firm "Aquereburu et Partners", located at 777, avenue Kleber Dadjo in Lomé (Republic of Togo).

The defendant **Republic of Mali** is represented by the Directorate General of State Litigation.

II - FACTS AND PROCEDURE

The Applicant, Société du Pont de Kayes, (S.P.K.) stated that on 3 October 1996 it entered into a concession contract with the Republic of Mali for the Kayes toll road bridge. As part of this contract, the S.P.K. was awarded the construction of a bridge linking Kaye Ndi to Kaye Ba, with a length of 420 metres and an estimated cost of two billion eight hundred million (2,800,000,000) CFA francs. KPS was awarded the operation and maintenance of the bridge for a period of 20 years. According to Article 33 of the concession contract, the licensee, i.e. the SPK, would be remunerated by the toll, the rates of which were set out in the contract.

On that ground, the applicant applied for and obtained a bank loan for the projected amount of two billion eight hundred million (2,800,000,000) CFA francs. It subsequently completed the bridge, which was open to traffic on 23 April 1999.

According to the application, the Malian authorities abruptly stopped the toll and, subsequently, took no action on the successive appeals made by the applicant.

It is under these conditions that the Société du Pont de Kayes allegedly referred the matter to the ECOWAS Court of Justice for violation of its rights by the Republic of Mali.

The Republic of Mali first responded to the arguments advanced by the applicant by way of a statement of defence. It relied first on the lack of jurisdiction of the Court and, as regards the merits, on the unsubstantiated nature of the claims made by the SPK.

On 16 February 2016, the Société du Pont de Kaye filed a statement of reply with the Registry of the Court. It argued that the Court had full jurisdiction to examine the case before it and, secondly, that the Republic of Mali had persistently refused all attempts to restore the toll.

III - PLEAS IN LAW AND ARGUMENTS OF THE PARTIES

KPS contended that by unilaterally breaking the concession contract, the Republic of Mali had caused it a loss of nine billion nine hundred and five million eight hundred and forty thousand (9,905,840,000) CFA francs, a sum established on the basis of a financial assessment report attached to the file. It is of the opinion that the failure by Mali to fulfil its contractual obligation has seriously and dangerously compromised the economic standing of the company.

It thus alleged a violation of its *"economic rights"* and, to do so, relied on several international instruments binding on the Republic of Mali. The relevant provisions are as follows:

- Article 22 of the Universal Declaration of Human Rights *states that "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality"*;

- Preamble to the African Charter on Human and Peoples' Rights, which states *that "it is essential to pay special attention from now on to the rights and development of citizens"*, and adds *that "civil and political rights are inseparable from economic, social and cultural rights, both in their conception and in their universality, and that the satisfaction of economic rights guarantees the enjoyment of civil and political rights"*;

- International Covenant on Economic, Social and Cultural Rights of 16 December 1966, which, according to the applicant, *"establishes the principle of equality between all citizens with regard to economic rights, as well as all the constitutions of African States which make the protection of human rights an objective element of the very existence of the State"*;

- Finally, the application relied on Article 4 of the ECOWAS Treaty in that it urged Member States to recognize and protect human rights.

On the basis of all these elements, the Société du Pont de Kaye asked the Court to *"hold and adjudge that the Republic of Mali has violated" its "economic rights and has violated its own international obligations",* to order it to pay the sum of nine billion nine hundred and five million eight hundred and forty thousand (9,905,840,000) CFA francs as compensation for the damage suffered and to order it to bear the costs.

As for **the Republic of Mali**, it maintained that the Court had no jurisdiction to hear the case before it. Mali is of the view that the dispute in question relates to the performance of contractual obligations, a question which is settled by Malian national law, in particular article 105 of the 1987 Act on the General Regime of Obligations in Mali, and which, in its view, applies to both civil and commercial obligations.

More specifically, the Respondent State cited Article 55 of the concession contract binding it to the SPK, which gives jurisdiction, for any dispute arising from the performance of the contract, to *"the Malian court".*

No action was taken to stop the toll, it added, and that it had itself *"fully paid"* the loan of two billion eight hundred million (2,800,000,000) CFA francs initially contracted by the KPS.

Therefore, the Republic of Mali requests the Court to recognize that it does not have jurisdiction. If "*by extraordinary circumstances*" it were to hear the case on the merits, it is requested to recognise that Mali "did not violate any contractual obligation" and to dismiss the claims of the Applicant.

IV - ANALYSIS OF THE COURT

As to formal presentation:

The Court must first address the very question of its jurisdiction. Apart from the fact that this is a primary obligation for any court seised, it must, in the present case, pay all the more attention to this point since the respondent State makes it a vital part of its defence.

The question raised borders on the jurisdiction of the Court to hear and determine a dispute the nature and contractual origin of which are not disputed by either party: it is indeed the concession contract for the Kaye toll road bridge, concluded on 3 October 1996 between the two parties, which constitutes the background to the present dispute.

The Court, it should be recalled, has jurisdiction in respect of violations of human rights, in accordance with Article 10 of the 2005 Supplementary Protocol. The question is therefore whether the non-fulfilment of a contractual obligation is, as such, capable of being interpreted as a "human rights violation".

It is difficult, in the opinion of the Court, to confuse the two domains. A careful examination of the arguments and pleas in law of the Société du Pont de Kaye reveals that, despite its attempts to place the damage it suffered in the realm of human rights, the issue is never more than the fulfilment of treaty obligations.

Admittedly, the applicant relied on a number of international instruments, which are enforceable *vis-à-vis* Mali. However, it must be noted that nowhere in its writings, and at no time during the pleadings, could it identify a specific "human right", a specific prerogative protected by the instruments invoked, which would have been disregarded in the present case. The Société du Pont de Kayes mentioned "economic rights" in a rather imprecise way, but there is no "economic right" in the field of human rights in general. On the other hand, there are specified prerogatives, special "rights-claims", to be applied in the economic order. The Court must find that the arguments advanced by the KPS lack precision in this respect, and are "general".

Assuming that the applicant had indeed suffered a loss of earnings, such damage does not necessarily amount to a "violation of human rights", the concept of "human rights" being more precise and referring to a catalogue of given prerogatives. The Court is obliged to find, like the respondent State, that the dispute submitted to it does not in any way concern "human rights", but remains contractual in nature, and is not suitable to be submitted to the Court pursuant to Article 10 of the 2005 Protocol.

Not all economic damage, not all loss of income, necessarily translates into "human rights violations". It must be concluded from this that the dispute in question must be brought before courts other than this Court, the latter obviously not having to indicate these courts.

In so doing, the Court remains in its established jurisprudential tradition.

In the judgment of 2 November 2007, "**Chief Frank C Ukor v. Rachad Laleye and the Government of Benin**", the Court, after recalling that ***"the two parties were in a business relationship"***, noted that ***"there was no question of human rights violations but merely of contractual relations"*** (§28) and thus concluded that it had no jurisdiction.

In the case of "**Mrs Alice Rapheal Chukwudolue and Others v. the Republic of Senegal**" (Judgment of 22 November 2007), the Court also declined jurisdiction in view of the fact that ***"the present dispute does not relate to human rights"*** (§54).

In the eyes of the Court, it is appropriate to remain faithful to this jurisprudence and, without the need to go any further in the judicial debate, to decline jurisdiction in the present proceedings and, consequently, to order the Applicant Company to pay the costs in accordance with Article 66 of the Rules.

ON THESE GROUNDS

The Court, ruling publicly and adversarially on human rights violations, in the first and last instance,

Formal presentation

- **Declares** that it lacks jurisdiction to hear the application filed by the Société de Pont de Kayes;

- **Orders** the applicant to bear the costs

Thus, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS in Abuja, on the above-mentioned day, month and year.

AND THE FOLLOWING APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Président.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.), - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/30/15
JUDGMENT NO: ECW/CCJ/JUD/15/16

BETWEEN
MR. N'GUESSAN YAO - *PLAINTIFF*

VS.
THE REPUBLIC OF COTE D'IVOIRE - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDENT*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **MARIAM DIAWARA, MARIO PIERRE STASI, MR MADOU KONE, MR BERNARD DENEE** - *FOR THE PLAINTIFFS*
2. **JUDICIAL OFFICER OF THE STATE, SCPA BAMBAOULÉ-DOUMBIA & ASSOCATE** - *FOR THE DEFENDANTS*

- Violation of political rights - Violation of the right to an effective remedy before the Courts.

SUMMARY OF FACTS

Mr. N'GUESSAN Yao, states that he filed with the Independent National Electoral Commission, filing as a candidate for the presidential elections.

That his file was forwarded to the constitutional council which rejected it on the grounds that it does not comply with the provisions of articles 24, 54, 55 and 56 of the Ivorian Electoral Code and that the file contains documents that do not fulfil the legal criteria. The Applicant considered that he had suffered considerable damage as a result of the invalidation of his candidacy.

He therefore filed, requesting a quick examination of the facts in order to order the Republic of Côte d'Ivoire to take measures to stop the violation of his rights.

In response, the Republic of Cote d'Ivoire rejected the Applicant's allegations because it considers that it knowingly intended to defy the laws and authority of the country by producing documents contrary to the law. He also pointed out that the Applicant had the possibility of making a complaint or observations before the Constitutional Council.

In any case, the Republic of Cote d'Ivoire requests the Court to declare that the Applicant's rights was not violated and therefore to dismiss all claims.

ISSUES FOR DETERMINATION

1. *Can a State's liability be held on allegations of human rights violations without tangible evidence?*

2. *Do the provisions of the electoral code violate international instruments?*

DECISION OF THE COURT

In its decision, the Court noted that on the basis of the evidence in the file, the Applicant did not provide any tangible evidence of any violation of his right to stand as a candidate in the presidential elections under international instruments. The Court also added that the rejection of his candidacy is based on the provisions of the electoral code and that they apply to all candidates without any discrimination.

In addition, the Court considered that the absence of any possibility of appeal is unfounded and that the Applicant wishes to lead the Court to criticise the validity of the decisions rendered by the national courts.

In conclusion, the Court dismissed the Applicant's claims on the ground they are unfounded.

JUDGMENT OF THE COURT

I- THE PARTIES

Between

Mr. Yao N'Guessan through his Counsel Maitre Mariam DIAWARA, Lawyer registered with Bamako Bar Association, Maitre Mario Pierre STASI, Maitre Madou KONÉ, and Maitre Bernard DENÉE, Lawyers registered with the Paris Bar Association.

And

The Republic of Côte d'Ivoire, acting through the Minister of Finance and the Economy, represented by the State Judicial Officer, the former building of the former US Embassy, BPV 98, Abidjan, Counsel: la SCPA Bambaoulé-Doumbia et Associés.

THE COURT,

Having regard to the ECOWAS Revised Treaty of 24 July 1993;

Having regard to the Protocol of 6 July 1991 and the Supplementary Protocol of 19 January 2005 relating to the Community Court of Justice;

Having regard to the Rules of the ECOWAS Court of Justice of 3 June 2002;

Having regard to the Universal Declaration of Human Rights of 10 December 1948;

Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;

Having regard to the Application dated 6 October 2016 filed by the Applicant mentioned above;

Having regard to the pleadings filed for consideration during deliberation and dated 20 April 2016, as filed by the Defendant;

Having regard to the documents submitted alongside the pleadings;

II- FACTS AND PROCEDURE

1. Whereas it can be deduced from the documents of the procedure, that by the Application received at the Registry of the ECOWAS Court Justice on 13 October 2015, Mr. Yao N'Guessan, through his Counsel Maitre Mariam Diawara, Lawyer registered with Bamako Bar Association, Maitre Mario Pierre Stasi, Maitre Madou Koné, and Maitre Bernard Denée, Lawyers registered with the Paris Bar Association, brought his case before this Honourable Court, for violation of his civil rights, including, among others:

   - The right to run for elective office without discrimination, within the meaning of Articles 2 and 25 of the International Covenant on Civil and Political Rights, Article 21 of the Universal Declaration of Human Rights.

   - The right to appeal against the decision of a court of law, as enshrined in Article 7 of the African Charter on Human and Peoples' Rights, and Article 2 of the International Covenant on Civil and Political Rights;

2. By Application dated 6 October 2015 and received at the Registry of Honourable Court on 13 October 2015, Mr. Yao N'Guessan asked the Court to examine the matter under expedited procedure.

3. By Order No. ECW/CC/CCJ/ORD/03/16 of 15 February 2016, the Presiding Judge rejected the said application for expedited procedure on the ground that the situation was not urgent, while reserving costs.

4. In support of his Initiating Application, Mr. N'Guessan stated that he had submitted on 25 August 2015, nomination forms to the Independent National Electoral Commission of the Republic of Côte d'Ivoire, for the 15 October 2015 Presidential Elections, which was sent to the *Conseil Constitutionnel* for the determination of his eligibility.

5. The *Conseil Constitutionnel,* through its decision No. CI-2015-EP-159/09-09/CC/SG of 9 September 2015, declined to include the name of Mr. Yao N'Guessan in the final list of candidates of October 2015 Presidential Elections, on the ground that his candidacy violated

Articles, 24, 54, 55 and 57 of the Ivoirian Electoral Code, in that his nomination forms contained documents that did not fulfil the legal requirements. These queried documents in question were:

- A certificate of criminal background-check and a residential certificate, each dating three years and eight months, instead of the legally required three-months period;

- A photocopy of a sworn statement of non-renunciation of Ivoirian citizenship, instead of the legally required original copy of same;

6. In addition, according to the Applicant, the *Conseil Constitutionnel* had equally noted the absence of tax clearance certificate as well as evidence of deposit of 20 million CFA francs as a guarantee.

7. In the light of the foregoing, the Applicant believed that his right had been clearly and considerably violated, all the more so because the presidential elections were scheduled to hold on 25 October 2015, and consequently asked the Court to take the following measures:

   - **Order** the Republic of Côte d'Ivoire to take necessary legislative and administrative measures to cease the violation of his rights.

   - **Order** the Republic of Côte d'Ivoire to bear all costs.

8. Whereas the Republic of Côte d'Ivoire, in its Memorial in Defence of 20 April 2016, objected to the orders sought, by arguing through its Counsel, that the pleas in law as presented by the Applicant, apart from lacking relevance, were not proven.

9. That indeed, it is true that the Republic of Côte d'Ivoire, in the Preamble to its Constitution, subscribed to international legal instruments relied on by the Applicant, especially the African Charter on Human and Peoples' Rights. However, the Republic of Côte d'Ivoire, like all independent African States, has an Electoral Code which determines the qualification of electoral contenders for elections, which comprise presidential elections, regardless of wealth, let alone the social status of candidates.

10. According to the Defendant, the Applicant willfully had the intention to disobey the laws and authorities of his country by refusing to pay the legally required guarantee, and to produce all the documents required by the said Electoral Code, especially the submission of a tax clearance certificate, and that the *Conseil Constitutionnel* was therefore justified in rejecting his candidacy on those grounds.

11. Finally, the Defendant argued that the Applicant wrongly asserts that the absence of right of appeal to the decisions of the Ivoirian *Conseil Constitutionnel* constituted a violation of international norms as provided in Article 7 of the African Charter on Human and Peoples' Rights, and that he forgets that the absence of the right of appeal against the said decisions derives from the Ivoirian Constitution and that this measure is mitigated by the fact that there was the possibility of lodging a complaint or observations before the *Conseil Constitutionnel,* if he deemed it necessary.

12. That was why the Republic of Côte d'Ivoire asked the Honourable Court to:

    - **Adjudge** that the obligations regarding payment of a guarantee, submission of a tax clearance certificate or producing valid administrative documents, as imposed on the candidates for presidential elections in the Republic of Côte d'Ivoire, do not violate in any way any international legal instrument guaranteeing human rights, especially the right to run for any kind of elective office;

    - **Adjudge** that the absence of all appeal proceedings before an appellate judicial body regarding decisions of the *Conseil Constitutionnel*, does not violate the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights;

    - **Adjudge** therefore that there is no need to order the Defendant to take any legislative and administrative measures to cease the violation of human rights invoked by the Applicant;

    - **Order** the Applicant to bear all costs;

13. At the external sitting of the Court, held in Abidjan on 19 April 2016, neither party appeared nor was represented and the matter was called up and adjourned for deliberation, for judgment to be delivered on 17 May 2016.

III- ANALYSIS OF THE COURT

14. The Court will focus its analysis on the admissibility of the Application submitted and eventually, on the substance of the Application.

As to admissibility of the Application

15. In accordance with its case law, the Court considers that the Application filed by Mr. Yao N'Guessan is admissible since it met all formal requirements as required by Article 33 of the Rules of the Court of 3 June 2002 and Article 10 of the Supplementary Protocol of 19 January 2005 on the Community Court of Justice, ECOWAS.

As to merits of the case

1. Regarding the substance of the requests made by the Applicant

16. Whereas the Applicant asserted that he is a victim of numerous violations of his civil and political rights, especially:

- The right to run for elective office without discrimination or to participate in the management of public affairs, within the meaning of Articles 2 and 25 of the International Covenant on Civil and Political Rights, Article 21 of the Universal Declaration of Human Rights and Article 2 of the African Charter on Human and Peoples' Rights.

- The right to appeal against the decision of a court of law, as enshrined in Article 7 of the African Charter on Human and Peoples' Rights, Article 2 of the International Covenant on Civil and Political Rights;

17. Whereas as a general rule, the onus lies on the Applicant to provide evidence, and whereas in applying that principle, the ECOWAS Court of Justice has consistently held that (*cf. Judgment of the ECOWAS*

Court of Justice, dated 7 October 2015, in Case Concerning ***Wiyao and Co. v. Republic of Togo***) all cases of human rights violation brought before it shall be relevantly supported with sufficient, convincing and unequivocal evidence.

18. Whereas in the instant case, the Court finds, on the basis of the pleadings of the procedure, that the Applicant did not provide any concrete proof of any violation whatsoever of his right of candidacy to any elective office without discrimination, nor of his right to participate in the management of the public affairs (of his community), within the meaning of the Articles cited above from the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights.

19. The Court equally finds that the candidacy of the Applicant was rejected for a justifiable reason, by Decision No.CI-2015 –EP- 159/ 09-09/CC/SG of 9 September 2015, of the Ivoirian *Conseil Constitutionnel*, for failing to fulfil certain conditions required by the Electoral Code applicable to all the candidates running for the Presidential Elections (regardless of one's wealth or social status), especially the default in the payment of the of 20 million CFA Francs guarantee, non-submission of a valid certificate of criminal background-check and a residential certificate dating back to a period of three months, as well as the original of a sworn statement of non-renunciation of Ivoirian citizenship.

20. Regarding the absence of every possibility of appeal proceedings against decisions delivered by the *Conseil Constitutionnel,* the Court finds that it is a provision provided for both by the Ivoirian Electoral Code and by Article 98 of the Ivoirian Constitution, which, all things considered, does not in any way violate the African Charter on Human and Peoples' Rights nor the International Covenant on Civil and Political Rights as alleged by the Applicant.

21. Whereas therefore, the Court considers that there are no grounds for ordering the Republic of Côte d'Ivoire to take legislative and administrative measures to cease human rights violations as averred by the Applicant.

22. Whatever the case may be, it appears that the alleged complaints of human rights violation as invoked above, were used by the Applicant to criticise, if not to challenge, the very basis of the decision made by the Ivoirian *Conseil Constitutionnel*, rejecting his candidacy. For a proof, one simply needs to refer to just one argument relied on by the Applicant, thus: *"Finally, the Conseil Constitutionnel in its Decision of 9 September 2015, based its reasons for inadmissibility of the candidacy of the Applicant on legislative censorship, contrary to the international commitments of the Republic of Côte d'Ivoire"*

23. Whereas it is established that the Applicant, by the claims he makes, seeks to lead the Court towards interfering in the domestic judicial procedures of Côte d'Ivoire, and to lure the Court to assume, somewhat, the role of an appellate court or a of *cour de cassation* (court of cassation), by way of arrogating to itself the power to adjudicate, if not to criticise, the substance of judgments delivered by Ivorian domestic courts, like the *Conseil Constitutionnel* of Côte d'Ivoire.

24. Now, the Court recalls that its mandate is not to adjudicate in terms of the most correct interpretation to be assigned to the domestic laws of Member States of ECOWAS, but to examine whether the manner in which the law was applied infringed upon the rights of the Applicant, as guaranteed by the international legal instruments invoked.

25. Similarly, the Court, in line with its case law, always held that it is not within its human rights protection mandate to re-examine and substitute its decisions for those whose facts may already have been submitted before the domestic courts and decided upon.

26. Thus, in the Judgment on **Alhaji Hammani Tidjani v. Federal Republic of Nigeria and Others**, the Court held that *"**Admitting this application will amount to this Court interfering in the criminal jurisdiction of the Nigerian Courts, without justification**"* §45

27. Similarly, in its Judgment N°. ECW/CCJ/JUD/03/05 of 7 October 2005 (§32) on *Case Concerning* **Jerry Ugokwe v. Federal Republic of Nigeria and Christian Okeke**, the Court held that: "***Appealing***

against the decision of the National Court of Member States does not form part of the powers of the Court."

28. From the foregoing, the Court holds that the requests made by the Applicant are unjustified and are hereby dismissed.

2. As to costs

29. Whereas the Applicant has lost the case, and he shall be required to bear costs in accordance with the provisions of Article 66 of the Rules of the Court.

FOR THESE REASONS

The Court,

Adjudicating in open court, after hearing both Parties, in a matter on human rights violation, in first and last resort;

As to the formal presentation,

- **Admits** the Application Mr. Yao N'Guessan;

As to the merits of the case,

- **Adjudges** that the requests filed by the Applicant are devoid of substance

- **Dismisses**, therefore, all his claims;

As to costs,

- **Orders** the Applicant to bear the costs.

- **Hon. Justice Jérôme TRAORE** - *Président.*
- **Hon. Justice Micah Wilkins Wright** - *Member;*
- **Hon. Justice Yaya BOIRO** - *Member;*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

THIS TUESDAY, 17TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/22/15
JUDGMENT NO: ECW/CCJ/JUD/16/16

BETWEEN
MARIE MOLMOU & 114 ORS. - *PLAINTIFFS*

VS.
REPUBLIC OF GUINEA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDENT*
2. **HON. JUSTICE MICAH W. WRIGHT** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **FRÉDÉRIC LOUA (ESQ.),** - *FOR THE PLAINTIFF*
2. **STATE JUDICIAL OFFICER** *AND* **RIVIÈRES DU SUD** - *FOR THE DEFENDANT*

Violation of human rights -Forced expropriation - Violation of the right to life -Arbitrary arrest and detention

SUMMARY OF FACTS

The Applicants, all Guineans, contended that they are in conflict with the Guinean Oil Palm and Rubber Company (SOGUIPAH), which allegedly made a forced occupation of several hectares of agricultural land belonging to them and that a decree that expropriated them. They claimed that they tried to protest the expropriation, but they were confronted with violent viciousness, including arrests and detentions. It was in the light of all his violations that they decided to appeal to the Court to put an end to the violations by SOGUIPAH and jointly the State of Guinea.

The Republic of Guinea and SOGUIPAH pleaded before the Court that all the claims of the Applicants are ill-founded and condemn them to damages and interest.

ISSUES FOR DETERMINATION

1. *Is the invocation of national texts authentic before the Court?*
2. *Do the Applicants represent a people?*
3. *Were the Applicants expropriated from their farmland?*
4. *Are the mere invocations of violations sufficient before the Court?*
5. *Can a lawsuit against a State be vexatious?*

DECISION OF THE COURT

The Court in its decision maintained that the invocation of national law cannot succeed before it and must be excluded from the debate and that only international texts can be exposed. The Court therefore concluded that the Applicants do not represent a people on the ground

that they cannot claim any specificity of a cultural or other order giving them autonomy within the Guinean nation, they cannot also claim to constitute a "State"

The Court in its analysis, asserted that there is no expropriation to the extent that the Plaintiffs provided no evidence of the existence of title deed, any land document, testimonial evidence.

On the other cases of violations, the Plaintiffs merely make allegations without proving killings, rapes, arrests and detentions.

On the last point, the Court considered that the claim of the Defendant cannot succeed because, in no event, is the case brought vexatious or abusive enough to justify a counterclaim.

JUDGMENT OF THE COURT

I. THE PARTIES AND THEIR REPRESENTATION

The Initiating Application of the instant case was lodged at the Registry of the Court on 13 July 2015 by Marie Molmou and 114 Others, Guinean citizens, represented by Maître Frédéric Loua, a lawyer registered with the Bar Association of Guinea.

The Defendant State, the Republic of Guinea, is represented by the State Judicial Officer, and has its headquarters at Conakry, Republic of Guinea, located at the *Petit Palais* of the Presidency of the Republic of the Republic of Guinea, Quartier Boulbinet, Conakry, and by the law firm known as *Rivières du Sud*, located at Boulbinet, Commune de Kaloum, Conakry, Republic of Guinea.

II. SUMMARY OF THE FACTS AND PROCEDURE

The Applicants are all Guinean citizens domiciled in the district of Saoro, under the *sous préfecture* (sub-district) of Diécké, in the Yomou *préfecture* (district), in the Republic of Guinea. They maintained that since the month of May 1987, they have been in conflict with SOGUIPAH (Guinea Oil Palm and Rubber Company) because SOGUIPAH had engaged in a "*forced occupation*" of almost 1,800 hectares of arable land belonging to their "*community*", following the adoption of Decree D/2003/PRG/SGG of 3 February 2003, which had allegedly served as the instrument for executing the expropriation of their land.

Faced with what they considered as unfair expropriation, the inhabitants of the "*Saoro community*", including the Applicants, decided therefore, as claimed by them, to protest. According to the Application, they were met with an extremely violent and brutal force, in the manner narrated below.

On 2 June 2011, "*three* (3) *Saoro farmers*" were arrested and subsequently detained within the premises of the Gendarmerie.

Not long after, there was an incident of the rape of one of the women, whose husband, Mr. Ouo-Ouo Sango, was considered to be one of the leaders of the protest. The Application states that the rape took place on

the woman's farm, that the act was committed by gendarmes, and that the victim was later handcuffed and transported by his tormentors to the N'Zérékoré Central Prison and released five (5) days later.

Still, according to the narrative of the Application, attempts were made to resolve the conflict through dialogue with the authorities of Saoro, but the effort yielded no positive result. It was a little later, after these fruitless attempts, that bulldozers sent by SOGUIPAH systematically destroyed 67 rice farms cultivated on the disputed site.

Then on 28 July 2011, the Governor of N'Zérékoré ordered the Armed Forces of Guinea to terminate a being meeting organised by the inhabitants of the locality.

The following day, 29 July, a "*peaceful march*" embarked upon by these same inhabitants was violently dispersed. There were arrests, violations of the physical integrity of the demonstrators, and even the destruction of their properties.

On 2 September 2011, the Applicants claim they witnessed the arrest and severe beating of four (4) of the inhabitants of Saoro, considered by the law enforcement officers as the "*leaders*" of the protest movement.

On 5 September 2011, a man who was accompanying his wife to a healthcare centre in the locality was suddenly arrested by officers from the law enforcement agency.

Finally, on 22 September 2011, as recounted by the Applicants, a group of heavily-armed military men descended upon Saoro, "*indiscriminately opening fire in all directions.*" It was during such show of force that the District Chairman, Mr. André Maloumou, is alleged to have been shot by the security forces, and died later from the gunshot wounds he sustained.

It was therefore after these events that the Applicants filed their case before the ECOWAS Court of Justice, jointly suing SOGUIPAH and the Republic of Guinea for human rights violation.

Subsequently, the Republic of Guinea and SOGUIPAH lodged a Defence on 1 September 2015.

The Applicants then responded by filing a Reply on 30 September 2015.

The Parties were heard during the external court session of the Court which was held at Abidjan, in the Republic of Côte d'Ivoire, on 19 April 2016, and the case was adjourned for deliberation by the panel of judges, after the Court had decided to join the preliminary objections raised by the Republic of Guinea to the merits of the case.

It shall be worthy, at this stage, and for the purposes of clarity in the argumentation of the case, to indicate that the Court had previously been seised by the same group of Applicants concerning the same issues; in the instant proceedings, the name of the group of persons acting by proxy in the suit had changed. In the Ruling thus made on 25 March 2015, the wording of the operative statement of the Court was as follows:

"***As to formal presentation***

- ***Dismisses*** *as ill-founded the preliminary objections raised by the Defendants, regarding non-communication of the Application to SOGUIPAH, and regarding failure to designate a person to accept service in the place where the Court has its seat;*

- ***Admits****, however, the Defendants' claim regarding foreclosure (estoppel) of the action brought by the Applicants, for lack of the necessary legal title for pleading the case before the court;*

- ***Adjudges*** *that the Defendants' claim concerning the said foreclosure (estoppel) of the action brought by the Applicants is well founded, and the Court thus declares that the action brought by Applicants is inadmissible;*"

III. PLEAS IN LAW AND ARGUMENTS OF THE PARTIES

THE APPLICANTS maintain, judging by the conditions under which the landed property was transferred to SOGUIPAH, and the numerous incidents of violence and frustration which must have tainted the relations between the inhabitants of Saoro and the national authorities, that the Republic of

Guinea together with SOGUIPAH (the latter being a direct beneficiary of the disputed lands) had committed human rights violations.

The legal instruments invoked by the Applicants are national in one instance, and international in another instance.

Among the national instruments invoked in the Application, one can cite:

- The 7 May 2010 Constitution of Guinea, whose Articles 5 and 6 provide for respect for the physical and moral integrity of human beings, and the Article 13, the principle of respect for the right to property;

- The domestic law of Guinea, as inconsistent with Order No. 043/ PRG/SGG/87 of 28 May 1987 on Creation, Ratification and Promulgation of Decrees Concerning SOGUIPAH;

- The Constitution of Guinea, again, as inconsistent with Decree D/2003/PRG/SGG of 3 February 2003, the instrument of execution of the contentious expropriation;

- The Guinean Code Concerning State-Owned and Privately-Owned Lands, whose Articles 57 and 69 are alleged to have been disregarded by the expropriation procedure;

- The Civil Code of the Republic of Guinea, whose Articles 533 and 534, relating to right property, are alleged to have been violated.

In terms of international texts, the Application invokes:

- The 1948 Universal Declaration of Human Rights, whose Article 17 talks of right to property;

- The International Covenant on Civil and Political Rights; its Article 1(2) provides that: "*In no case may a people be deprived of its own means of subsistence*";

- The African Charter on Human and Peoples' Rights, whose Articles 21 and 24 make mention of the right to property.

At the hearing of 19 April 2016, the Applicants further argued that since SOGUIPAH represented private interests, it cannot be a beneficiary of an expropriation measure executed "*for public-utility purposes*". They equally stated that the expropriation of lands by SOGUIPAH had resulted in a chain of environmental damage.

On the basis of all these arguments and pleas in law, the Applicants ask the Court to: "*declare as null and of null effect*" the expropriation carried out pursuant to the Decree of 3 February 2003; order the restoration of the disputed lands to the Applicants; and thereby, order "*the immediate eviction*" of SOGUIPAH from the lands in contention. The Court is equally requested to ask the two Defendant entities to pay damages in the total sum of Two Hundred and Fifty Billion Guinean Francs (GNF 250,000,000,000), for human rights violation.

THE REPUBLIC OF GUINEA, raises, on its part, in *limine litis*, preliminary objections on the basis of: non-communication of pleadings by the Applicants; absence of identity, or "*anonymity*" of complainant; lack of *locus standi*, and thereby, lack of interest at stake.

As to merits, the Defendant essentially pleads lack of evidence for the numerous allegations made by the Applicants, which, it claims, "*are not proven, neither are they irrefutable nor convincing.*" The Republic of Guinea further contests the very existence of certain facts alleged, like the communication of a letter addressed to the President of the Republic of Guinea by the Applicants, or certain legal arguments such as the one based on the text cited from the International Covenant on Economic, Social and Cultural Rights, which recognise certain rights to "***all peoples***".

After arguing that the representation of the Applicants, as to their power of attorney in court, appears doubtful, whereas they claim to be representatives of the alleged aggrieved community, the Republic of Guinea again argued that the Applicants only constitute a microcosm of the population of the district or village whose lands were allocated to SOGUIPAH, and still went further to state that contrary to the claims made by the Applicants, the development of the said lands at Saoro did bring economic gains which, without any doubt, went to the benefit of the inhabitants of that area.

For all these reasons, the Defendant asks the Court to dismiss the claims made by the Applicants, and in a counter-claim, requests a financial compensation of 500 Million Guinean Francs in damages, in reparation for the attempt by the Applicants to portray the Republic of Guinea as a rogue State and a terrorist State against its own people.

IV. ANALYSIS OF THE COURT

As to formal presentation

Two points must engage our attention here:

Regarding the objections raised by the Republic of Guinea

The Republic of Guinea raised a number of objections which require commenting on.

Incidentally, in its Ruling of 25 March 2015, as cited above, the Court made a declaration on some of those objections. The Court dismissed the objections raised in respect of non-communication of the Application to SOGUIPAH, failure to designate a person at the seat of the Court, anonymity of the Application lodged, and the Applicants' lack of *locus standi*.

The Republic of Guinea simply reiterated the said objections, and so their objections must once again be dismissed, since no new point was produced or argued in regard to the same subject-matter.

The Court however declared the action inadmissible because the persons who filed the case before the Court on behalf of the "*Victims of Saoro*" were unable to produce any document conferring on them the authorisation to act on behalf of the said "Victims". The Court finds that for the instant action, that flaw has been remedied, since the persons now bringing the action before the Court have duly produced the required title for doing so.

Regarding the issue of SOGUIPAH featuring as a party in the proceedings

A point must be made clear here concerning the issue of citing of SOGUIPAH (a limited liability company, registered under the laws of Guinea) as a party in the instant case. It is apparent that SOGUIPAH was

sued as a Defendant before this Court, for human rights violation. Now, even if it is manifest that SOGUIPAH, as a company, maintains an overriding interest in the action brought before the Court, since it is SOGUIPAH which has been benefiting from the disputed land expropriation, SOGUIPAH cannot, as such, constitute a party in the proceedings, for the reason that only States may be cited as Defendants in proceedings for human rights violation. This principle is easily explicable: the international instruments, *international* by definition, as invoked by those bringing the action, do remain instruments binding only on States; the States concerned are the only entities which signed those instruments, and thereafter, either ratified them or declared allegiance to them. Such instruments cannot therefore, by definition, be invoked against any other entities than the States concerned, for they shall not be binding on those other entities.

The case law of the Court is abundantly clear in that respect.

The Court first of all declared in its Judgment of 11 June 2010, in the **Peter David Case**, that: "… ***the international regime of human rights protection before international bodies relies essentially on treaties to which States are parties as the principal subjects of international law***…." (§42).

In the Judgment of 8 November 2010 concerning **Mamadou Tandja v. Republic of Niger**, the Court further states: "… ***it is commonly admitted that proceedings related to human rights violations are initiated against Member States (…) the obligation to respect and protect human rights is placed upon States*** …" (Page 121 - (2010) CCJELR).

In the same vein, in the Judgment of 24 April 2015, in **Bodjona v. Republic of Togo**, the Court held that: "***In examining the cases brought before it, the ECOWAS Court of Justice shall refer exclusively to the norms of international law as binding on the Member States which have subscribed thereto***." (§37).

Finally, in its case law of 16 February 2016, concerning **Abouzi Pilakiwe and 183 Others**, the Court recalled once more that ***"the rules it applies in disputes regarding human rights violation, of which the case cited above was an example, remained the rules of public international law,***

derived notably from international conventions signed by States and binding on the signatory States concerned. Therefore, the Court declared, that violations committed by entities other than States shall not be examined before the ECOWAS Court of Justice. The Court equally stated that in adopting that stand, it does not, obviously, seek to contest the possibility that such violations may or may not be committed by entities clearly distinguishable from States, but rather, it does so on strictly formal and principled grounds; that only States may be sued to answer for any blame that may be assigned against them, as arising from commitments they may have made in international instruments. The Court affirmed this has been the position it has always stood by, and that under the prevailing circumstances, it could not but grant the reliefs sought by OTR. The Court therefore declared that OTR had no case to answer in the matter brought before it". (§20 and §22)

Hence, SOGUIPAH, a limited liability company incorporated under the laws of Guinea, shall equally be deemed as having no case to answer in the instant proceedings, instituted pursuant to Article 9 of the 2005 Protocol, and relating to allegations of human rights violations.

As to merits

At this stage, where the merits of the case are to be examined, the Court shall equally consider the matter under various points.

Regarding rules that may be invoked in the instant procedure

By virtue of what has been affirmed in relation to Defendant entities coming before the Court, it must be stated that the law which may be invoked before the Court remains international law, the law the States have subscribed to, and which they apply in the given circumstance.

It therefore, follows that a party, notably an Applicant, shall not invoke any source of the national law. Directly in line with this principled position, the Court has decided that it has no power to constitute itself as a body set up to examine the legality of acts which fall exclusively within the domain of the domestic or national courts of the Member States. There is, once again, more than sufficient jurisprudence to be cited in this regard:

- Judgment of 11 June 2010, **Peter David Case**: "… ***the international regime of human rights protection before international bodies relies essentially on treaties to which States are parties as the principal subjects of international law***…." (§42);

- Judgment of 24 April 2015, **Bodjona v. Republic of Togo**: "… ***the Court shall note as irrelevant, all the references made to the domestic law of Togo by the Parties in their written pleadings. The Constitution of Togo in particular was frequently cited by the two Parties. Now, the Court has no powers to assess the constitutionality or legality of instruments adopted by the national authorities. That mandate is assigned to the domestic courts of the Member States, and the ECOWAS Court of Justice cannot assume their role***…" (§37);

- Judgment of 13 July 2015, **CDP and Others v. Burkina Faso**: "***The first of these principles, which assumes a particular significance in the case submitted before the Court, is the Court's refusal to assume the role of a judge over the domestic law of the Member States. The Court has indeed always recalled that it is not a body set up with a mandate for settling cases whose subject matter is the interpretation of the law or the Constitution of the Member States of ECOWAS. Two effects arise therefrom.*** (…) ***The first is that the present judicial argumentation must be devoid of every form of reliance on the domestic law, be it on the Constitution of Burkina Faso, or on any norms whatsoever related to the Constitution of Burkina Faso***." (§24 and 25).

But, the Applicants cite, in most cases, the norms derived from the national law: the Constitution of Guinea, illegality of Order N^{O}. 043/PRG/SGG/87 of 28 May 1987 on Creation, Ratification and Promulgation of Decrees Concerning SOGUIPAH, illegality of Decree D/2003/PRG/SGG of 3 February 2003 on Allocation of Arable Land to SOGUIPAH for Industrial and Commercial Purposes, the Guinean Code Concerning State-Owned and Privately-Owned Lands, the Civil Code of the Republic of Guinea, etc.

Such elements must therefore be set aside in the argumentation process; that is the stand adopted by the Court. As far as the texts invoked by the Applicants are concerned, one is therefore left with none other to consider than: the International Covenant on Civil and Political Rights, whose Article 1(2) stipulates the right of "***a people***" not to be deprived of their means of subsistence; the Universal Declaration of Human Rights; and the African Charter on Human and Peoples' Rights, whose Articles 17, 21 and 24 talk of right to property.

Regarding the citing of Article 1(2) of the International Covenant on Civil and Political Rights in connection the concept of "people"

The first question which arises therefore, before every other consideration, is whether the Applicants do constitute a representation for a "*people*", as claimed in their argumentation.

The answer, for the Court, is obviously in the negative.

In law, indeed, the concept of a "people" is capable of taking on several meanings, but none of them may be applied to "*the inhabitants of Saoro*" who filed the case before the Court.

It is certainly out of question that a group of human beings holding themselves out as "the inhabitants of Saoro" may claim to form a "State". They cannot, as well, lay claim to any specific cultural order or a particular trait which may confer autonomy on them, within the nation of Guinea; the entire group of the Applicants, considered as a single unit, cannot constitute a distinct "collective" entity, as understood under the international order. The inhabitants of Saoro cannot therefore arrogate to themselves the prerogatives which the international order ascribes to the status of a "people". Since they do not constitute a "people", the Applicants are not entitled to the range of rights recognised in international law for an entity which may be called a "people".

Therefore, every reference to the International Covenant on Civil and Political Rights, particularly to its Article 1(2), regarding the citing of "… ***a people*** …" in the Applicants' argumentation, shall be considered utterly out of place.

Hence, the only fundamental issue in the Application that may have to be considered carefully, has to do with what has been submitted as "*illegal compulsory expropriation*" perpetrated against the inhabitants of Saoro.

Regarding "illegal compulsory expropriation"

The Court must however point out that this plea in law, as raised by the Applicants, is problematic in several regards.

There is first of all a problem of consistency in the written pleadings filed by the Applicants. Indeed, whereas the decree effecting the said expropriation was dated 3 February 2003, the Applicants claim that they wrote to the President of the Republic to hint him of the violation of their rights on 20 January of the same year, 2003 (see pages 1 and 2 of the French version of the Application). In other words, the mail in question, assumed to have been written to complain of the expropriation measure, must have been written even before the expropriation had occurred. Even in supposing that the Application did not make a mistake in the dates submitted, the Court still finds that the narration poses a problem of credibility, in terms of argumentation.

Secondly, it must be observed that in claiming ownership of the lands, the Applicants never contested the validity of the Decree of 3 February 2003 in a court of law. It was 13 years after, when, obviously every hope of arguing their case before the domestic courts was gone, that they brought the matter before an international court, for the purposes of contesting an administrative measure which they considered to be a "*thoroughly questionable*" decree. Outside the fact that the Court has no jurisdiction to adjudicate on such issues, it is curious to observe that the persons who consider themselves to be the owners of the property did not think it fit to challenge the administrative instrument which took their property away from them, till 13 years after it had been promulgated. Such is not, in the view of the Court, the usual attitude of an owner of a property who is sure of his right of ownership.

Especially, the Court holds that irrespective of the litany of facts narrated in the Application, the request brought before it severely lacks the evidence

to back up the allegations. No title to the land is produced; there is nothing, absolutely nothing in the case-file, which may compel one to think that the Applicants are holders of a title to the ownership of the disputed lands. Asking the Court to grant their requests under such conditions, implies that the Applicants are making a demand on the Court to take their word for the truth.

Certainly, the Applicants did advance, notably in the course of their pleadings, that the traditional land ownership system in Guinea does not require the production of a land title or a deed to serve as a proof of ownership. All the same, the Court is of the view that attempts at proving ownership of the occupied lands could have been submitted in the case file. Now, there is no land title, nor title deed of any kind whatsoever, nor even a testimonial to that effect. The Applicants only limit themselves to mere averments throughout the submission of their written pleadings, and they make no effort at producing any proofs for their statements.

At this juncture, the Court must state that it needs not devote any attention to the other issues raised by the Applicants, such as the nature of interests SOGUIPAH represents, or the effects of the development of the lands by SOGUIPAH, since entertaining those extra-legal aspects of the case falls outside the remit of the Court.

Regarding other alleged violations

The same observation must be made concerning the violent incidents the security forces may have been guilty of. The facts alleged are extremely serious, since we are dealing with rape, despoilment, arbitrary arrests, and even murder. But in no instance, once again, was evidence produced to back up those allegations: no certificate of death, not even a medical certificate, nor statements capable of lending credence to the allegations made.

Whereas, the Court has always held that allegations of human rights violation must be buttressed by evidence. In the judgment on **Daouda Garba v. Republic of Benin**, dated 17 February 2010, the Court ruled as follows:

> "… ***cases of violation of human rights must be backed by indications of evidence which enable the Court to find that***

> ***such violation has occurred in order for it to prefer sanctions if need be."*** (§37); "… ***Indeed, to enable the Court find that violations have occurred, particularly in the instant case, the Applicant was expected to file sufficiently convincing, and not equivocal evidence***" (§39); In the end, the Court decided thus: "… ***the only point of evidence provided by the Applicant is neither sufficient nor compelling enough to convince the Court of the truth of the alleged attack committed by the Benin Immigration Officers, in order for the Court to implicate the State in any offence***." (§41).

Re-invoking the reasoning inherent in this case law, founded upon the requirement of minimal proof, which, at any rate, stems from a general principle of procedural law, thus compels the Court to conclude that the allegations of human rights violation made against the Republic of Guinea do not have any basis.

Regarding the counter-claims made by the Republic of Guinea

The Defendant argues that the action brought against it had caused it "*moral harm*", because the Applicants had dragged its international image in the mud. It therefore requested that the Court should ask the Applicant to pay to the State, the sum of Five Hundred Million Guinean Francs (GNF 500,000,000) as damages.

The Court however holds a contrary view. The Court is of the opinion that if, obviously, the proceedings instituted against the Republic of Guinea does cause it some embarrassment, the suit filed does not constitute an abuse of court process, nor is it vexatious in nature, such as to warrant a counter-claim or a resultant financial compensation.

Consequently, the Court dismisses the said claims made by the Defendant.

Regarding costs

The Court holds that following the stand it has taken, the Applicants shall bear the costs, in accordance with Article 66 of the Rules of the Court.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing both Parties, in a suit filed against the Republic of Guinea, in a matter concerning human rights violation, in first and last resort;

As to formal presentation

- **Declares** that it has jurisdiction to determine the case;
- **Declares** that the Guinea Oil Palm and Rubber Company (SOGUIPAH) has no case to answer in the instant proceedings.

As to the merits of the case

- **Adjudges** that no case of human rights violation may be made against the Republic of Guinea;
- **Dismisses**, as a result, the claims submitted by the Applicants;
- **Dismisses** the counter-claim made by the Republic of Guinea;
- **Rules** that the Applicants shall bear the costs.

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

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Micah W. WRIGHT** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

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

HOLDEN AT ABUJA, IN NIGERIA

ON THURSDAY, 19TH DAY OF MAY, 2016

SUIT NO: ECW/CCJ/APP/09/14
JUDGMENT NO: ECW/CCJ/JUD/17/16

BETWEEN

1. **KHADIJATU BANGURA**
2. **FREEMAN, PATRICK D. T.**
3. **SILLAH, SIDIQUE**
4. **SAMUEL TURAY**
5. **MRS. GLADYS SAWYER & 175 ORS.**

} *PLAINTIFFS*

VS.

1. **THE REPUBLIC OF SIERRA - LEONE**
2. **SIERRA NATIONAL AIRLINES**

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDENT*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:

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

REPRESENTATION TO THE PARTIES:

1. **GARBER, MAURICE (ESQ.)** *AND*
   AJOMO, IBUKUN (ESQ.) - *FOR THE PLAINTIFFS*
2. **OSMAN I. KANU (ESQ.)** - *FOR THE DEFENDANTS*

Human Rights Violation - Right to be heard - Civil and Socio-economic Rights - Right to Just and Equitable Compensation

SUMMARY OF THE CASE

The Applicants are staff of the Sierra National Airlines Ltd relieved of their jobs upon the liquidation order made on the 5th of April 2006 by the Government of Sierra Leone and were not substantially compensated.

That the Ministry of Labour and Social Security of Sierra Leone, proposed to pay to the Applicants their terminal employment benefits and severance totaling the sum of 17.177.644.816,00 Leones, on the condition that each beneficiary signs an undertaking not to make any further claims.

Being dissatisfied with the proposed settlement, the Applicants brought the present action contending that the Respondents are in violation of the provisions of the Constitution of the Republic of Sierra-Leone, Statutes of the Sierra-Leone Airlines and the provisions of the international instruments in which the Respondents has ratified.

The Respondents in response, contended that the Applicants have not availed the Court with any tangible proof of human rights violations within the purview of the international instruments relied upon and that most of the Applicants have been adequately compensated.

Further, that the 2nd Respondent being a corporate body should not be made party in the suit.

ISSUES FOR DETERMINATION

1. *Whether from the totality of facts and evidence put forward, the Applicants have established their claims against the Respondents.*

2. *Whether the Applicants are entitled to the reliefs sought.*

DECISIONS OF THE COURT

The Court held:

- *That the application filed by the Plaintiffs/Applicants is admissible.*
- *That it restricts itself to examining disputes on human rights violation submitted before it within the confines of the rules of International Law which the Member States have subscribed to and not disputes concerning the domestic laws of Member States.*
- *That the liquidation process initiated by the State of Sierra –Leone does not in any way constitute a violation of any of the rights invoked by the Plaintiffs/Applicants.*
- *That the Plaintiffs/Applicants failed to prove that they were coerced to establish and sign the attestations renouncing any further claims.*
- *That the claims of the Plaintiffs/Applicants deriving from socio-economic rights, rights to fair trial, right to be heard within reasonable time and right to work under satisfactory conditions have not been buttressed by concrete and convincing evidence.*
- *That even if the Applicants did suffer a denial which is to be restored to them, or that they suffered any other harm as a result of the termination, such denial or prejudice may not necessarily be construed as "a human right violation" since the latter concept is more precise and makes reference to a specified catalogue of prerogatives.*
- *That in terms of involving the Sierra National Airlines, the Court has always held that human rights protection is the exclusive preserve of the States. Hence, Sierra National Airlines must be exonerated from any claims.*
- *Dismissed the complaints filed by the Plaintiffs/Applicants against the Defendants as baseless.*
- *Rejects the claim on compensation and ordered the Plaintiffs/ Applicants to bear all costs.*

RULING OF THE COURT:

The Court,

Having regard to the ECOWAS Revised Treaty of 24th July 1993 on the Economic Community of West African States;

Having regard to the Protocol of 6th July 1991, and the Supplementary Protocol of 19th January 2005 on the ECOWAS Court of Justice;

Having regard to the Rules of the ECOWAS Court of Justice, of 3rd June 2002;

Having regard to the Universal Declaration of Human Rights of 10th December 1948;

Having regard to the African Charter on Human and Peoples' Rights of 27th June 1981;

Having regard to the initiating Application filed by the above-mentioned Plaintiffs/Applicants on 2nd June 2014;

Having regard to the Memorial in defence, filed by the above-mentioned Defendants, on 27th January 2015;

Having regard to the annexure, filed in the case file;

Having regard to the submissions made by Counsels to the parties, during their appearance at the hearings;

Having regard to the Ruling no: ECW/CCJ/RUL/10/15 dated 3rd December 2015, delivered by this Honourable Court.

As to the merit of the case

Facts and procedure

1. Having regard to the exhibits filed, in the present procedure, which revealed that during the course of the year 2005, the National Commission of Sierra - Leone on privatisation proposed the liquidation of *Sierra National Airlines Ltd.,* to the Government of Sierra Leone;

2. On 5th April 2006, the said liquidation was ordered by the Government; and this decision was adopted by the Parliament on 26th September 2006. Following this adoption, the Sierra Leone Airports Authority inherited equipment and machines, which belonged to the *Sierra National Airlines,* on the condition that the former shall absorb 73 workers of the latter.

3. On 24th September 2010, the Ministry of Labour and Social Security calculated both the terminal employment benefits, and the severance pay due to the Plaintiffs/Applicants, all former workers of the *Sierra National Airlines Ltd,* and got a figure of 17,177,644,816.00 Leones.

4. In the meantime, and especially on 2nd August 2010, the State of Sierra-Leone effected payments in favour of Plaintiffs/Applicants, on the condition that each beneficiary shall sign an undertaking that s/he shall not make any further claims.

5. In August 2012, while feeling not satisfied with the settlement that was proposed to them, Plaintiffs/Applicants decided to take the Defendants to court, in Sierra Leone.

6. In December 2013, owing to the delay in the judicial procedure, Plaintiffs forwarded a correspondence to the President of Sierra-Leone, on their claims, but to no avail.

7. On 30th June 2014, Plaintiffs filed a case dated 2nd June 2014 at the Registry of the Community Court of Justice, ECOWAS, and sought from the Court, the following reliefs:

   - A **declaration** that Defendants have violated their rights, notably their rights to draw salary arrears, pension, and severance allowances due and owed them, in total disregard for the provisions of the African Charter on Human and Peoples' Rights (Articles 5, 7, 14 and 15), the Universal Declaration of Human Rights (Article 23, paragraph 3) and the Constitution of Sierra-Leone of 1991 (Articles 20, 21 and 23, paragraph), which guarantee human dignity, the right to fair hearing, the right to own property and the right to work in equitable and satisfying conditions;

- Consequently, an **order** that Defendants should pay them the understated amounts of money:

- **On** 17,177,644,816.00 together with accrued interests;

- **On** 722,755,265.74 together with accrued interests, as allowances due and owed them by the Sierra - Leone Airports Authority;

- **On** 230,428,235 together with accrued interests, calculated from October 2009, till date, as compensation for the contributory pension to the NASSIT, which is due to, and owed some of them;

- **Enjoin** Defendants to respect the instant laws of Sierra - Leone, by paying them the sum of 24,900,000 USD, which represents the counterpart funding from the defunct *Sierra National Airlines Ltd.*, which is due and owed them;

- An **order** on Defendants, to pay each of them, the sum of one million USD, as damages, and further order Defendants to bear all the costs.

8. By Ruling N°. ECW/CCJ/RUL/10/15 dated 3rd December 2015, the Honourable Court declares as follows:

"The Court,

Sitting in a public hearing, in a first and last resort, and after hearing both parties, in a human rights violation matter.

As to form

- ***Approves** Plaintiffs' decision to withdraw their request seeking a judgment by default, to be entered by the Court, against the Defendants;*

- ***Rejects** the preliminary objection raised by Plaintiffs, seeking the Memorial in defence filed by Defendants, to be declared as inadmissible, owing to the justified lateness ins filing it;*

- ***Declares** as inadmissible, the rejection to the continuation of the cased as raised by Defendants, notably their*

Application for a stay of proceedings; Invites Counsels to parties to argue their case, on its merit;

- ***Reserves** its right, as to costs."*

9. At the external court session held in Abidjan (Republic of Cote d'Ivoire) on 18 April 2016, Plaintiffs/Applicants failed to appear; they neither were represented by their Counsels, unlike the State of Sierra - Leone, which was represented by its Counsel, Barrister Osman I. Kanu, who argued on the merit.

II- CLAIMS AND PLEAS-IN-LAW BY APPLICANTS

10. Whereas in support of their claims, Plaintiffs/Applicants aver, through their above-named Counsels that the termination of their appointments in sequel to the bankruptcy and liquidation of their former employer, a state-owned company known as Sierra National Airlines;

11. They claim that, at the time of the liquidation of the said state-owned company, they incurred great losses in the sense that they lost their means of livelihood, without being compensated substantially, in a way as to make-up for their losses. This situation, according to them, constitutes an infringement upon their socio-economic rights, such as the right to earn compensation (in terms of salary, salary arrears, severance pay, the right to own property...), which are guaranteed under international legal instruments stated above, especially, Article 21 of the Sierra-Leonean Constitution and Article 14 of the African Charter on human and Peoples' Rights.

12. Plaintiffs/Applicants equally claim that Article 27 (a) and (b) of the Statutes of the Defendant company - Sierra National Airlines provides that: *"Payment of emoluments shall not be unduly delayed, for whatsoever reasons. When the waiting period becomes so long that* it *has affected years of service, which shall be calculated in arrears, the Employer must base the calculations of emoluments,* to *cover the whole waiting period.",* thus, they aver that they are right under the law, to claim, without further delay, all their rights inherent in the loss of their jobs.

13. On this note, Plaintiffs/Applicants conclude by averring that "the significance of this Article is that the severance allowances of all the former workers should be recalculated, and that the salary arrears due and owed them must be revised, by adding at least, an amount of Le 1,000,000,000 (one billion Leones) to each year passed during which there was no payment of severance pay to Plaintiffs/Applicants by Defendants."

14. Within the same line of thinking, Plaintiffs/Applicants recall that the common law that is the law subscribed to by the State of Sierra-Leone provides that it is obligatory upon an employer to pay settle any severance pay within reasonable period. They add that the worse scenario is that the refusal to pay severance allowances under reference, apart from being a cruel and degrading act, was likely to have infringed upon the human dignity of their persons. (Article 5 of the African Charter on Human and Peoples' Rights.)

15. Also, Plaintiffs/Applicants allege the violation of Article 7 of the said Charter, because their right to be heard by an independent, impartial court, and within reasonable period, was disregarded. This is because according to them, the liquidator, who is supposed to represent the interest of Sierra National Airlines, and its creditors (among whom are Plaintiffs /Applicants in the instant case), equally represents the first Defendant, because his nomination and representation before the national courts of Sierra-Leone were by the leave of the first Defendant.

16. Finally, Plaintiffs/Applicants allege the violation of Articles 5, 7, 14 and 23 of the Universal declaration of Human Rights, and Articles 20, 21 and 23 of the Constitution of Sierra-Leone of 1991, all of which guarantee the safeguard of human dignity, the right to fair hearing, the right to own property, and the right to work in equitable and satisfying conditions;

17. Whereas on their own part, Defendants, namely the State of Sierra-Leone and the Sierra National Airlines, through their Counsel, seek the setting aside of all the claims made by Plaintiffs/Applicants, by arguing that they (Plaintiffs/Applicants) did not avail the Court of any

tangible proof, whatsoever, for a human rights violation, within the purview of the international legal instruments that they relied on;

18. Whereas the slowness in the process of the liquidation of Sierra National Airlines was independent of Defendants, but rather, intimately connected to the long administrative and parliamentary procedure?

19. Whereas Defendants equally argue that most of the Plaintiffs/ Applicant have been adequately compensated, and that a court pronouncement was made, lately, ordering that those of Plaintiffs/ Applicants that are yet to be taken care of, should be fully compensated;

20. Whereas Defendants finally point out that the process of liquidating Sierra National Airlines was initiated, pursuant to a court judgment dated 21 October 2011, and that, on this premise, Sierra National Airlines should not be cited as party to the instant case, because, as a corporate body, it is different from the State of Sierra-Leone.

III - LEGAL ANALYSIS BY THE COURT.

A - On the appropriateness of the claims made by Plaintiffs/Applicants

21. Taking cognizance of the fact that in their initiating Application, filed before the Court, Plaintiffs/Applicants invoke, essentially, the Constitution of Sierra-Leone, Article 27 (a) and (b) of the Statutes of the Defendant known as Sierra National Airlines, and a certain number of international legal instruments, among which are the Universal Declaration of Human Rights, and the African Charter on Human and Peoples' Rights. They also allege the violation of a certain number of civic and socio - economic rights, such as the right to fair hearing, within reasonable period, the right to own property, and the right to just and equitable compensation;

22. The Court finds, straightaway, the irrelevance of the domestic texts invoked by the Applicant, like the citing of the Constitution of Sierra Leone; in principle, the Court restricts itself to examining disputes on human rights violation submitted before it within the confines of the rules of the international law which the Member States have subscribed to. In other words, it is a consistently held principle that the Court

does not handle disputes concerning the domestic law of the Member State of ECOWAS. For illustrative purposes, one may cite Judgment of the Court dated 24 April 2015 on **Bodjona v. Republic of Togo**, §37, where it is clearly stated that: ***" ...In examining the cases brought before it, the ECOWAS Court of justice shall refer exclusively to the norms of international law as binding on the Member States which have subscribed thereto."***

23. It follows therefore that in its analysis, the Court shall set aside every reference made to the Sierra Leone domestic law, be it the Constitution of Sierra Leone; it will rather devote its attention to the international instruments invoked by the Applicants, notably the African Charter on Human and Peoples' Rights (its Article 5) and of the Universal Declaration of Human Rights (its Articles 5, 7, 14 and 23), which, taken together, do guarantee human dignity, right to fair trial, right to property, and the right to work under fair and satisfactory conditions.

24. In considering the facts of the case, the Court finds that the liquidation process initiated by the State of Sierra Leone does not in any way constitute a violation of any of the rights invoked by the Applicants. At any rate, it is established from the proceedings that the liquidation of Sierra National Airlines was ordered in 2006 by the Government of Sierra Leone, and the decision was adopted by Parliament some months after.

25. In 2010, the Ministry of Labour and Social Security of Sierra Leone evaluated the terminal and severance benefits at 17,177,644,816.00 Leones, with the payment to beneficiaries (with the exception of the training personnel of the Sierra National Airlines) completely made on 2 August 2010, and the beneficiaries made to acknowledge receipt of payment, with a pledge to put a definitive end to any existing dispute between them and the State.

26. Whereas it is established from the duly signed attestations, pleaded as "acts of renunciation of any further claim", under the exhibits of the case file, that the Applicants, except the said training personnel, had acknowledged that they were totally settled before they made such "renunciation of any further claim" from the Sierra Leone Government.

27. Whereas the acknowledgment of that definitive settlement is clearly mentioned in the Initiating Application dated 2 June 2014 (see paragraphs 19 and 20), even if the Applicants plead further on, without supporting evidence, that they were coerced to establish and sign the said attestations.

28. The Court equally notes that the diligent efforts made by the judicial authorities of Sierra Leone to resolve the dispute among the parties, pursuant to the Sierra Leone High Court Decision of 17 August 2015, which upheld the entitlements due the trainers of Sierra National Airlines who were absorbed by Sierra Leone Airport Authority.

29. Whereas moreover, the said judicial decision, like the one which was dated 21 October 2011 and ordering the judicial liquidation of Sierra National Airlines, is inconsistent with the complaint made by the Applicants, according to which the Sierra Leone judiciary is incapable of rendering a fair judgment in reasonable time. Going by that assertion, it becomes worthy to recall that it was not until 2012 that the Applicants lodged the case in question for the first time before the Sierra Leone judiciary, and less than two years after, on 30 June 2014, to be precise, they brought the matter before the ECOWAS Court of Justice.

30. In sum, it is imperative to notice that the complaints deriving from violation of the socio-economic rights of the Applicants or from their right to fair trial - that their cause be heard in reasonable time or that they work under satisfactory conditions, are neither relevant nor buttressed by concrete and convincing evidence.

31. Supposing even that the Applicants did indeed suffer a denial which is to be restored to them, or that they suffered any other harm as a result of a termination of the contract with Sierra National Airlines, such denial or prejudice may not necessarily be construed as "a human rights violation", since this latter concept is more precise and makes reference to a specified catalogue of prerogatives.

32. From the foregoing, it shall be justified to dismiss the complaints filed by the Applicants against the Defendants as baseless.

33. In terms of involving Sierra National Airlines in the dispute between the Parties, the Court is always guided by its time-held traditional principles which has been guiding its jurisprudence. The Court has always held that human rights protection is the exclusive preserve of States, and the Court has thus expressed this position in numerous decisions it has had to make, including the one delivered on 8 November 2010 in **Mamadou Tandja v. Republic of Niger**, where it declared that, it is a general principle that procedures of human rights violation are brought against States, and not individuals. Indeed, that the obligation to respect and protect human rights lies on States.

34. Hence, Sierra National Airlines must be exonerated from every blame.

On the claim of compensation made by Plaintiffs/Applicants.

35. Whereas Plaintiffs/Applicants did not bring any proof, in support of their claim on the violation of their human rights, for which they could be victims;

    It follows that the Court shall reject their claim on compensation.

3. As to costs

36. Whereas Plaintiffs/Applicants have succeeded in their case, and that there is need to award costs, pursuant to the provisions of Article 66 of the Rules of procedure of the ECOWAS Court of Justice.

FOR THESE REASONS

The Court,

Sitting in a public hearing, in a first and last resort, and after hearing both parties, in a human rights violation matter.

As to form

- **Declares** as admissible, the Application filed by Plaintiffs/ Applicants

As to merit

- **Declares** that Defendant Sierra National Airlines should not be cited as party to this case;
- **Declares** that the claims made by Plaintiffs/Applicants are not founded;
- Consequently, **strikes out** all the claims made by Plaintiffs/ Applicants;
- **Orders** Plaintiffs/Applicants to bear all the costs;

Thus, made and adjudged in Abuja, the seat of the Court on the day, month and year as stated above.

And the following have appended their signatures:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by:

Tony Anene-Maidoh (Esq.) - *Chief Registrar.*

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

HOLDEN AT ABUJA, IN NIGERIA

ON THIS TUESDAY, 7TH DAY OF JUNE, 2016.

SUIT N°: ECW/CCJ/APP/02/14
JUDGMENT N°: ECW/CCJ/JUD/18/16

BETWEEN

1. THE INCORPORATED TRUSTEES OF FISCAL AND CIVIC RIGHT ENLIGHTENMENT FOUNDATION
(for and on behalf of Families of the Persons shot dead by the officers and men of the 2nd Defendant who are enumerated on the face of the application as follows):
   - **A. NURA ABDULLAHI**
   - **B. ASHIRU MUSA**
   - **C. ABDULLAHI MANMAN**
   - **D. BUHARI IBRAHIM**
   - **E. SULEIMAN IBRAHIM**
   - **F. AHMADU MUSA**
   - **G. NASIR ADAMU**
   - **H. MUSA YOBE**

2. MUTTAKA ABUBAKAR
3. SANNI ABDULRAHRMAN
4. NUHU IBRAHIM
5. IBRAHIM MOHAMMED
6. IBRAHIM ALIYU
7. YAHAYA BELLO
8. ABUBAKAR AUWAL
9. YUSUF ABUBAKAR

PLAINTIFFS

10. IBRAHIM BALA
11. MURTALA SALIHU } *PLAINTIFFS*
12. SANNI USMAN

VS

1. THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA
2. NIGERIAN ARMY } *DEFENDANTS*
3. THE DEPARTMENT OF STATE SECURITY SERVICES

COMPOSITION OF THE COURT:

1. HON. JUSTICE FRIDAY CHIJIOKE NWOKE - *PRESIDING*
2. HON. JUSTICE MARIA DO CEU SILVA MONTERO - *MEMBER*
3. HON. JUSTICE MICAH WILKINS WRIGHT - *MEMBER*

ASSISTED BY:

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

REPRESENTATION TO THE PARTIES:

1. **ALHAJI ALIYU UMAR (SAN), DR. NASIRU ADAMU ALIYU, MUSA ADAMU ALIYU, ABDUL MOHAMMED, ALIYU IBRAHIM LEMU, SANUSI MUSA, MAGE DAPHINE ACHO (MS), IGWE UGOCHUKWU (ESQ.)** - *FOR THE PLAINTIFFS*

2. **DR. FABIAN AJOGWU (SAN), CHARLES NWABULU (ESQ), JUSTINA FAKULUDE (MRS), MATHEW ECHO, GIDEON ODIONU, OLUFUNKE COLE (MS)** - *FOR THE 1ST DEFENDANT.*

3. **MOHAMMED IBRAHIM SANNI** - *FOR THE 2ND DEFENDANT*

4. **CHIEF SOLOMON AKUNNA,** MON (SAN), **GEORGE UKAEGBU (ESQ.), EMMA N. UKAEGBU (ESQ.)** - *FOR THE 3RD DEFENDANT*

Locus standi - Proper party - Cause of action -Abuse of Court process - Reasonableness

SUMMARY OF FACTS

The Plaintiffs brought this action against the Defendants alleging that on Friday, the 20th day of September 2013 at about 12.00 am the officers and men of the 2nd and 3rd Defendant raided an uncompleted building at Aderemi Adesoji Crescent, Apo Zone E, where they were resident on alleged suspicion that members of the dreaded Boko Haram terrorist group were hiding there and that there were stockpiles of weapons kept in the building. That the men of the 2nd and 3rd Defendant on entering the building opened fire on innocent civilians residing in the building and in the cause of the shooting fatally wounded 7 persons and leaving many injured from gunshot wounds. That after the raid on the building, no weapon nor any Boko Haram member was found. That after the operation, the men of the 2nd and 3rd Defendant left without taking the injured to hospital for medical attention which led to the eventual death of many of the victims. That there was no search prior or after the raid to ascertain whether there was weapon nor Boko Haram members in the premises even up until the filing of this application. They therefore brought this action seeking compensation for the unlawful action of the 2nd and 3rd Defendants.

The 1st Defendant filed a Preliminary Objection on grounds that first Applicant lacks the locus standi to institute the action as it is not a victim, also that the Applicants disclose no cause of action etc. the 2nd Defendant also filed preliminary objection similar to the 1st Defendant and also raised issue of proper party. Similarly, the 3rd Defendant also filed a preliminary objection on same ground as the 1st and 2nd Defendant.

ISSUES FOR DETERMINATION

1. *Whether the first Applicant is a legal person and not being a victim or related to a victim, have a standing to institute the present action on behalf of the deceased victims.*

2. *Whether the facts put forward by the Applicants have disclosed any cause of action.*

3. *Whether the action as presently constituted is an abuse of Court process and / or an academic exercise as alleged by the 3rd Defendant.*

4. *Whether the 2nd Defendant and by implication the 3rd Defendant are proper parties to this suit.*

DECISION OF THE COURT

The court held that;

1. *An NGO duly constituted can sue on behalf of victims of abuse once it can show a public right worthy of protection. That the 1st Applicant can institute and prosecute the present action as this is reinforced by the fact that the 2nd to 12th Applicants are direct victims of alleged violation of human rights.*

2. *The court also held that from the narration of facts as presented by the Applicants, they have disclosed a cause of action as the action is predicated on violation of human rights of which the court has jurisdiction to determine.*

3. *Furthermore, the Court held the application by the Applicant is not an abuse of court process as alleged by the 3rd Defendant*

4. *The Court also held that in an application for violation of human rights the proper Defendant is a Member of the Economic Community of West African State and not an individual or agency of the Member State. Therefore, the 2nd and 3rd Defendants are not proper parties to this suit and their names were accordingly struck out.*

5. *The Court ruled that the argument and defence of the Defendant is not supported by evidence and therefore held the Defendant liable for the illegal killings of persons named and represented by the Applicant and injuries caused to the 2nd to 12th Applicants and awards the sum of 200,000 USD to each of the deceased family and 150,000 USD each to the 2nd to 12th Applicants for injuries caused to them.*

JUDGMENT OF THE COURT

1. CIRCUMSTANCES OUT OF WHICH THE ACTION AROSE

This action is for a claim for reparation and payment of compensation to the victims of the 20th September, 2013 raid of an uncompleted building situated at Aderemi Adesoji Crescent Apo Zone E in the Federal Capital Territory of the Federal Republic of Nigeria by the officers and men of the 2nd and 3rd Defendants in the course of the raid of the premises in search of weapons allegedly buried by suspected members of the dreaded Boko Haram Terrorist Group.

2. THE PLAINTIFFS' CASE

On Friday, the 20th September, 2013 about 12.00 am, some armed men comprising officers and men of the 2nd and 3rd Defendants raided an uncompleted building at Aderemi Adesoji Crescent Apo Zone E on the alleged suspicion that there are likely weapons buried in the vicinity by members of the dreaded Boko Haram Terrorist Group and that some of the Terrorists are occupying the building.

Owing to the alleged suspicion, the members of the 2nd and 3rd Defendants went to the building heavily armed and fired several gunshots into the building without any warning or regard to any of the standard rules of engagement. The uncompleted building had been used by the Applicants and other menial job workers as their makeshift residence upon payment of a weekly rent of N200 to the Security guard at the premises.

The victims who were residents in the uncompleted building alongside over one hundred persons, who lived as tenants in the uncompleted building, were deep asleep and were awaken by the gunshots from the men of the 2nd and 3rd Defendants and they started running for their dear lives upon hearing of the gunshots.

After the operation, the men of 2nd and 3rd Defendants, knowing fully well that some civilians had been injured in the operation, left the scene and abandoned the Applicants unattended, hence left them to their fate with several gunshot wounds. The Applicants were bleeding profusely with no

provision of medical aid. Seven of the victims were fatally wounded and bled to death owing to non-provision of medical aid.

It took almost eight hours, after the raid of the uncompleted building at 8:00 am or thereabout when the members of the Nigeria Police Force and the Nigeria Security and Civil Defense Corps came to the scene of the incident and took the Applicants and the dead bodies to Asokoro General Hospital.

There was no weapon found in the premises nor was any found on the Applicants when the officers and men of the 2nd and 3rd Defendants entered the premises.

There was no search conducted in the premises or any digging of any part of the pretnis.es prior to the shooting and afterwards there was no attempt up till the time of initiating this proceedings to recover any weapon allegedly buried by dreaded Boko Haram Terrorists nor were there any weapons recovered anywhere in connection to the fact and the circumstances leading to this case.

The Applicants argue that they do not belong to any terrorist group. Even if they do (which has been vehemently and uncontrovertibly denied), they could not and should not have been left abandoned by the men of the 2nd and 3rd Defendant with bullet wounds and without the provision of medical aid after the attempt to arrest them. As a result of the attack, the 2nd to 12th Applicants suffered various degrees of gunshot injuries as shown on pages 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 of the folder containing Death Certificates and photographs of the Applicants.

Owing to the public outcry, the Senate of the Federal Republic of Nigeria set up a Joint Committee comprising of the Senate Committee on National Security and Intelligence and Senate Committee on Judiciary, Human Rights and Legal Matters to investigate the actions of the 2nd and 3rd Defendants on the 20th September, 2013 at the uncompleted building at Aderemi Adesoji Crescent Apo Zone E.

The Joint Committee conducted an investigation on the matter and found out that all the victims presenting this Application are not members of the Boko Haram Terrorist Group but may have interacted with them "unknowingly" while living as tenants in the uncompleted building. The Applicants shall rely on page 62 of the Senate Report.

It is the reasonable expectation of the Applicants that law enforcement agents, including members of the 2nd and 3rd Defendants, are required to be circumspect in the exercise of their duty and to also provide compensation to any innocent victim who loses his property, limb or life in the course of operation leading to the violation of the Applicants' rights.

That during the Question and Comments session with the Commander, Guards Brigade, of the 2nd Defendant, he conceded that compensation to the victims could heal wounds. Below is a representation of the interaction as contained on page 56 of the Senate Report;

At the Senate Joint Committee hearing, the Counsel to the Applicants, Mr. Sanusi Musa, who presented a written submission did request the Senate Joint Committee to direct the payment of compensation to the victims as follows;

a. N 100,000,000 to each of the victims as follows;

b. N 20,000,000 to each of the injured.

However, this request was never heeded. The failure to heed to this request is because the Nigerian Government has deliberately and actively insisted on **ZERO COMPENSATION** to innocent victims of the 1st Defendant fight against Boko Haram insurgency. Prior to the episode of 20th September 2013, the Nigerian Government set up a Presidential Committee on the Security challenges in the North-East relating to acts of insurgency and terrorism. The Presidential Committee in the month of November 2013 submitted its report to the President of Nigeria recommending that Nigeria should pay compensation to the victims of the Boko Haram insurgency. However, by several newspaper publications circulated within Nigeria on the 6th day of November 2013, the Nigerian Government rejected the recommendation.

The Socio-Economic Rights and Accountability Project, SERAP, (a renowned non-governmental organization reputed for fighting for the enthronement of the rule of law and the enforcement of fundamental rights in Nigeria) petitioned the President of Nigeria requesting it to reverse its decision for zero compensation to Boko Haram victims.

The Organization stated that, in the wake of the devastation by Boko Haram, compensation and reparation programmes are absolutely essential to deliver justice to the victims of human rights abuses precipitated by the group. They further contended that paying compensation and reparation to victims of human rights by Boko Haram is a matter of right and not charity; also, that refusing or failing to pay adequate compensation and reparation to victims is to buy impunity for perpetrators.

SERAP is seriously concerned about the policy of your government that there will be no compensation paid to victims of Boko Haram attacks. This policy is a clear violation of the Country's international human rights obligations and commitments to provide effective remedies, including compensation and reparation to victims of serious human rights abuses such as those perpetrated by Boko Haram.

The attacks against innocent citizens by the Boko Haram constitutes gross violation of international human rights law, having been systematically perpetrated, and affecting in qualitative and quantitative terms, the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person.

The content of the petition is published in several Newspaper publications published in Nigeria. The Applicants relied on the contents of these publications as made available at page 12 of vol. 25. N° 62010 of the Vanguard Newspaper of the 8th November 2013 in proof of this averment.

Even though the 1st Defendant was given a 14-day ultimatum, it failed, refused and or neglected to provide reparation and compensation to the victims of Boko Haram, including the Applicants.

This formed the reason why the National Assembly (the legislative arm of the 1st Defendant) under the auspices of the Senate Joint Committee on National Security and Intelligence and Judiciary Human Rights and Legal matter on the investigation alleged extra-judicial killings in Apo, Abuja, merely recommended that Government at all levels should improve the quality of healthcare, water supply and other social services.

Finally, the Applicants contended that by not recommending the payment of compensation to the Applicants as requested by their counsel, the report's

recommendation falls short of Nigeria's obligation to its innocent citizens and injured in the cause of carrying out internal operations as contained in all the international instruments under which the application is brought. They further contended that this Court has the power to compel the 1st Defendant to perform its obligations under international law, being a member of the civilized world.

Consequently, the Applicants sought the following orders and reliefs from the Court;

1. A **DECLARATION,** that the Applicants as law abiding citizens of the 1st Defendant are entitled to the right to life, freedom of movement, freedom of Association, right to human dignity, integrity and security of their persons.

2. **A DECLARATION,** that the shooting of the Applicants by the officers and men of the 2nd and 3rd Defendants on the 20th of September, 2013 while they were raiding a supposed Boko Haram Camp, thereby causing death or permanent bodily injuries to the Applicants, constitute a flagrant abuse of the Applicants' fundamental human rights to life, dignity of the human person, integrity and security of their person, as guaranteed under international laws by which the application is brought and are entitled to reparation and compensation for the infringement of those rights.

3. **AN ORDER** directing the Defendants to pay compensation to the families of the deceased and surviving victims of the 20th September, 2013 Apo killings in the manner stated below:

    a) The sum of USD $100,000,000.00 (one hundred million United States Dollars only) to families of each of the eight deceased victims.

    b) The sum of USD $10,000,000.00 (Ten million United States Dollars only) to each of the surviving victims for the mutilation of the Applicants who suffered injuries caused by bullet wounds affecting their spinal cord, fracturing of tibia, plateau, proximal metaphysics and neck of fibula, abdomen wounds and fracture of their hands and other limbs and therefore permanently

mutilating their body and robbing them of their ability to secure a dignified livelihood and thereby constituting a breach of their fundamental rights.

4. **AN ORDER** of this Honourable Court directing the Defendants to settle the cost of this action as incurred by the Applicants AND

5. Any other further orders that the Court may deem fit to make.

Upon the service of the originating application, the Defendants raised preliminary objections to the suit and the Court took arguments on the objections of the Defendants and decided to rule on the preliminary objections as well as the substantive suit in one judgment.

3. PRELIMINARY OBJECTION OF THE DEFENDANTS

1. <u>The First Defendant.</u>

The First Defendant in her preliminary objection (Document No 2) sought an order striking out her name from the suit and also dismissing the Applicants' suit dated the 24th day of February, 2014 on the grounds that;

i. The 1st- Applicant lacks the *locus standi* to bring this application, as it lacks legal personality and is not a victim or relative of the victim of any human rights violation, nor does it have any evidence of authority of the persons or relatives of the persons it represents.

ii. That the Applicants disclosed no cause of action as the victims actually received medical attention.

iii. That the 1st Defendant is under a duty placed on her by the Constitution of Nigeria to protect the lives and properties of the citizens of Nigeria and the Constitution is superior to all laws, including statutes, conventions, enactments and treaties.

iv. That the law enforcement agents acted within the law and in a situation of justifiable necessity.

v. That the Applicants' request for monetary compensation cannot be granted in view of the circumstances of the case.

The notice of preliminary objection was supported by a twelve-paragraph affidavit sworn to by one Mr. Nnamdi Ekwem, a Nigerian citizen of Gwandal Center, Plot 1015 Fria Close, Formella Street, Adetokunbo Ademola Crescent Wuse 2, Abuja Federal Republic of Nigeria, and the 1st Defendant relied on all the depositions in the affidavit.

In his legal arguments, the Counsel to the 1st Defendant formulated two issues for determination, namely;

a. Whether from the facts and circumstances of the case there exists reasonable cause of action and/or *locus standi* on the part of the Applicants to activate the judicial power of this Court.

b. Whether the claims of the Applicants in this suit are grantable having regards to the facts and circumstances of the suit.

With regard to the first issue, the 1st Defendant argued that a cause of action is a **"bundle or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make the claim for the relief being sought".**

To him, the fact on by the Plaintiff to support his claim must be one recognized by law as giving rise to a substantive right capable of enforcement against the Defendant. Where the application discloses no cause of action, the statement of claim (application) will be struck out and action dismissed.

The 1st Defendant further argued that a nexus exists between cause of action and *locus standi*.

Accordingly, where a party commences an action in which no reasonable cause of action exists, the *locus standi* of such party is affected and the consequence is that he cannot validly activate the judicial powers of this Court.

Citing the Nigerian case of **Oloriode Vs Oyebi (1984) 5 S C 1 at 28**, he posited that:

> ***"it is a basic principle of law that no action can lie where there is no reasonable cause of action and the requisite locus to sue is***

absent because these fundamental principles of law render the process incompetent"

He therefore concluded that from the originating process filed by the Applicants, the 1st Applicant has no locus to commence the action having done so for and on behalf of families of the persons shot dead by officers and men of the 2nd and 3rd Defendants. This is because, to him, a person suing on behalf of a deceased, must do so on behalf of the deceased estate. Thus, it is only the Administrators/ Executors and /or Probate Court as the case may be can legally empower a party suing on behalf of the deceased.

Counsel to the 1st Defendant also referred to the decision of this Court in **SERAP Vs FEDERAL REPUBLIC OF NIGERIA & ANOR. (ECW/CCJ/09/11)** delivered on 13th February, 2013 which held that:

"If for any reason the direct victim of the violation cannot exercise his or her rights, in particular, for being irreversibly incapacitated or having died as a result of the violation, the closest family members can do so, while assuming the status of direct victims".

Furthermore, to the 1st Defendant, the 1st Applicant is not a body known to law, that the burden of establishing that the Plaintiff is a body known to law rests on the Applicants. This burden of proof can only be discharged by production of the certificate of incorporation.

He relied on **FAWEHINMI Vs. N.B.A & 5 ORS (No 2) (1989) 2 NWLR (PT 105) 558 at 632**. He concluded that without this, the 1st Applicant, not being a juristic person, has robbed the Court of the jurisdiction to entertain the suit against the 1st Defendant.

The 1st Defendant raised other issues bordering on terrorism to show why the case is incompetent. These matters appear to hinge on substantive issues already canvased and will be dealt with in the course of the substantive suit if any.

With regard to issue (N°. 2), the 1st Defendant argued that the claim for monetary compensation for and on behalf of the deceased and the victims who are alive are not grantable if the 1st Applicants have no *locus standi* to commence this action and that the action must fail.

He therefore concluded and urged the Court to hold that the 1st Applicants lack the requisite *locus standi* and cause of action to commence the action against the 1st Defendant and that, in any case, their claims are by no means grantable.

3.2 The 2nd Defendant.

The 2nd Defendant also filed a preliminary objection to the suit (Document N°. 4). The 2nd Defendant's motion also raised objections similar to that of the 1st Defendant. He further contended that since the suit is for human rights violation, the 2nd Defendant being an organ of the 1st Defendant, ought not to be joined as a party, as suits of this nature can only be instituted against a State.

Arguing the motion, the Counsel to the 2nd Defendant submitted that only States are the appropriate Defendants in actions for human rights violation before this Court. He relied, *interlia*, on the decision of this Court in **ALIMU AKEEM Vs FEDERAL REPUBLIC OF NIGERIA** and urged the Court to follow its previous pronouncement in that case.

Accordingly, since the suit was instituted against a wrong party, (in this case the 2nd Defendant) the action is incompetent and cannot stand.

As earlier noted, the 2nd Defendant also questioned the standing of the 1st Applicant in bringing this suit as well as its legal personality to institute same. The 2nd Defendant therefore urged the Court to strike out the name of the 2nd Defendant from the suit.

3.3 The 3rd Defendant.

The 3rd Defendant also raised a preliminary objection (DOC N° 9) against the Applicants' suit. The major planks of the preliminary objection are as follows;

i. That the suit is academic and constitutes abuse of judicial process.

ii. That the 1st Plaintiff lacks *locus standi* to bring this suit on behalf of families of the deceased.

iii. That the 1st Plaintiff is not a legal person and, not being victim or relative of a victim of any alleged human rights violation, lacks the competence to institute this action;

iv. That the suit being incompetent, the Court lacks jurisdiction to entertain same. He cited the Nigeria case, **ONYEBUCHI Vs. INEC (2002) 8 NW L R (PT 769) P. 417 at 45**, where abuse of judicial process was defined as; ***"It is an abuse of Court process for Plaintiff to litigate again over an identical question which has already been decided against him. In the case of Domer Vs. Gulf Oil (Great Britain) 1975 119 S.J 392, it was held that where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the Court".***

The 3rd Defendant posited that the suit by the Applicants constitutes an abuse of Court process because the complaint before the National Human Rights Commission pursuant to sec 5(a) and (J) of the National Human Rights Commission, which necessitated a public inquiry, is the same as the present suit. That the Commission having awarded N10 million in respect of each of the deceased person and N5 Million Naira to each of the Applicants in this suit, divests the Court of jurisdiction to make any other award on the same subject matter as it will tantamount double portion, which the law frowns act. He urged the Court to dismiss the suit on grounds of abuse of process.

The 3rd Defendant also submitted that the suit is an academic exercise having regard to the reliefs sought by the Applicants as enumerated above. He argued that those reliefs were the same sought before Nigeria's National Human Rights Commission for which an award was made.

Relying on the Nigerian cases of **PLATEAU STATE GOVERNMENT Vs. AG. OF THE FEDERATION (2006) 3 NW L R (PT 967) P 346 at 419. ADEOGUN Vs. FASHOGBON (2008) 1 7 NWLR (PT 1115) 149 at 180-181 and AGBAKOBA Vs. INEC (2008) 18 NWLR (PT 1119) P. 489 at 546- 547**, he urged this Court to decline jurisdiction as it would amount embarking in a futile exercise since the suit is merely academic and has no practical utilitarian value to the Plaintiffs.

On the issue of *locus standi* of the 1st Applicant, he submitted on the same line with the 1st Defendant that the 1st Applicant lacks a standing to institute this suit since **"is not qualified under our laws to present this claim".**

He relied on **SERAP Vs. FEDERAL REPUBLIC OF NIGERIA (suit no: ECW/CCJ/APP/09/2011 delivered on 13/12/2014.**

He concluded that the issue of absence of *locus standi* goes to issue of jurisdiction and that since the Applicant lacks standing to institute the proceedings, the Court lacks jurisdiction to hear same.

3.4 <u>The Applicants Reply.</u> .

The Applicants filed a counter affidavit to the affidavit of the Defendants. He opposed the granting of the objections of the Defendants (see documents, 7, 11, and 12).

First, in his counter affidavit in support of Reply to the Applicants to the preliminary objection, the 1st Applicant exhibited its CERTIFICATE OF INCORPORATION (marked exhibit 1), the process of registration with the Corporate Affairs Commission (exhibit 2) and the Constitution of the 1st Applicant (exhibit 3).

The first Applicant argued that it was suing in a representative capacity and on behalf of the relatives of the deceased which it has exhibited on the face of the record. Accordingly, **SERAP Vs. FEDERAL REPUBLIC OF NIGERIA (SUPRA) does** not apply.

The 1st Applicant also argued that it was not a party to the petition before the National Human Rights Commission as shown on the processes before this Court and cannot be engaging in academic exercise. He also contended that this could only avail to the Respondents especially the 3rd Respondent/ object or if it was raised in the substantive suit. He cited the decision of this Court in **ESSIEN Vs. REPUBLIC OF GAMBIA & ANOR (2004-2009) CCJ ELR 95 at 108.**

Furthermore, the 1st Applicant argued that the argument that this suit is an abuse of Court process and an academic exercise on an account of similar suit having been determined by the National Human Rights Commission, is

misconceived. He relied on Article 10(d) of the Supplementary Protocol of this Court, 2005 as the only condition precedent to invoking the jurisdiction of this Court.

In its totality, the 1st Applicant urged this Honourable Court to dismiss the objections of the Defendants in its totality.

4. Analyses of the Court.

Having considered the facts of this case, the preliminary objections raised by the Defendants and the reply of the Applicants and the legal arguments in support, the Court will now consider the issues that require serious consideration in the preliminary objections before delving into the substantive matter, if necessary. We hold that there are four major issues to be determined at this stage, namely:

a. Whether the first Applicant is a legal person and not being a victim or related to a victim, have a standing to institute the present action on behalf of the deceased victims.

b. Whether the facts put forward by the Applicants have disclosed any cause of action.

c. Whether the action as presently constituted is an abuse of Court process and/ or an academic exercise as alleged by the 3rd Defendant.

d. Whether the 2nd Defendant and by implication the 3rd Defendant are proper parties to this suit. The Court will briefly consider these issues seriatim.

a. Whether the 1st Applicant is a legal person and not being a victim, or related to a victim have a standing to institute the present action?

The Defendants raised in their objection the legal capacity of the 1st Plaintiff to institute the present action. They rightly contended that *locus standi* is a condition precedent to the determination of a case on its merit. Where the Plaintiff have no standing to bring the action, the suit is incompetent and divests the Court of jurisdiction to entertain same. They further

contended that where standing order is lacking the action must fail. They relied in the case of **ODAFE Vs. ECOWAS COUNCIL OF MINISTERS & 2 ORS SUIT N°: ECW/CCJ/APP/05/07** where this Court held that since the Applicant has not personally or by his organization suffered any harm he does not have the *locus standi* to bring the application and it was thus declared inadmissible.

They also relied in **SERAP Vs. FEDERAL REPUBLIC OF NIGERIA SUIT N°: ECW/CCJ/APP/09/11, RULLING N° ECW/CCJ/RUL/ 03/ 14,** where this Court stated the law as follows:

a) In cases of violation of human rights, only the victims may have access to the Court;

b) Aside from cases of collective interests, NGO's cannot substitute the victims;

c) Non-victims of violations must receive prior authorization to act on behalf of victims or their closest relatives.

The issue of legal capacity is germane in all proceedings. It is trite law that proof in civil cases including, human rights, the standard of proof is on preponderance of evidence and the burden is usually on the person who will fail where no evidence is led. In their counter affidavit to the Defendant's preliminary objections, the 1st Applicant annexed its certificate of incorporation (Annexure 1) and the process of its registration. The certificate of incorporation is a *prima facie* evidence of the personality of the 1st Applicant who is registered as a non-governmental Organization (NGO). Having produced their certificate of incorporation, it is for the Defendants to dispute the authenticity or otherwise of that certificate. Not having done so, this Court will presume the regularity of that certificate as evidence of the legal personality of the 1st Plaintiff and we so hold.

Aligned to the above is the question of *locus standi*. The jurisprudence of this Court as stated in **SERAP** case (SUPRA) and other cases is to the effect that it is only the direct victims of human rights violation that have the standing to move this Court.

However, exceptions to this rule exist. These include but not limited to cases of collective interest (usually referred to as public interest litigations)

and the non-victims receiving authority to act on behalf of the victims or their close relations.

It is noteworthy that public interest litigations refer to cases in which Courts allow volunteers like Lawyers, Citizen Petitioners, NGOs to bring actions on behalf of some victimized groups who ordinarily are without sufficient means of access to legal services or justice.

In the instant case, the 1st Plaintiff has established that it is a registered NGO authorized by its constitution to engage in public interest litigation. Similarly, on the face of the Application, it is described as suing "for and on behalf of families of the persons shot dead by the officers and men of the 2nd and 3rd Defendants.

These victims were also enumerated on the face of the Application. The eight victims enumerated are deceased and cannot maintain this action. The burden of proving lack of authority on the part of the 1st Applicant to institute this action on behalf of the deceased victims rests on the Defendants. It is not sufficient merely to raise lack of authority without more. In this regard the principles in SERAP's case supports this suit as it can be regarded as one of the exceptions to the rule that only victims of human rights violation can sue.

In **ADESANYA VS. PRESIDENT OF NIGERIA, (1981) 1 All NLR 1 at 20** the Supreme Court of Nigeria, Per Fatayi-Williams CJN, rightly observed as follows:

> **"I take significant cognizance of the fact that Nigeria is a developing Country with multi-ethnic society and a written Federal constitution where rumor-mongering is the past-time of the market places and construction sites to deny member of such a society who is aware or behaves or is led to believe that there has been an infraction of any provisions of our constitution, or that any law passed by any of our legislative houses, ... is unconstitutional, access to a Court of law to hear his grievances on the flimsy excuse of lack of insufficient interest is to provide a ready recipe for organized disenchantment with the judicial process".**

In the Nigerian context, it is better to allow a party to go to Court and to be heard than to refuse him access to our Courts. Non-access to my mind, will stimulate the free for all in the media as to which law is constitutional and which law is not. In any case our Courts have inherent powers to deal with vexations litigations and frivolous claims.

Although this dictum is related to the Nigerian society, it is applicable mutatis mutandis to ECOWAS States to whom the jurisdiction of this Court applies. More pointedly, **THE SUPREME COURT OF INDIAN IN FERTILIZER CORPORATION KAMAGER UNION VS. UNION OF INDIA (1981) A I R (SC) 344 succinctly** captured the modem Jurisprudence on *locus standi* as follows:

> ***"Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law, if a Plaintiff with a good cause is turned away merely because he is not sufficiently affected personally, that could mean that "some government agency is left free to violate the law. Such a situation would be extremely unhealthy and contrary to the public interest. Litigants are unlikely to spend their time and money unless they have some real interest at stake and in some cases where they wish to sue merely out of public spirit, to discourage them and thwart their good intentions would be most frustrating and completely demoralizing"***.

The activities of the Government and its agencies including law enforcement agents that violate the rights of individuals, especially the right to life is a matter in which the public can legitimately be interested, as in this case. The 1st Plaintiff is not a busybody as the Defendants would want this Court to believe and we so hold.

This Court is not devoid of its jurisprudence in the area of *locus standi*. In **SERAP Vs. PRESIDENT, FEDERAL REPUBLIC OF NIGERIA & UBEC (2010) CCJ L R P.119**, this Court held the view that taking into account the need to reinforce access to justice for the protection of human rights, an NGO duly constituted can sue an action on behalf of victims of abuse and all they need to show is that there is a public right worthy of protection. Similarly, in **SERAP Vs. PRESIDENT, FEDERAL**

REPUBLIC OF NIGERIA & 8 ORS (2010) CCJ LR 231 at 248, this Court observed and rightly too that;

> ***"There is a large consensus in international law that when the issue at stake is the violation of rights of entire communities as in the case to damage to the environment, access to justice should be facilitated"***

In this regard, where the right violated as in this case, the right to life of community of persons who are deceased, as in this case, access to justice should be facilitated because the outcome is very likely to impact positively on the activities of law enforcement agents who sometimes act overzealously.

Based on the foregoing, it is the considered view of this Court that the 1st Applicant can institute and prosecute the present action. This position is reinforced by the fact that the 2nd to 12th Applicants are direct victims of the alleged violation of human rights, shall we also deny them capacity and standing to prosecute this claim. We think not.

b. The next issue for determination in this objection is whether the facts put forward by the Applicants disclose any cause of action.

A cause of action can be defined as a matter for which an action can be brought, a legal right predicated on facts upon which an action may be sustained. It is the right to bring a suit based on factual situations disclosing the existence of a legal right. It is often used to signify the subject matter of a complaint or claim on which a given action or suit is grounded whether or not legally maintainable.

In law, a cause of action is a set of facts, a combination of facts giving rise to a claim or this right to sue. The ground for this action is the alleged violation of the Applicants' human rights. The Applicants have alleged that they were shot at, by the agents of the 1st Defendant which resulted to injury to the 2nd to the 12th Applicants and the death of the persons named and represented by the 1st Applicant as suing on behalf of the relatives of the deceased.

It is trite law that whether a cause of action exists or not, can only be gathered from the statement of claim and not defense. A cause of action of course can be extinguished by effluxion of time. This is usually provided for by statute, see for example Article 9(3) of the Supplementary Protocol of the ECOWAS Court of Justice 2005. The Applicants have alleged violation of their human rights. The Jurisdiction of this Court in relation to human rights is predicated on Article 9 of Supplementary Protocol A/S P.1/ 01/05 provides as follows:

> **"The Court shall have Jurisdiction to determine cases of violation of human rights that occur in any member State".**

The Plaintiffs have alleged the violation of their various rights under the African Charter on Human and Peoples' Rights and this raises a fundamental issue of violation of human rights against the 1st Defendant and this is sufficient cause of action. Although the Applicants have a cause of action, this does not automatically tantamount to proof of the allegations contained in the Application.

Accordingly, from the narration of facts presented by the Applicants, the Court holds that they have made out a cause of action necessitating the Court's adjudication.

One of the issues raised by the 3rd Defendant in its preliminary objection is that:

> **"The suit is an academic exercise and constitutes an abuse of judicial process. The basis of this plea according to the 3rd Defendants is that the suit is an abuse of Court process in that the suit is the same with the complaint before the National Human Rights Commission (NHRC) lodged on 24th September, 2013 (see Exhibits DSS 1 and DSS 2 of the Affidavit in support) and that NHCR has already rendered a ruling and as such the instant suit became inescapably doomed to fail and as such constitute abuse of process".**

The Applicants herein are seeking for damages which have been awarded to them by the NHRC. In the same vein the 3rd Defendant opined that the suit is merely an academic exercise because the reliefs sought by the

Applicants before this Court in the same as the orders made by the NHRC in its ruling of 17th April, 2014.

However, curiously, the 3rd Defendant neither alleged nor established that the Applicants were parties to the petition or that the NHRC is a Court of law. Be that as it may, even if these were established, this could not have been a bar to the exercise of this Court's jurisdiction. This is because Article 10(d) of the Supplementary Protocol relating to the Community Court of Justice with regard to access to the Court provides that access is open to:

> "Individuals on application for relief for violation of their human rights, the submission of which shall:
>
> i. Not be anonymous; nor
>
> ii. Be made whilst the same matter has been instituted before another international Court for adjudication."

This Court has reiterated that it cannot impose other extraneous conditions on litigants other than the ones provided for in this Protocol. Accordingly, we hold that the Applicants have satisfied the conditions precedent for access to this Court.

Consequently, the Application is neither an abuse of Court process nor an academic exercise.

c. The next issue that is for determination is whether the 2nd Defendant ought to be a party to this. One of the grounds of objection by the 2nd Defendant is that:

> **"The application in the nature of this suit ought to be made or instituted against the 1st Defendant (The Federal Government of Nigeria) alone. Her main plank of complaint is that this type of suit should have been instituted against the 1st Defendant, a State as reiterated by this Court in ALIMU AKEEM vs. FEDERAL REPUBLIC OF NIGERIA JUDGEMENT N°: ECW/CCJ/APP/105/11. They concluded that once an action is for human rights violation, the application shall be made against the State, irrespective of the organ of State which committed the alleged infraction"**.

Article 9(4) of the Supplementary Protocol (A/SP.l/01105) amending protocol (A/P.l/7/91) relating to the Community Court of Justice upon with the human rights jurisdiction of this Court is predicated provides that the Court shall

> **".... Have jurisdiction to determine cases of violation of human rights that occur in any Member States"**.

The Court has emphasized in a long line of cases, a few of which will be referred to here that in cases alleging violation of human rights brought before it, the appropriate Defendant is a Member State of the Economic Community of West African States. Accordingly, neither individuals, agents nor organs of a Member State can be sued as Defendants before this Court for human rights violation. In its decision in suit **N°: ECW/CCJ/APP/04/09, PETER DAVID VS. AMBASSADOR RALPH UWECHUE**, this Court held that in dispute between individual on alleged violation of human rights, the natural and proper venue before which the case may be pleaded is the domestic Court of State party where the violation occurred. It is only when at the national level that there is no appropriate and effective forum for seeking redress against individuals that the victim of such offences may bring an action before the international Court, against the signatory State for its failure to ensure the protection and respect for the rights allegedly violated.

See also the decision **in CDD Vs. MAMADOU TANDJA (2011) CCJ L R 103 especially at 115-116**.

This Court has consistently maintained the position and have no reason to deviate from it.

Accordingly, since this Court has no jurisdiction to entertain disputes between individuals on alleged cases of human rights violation, the preliminary objection of the 2nd Defendant on this Count is upheld. The Court therefore holds that the 2nd and the 3rd Defendants, not being State parties to the ECOWAS Treaty, are not proper parties in this suit. The names of the 2nd and the 3rd Defendants are hereby struck out from the suit.

With regard to the 1st Defendant, his ground of preliminary objection are hereby dismissed and the Court holds that the case against her is admissible. The Court will now proceed to consider the case against the 1st Defendant on the merits.

1. THE SUBSTANTIVE CASE

1.1 The Plaintiffs case. For the purpose of clarity and emphasis, we shall restate the facts and circumstances leading to this application, the claim of the Applicants and the evidence in support.

The 1st Applicant described as a registered Non -Governmental Organization (NGO) in Nigeria, brought this Application in a representative capacity as representatives of eight deceased persons named (therein) and the 2nd to 12th Applicants, against the 1st Defendant and the two others whose names have been struck out. Their right are enshrined in Articles 3, 5, 7 and 8 of the Universal Declaration of Human Rights, Articles 5, 6 and 7 of the African Charter on Human and Peoples' Rights.

The facts of the case as alleged by the Applicants is that on Friday 20th September, 2013 at about 2am, armed men comprising officers and men of the Nigerian Armed Forces and the Department of State Security Services (DSS), agents of the 1st Defendants, raided an uncompleted building at Aderemi Adesoji Crescent Apo, Zone E, on the alleged suspicion that there are weapons buried in the vicinity by members of the BOKO HARAM terrorist group and that some of the terrorists are occupying the building.

Owing to the alleged suspicion, the security agents of the 1st Defendant, the Federal Republic of Nigeria and a Member State of the Economic Community of West African States (ECOWAS), went into the building. They were heavily armed and fired several shots into the building without any warning or regard to the standard rules of engagement.

At the time of the raid, the victims who were deep asleep were awakened by the gunshots and they ran for their life. The deceased Applicants and the living 2nd - 12th Applicants have been occupying this premises and have been paying N200 (Two hundred Naira) to the security guard of the premises.

After the operations, the Security agents of the Defendant knew that some Civilians had been injured, left the scene, abandoned the Applicants who were bleeding profusely without medical aid. Seven of the victims bled to death, while 2nd to 12th Applicants, who suffered gun-shot wounds, survived till 8:00am. When members of the Nigerian Police Force and Nigerian Security and Civil Defence Corps came around 8.00an and evacuated them (both the dead and injured) to the Asokoro General Hospital, one of the victims, **Nasiru Adamu** later died at the hospital on 23/09/2013 as a result of the gunshot injuries he sustained.

The Applicants specifically alleged circumstances culminating in the violation of the Applicants' rights as follows:

a. The agents of the Defendant did not enter the building but shot from outside, without provocation.

b. The Applicants, out of fear, ran out of the building unarmed and were shot individually.

c. The agents of the Defendant were directing at them when they ran outside the building. The said agents left the Applicants in the pool of their own blood without first aid or medical attention.

d. No weapons were found on the premises when the Applicants were shot.

e. No search was conducted in the premises prior to the shooting or after wards and no attempt has been made up to the time of initiating this proceeding to recover any weapon allegedly buried by the Boko Haram Terrorist group. No Weapon was also recovered anywhere in connection with the Applicants.

Following the death and injury caused by the Defendant, the Applicants (the 1st Applicant suing for and on behalf of the families of the deceased victims named in this process) brought this suit, seeking the following relief from this Court:

1. **A DECLARATION,** that the Applicants (as law abiding citizens) are entitled to right to life, freedom of movement, freedom of

association, right to human dignity, right to integrity of their persons and the security of their person.

2. A **DECLARATION** that the shooting of the Applicants by the officers and men of the Defendants while raiding a supposed BOKO HARAM camp on the 23rd day of September, 2013 thereby causing the death and/or permanent bodily injuries to the Applicants constitute a flagrant abuse of the Applicant's fundamental Human Rights of life, dignity of the human persons, integrity and security of the human person, as guaranteed under international law under which this application is brought (Articles 3, 5 7 and 8 of UDHR, 5, 6 and 7 ACHPR, Articles 2 of ICCPR, Article 14 of the Convention Against Torture and other cruel, inhuman and degrading treatment or punishment etc.) and are entitled to reparation and compensation for the infringement of those rights.

   i. AN ORDER directing the Defendant(s) to pay compensation to the families of the deceased and surviving victims of the killings in the manner state below:

   ii. The sum of USD $100,000,000 (One hundred Million United States Dollars only) to the families of each of the eight deceased victims.

   iii. The sum of USD $10,000,000.00 (Ten Million United States Dollars only) to each of the surviving victims for the injuries suffered by them.

   iv. An ORDER directing the Defendant to settle the cost of this action as incurred by the Applicants.

   v. Any ORDER further Orders the Court may deem fits to make.

1.2 EVIDENCE IN SUPPORT OF THE APPLICANT CASE.

The Applicants relied on documentary evidence provided by them for the purpose of proving their case.

These are as follows:

i. Medical Report submitted to the Senate Joint Committee on National Security and Intelligence and Judiciary, Human Rights and Legal matters (Senate Committee Report) by Medical Doctors at Asokoro General Hospital contained in page 49 and 50 of the Joint Senate Committee Report on Investigation into alleged killings in Apo, Abuja.

ii. A copy of the Senate Joint Committee Report.

iii. Death certificate of the deceased namely,

a. Nura Abdullahi
b. Ashiru Musa
c. Abdullahi Manman
d. Buhari Ibrahim
e. Suleiman Ibrahim
f. Musa Yobe (not issued)
g. Ahmadu Musa
h. Nasir Adamu

The death certificate of the 8th deceased contains details of the cause of death of all the deceased, see PP 2, 3, 4, 6, 8, 10, 28 and 29 of the FOLDER CONTAINING DEATH CERTIFICATES AND PHOTOGRAPHS OF THE APPLICANTS.

iv. Report of the Joint Senate Committee on National Security and Intelligence and the judiciary, Human Rights and legal Matters on the Investigation into the alleged Extra- Judicial Killings in Apo, Abuja.

v. Newspaper publications regarding the Apo Killing, namely; Weekly Trust, Sunday Trust, The Guardian Newspaper, Vanguard all authenticated and certified by the National Library of Nigeria.

2. THE APPLICANT'S ARGUMENT AND PLEAS-IN-LAW.

In an attempt to prove their case, the Applicants argued as follows:

1. That Nigeria accepts and enforces international customary law regarding the well-established legal Maxim "*Ubi jus ibi remedium*".

i.e. where there is a legal wrong, there is a remedy. He cited Nigeria cases of **BELLO VS. ATTORNEY -GENERAL OF OYO STATE (1986) J NWLR 528, NEMI VS. ATTORNEY-GENERAL OF LAGOS STATE &ANOR (1996) 6 NWLR (P 452) A 42.**

2. That the death and injuries caused the Applicants are in contravention of Articles 4, 5 and 7 of the African Charter on Human and Peoples' Rights.

3. That the action of the Defendant(s) violated Resolutions 2,3,4, and *5* of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth UN Congress on the prevention of crime and the Treatment of offenders, adopted at Havana, Cuba in August 27th to September 7th 1990 and Articles 2 and 5 of the Code of conduct for Law Enforcement Officials adopted by General Assembly Resolution 34/169 of 17th December, 1979.They argued that by these provisions which bind the Defendant, the agents of the Defendant ought to use reasonable force in the execution of their operation. They ought to have used non-lethal force in incapacitating members of BOKO HARAM in the circumstances leading to this application.

4. That even though the Defendant's agents argued before the Senate Committee that they were fired at and shot back in retaliation, they ought to have known by their intelligence gathering that there were civilians occupying the said building. They also asserted that there is no evidence of used canisters by alleged members of the BOKO HARAM to prove the "heavy gunfire" as contained by the Defendant's agents in their press release forming the fulcrum of the Defendant's defence.

5. The Applicants further opined that in international law as evidenced by the basic rules of engagement referred to in (iii) above, the use of firearm is an extreme measure that should not be applied against Children and, if used at all, it should be in extreme situation only; like where the suspect offers armed resistance or otherwise jeopardizes the lives of others. The agents of the Defendant (originally 2nd and 3rd Defendants) alleged they were shot at first and that they recovered a

magazine from the site of the raid. None of their men were injured-while eight Civilians were shot dead and eleven others sustained various degrees of gun-shot wounds.

6. The Applicants also made references to International Humanitarian law principles governing armed conflict to support their case.

7. The Applicants further submitted that by virtue of Article 9(1) (d) and 10(c) and (d) of the Supplementary Protocol (A/SP.1/01/05) relating to the Community Court of Justice of ECOWAS, the Court has power to hear applications bordering on enforcement of human rights contained in the African Charter on Human and Peoples' Rights as well as other international treaties, Declarations and Conventions; citing the decision in **JERRY UGOKWE VS. FEDERAL REPUBLIC OF NIGERIA AND ANOR (2004-2009) CCLR 37 (A) 49 TO 52.**

8. That by virtue of the Defendant being a signatory to the UN General Assembly Resolution 40/34 of November,1985 on the Declaration of the Basic Principles of Justice for victims of crime and victims of abuse of power, the Defendant accepts that victims of fundamental human rights abuse are persons who:

> **"Individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative in Member States".**

Accordingly, victims include, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered harm in intervening to assist victims in distress or preventing victimization. The Applicants further submitted that the complaints made in the Application are clearly covered by the African Charter on Human and Peoples' Rights and S.33 of the Constitution of the Defendant which guaranteed the right to life except in circumstances permitted by law.

They drew the Court's attention to the Senate Report, which states that in this particular case, the operations of the agents of the Defendant's "leaves much to be desired" and that the "Apo incident" is tragic and regrettable".

9. That the Defendant has a duty in International Law to make a reparation.

They urged the Court to sustain their contention and hold the Defendant liable in the course of enforcing the law. They referred to the decision of this Court in **EBRIMAH MANNEH VS. THE REPUBLIC OF THE GAMBIA (2004-2009) CCLR 181 AT 195**. Where the Court relied on the European Court decision in **SELMONNI VS. STATE OF FRANCE (2005) CHR 237** and **MIROSLAV VS. REPUBLIC OF CROATIA (2005) CHR 429.**

In conclusion, they urged the Court to grant all reliefs sought for in this application.

3. THE DEFENDANT'S CASE

The Defendant, in response to the claim against her, filed a statement of defence (Document No.3) apparently out of the time stipulated by the Rules of this Court. Realizing the gaffe, the Defendant now filled a motion on notice seeking for enlargement of time within which to file her defence. The prayer was granted and issues were thus properly joined by the parties.

In their statement of Defence, the Defendant denied violating the rights of the Applicants in any manner whatsoever. The main planks of their denial of liability are as follows:

a. That terrorism cannot be justified under any circumstances and must be combated in all forms.

b. That pursuant to this Member States of the Organization of African Unity (OAU) now African Union (AU) on the 13th of July, 1999 promulgated the Prevention and Combating of Terrorism. That the Convention was ratified by the Defendant on April 28, 2002.

c. That Article 4(2) of the Convention on the Prevention and Combating of Terrorism provides that:

> **"State parties shall adopt any legitimate measures aimed at preventing and combating terrorists' acts in accordance with the provisions of this Convention and their respective national legislation".**

d. That the Convention imposed on Members States the duty of preventing their territories from being used as a base for planning, organization or execution of terrorist acts.

e. That pursuant to the above provision, the terrorism (Prevention) Act 2011 was enacted by the National Assembly of Nigeria, which made provisions for the prevention, prohibition and combating of acts of terrorism and the financing of terrorism in Nigeria. That the Nigerian Terrorism Act of 2011 was amended by the terrorism (Prevention) (Amendment) Act 2013, under which the responsibility for the gathering of intelligence and investigation of offences constituting acts of terrorism was vested in the Nigerian Law Enforcement and Security Agencies.

f. That S. 40 of the Terrorism Prevention (Amendment) Act 2013 provides that law enforcement and security agencies include the Nigerian Armed Forces.

g. That intelligence gathered by law enforcement and Security agencies in the Country confirmed increased activities of suspected BOKO HARAM Terrorist (BHT) in certain places within and around Apo, Karu, Mararaba (around Abuja FCT) and Suleja areas. Intelligence reports further confirmed that suspected BOKO HARAM members fleeing Borno State and other parts of the North East of Nigeria had taken refuge in uncompleted building in the capital city of Abuja from where they engaged in menial jobs such as Hawking, Keke Napep Riding, Selling of water, Shoe shinning and Driving of Taxis in Abuja.

h. Based on the development above, the Army Garrison and Guards Brigade activated various operations (one of which was the

September, 20 2013 operation) to rid the city of criminals and Boko Haram elements. These two formations support the Department of State Security Services (DSS) operations in Abuja from time to time as is the case with other Nigerian Army Formations across the Country.

i. On Friday, 20th September, members of the Nigerian Army and Department of State Security Services (DSS) (who were hitherto the and the 3rd Defendants and whose names were struck out from the suit at the preliminary objection stage) went to an uncompleted building at Aderemi Adesoji Crescent, Apo Zone E on the alleged suspicion that there were likely weapons buried in the vicinity by members of the BOKO HARAM Terrorist Group and that some of the terrorists were occupying the building. As the members of the Army and State Security Service approached the vicinity, several gunshots were fired at them from the building in response to which they fired gunshots into the building as a means of self-defence.

j. They further contended that as a normal cause of events following a shootout, there is more often than not the loss of lives within the vicinity. Regrettably, this was not an exception as some persons were killed and wounded while the operation was on.

k. Further to the raid, the Defendant deployed members of the Nigerian Security and Civil Defence Corps to convey the Applicants and the deceased to Asokoro Hospital for appropriate medical care. The officers could not carry out this assignment until day break at about 8.00am on September 21, 2013 to avoid being harassed or attacked by aggrieved members of the Community.

l. That the Government of the Defendant is committed to the security of lives and properties of Nigerians. There is no action or policy of the Federal Government or any of its agencies that encourage murder of any section of Nigerians as the Constitution of the Federal Republic of Nigeria recognizes the right to life of every Citizen.

m. That the Defendant cannot be said to have violated Articles 3,5,7 and 8 of the Universal Declaration of Human Rights or Articles 5,6 and 7 of the African Charter on Human and Peoples' Rights because the Defendant has a "sacrosanct" duty to protect the lives, properties and well-being of citizens of the Country.

n. That the Senate Report commended the agents of the Defendants for averting what would have been a major terrorist attack in the City of Abuja in view of the fact that three (3) Members of the sect were arrested.

The 2nd and 3rd Defendants (whose names have been struck out) also filed the statements of defence in the same line with the Defendant. However, since they are no longer parties, the processes filed by them are of no consequence to the determination of this Application.

4. ARGUMENTS BY THE DEFENDANT.

In their argument in law, the Defendant formulated two issues for determination in this application namely;

i. Whether the Defendant(s) are in breach of International conventions and law such as the African Charter on Human and Peoples' Rights and other International Conventions relied on by the Applicants.

iii. Whether in the circumstance of this case, the Applicant has a cause of action and *locus standi* to institute this action.

With regard to issue nº 1, she submitted as follows:

i. That the Constitution of the Federal Republic of Nigeria 1999 provides for the Supremacy of the Constitution over all other laws.

ii. That the Constitution also recognizes the right to life under s.33 thereof thus:

> **"Every person has a right to life, and no one shall be deprived intentionally of his right of life".**

Furthermore, it was submitted that the African Charter on Human and Peoples' Rights in Article 4 provides that;

> **"Human beings are inviolable, every human being shall be entitled to respect to his life and integrity of his persons. No one may be arbitrarily deprived of his right"**.

Moving further, the Defendant cited S.33 (2) of the Constitution of Nigeria 1999 relating to the exceptions to the right to life as follows;

> A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use to such extent and in such circumstances as are permitted by law, such force as is necessary-
>
> a. For the defence of any person from unlawful violence or for defence of property.
>
> b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or
>
> c. For the purpose of suppressing a riot, insurrection or mutiny. He specifically defined insurrection as distinct from an offence connected by Mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government (underlying theirs).

The Defendant argued that the activities of the BOKO HARAM sect in her territory constitutes an act of insurrection, and as such the right to life as guaranteed in the Defendant's Constitution is not absolute but subject to the suppression of insurrection.

> o. That the Defendant is committed to respecting the right to life, freedom of movement, freedom of association, right to human dignity, right to integrity and right to the security of Nigerians. That the Defendant is also committed to ensuring the protection of human rights contained in all international human rights instruments.
>
> p. Furthermore, that the National Assembly of the Defendant set up the Committee to investigate the circumstances leading to the

death and injury of the Applicants and others as contained in the Senate Committee Report on the Investigation on alleged Extra-Judicial Killing, in Apo Abuja, which report commended the Defendant in many respects.

q. That the Defendant is taking steps to strengthen Security to ensure the protection of lives and property of its citizens; and that the Defendants took the injured for treatment on its own expense. Accordingly, to the Defendant, these acts are "responsive and noble acts expected of a democratic Government" and urged the Court to resolve issue one in favour of the Defendant and refuse the reliefs sought by the Applicants.

With regard to issue No 2, i.e. whether in the circumstances of this case, the Applicant has a cause of action and *locus standi* to institute this suit, the Defendant submitted as follows:

i. That a cause of action is a bundle or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make the claim for the relief being sought. The factual situation must be recognized by law as giving rise to a substantive right capable of enforcement. Where an application discloses no cause of action, the claim must be struck out and the action dismissed.

ii. It is true that the African Charter on Human and Peoples' Rights and the Defendant's Constitution confer certain human rights on Citizens. He cited the case of **ABACHA Vs. FAWEHINMI (2002) 6 NWLR (PT 660) 228 at 289** which he described as the *locus classicus* on the applicability of treaties, particularly the African Charter on Human and Peoples' Rights to Nigeria.

iii. The Defendant recognized that by virtue of Article 4 of the African Charter on Human and Peoples' Rights, human beings are inviolable and are entitled to respect to life and integrity of their person and no one may be arbitrarily deprived of his right to life.

iv. The Defendant also contested the *locus standi* of the 1st Plaintiff to institute the action against the Defendant on behalf of the

deceased. Citing the case of **ODAFE OSERADA Vs. ECOWAS COUNCIL OF MINISTERS & 2 ORS SUIT N^{O}: ECW/CCJ/APP/05/07** where this Court decided that since the Applicant has not personally or by his organization suffered any harm, he does not have the *locus standi* / cause of action to bring the application. The Application was thus held inadmissible. The Defendants also argued that the right to sue can only be conferred by statute or by the Constitution or Customary Law or Contract and concluded that the Applicant lacks *locus standi* to institute the action as no right was conferred on it to do so. Thus, the 1st Applicant has not shown that its own interest is at stake, but purports to enforce the rights of persons who have not instructed it to represent them.

That this Court in **SERAP VS. FEDERAL REPUBLIC OF NIGERIA, SUIT N^{O}: ECW/CJ/APP/09/11** have held that:

a. In Cases concerning the violation of human rights, only the Victims may have access to the Court,

b. Aside from cases of collective interests NGOs cannot substitute the victims

c. Non-victims of violation must receive prior authorization to act on behalf of the victims or their closest relatives.

The Defendant submitted that the 1st Applicant have no cause of action because no wrong was done to it. She submitted that on the strength of SERAP's case above that none of the parties to this application is a victim of human rights to violation and urged the Court to hold that the monetary and other claims of the Applicants disclose any cause of action and no *locus standi* to which they can be predicated upon and urged the Court to dismiss the application as lacking in merit.

In conclusion, the Defendant urged the Court to hold as follows:

i. That the activities of the BOKO HARAM sect constitute an armed uprising against the authority of the Defendant and a threat to lives, property and well-being of Nigerians.

ii. That the Apo incident was an urgent and necessary operation carried out to pre-empt a planned attack on some location in Abuja

iii. That it cannot be said that the Defendant failed to provide protection and exercise due diligence before, during and after the raid.

iv. That the Defendant provided reasonably adequate treatment to victims of the raid of the uncompleted building at Apo Zone E.

v. That the Defendant, promptly took steps through the Police and Civil Defence to convey the dead and the wounded to the hospital and should be commended.

vi. That the Defendant did not in any way breach or violate the fundamental human rights of the victims of the raid on 20th September, 2013 or of the Applicants. In Particular, their right to life, dignity of the human person guaranteed under the Constitution of the Federal Republic of Nigeria 1999, The African Charter on Human and Peoples' Rights, Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights.

vii. That the Applicants lack both a cause of action and *locus standi* to institute this suit.

5. DISCUSSION AND ANALYSIS BY THE COURT

The facts of this case as pleaded by the Applicants and the Defence are not substantially in dispute. The allegations of the Applicants is that on the 20th of September, 2013, the armed agents of the Defendant invaded an uncompleted building occupied by the Applicants, killed some of the Applicants (as named and represented by the 1st Applicant) and wounded the 2nd to the 12th Applicant thereby violating their right, inter-alia, to life and integrity and dignity of the human person.

The Defendant's admitted that they actually invaded the premises as alleged, shot, killed and wounded some persons who were suspected to be members of the dreaded Boko Haram Terrorists. However, their defence is that

when they approached the building in question, they were first shot at by the occupants and they returned fire which resulted in some deaths. Accordingly, their contention is that there was no violation of the rights of the Applicants in view of the fact that they acted in self-defence and out of necessity.

It appears from the narration of facts by both parties that after the incident some groups lodged various complaints to the National Human Rights Commission of the Defendant, who requested the Nigerian Army (Security Agents of the Defendant) to respond to the complaints. The Human Rights Commission on the 7/04/14 delivered a ruling as follow:

i. Awarded the sum of N10 Million (Ten million Naira) as compensation for each of the deceased or N80 million (Eighty Million Naira) in respect of the eight deceased persons to be paid by the Defendant.

ii. Awarded the sum ofN5 million (Five Million Naira) to each of the injured survivors to be paid by the Government of the Federation (The Defendant)

iii. Ordered the Honourable Attorney General of the Federation and Minister of Justice to ensure evidence of payment is lodged with the Registry of the Human Rights Commission within thirty days of the decision.

Similarly, the Senate of the National Assembly of the Defendant carried out an investigation in which they made a report attached to this proceedings. The Report suggested that some persons arrested by the Security Agents of the Defendant confessed to being members of the Boko Haram Sect, who intended causing mayhem in the Federal Capital Territory, Abuja. In the Report, Agents of the Defendant explained that the invasion of the uncompleted building at Apo Abuja was based on proactive intelligence gathered by the Security Agencies and that standard rules of engagement were applied where Terrorists attack law enforcement agencies.

Although this Court is not bound by the Report of either the National Human Rights Commissioner the Senate Report of the Defendant, it is noteworthy that majority of the findings and recommendations contained in the latter

report was not supported by any evidence properly so called. The Security Agencies were merely interviewed and whatever they said were taken hook line and sinker. It equally appears that the Applicants were not parties properly so called, nor were any of the surviving Applicants interviewed by the Senate investigating panel with regard to their own side of the story.

There is consensus on the part of the Applicant and Defendant as to the events of 20th September 2013 that necessitated the current action; namely:

That the Security Agents of the Defendant acting on presumed intelligence report invaded an uncompleted building at Apo, Abuja, Nigeria and in the course of their operations killed the deceased named in this suit as represented by the first Applicant and also injured the 2nd to the 12th Applicants. However, there is divergence as to whether the killings and/ or injuries are justified.

The Defendant posits that the death of the deceased and injury to the Applicants was committed in their exercise of the right of self-defence and necessity as provided for by law having been fired at first by the occupants of the building.

Making reference to Article 4(2) of the AU Convention on the Prevention and Combating of Terrorism Act which enjoins State Parties to adopt any legitimate measures aimed at preventing and combating terrorism acts in accordance with the provisions of the Convention and their national legislation, the Defendant submitted that pursuant to the above, she enacted the Terrorism (Prevention) Act 2011 which provided for measures for the prevention, prohibition and combating of acts of Terrorism in Nigeria.

She also contended that under the Terrorism (Prevention) (Amendment) Act 2013, the responsibility for gathering intelligence and investigating offences constituting acts of terrorism lies with the law enforcement and Security agencies which includes the Nigeria Armed Forces.

Furthermore, the Defendant submitted that intelligent report gathered by Security agents of the Defendant confirmed increased activities of suspected Boko Haram Terrorists within and around Abuja, as a result of their fleeing from Borno State and other parts of North-Eastern Nigeria. That such elements were taken refuge in uncompleted building in Abuja

from where they engaged in menial jobs like hawking, driving "Keke Napep" hawking water and cab driving.

As a result of these, the Defendant's Security agencies including the Army, and the Department of State Security do carry out operations in Abuja from time to time. Pursuant to the above, the Agents of the Defendant invaded an uncompleted building at Adesoji Aderemi Crescent Apo, Zone E on an. alleged suspicion that there were likely weapons buried in the vicinity by members of Boko Haram and that some terrorists were occupying the building. The Defendant further contended:

a. That when the Agents approached the vicinity, several gun shots were fired at them from the building and they fired gunshots into the building in self-defence which resulted in the loss of lives and injuries while the operation was on.

b. That members of the Police force and Civil Defence of the Defendant were deployed the following day to the scene to convey the Applicants and deceased bodies to Asokoro Hospital. In their words, **"The officers could not carry out assignment until day break to avoid being harassed or attacked by aggrieved members of the Community".**

c. That even the Senate Report commended the Agents of the Defendant for a job well done.

d. That in carrying out the operations, the Defendant's agents complied with all known rules of engagement. More so, as some Terrorists were arrested including one Yayan Gida known to be a violent extremist responsible for the death of several people.

e. That in these circumstances, the Defendant cannot be said to have violated Articles 3,5,7 and 8 of the Universal Declaration of Human Rights or Articles 5,6, and 7 of the African Charter on Human and Peoples' Rights. The Defendant's plea and submissions have been restated for emphasis.

The issues raised by the claims and submissions of the parties raise fundamental questions regarding the general concerted effort by mankind

against terrorism on the one hand and international protection of human rights on the other.

There appears to be only one issue for determination ; namely:

Whether the injury caused by the agents of the Defendant to the 2nd - 12th Applicants constitutes a violation of their human rights especially right to life and whether the death of the deceased as represented by the 1st Applicant is justified in law. To answer these questions, the Court will consider the law and marry them with the facts to arrive at an informed decision.

One of the side effects of terrorist activities and the international response to it has been the tendency to pit the ideas of liberty and security against each other. The notion of terrorism has often been viewed (especially by Governments and their agents) as being in conflict with protection of human rights. This is basically the perceived conflict in the instant case.

Indeed, the notion of human rights protection has often been viewed as being in conflict with protection from terrorism.

International human rights standards emerged from a need, and obligation to control violent and extreme behaviour which terrorism tends to perpetrate. Thus, a general abrogation and violation of human rights in the face of threat from terrorists amounts to succumbing to the blackmail and threats of violent acts by extremist groups.

It is now generally accepted that the International Human Rights framework is applicable to dealing with the terrorist threat, from addressing its causes, to dealing with its perpetrators, to protecting victims, and to limiting its consequences.

States have an obligation to provide protection against terrorist attacks. Human Rights standards impose positive obligations on States to ensure the right to life, protection from torture and other human rights and freedoms. Acts of terrorism and attempts at fighting it, no doubt, are likely to result in infringement of fundamental rights. This is not to suggest that an act of terrorism amounts to a failure to protect by the State.

International law has attempted to balance the interest of the State in fighting terrorism and the duty to protect human rights. The case law of International Courts and Tribunals, as well as Domestic Courts, including the works of the United Nations, attests to these efforts. In this regard, practice recognize and acknowledge the fact that counter-terrorism measures have resulted and do result in;

i. Prolonged detention;

ii. Denial of the right to challenge the rightfulness of the detention;

iii. Denial of access to legal representation, monitoring of conversation with lawyers;

iv. Incommunicado detention or ill treatment or even torture of detainees as well as inhuman and degrading treatment;

v. Use of lethal force resulting in death.

These counter-terrorism measures may result in derogation from human rights norms. However, in determining whether a State is justified in such derogation, the International Courts and Tribunals usually consider certain factors which include:

i. Legality *i.e.* whether there is a legal basis for interference with rights;

ii. Justification: This considers whether there are justifiable grounds for restricting the application of fundamental rights. In this regards, justifiable grounds include, national security, public order, morality, health and the right of others;

iii. Necessity: Necessity does not mean indispensability or reasonableness. It implies a pressing social need for the restriction of rights and that pressing need must accord with requirements of democratic society whose hallmark is tolerance, pluralism, and broad-mindedness.

iv. Proportionality: Proportionality requires that there is a reasonable relationship between the means employed and the aims to be achieved.

All these factors may not all exist or be considered necessary in all circumstances. With regard to right to life (the principal subject matter of the suit under consideration), international human rights provisions relating to the right to life must be strictly construed. This is particularly in cases where excessive use of force is used by law enforcement agencies.

The right to life should be understood as creating obligations, namely, a substantive obligation in relation to the guarantee of life itself; and the procedural obligation, where there has been a loss of life.

The United Nations Humans- Rights Committee, in a long line of cases, which cannot be captured here for lack of space, has addressed the relationship between the right to life and armed conflict and has noted the link between non-compliance with international law rules prohibiting resort to armed force and loss of innocent lives.

First, a State has a responsibility to ensure that the law protects everyone's life. This includes a procedural aspect whereby the circumstances of deprivation of life receives public and independent scrutiny.

Second, a State has obligation to investigate deaths irrespective of how the authorities found about the death whether State authorities were involved or circumstances surrounding the death.

This responsibility is not diminished in the counter- terrorism context. Failure to investigate properly a death will be at odds with a State procedural obligations in relation to the right to life and this will be in addition to any violation found in relation to the killing itself.

These are therefore the two aspects to the right of life. We have analyzed the principles of international law regarding the protection of human rights, even in the situation of counter-terrorism, in order to make reasoned findings(s) with regard to the case at hand.

As earlier noted, the Applicants' primary contention as a basis for their claim is that the security agents of the Defendant failed to use reasonable force in the execution of the operation of 20th September, 2013 which led to the death of eight persons (represented in this claim by the 1st Applicant

on behalf of the deceased families) and injury to the 2nd to 12th Applicants. Their argument is that the agents of the Defendant, ought to have used non-lethal force in incapacitating suspected members of the Boko Haram Sect during the operation.

Article 4 of the African Charter on Human and Peoples' Rights, the most fundamental Provisions of the Charter encapsulates and safeguards the right to life. It provides as follows:

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

In the same vein, S.33 of the Defendant's Constitution 1999 provides that:

> "A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary";
>
> a. For the defense of any person from unlawful violence or for the defense of property.
>
> b. In order to effect a lawful arrest or prevent the escape of a person lawfully detained;
>
> c. For the purpose of or suppressing a riot, insurrection or mutiny (we may equally add or terrorism);

From the totality of the provisions especially the Charter, what makes a deprivation of life under Articles 4 unlawful is the arbitrariness of the act.

The word 'Arbitrariness' is defined by the Black's Law Dictionary (7th Edition) as "depending on individual's discretion rather than by fixed rules of procedure or law.

In the same vein, S.33 (1) of the Defendant's Constitution prohibits intentional deprivation of life and where intentional must be in accordance with S.33 (2) stated above. Deprivation of life is therefore unacceptable when not done in accordance with the law.

Thus, the legality of a killing outside the context of armed conflict (as in this case) is governed by human rights standards especially the ones concerning the use of force. Sometimes referred to as **"law enforcement model",** they do not in fact apply only to armed forces or in time of peace. They apply to all government officials who exercise police powers including the military and Security forces operating in contexts where violence exists but falls short of the threshold of armed conflict. Lethal force under human rights law is legal if it is strictly and directly necessary to save life. Thus, the defense of self-defense and necessity (as purportedly claimed by the Defendant in this case) must be circumscribed within the limits of force required by human rights law. Questions of due diligence, reasonableness, and proportionality, the use of warnings, restraint and capture are all matters to be considered in this regard.

In **McCann Vs. UK. (1995) ECHR 18984/91 at paragraph 150**, the European Court of Human Rights in dealing with the deprivation of life contrary to Article 2 of the European Convention which is similar to the provisions of Article 4 of the African Charter, which stressed that the Court must subject allegations of breach of Article 2 of the Convention to the most careful scrutiny and that in cases concerning the use of force by State agents , it must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances including such matters as relevant regulatory framework in place and the planning and control of the actions under examination. *(See also* **Makarat 215 Vs. Greece (2004) ECHR 5038/ 99 at Patas 57-59**.)

That indeed appears to be the international minimum standard regarding the use of lethal force. The United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials adopted on 7th September, 1990 by the 8th United Nations Congress on the Prevention of Crime and Treatment of Offenders provides in paragraph 9 as follows:

> **"Law enforcement officials shall not use firearms against persons except in self-defense or defense of others, against the <u>imminent</u> threat of death or serious injury, to prevent the perpetration of a particular serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting**

their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

It may be stated that a law enforcement officer may be justified in using lethal force in the arrest of a person he reasonably believed to have committed an offence or is in the process of committing a felony involving the risk of serious harm or death to others. The important condition here is reasonable necessity. Thus, once there is such reasonable necessity, even if the reasonableness is wrong, the use of force will be justified. The United States Supreme Court in **GRAHAM VS. CONNOT 490 US 386 (1989)** succinctly laid down the issues necessary for the determination of whether a circumstance of reasonable necessity exists to warrant the use of lethal force as follows;

a. What was the severity of the crime believed to have been committed?

b. Did the suspect present immediate threat to the safety of the officers or the public?

c. Was the suspect actually resisting the arrest/or attempting to escape?

The Court further observed that "the calculation of reasonableness must embody allowance of the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation. Thus, it is the law that when officers are confronted by particularly powerful suspects, additional force may be justified. Where a soldier on patrol shot and killed an unarmed man who ran away when challenged, Lord Diplock held exonerating the officer for murder and that soldier who is employed in the civil power is under a duty enforceable under Military Law to search for criminals if so ordered by his Superior officer and to risk his life should this be necessary in preventing terrorist acts. For the performance of this duty, he is armed with a firearm, a self-loading rifle from which a bullet, if it hits a human body is almost certain to cause serious injury if not death.

Similarly, in **R.V Clegg** (1951) IAC 482, where a Military officer shot at a vehicle driving at a very high speed towards the check point.

Lord LLYOD of Berwick stated at Pg. 479;

> "**In the case of a soldier in Northern Ireland in the circumstances in which Private Clergy found himself, there was no scope for graduated force, the only choice being between firing a high- velocity rifle which if aimed accurately, was almost certain to kill or injure and doing nothing at all"**

In considering the concept of necessity, the question to be determined is given the nature of the threats what are the minimum actions necessary to respond to the threats.

This Court takes judicial notice of the fact that Boko Haram is a terrorist group with the capacity and tendency to inflict deadly unprovoked injuries on human beings and properties. The Applicants have contended that the Security Agents of the Defendant ought to have used non-lethal force in incapacitating the Boko Haram Group.

The Applicants contended that they were unarmed while the Defendant stated that they were first shot at by the suspects and they reacted in self-defense.

It should however be noted, that facts stated in pleadings are not proof and, unless where they are admitted, the burden of proof is on the person who will fail if no evidence is offered. Self-defense is a judicial concept that needs certain factors for proof. The Defendant pleaded self-defense *i.e.* while they were approaching the uncompleted building they were fired at by the suspects.

However, there is no evidence of such a firing including, recovered guns, bullet or its pellets tendered in before the Court as proof of the circumstances. The Applicants clearly stated that they were unarmed, while the Defendant asserted that the suspects fired at the1n. The burden of proving self-defense is on the Defendant and this burden has not been satisfactorily discharged. Indeed, as earlier noted, pleading is not evidence. There must be evidence that the Defendant acted in self-defense against a

powerful terrorist group in a non-conflict environment. This burden has not been satisfactorily discharged by the Defendant.

Reasonableness suggests that an officer of any sort must act without passion or prejudice, in a non-conflict zone, consideration should have been made with regard to persons who might have occupied the place in error and who are not among the suspect terrorists. The international minimum have included the use of warnings, a shot fired in the air, as well as other methods of information to give time to the occupants to surrender. This is in view of the fact that there is no evidence of self-defense. The Defendant alleged that before the raid on the building on the 20th of September, 2013, there was security report indicating a plan by the Boko Haram sect to invade Abuja.

This report was not made available nor was there anyway the Court could determine the veracity or otherwise of a report not brought before it.

As earlier noted, right to life as enshrined in human rights instruments is very fundamental because other rights necessarily depend on it. Secondly, there is substantive and procedural responsibility imposed on States by the International Human Rights Standard. Was there any thorough investigation of this incident by the Defendant? If not, this will also engage the responsibility of the Defendant. As the European Court of Human Rights held in the case of **MAKARATZIS Vs. GREECE (2004) ECHR 5038/99 AT PARA 58**, national law regulating Police operation must be put. on ground a system of adequate and effective safeguards against arbitrariness and abuse of force even against avoidable accident.

Indeed, the obligation to protect the right to life, if read together with the States general duty under Article 1 of the African Charter, requires, by implication, that there should be some form of effective official investigation when individuals have been killed as a result of force (*see* **CAKICI VS. TURKEY)** (1999) ECHR 23657/94 at para 88).

The essential purpose of such investigation is to secure the effective implementation of the domestic laws safeguarding the right to life, and in those cases involving States' agents or bodies to ensure their accountability for deaths occurring under their responsibility (*See* **ANGUELORA VS. BULGARIA** (2002) ECHR 38361197 at para 137.)

For an investigation into an alleged unlawful killing by State agents to be effective, the person responsible for and carrying on the investigation must be independent and impartial in law and in practice. (*See* **GULEC Vs. TURKEY** (1998) ECHR 215 93/ 93 at para 81 - 82.)

In this case, there was a Senate Committee convened to investigate the events that led to this case. The Committee considered submissions from various persons and groups involved and presented a report. None of the current Applicants (Nos 2-12) as invited to testify in the course of the investigation.

It may be argued that both parties, especially the Applicant, have not questioned the impartiality of the investigation. Be that as it may the exclusion of the interest of the individuals currently pursuing this case is a minus for that investigating body whose evidence does not bind this Court. Thus, it cannot be said that the current Applicants were party to the investigation.

The National Human Rights Commission made recommendations for monetary compensation after castigating the law enforcement officers for breaching the rules of engagement, recognized by international law and practice.

Placing the two reports side by side, it appears that the findings of the National Human Rights Commission, an Institution established under the laws of the Defendant is more credible having been based on credible evidence clearly stated.

Accordingly, the Court holds that the defense of self-defense exercised against a powerful terrorist group cannot stand in view of lack of evidence to support the plea.

Accordingly, the Defendant failed in this case to establish the defense of self-defense or necessity. The Court recognizes the devastation that Boko Haram have inflicted on the Nigeria Nation especially in the North East, However, a situation where a group of Citizens of a State can be styled as members of a Terrorist Group (without any conclusive evidence) and shot portends danger for the society at large. This needs to be discouraged.

As earlier noted, apart from the substantive right to life in International Human Rights Law, the procedural aspect is equally important. International law imposes a duty on a State to carry out independent investigation into killings in the circumstances that it is likely to be extra- judicial. After the killings in this case, no further action was taken by the Defendant; this is unfortunate to say the least.

Even if the State is not guilty of substantive violation of the right to life, it can still be liable for failure to investigate. Accordingly, as the European Court of Human Rights stated in **MAKARATEIS Vs. GREECE** (2004) ECHR 5038/99 the national law regulating policing operation must put on ground a system of adequate and effective safeguards against arbitrariness and abuse of force even against avoidable accident.

Thus, the obligation to protect life, read together with the State's general duty under Article 4 of the Charter (Equivalent to Article 4 of the African Charter on Human and People's Rights) (words in Parenthesis is ours) requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (*See* **CAKACI Vs. TURKEY** (1999) ECHR 2365/94.)

The essential purpose of such an investigation 1s to ensure the effective implementation of domestic laws safeguarding the right to life, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (*See* **ANGUELOVA Vs. BULGARIA** (2002) ECHR 38361/97).

For an investigation into alleged killing by State agents to be effective, the persons responsible for carrying out the investigation must be independent and impartial in Law and Practice (*See* **GULEC Vs. TURKEY** (1998) ECHR 21593/93.)

In the instant case there was a Senate Committee convened by the Legislative Arm of the Defendant to investigate the circumstances and events that led to this case which considered submissions from various persons and groups and presented a report. While not castigating the report of the Committee, it is worthy of note to state that it did not make any specific finding 'as to the legality of the killings. It also appeared to have

relied heavily on the submission of State agents in most respects lacking in any concrete evidence without question.

Above all, the National Human Rights Commission, an independent body established under the law of the Defendant to investigate cases of violation of human rights occurring within the territory of the Defendant, made submissions before the Committee which tended to contradict the testimonies of the agents of the Defendant, but curiously no reliance was placed on these statements of fact.

The Commission itself recommended the payment of compensation, having found that the grounds for the killings were largely unfounded. The Defendant did not deem it necessary to comply with any of them.

The Court, based on the evidence before it, finds that the procedural requirements of International Law with regard to extra-judicial killings were not complied with by the Defendant. All these acts amount to a violation of Article 4 of the African Charter on Human and Peoples' Rights.

Accordingly, the application of the Applicants succeeds.

DECISION

The Court adjudicating in a public siting, after hearing the parties in last resort, after deliberating in accordance with the law.

AS TO MOTION FOR EXTENSION OF TIME:

- **Declares** that all motion for extension of time filed by all the Parties be granted and the same are hereby granted.

AS TO THE PRELIMINARY OBJECTION OF THE DEFENDANTS:

- **Declares** that the Defendants are not appropriate parties to this suit and their names are hereby struck out from the proceedings, but all other grounds of objections are hereby dismissed.

AS TO THE MERITS

- **Rules** that the arguments and defense of the Defendant are not supported by evidence, and accordingly, enters judgment against the Defendant for the illegal killings of the persons named and represented by the 1st Applicant and injuries caused to the 2nd to the 12th Applicants;

- And **awards** the sum of **$200,000** (two hundred thousand United States Dollars) to each of the deceased families and $**150,000.00** (one hundred and fifty thousand dollars) each to the 2nd to 12th Applicants for injuries caused them by the agents of the Defendant.

AS TO COSTS

The Court **rules** that costs are hereby awarded to the Applicants against the Defendant as assessed by the Registry of the Court.

Thus made, adjudged and pronounced in a public hearing at Abuja this day 7th day of June, 2016 by the Court of Justice of the Economic Community of West African States, ECOWAS.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT.

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Maria Do Ceu Silva MONTEIRO** - *Member,*
- **Hon. Justice Micah Wilkins Wright** - *Member.*

Assisted by

Tony ANENE-MAIDOH (Esq.) - *Chief Registrar.*

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

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, 15TH JUNE, 2016

SUIT NO: ECW/CCJ/APP/31/15
JUDGMENT NO: ECW/CCJ/JUD/19/16

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

VS.
1. **THE FEDERAL REPUBLIC OF NIGERIA**
2. **ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE**

} *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE MICAH WILKINS WRIGHT** - *PRESIDING*
2. **HON. JUSTICE HAMEYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **SOLA EGBEYINKA (ESQ.)** - *FOR THE PLAINTIFFS*
2. **ANDREW O. ZIBIRI (ESQ.)** *AND* **ABUBAKAR MUSA (ESQ.)** - *FOR THE DEFENDANTS*

Human Rights Violations -Health - Shelter - Security - Cause of Action -Proper Party

SUMMARY OF FACT

The Plaintiff, a Non-Governmental Organisation registered in Nigeria and committed to the promotion of the socio-economic rights of Nigerians brought this action against the Government of the Federal Republic of Nigeria on behalf of over 3 million Nigerians who have become displaced as a result of the Islamist Group Boko Haram terrorist activities in the North Eastern part of Nigeria. The Plaintiff contended that as a result of the Boko Haram activities, farmer/herder clashes and the heavy counter insurgency clampdown by the Government on Boko Haram, millions of people in the North East were displaced and kept in IDP camps, some of which camps have been closed down, that as a result of all these activities the people were forced to live in terrible conditions without adequate protection and provision from the government. The Plaintiff contended that the Defendant failed and / or neglected to respect, protect, fulfil and promote the Human rights of IDPs by failing to meet their protection and assistance needs, including social and work relations and their family dynamics to provide health facilities to meet their physical and mental health needs. The Plaintiff therefore sought from the court a declaration of lack of due diligence on the part of the Defendant by failing to effectively and proactively implement and promote IDP policies, rehabilitation and providing humane conditions for IDPs. It also sought a $300 million USD compensation for the IDPs.

The Defendant in its Defence contended that it observed and implemented its mandate in protecting not only the IDPs but also all Nigerians as required by the constitution in line with Bilateral and Multilateral obligations signed by it. That it had provided security, shelter and support to the affected persons. It therefore stated that the Plaintiff had disclosed no cause of action against it. That it had not shown were it or any of its agencies failed to carry out its mandate as required by law as its agencies such as the National Commission for Refugees and Internally Displaced Persons, National Emergency

Management Agency, States Emergency Management Agencies all look into the plight of IDPs. That it even signed a National Policy on the Plight of IDPs in 2013.

The Plaintiff filed a reply to Defendants defence and urged the court to discountenance the defence as Defendant failed in its obligations.

ISSUES FOR DETERMINATION

1. *Whether the Plaintiff has an established cause of action against the Defendant.*

2. *Whether the Plaintiff has established that the initiatives or response by the Defendant constitute a violation of their obligations to IDPs.*

DECISION OF THE COURT

1. *The Court held that considering the fact that this court does not exercise jurisdiction over Defendants who are not juridical persons, the court sua sponte drops the name of the 2nd Defendant because he is not a juridical person in International Law and as such is not proper party before this court and hence not answerable.*

2. *As to the merits of the case, the court determines, firstly, that this case is not admissible and secondly, that there is no factual merit in the suit and as such the claim is denied and the case is dismissed and the Defendant discharged from further answering herein.*

3. *The court also rules that costs shall be and are hereby assessed for the Defendant against the Plaintiff/Applicant in accordance with Article 66 of the Rules of this Court.*

JUDGMENT OF THE COURT

2. COUNSEL FOR THE PARTIES AND ADDRESSES FOR SERVICE

For the Plaintiffs:
Sola Egbeyinka, (Esq.), LL.M.
Falana & Falana's Chambers
Counsel to the Plaintiffs

For the Defendants:
1st and 2nd Defendants
Andrew O. Zibiri (Esq.),
Abubakar Musa (Esq.),
Office of the Attorney General
And Minister of Justice
Federal Ministry of Justice
Shehu Shagari way, Central Business District,
Abuja.

3. SUBJECT-MATTER OF THE PROCEEDINGS

Violations by the Defendants of the human rights of Internally Displaced Persons (IDPs') to life, to health, to adequate housing, to personal integrity, to privacy, to fair trial, to freedom of movement and residence, to judicial guarantees, to private property and child rights, as guaranteed by:

1. Articles 1, 2, 3, 4, 5, 6, 12, 13, 14, 16 and 17 of the African Charter on Human and Peoples' Rights;

2. Articles 2, 3, 5, 7, 9, 12, 13, 17, 20, 21 and 25 of the Universal Declaration of Human Rights;

3. Articles 2, 3, 6, 9, 10, 12, 22 and 26, of the International Covenant on Civil and Political Rights;

4. Article 2, 3, 5, 1 0, 11 and 12 of International Economic, Social and Cultural Rights;

5. Articles 1, 2, 3, 4, 5, 7, 9, 11, 12, 13 and 14 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; and

6. Principles 1 - 30 of the UN Guiding Principles on Internal Displacement.

4. LAWS RELIED ON / ARTICLES VIOLATED

A. ARTICLES 1, 2, 3, 4, 5, 6, 12, 13, 14, 16 and 17 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHT;

B. ARTICLES 1, 2, 3, 4, 5, 7, 9, 11, 12, 13 and 14 OF THE AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA;

C. ARTICLES 2, 3, 5, 7, 9, 12, 13, 17, 20, 21 and 25, OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948);

D. RTICLES 2, 3, 6, 9, 10, 12, 22 and 26, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS;

E. ARTICLE 33 OF THE RULES OF THE COMMUNITY COURTS OF JUSTICE;

F. ARTICLE 10 OF THE SUPPLEMENTARY PROTOCOL A/SP.1/01/05 AMENDING THE PROTOCOL (A/P.1/7/91) RELATING TO THE COMMUNITY COURT OF JUSTICE;

G. ARTICLES 2, 3, 5, 10, 11 and 12, OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS;

H. PRINCIPLES 1-30 OF THE UN GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT;

5. NATURE OF EVIDENCE IN SUPPORT

Documentary & other:

1. The African Charter on Human and Peoples' Rights.
2. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.
3. UN International Covenant on Economic, Social and Cultural Rights.
4. UN International Covenant on Civil and Political Rights.
5. Economic Community of West African States (ECOWAS) Revised Treaty dated 24th July, 1993.
6. The UN Guiding Principles on Internal Displacement.
7. A report titled *Global Overview 2014 People internally displaced by conflict and violence* and published in 2015 by the Internal Displacement Monitoring Centre.
8. *THE IDP SITUATION IN NORTHEASTERN NIGERIA (Adamawa, Bauchi, Gombe, Taraba, Yobe) DISPLACEMENT TRACKING MATRIX REPORT (DTM)* published in 2014 by the IOM.

6. FACTS AND PROCEDURE

6.1. SUMMARY OF FACTS ON WHICH APPLICATION IS BASED

(i) The Federal Republic of Nigeria is a signatory to the African Charter on Human and Peoples' Rights; the International Covenant on Economic, Social and Cultural Rights; the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; the International Covenant on Civil and Political Rights, and other similar regional and international human rights treaties.

(ii) The Federal Republic of Nigeria is also a signatory to the Revised Treaty of the Economic Community of West African States dated 24th July, 1993.

(iii) Nigeria ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights in October 1993. Nigeria ratified the African Charter on 22nd July, 1983. Nigeria also ratified the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa in April 2012.

(iv) The Plaintiff is a human rights non-governmental organization registered under Nigerian laws.

(v) The 1st Defendant is the Federal Republic of Nigeria

(vi) The 2nd Defendant is the Chief Law Officer of the Federation.

6.1.1. NARRATION OF FACTS BY THE PLAINTIFF

i. This suit is brought by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) on behalf of the over 3 million Internally Displaced Persons (IDPs) across Nigeria, against the Federal Republic of Nigeria, a member of the Economic Community for West Africa (ECOWAS) and a state party to the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, and other related human rights treaties.

ii. SERAP is a human rights non-governmental organization registered under Nigerian laws, and whose mandates include the promotion of respect for socio-economic rights of Nigerians, through litigation, research and publications, advocacy and monitoring. SERAP seeks to promote the full realization of economic and social rights in Nigeria by working to ensure that

public institutions and officials are made more accountable and transparent in the use of Nigeria's wealth and natural resources.

iii. The Islamist armed group Boko Haram has been fighting to create an independent state in northern Nigeria since the early 1990s.

iv. As a result of the armed conflict between the Nigerian government and Boko Haram, residents across many parts of northern Nigeria were forced to flee their homes because of killings, generalized violence and other human rights violations.

v. The Boko Haram carried out an increasing number of brutal attacks during 2013, which triggered significant new displacement in Northeastern Nigeria. The attacks, as well as heavy-handed counter insurgency operations, compound ongoing inter-communal conflict in central Middle Belt region. Boko Haram concentrated its attacks in the north-east during this period, with fighters increasingly targeting civilians in roadside attacks or assaults on sites they consider sacrilegious to Islam.

vi. The Nigerian Government's counterinsurgency tactics and its excessive use of force against civilians have also forced residents to flee their homes, and its use of self-defense groups known as "Civilian Joint Task Forces" put non-combatants at greater risk of becoming targets for reprisals and attacks.

vii. According to the National Emergency Management Agency (NEMA), as at February 2014, around 3.3 million people have been displaced by conflict and violence since 2010. The government figure is based on primary and secondary data for people displaced by conflict and violence since 2010. No comprehensive survey of internal displacement has been conducted and there are no mechanisms to monitor durable solutions.

viii. At least 470, 500 people were newly displaced during 2013 violence alone. According to NEMA, during 2013 nearly 300,000 people were forced to flee violence within the north-eastern states of Borno, Yobe, and Adamawa alone. Inter-communal violence

continued to cause displacement in northern areas and the Middle Belt region. Cattle rustling raids and clashes between herders and farmers over land use caused deaths and the destruction of property and crops and led to the displacement of thousands of people in Zamfara, Benue and Plateau states during 2013.

ix. The Nigerian Government has continued to fail and/or neglect to respect, protect, fulfill and promote the human rights of IDPs by among others failing to meet their protection and assistance needs, including social and work relations, and their family dynamics, to provide health facilities to meet their physical and mental health needs. The Nigerian government has also failed to systematically assess the conditions and situation of the IDPs across the country. In other words, the Nigerian government has failed to exercise due diligence and to act proactively to assist IDPs, many of whom do not have a home to go back to.

x. The response by the Nigerian Government to the conditions of IDPs is fragmented and inadequate, as illustrated by Defendants' closure of several displacement camps in central and northern areas of Nigeria. Those living in camps are often left without enough food, essential household items or health facilities.

xi. As noted, due to threats by the Boko Haram, physical and psychological damage and the destruction of properties and means of livelihood, several families were forced to flee their homes. Other major negative effects of internal forced displacement include the loss of land and housing, marginalization, serious psychological repercussions, unemployment, increased poverty and the deterioration in living conditions, an increase in illnesses and mortality, loss of access to communal property, lack of food security, and social disintegration.

xii. The Plaintiff contends that the origins, complexity and manifestations of the IDP crisis in Nigeria need to be placed within the context of a larger human rights problem in the country.

xiii. The human rights challenges posed by internal displacement in Nigeria shows that the Nigerian Government is failing to meet its clear obligations and commitments under the African Charter on Human and Peoples' Rights and other international instruments highlighted above.

xiv. The increased vulnerability of IDPs across Nigeria demands accountability and greater level of respect for the full and effective realization and enjoyment of IDPs rights in Nigeria.

xv. The 'crisis of security' created by forced internal displacement leaves IDPs unprotected, with women and children disproportionately affected. This condition of special vulnerability creates an obligation for the Nigerian government to adopt positive measures to ensure protection and security for IDPs, even when the displacement is caused by the actions of third parties.

xvi. The Plaintiff contends that the right not to be forcibly displaced is a key component of the right to freedom of movement and residence. The Plaintiff also argues that the vulnerable condition of IDPs is a violation of the right to personal integrity.

xvii. The Plaintiff contends that internal displacement entails massive, systematic and prolonged violations of several human rights, thus preventing IDPs from leading a 'dignified life'. This is an expanded interpretation of the 'right to life', thereby broadening the nature of protection from mere relatives.

xviii. The Plaintiff contends that the above highlighted human rights, economic, social and cultural rights as well as civil and political rights are recognized and guaranteed by the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, and other related human rights treaties to which Nigeria is a state party.

xix. Given other regional human rights jurisprudence in this field, the Plaintiff contends that the ECOWAS Court can play a significant role in emphasizing the rights-based nature of international IDP protection in Nigeria.

6.12 SUMMARY OF PLEAS-IN-LAW

In their summary of pleas in law, the Plaintiff submits that:

a. Article 4 of the Revised Treaty of the Economic Community of West African States (ECOWAS), 1993 provides for the applicability of the provisions of the African Charter on Human and Peoples' Rights to Member States of the ECOWAS.

b. The Federal Republic of Nigeria has ratified and adopted the provisions of Article 1 of the African Charter on Human and Peoples' Rights which provides that:

> **"The Member States of the Organization of African Unity, parties to the present Charter, shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other means to give effect to them."**

c. Under the combined Articles 1, 2, 3, 4, 5, 6, 12, 13, 14, 16 and 17 of the African Charter on Human and Peoples Rights, to which Nigeria is a signatory, the Defendants have individually and collectively violated the human rights of IDPs to life, to health, to adequate housing, to personal integrity, to privacy, to fir trial, to freedom of movement and residence, to judicial guarantees, to private property and child rights.

d. The grave deterioration of the vulnerability of the living conditions of the over 3 million IDPs across the country, and the persistence of the impunity of those responsible for the violations, the human rights of IDPs amount to serious breaches of the obligations and commitments of the Nigerian Government under the African Charter on Human and Peoples Rights; the International Covenant

on Civil and Political Rights; the International Economic, Social and Cultural Rights; the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; the Universal Declaration of Human Rights and the UN Guiding Principles on Internal Displacement.

d. The difficulty of individualizing the victims of forced displacement, when this occurs massively, is one of the principle components of impunity in relation to this human rights violation.

e. These international instruments establish the duty of state parties including the Nigerian government to respect and ensure respect for the rights that they protect and that these human rights have been violated in the case of the over 3 million IDPs across the country by the Defendants and their agents by a set actions and omissions.

f. Freedom of movement and residence is an essential condition for the free development of a person and consist, inter alia, of the right of those who are legally within a State to move freely within this State and choose their place of residence.

g. The Nigerian Government has failed and/or neglected to prevent violations of the human rights of the IDPs, contrary to: the obligation to protect the population, in order to avoid its expulsion from its usual place of residence and so that it can exercise its fundamental rights; the obligation to guarantee to those who have been victims of the violation the minimum conditions necessary for subsistence, which they were deprived of when they were displaced, in particular, food, housing and health care; and the obligation to create the conditions for the return of the displaced, not merely from a material point of view, but fundamentally creating the conditions to ensure that the facts are not repeated in the place from which they were expelled; in other words, that the facts investigated and those responsible are prosecuted and punished.

6.1.3 ORDERS SOUGHT BY PLAINTIFF

The Plaintiff therefore is asking the ECOWAS Court of Justice for the following reliefs:

1. *A **DECLARATION*** that the failure and/or lack of due diligence by the Nigerian Government to proactively and effectively implement and promote IDP policies and allocate sufficient resources to IDP protection and the corresponding failure to effectively address the magnitude of the problem, is unlawful as it constitutes serious breaches of Nigeria's human rights obligations under the African Charter on Human and Peoples' Right; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa and other international human rights treaties to which Nigeria is a state party.

2. *A **DECLARATION*** that the failure and/or lack of due diligence by the Nigerian Government to proactively pursue the rehabilitation of surviving victims and the corresponding continuing exposure of victims to violence, abuse, marginalization, impoverishment and social disarticulation caused by their loss of residence, property and livelihood is unlawful as it violates the right to life, to the security and dignity of the human person, and the right to health, guaranteed under the African Charter on Human and Peoples' Rights; the UN International Covenant on Civil and Political Rights, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa and the UN International Covenant on Economic, Social and Cultural Rights, to which Nigeria is a state party, as well as the UN Guiding Principles on Internal Displacement.

3. *A **DECLARATION*** that the conditions faced by IDPs in Nigeria are inhumane and degrading and therefore unlawful as they amount to serious breaches of the international obligations and commitments of the Defendants to provide an effective remedy to victims of human rights violations, as recognized by the African Charter on Human and Peoples' Rights, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, the International

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. *AN* ***ORDER*** finding the Nigerian Government responsible for these human rights violations.

5. *AN* ***ORDER*** directing the Nigerian Government to allow and facilitate a safe and dignified return to all displaced persons who want it, within a period of six months.

6. *AN* ***ORDER*** directing the Defendants and/or their agents, individually and/or collectively, to promote, respect, secure, fulfil and ensure the IDPs' human rights to life, to health, to adequate housing, to personal integrity, to privacy, to fair trial, to freedom of movement and residence, to judicial guarantees, to private property and child rights.

7. *AN* ***ORDER*** directing the Defendants and/or their agents, individually and/or collectively, to provide necessary and sufficient resources and effective protection for the victims of displacement to resettle in similar conditions found before the facts of the case and in a place that they freely and voluntarily choose.

8. *AN* ***ORDER*** directing the Defendants and/or their agents, individually and/or collectively, to keep and publish IDPs' Register, with complete information on the number of those displaced since 2010, and information on age, sex, level of education, place of origin of the displaced, reasons for the displacement, etcetera, information on the establishment of explicit channels for those affected by displacement to be able to claim from the State special measures of protection, emergency humanitarian assistance, and support for return or relocation, among other matters.

9. *AN* ***ORDER*** directing the Defendants and/or their agents, individually and/or collectively, to pay adequate monetary compensation of $300 million (US Dollar) to the IDPs for the violation of their human rights, the subject matter of this suit, and to provide other forms of reparation, which may take the form of restitution, satisfaction or guarantees of non-repetition, and other forms of reparation that the Honourable Court may deem fit to grant.

6.2 PROCEDURE

6.2.1 The initiating Application (Document number 1), though dated October 19, 2015, was lodged in this Court on October 21, 2015, and accordingly served on the Defendants.

6.2.2 The (1st and 2nd) Defendants filed their Statement of Defense (Document number 2) on December 14, 2015 and also same was served on the Applicant/Plaintiff.

6.2.3 The Plaintiff filed their Written Reply (Document number 3), to the Statement of Defense of the Defendants.

6.2.4 No other documents were filed by the parties, and thus the Judge Rapporteur concluded that the Written Procedure had closed or should be closed so the case can be proceeded with, and the Oral Procedure can begin.

As stated above, the Defendants filed their Statement of Defense in opposition to the Plaintiffs Application.

6.3 DEFENDANTS' ARGUMENT OF FACTS AND LAW IN OPPOSITION TO APPLICATION

The Defendants, in addition to denying all the allegations of facts in the Plaintiffs application, aver that:

6.3.1 The Defendants observe and implement their mandate in protecting not only the Internally Displaced Persons but the entire Nigerians as required under the Nigerian Constitution; in line with Bilateral and Multilateral Obligations signed by the Defendant, under various Treaties, in collaboration with International, Multilateral, Bilateral Agencies, Organizations and Departments, both private and public; the Defendant have provided security, support and shelter to the affected persons.

6.3.2 The Plaintiff cannot benefit from its inequities, it could have studied and analyzed the true nature of internal displacement in Nigeria before instituting this action, the Plaintiff failed to disclose any cause of action against the Defendants, there is no act or default of the

Defendants, her Ministries, Departments or any of their Agencies that the Plaintiff directly established as the cause of internal displacement.

6.3.3 That the law did not give unfettered rights for parties to be sued indiscriminately without cause of action against parties they are suing. The Plaintiff has not disclosed any reasonable cause of action against the Defendant. The Plaintiff did not disclose the necessary facts to substantiate its plea capable of granting it cause to seek for the reliefs prayed for before this Honorable Court.

6.3.4 The Defendants have agencies such as National Commission for Refugees and Internally Displaced Persons, National Emergency Management Agency, States' Emergency Management Agencies that look into the plight of Internally Displaced Persons. In the year 2013 the Nigerian Government signed the new policy on the plight of Internally Displaced Persons. The policy comprehensively made provisions for measures preventing displacement, minimize unavoidable displacement, mitigate effects of displacement and ensure that displacement does not last longer than required by the circumstances. In addition, the Defendants outlined strategies in accordance with circumstantial needs/demands and actively implemented measures through projects and programs, increasing public awareness and sensitizing the public in ensuring durable solutions are concretized to curtail and or completely eradicate the challenges of internal displacement.

6.3.5 That the Defendants are to be encouraged and commended on their efforts in ensuring that Internally Displaced persons are well catered for and are not left to linger in degrading or inhuman situation.

6.3.6. The Plaintiffs assertions are so myopic, vague and ambiguous to the extent of denying this Honourable Court the opportunity of identifying the alleged violators of those rights. The Defendant has Federal, State and Local Governments; it is pertinent to be specific in making such grievous allegations. In paragraph E (iv) of the Narration of Facts by the Plaintiff, it admits the fact that the Defendants are fighting a war against insurgency, responsible for

the increased number of displacements. The fight against insurgency requires personnel, logistics and resources, both human and natural. It is highly contradictory for the Defendants to employ personnel, logistics and resources, with provision of temporary and permanent reliefs and settlements, in fighting insurgency to be accused of neglect or failure to protect, fulfill and promote the Human Rights of Internally Displaced Persons.

6.3.7. Negligence arises when a legal duty owed by the Defendant to the Plaintiff is breached. The duty of care owed by the Defendant is paramount, but allegation of negligence has to be proved either by preponderance of evidence or on the balance of probability. Negligence being a question of fact, a party claiming it must plead it and particularize it by identifying each ingredient of negligence the Defendant breached.

6.3.8. That the Defendants, in their quest to eradicate internal displacement through their agencies, carefully studied the nature indices of displacement through constant monitoring and evaluation and put measures in place for ensuring the prevention of displacement. Some of these measures are; encouraging reconciliation, raising early warnings against both manmade and natural causes of internal displacement and assisting in evacuation of persons and property. The Defendant has provided relief materials in both temporary and permanent relocation of the Internally Displaced Persons.

6.3.9. The challenge the Internally Displaced Persons faced in participating in election, especially where they moved from their voters' registration centres, is amongst the Defendants' priority and efforts are continually improved to ensure that Internally Displaced Persons cast their votes during each and every election.

6.3.10. The Plaintiff misconceived the nature of displacement and the appropriate remedy for the displaced by restricting its facts and arguments on temporary displacement, not minding the medium and permanent remedial durable solutions. Even in the temporary camps, the Internally Displaced are provided with relief materials such as shelter, foods and clothing etc. Internally Displaced Persons in

Nigeria are respected with their full Human Rights protected and guaranteed; in taking decision on the appropriate solution to their plight, they also partake i.e. decisions on whether they want to go back to their homes or they prefer another abode. The Defendants provide the Internally Displaced Persons with facts and logistics of the environment they intend to settle.

6.3.11. That in addressing internal displacement, the aim is not to keep the Internally Displaced Persons in a camp permanently but the objectives are rehabilitation, reintegration, reconstruction and resettlement of the displaced persons. The Defendant, in her desire to provide a lasting solution to minimize or totally eradicate internal displacement, had officially organized her responsibility to address internal displacement, through identifying internal displacement as a priority and a challenge to the Government to respond, mandating key ministries to address internal displacement in collaboration with organizations, both national and international, private and public.

6.3.12. The Defendant, through her agencies in collaboration with stakeholders, collects data on Internally Displaced Persons which is constantly updated periodically (monthly, quarterly, half quarterly, half yearly and yearly) also spontaneously as circumstances demand, to appropriately take measures on work nature, educational capacity, experience, Women and Children specific needs etc., for planning and effective management of Internally Displaced Persons' plight.

6.3.13. That the Defendant, in their efforts to safeguard and enforce the rights of the Internally Displaced Persons, trained staff of their Agencies with other stakeholders on: respect and recognition of rights of persons to life, freedom of thought and association, against discrimination, of movement, to liberty, of property, of dignity, of religion, along with other economic, social, civil and political rights; violation of any of such rights attracts penalty; protection also implies prevention of further occurrence and ensuring the rights of Internally Displaced Persons are provided, maintained, enforced, guarded and guided during and after displacement; the Defendant's guiding principle of attending to the plight of Internally Displaced Persons in accordance with best practice, the Defendant pays specific

attention to nature and circumstances of displacement; sustenance and phases of displacement are taken into consideration to guide in training to provide relevant assistance necessary to Internally Displaced Persons. The Defendants train staff and stakeholders on preventing natural causes of displacement, some of which include reclamation of soil components, meteorological data, providing aid and relief materials, etc. and man-made causes by training staffs and stakeholders on preaching the ideals of peace, tolerance, forgiveness, respect and support.

6.3.14. That the Defendants provides Intervention Funds from all the tiers of its Government with assistance from various stakeholders with ecologic allocation, to promote inter-communal reconciliation, address fundamental economic and political injustice, designs and implements fair and equitable formula of distribution of wealth and services, encourage reconciliation and creating more resources.

6.3.15. That the allegations of the Plaintiff are devoid of merit and urges this court to dismiss same in its entirety.

6.4. PLAINTIFF'S WRITTEN REPLY TO DEFENDANTS' DEFENSE

6.4.1 Plaintiff filed a reply to the defense and submitted that Defendant's contention that the Plaintiff suit did not disclose a reasonable cause of action is highly misconceived and misleading. That the learned counsel representing the Defendants did not appreciate the jurisprudence of the term "cause of action" which has been defined as a combination of facts and circumstances giving rise to the right to file a claim in Court for remedy. It includes all things which entitle the Plaintiff to succeed.

6.4.2 That the Plaintiffs originating application is predicated upon the plight of the Internally Displaced Persons (IDP's) in some parts of the Northern States of the Federal Republic of Nigeria such as Borno, Yobe, Adamawa, among others. The cause of action which has given rise to the Plaintiffs suit is premised on the fact that the Defendants, though under a statutory obligation to provide adequate

security services through established institutions such as the Nigerian Army, the Nigeria Police Force, State Security Services, among others, to inhabitants residing in every State of the Federation, including the Northern States, failed in their responsibilities to avail maximum security services to inhabitants of these Northern States negatively affected by the Boko Haram insurgents.

6.4.3 That the factual situation herein and the aggregate fact of the Plaintiffs suit which estimate destruction of properties, displacement of dwellers in the Northern States of the Federal Republic of Nigeria and the refusal of the Defendants to provide adequate facilities to alleviate the pains and sufferings of the internally displaced residents in the affected Northern States are the cause of action in this suit.

6.4.4 That the Defendants were unable to produce documentary facts to show that the agencies they mentioned such as the National Commission for Refugees and Internally Displaced Persons, National Emergency Management Agency, States' Emergency Management Agencies, have put in place adequate and substantial measures to ameliorate the hardship encountered by the Internally Displaced Persons.

6.4.5 That the argument by the Defendants that the Plaintiff could not identify the violators is untenable and misleading and Plaintiff urges the court to hold that the violators have been identified and that the Defendant refused to put up adequate security measures to combat the insurgences in the affected areas. They refer to the paragraphs contained in the Plaintiffs originating process which point to the fact that the nefarious activities of the Islamic sect, Boko Haram, led to the plight of the internally displaced persons.

6.4.6 That the Defendant has not placed before this Honorable Court, evidence to support the fact alluded to under paragraphs 3.05 to 3.09.

6.4.7 That the Defendants in this suit are strictly under a statutory obligation to avail Internally Displaced Persons with adequate care and facilities. Plaintiff referred to Section 6 of the NATIONAL

EMERGENCY MANAGEMENT AGENCY Act, which provides for the functions of the Agency.

6.4.8 They submitted that these provisions of the law bear eloquent testimony to the fact that the Defendants are under a statutory obligation to provide palliative measures to persons affected by all forms of natural disasters, which include crisis as contemplated by the provision of Section 6 (2) of the NATIONAL EMERGENCY MANAGEMENT AGENCY Act, 2004. The crisis in this suit, which led to the Internally Displaced Persons' plight as prevalent in some Northern States of the Federal Republic of Nigeria, arose from political, social and religious problems caused by the Boko Haram Sect in those crisis-ridden States.

6.4.9 That there are numerous international conventions, statutes and treaties that the Federal Republic of Nigeria is a signatory to and to that extent, those conventions, statutes and treaties are binding on the Federal Republic of Nigeria. Reference is made to the provisions of PRINCIPLES 1, 2, 3, 5, 6, 9, 25, 28, among other provisions contained in the Guiding Principles on Internal Displacement.

6.4.10. That the Federal Republic of Nigeria is a signatory to the International Convention of 1951, the Federal Republic of Nigeria is also a signatory to the African Union Charter of 1969 and, as such, the Defendants owe a duty of care to all Internally Displaced Persons as well as Refugees within the sub-African continent.

6.4.11. The Plaintiff finally urges this Honourable Court to discountenance the submission of the Defendant's counsel and to hold that the Plaintiff has a justiciable cause of action and more importantly, grant all the reliefs sought by the Plaintiff.

6.5. ORAL ARGUMENTS

6.5.1. The Court entertained oral arguments before this BENCH.

6.5.2. The Plaintiff, in their closing arguments, submitted that the Defendant failed to carry out its functions in violation of international legal obligations; that Boko Haram has created a lot of IDPs and

the Defendant has not done what it ought to have done; that the Government has not shown specifically what they have done; that the Court should take judicial notice that the IDPs are not cared for and are still subject to attacks from Boko Haram, and finally that the IDPs have not been treated fairly.

6.5.3. In counter argument, the Defendant contended that the Government has done extremely well to alleviate the suffering and hardship of the IDPs, and they are surprised that the Plaintiff, who are citizens of Nigeria, would condemn the Government when outsiders are not just commending but also supporting the Government. The Defendant cited examples of those persons assisting the Government, such as the United Nations, the G7 countries, ECOWAS, among others, and they would not have done so if they were not convinced that the Government was really trying to contain the insurgency and terrorism from Boko Haram. Finally, the Defendant argued that some IDPs have been approached by the Government to go back to their homes but they have refused since they are being well taken care of in the camps.

6.5.4. In further argument, the Defendant contended that the perceived lack of capacity to deal with the insurgency have been redressed and those found to have been responsible are being prosecuted. Defendant contended that the Plaintiffs are merely self-seeking in their application as they, only intend to enrich themselves by capitalizing on the plight of the poor IDPs.

6.5.5. In terms of concrete actions taken by the Government, the Defendant argued that the Government has set up a Victims Relief Fund and that funds have been systematically arranged and sums paid out to the victims. The second action taken by the Government is the creation of a multi-national Joint Task Force consisting of militaries from countries in the region, such as the Republics of Benin, Cameroon, Chad, Niger and Nigeria, with headquarters in Chad. Defendant said under that Task Force, the Defendant has been able to liberate all territories formerly held by Boko Haram.

6.5.6. The Defendant argued that terrorism and insurgency are global and no country is spared from its scourge, and Nigeria is doing its best to deal with the menace.

6.5.7. Therefore, the Defendant asked the Court to dismiss the Application in its entirety as it lacks merit and appreciation for the efforts of the Defendant which have been acclaimed by the international community.

6.5.8. The Defendants further said that the Defendants, in their quest to eradicate internal displacement through their agencies, carefully study the nature of displacement through constant monitoring and evaluation and put measures in place for ensuring the prevention of displacement. Some of these measures are; encouraging reconciliation, raising early warnings.

6.5.9. The Defendant concluded by saying that the Defendant, as a signatory to the above treaties and upholder of the law remains committed in the enforcement and ensuring the observance of the treaties and laws; and that the allegations of the Plaintiff are devoid of merit and therefore eligible to be dismissed.

6.5.10. Therefore, the Defendant prayed this Honourable Court to dismiss this action in its entirety with appropriate cost against the Plaintiffs.

6.6. SUMMARY OF SUBMISSIONS AND ARGUMENT BY BOTH PARTIES

6.6.1. Plaintiff avers that the Nigerian Government has continually failed and/or neglected to respect, protect, fulfill and promote the human rights of IDPs by, among others, failing to meet their protection and assistance needs, including social and work relations, and their family dynamics, to provide health facilities to meet their physical and mental health needs; that the Nigerian Government has also failed to systematically assess the conditions and situation of the IDPs across the country; in other words, the Nigerian Government has failed to exercise due diligence and to act proactively to assist IDPs, many of whom do not have a home to go back to.

6.6.2. Further, that the response by the Nigerian Government to the conditions of IDPs is fragmented and inadequate, as illustrated by Defendants' closure of several displacement camps in central and northern areas of Nigeria. Those living in camps are often left without enough food, essential household items and health facilities.

6.6.3. On the other hand, the Nigerian Government has denied being negligent. Specifically, the Defendant Government has argued that Negligence arises when legal duty owed by the Defendant to the Plaintiff is breached. The duty of care owed by the Defendant is paramount but allegation of negligence has to be proved either by preponderance of evidence or on the balance of probability. Negligence being a question of fact, a party claiming it must plead it and particularize it by identifying each ingredient of negligence the Defendant breached.

6.4.4. The Government, in its contention that Negligence on its part does not exist in this case, has further argued that in the case of *Bouygues (Nig.) Ltd. V Marine Services Ltd. (2013) the Court held:*

"negligence is complete and actionable when three conditions are met. The conditions are:

(a) The Defendant owed a duty of care to the Plaintiff;

(b) The duty of care was breached;

(c) The Plaintiff suffered damage arising from the breach."

"For a Plaintiff to succeed in an action in negligence, he must plead sufficient particulars of the negligence alleged, adduce credible evidence to show the duty of care owed, breach of that duty by the Defendant and the damage suffered as a result ...."

"The burden of proof of negligence falls on the Plaintiff"

"Facts are important in every case before the Court as they are the fountain head of law. Facts are of great importance in the case of negligence. In a case of negligence, the facts which gave rise to the negligence must be comprehensively and delicately pleaded in minute"

6.6.5. The Defendant said it is apparently clear from the facts, figures and circumstances that the Defendants are to be encouraged and commended on their efforts in ensuring that Internally Displaced Persons are well catered for and are not left to linger in degrading or inhuman situation.

6.6.6. The Government, in defending itself against the charge of Negligence made by the Plaintiff, says that the Defendants comprise the entire public of the Federal Republic of Nigeria, including the Plaintiff, who is registered by the Defendant; that the Plaintiff's assertions are so myopic, vague and ambiguous to the extent of denying this Honourable Court the opportunity of identifying the alleged violators of those rights; that the Defendant has Federal, State and Local Governments; it is pertinent to be specific in making such grievous allegations.

7. ISSUES PRESENTED FOR DETERMINATION

7.1. Plaintiff prayed in its complaint for orders condemning the Defendant for Negligence and granting reliefs in the nature and form of financial compensation and other forms of reparation.

7.2. On the other hand, the Defendant denied any Negligence in its fight against Boko Haram and contended that it has taken appropriate and adequate measures in protecting civilians in the war and therefore asked the Court to deny the claims and dismiss the case with costs against the Plaintiff.

7.3. Accordingly, the following issues call for determination by this court:

A. Whether or not, from the totality of facts put forward, the Plaintiff has established a cause of action against the Defendant for violation of human rights of the IDP's?

B. Whether or not, in the light of the totality of evidence adduced, the Defendants are in violation of the rights of the IDPs as alleged?

C. Whether the Plaintiff is entitled to damages as claimed?

8.0. ANALYSES OF THE COURT

8.0.1. We observe that it is not in contention or dispute that the Government is facing and fighting a war against terrorism and insurgency as a result of which many of the civilian population have been uprooted from their homes and displaced in IDPs Camps.

8.0.2. The only points of divergence between the parties is whether or not the Plaintiff has established a cause of action against the Defendants and secondly, whether or not the Plaintiff has established that the initiatives or response by the Defendants constitute a violation of their obligations to the IDPs.

8.0.3. We have however noted that the 2nd Defendant is the Attorney General of the Federation. This Court has in a plethora of cases held that only Member States, signatories to the Treaty, can be sued before this court. Accordingly, this Court deems it necessary to strike out the 2nd Defendant from this case. (*See the case*, **PETER DAVID V. AMBASSADOR UWECHUE (2010) CCJELR, SERAP V. FRN & 4 ORS (2014) UNREPORTED.)**

8.1. AS TO CAUSE OF ACTION

8.1.1. A cause of action is the heart of the complaint, which is the Pleading that initiates a lawsuit. Without an adequately stated cause of action the Plaintiff's case can be dismissed at the outset. It is not sufficient merely to state that certain events occurred that entitle the Plaintiff to relief. All the elements of each cause of action must be detailed in the application. The claims must be supported by the facts, the law, and a conclusion that flows from the application of the law to those facts. It is a set of facts sufficient to justify a right to sue.

8.1.2. The Nigerian Supreme Court in **SAVAGE V. UWAECHIA (1972) All NLR 255** pointed out that in determining whether there is a reasonable cause of action, the court is guided and directed to restrict itself to the statement of claim of the Plaintiff and nothing else.

8.1.3. In the instant case, the Plaintiff alleged that the Defendant has continuously failed or neglected to respect, protect, fulfill, promote

and access the condition and situation of the human rights of IDPs across the country by, among others, failing to meet their protections and needs. The Plaintiff contended that the Defendant has failed to exercise due diligence and to act proactively to assist the IDP's, many of whom have no home to go back to. That the Defendants response towards the condition of the IDPs is inadequate and fragmented as several IDPs camps in the central and northern areas of Nigeria have been closed.

8.1.4. That the IDPs have suffered loss of lands and housing, marginalization, serious psychological repercussions, unemployment, increased poverty, deterioration in living conditions, increased illness and mortality, loss of access to communal property, lack of food, security and social disintegration.

8.1.5. That the crisis of security created by forced internal displacement leaves IDPs unprotected, with women and children disproportionately affected. Such vulnerability creates an obligation for the Defendant Government to adopt positive measures to ensure protection and security of IDPs even when the displacement is caused by third parties. That such vulnerability is a violation of the right to personal integrity.

8.1.6. The Defendants, in submitting that the Plaintiff has no cause of action, referred to the Nigerian Supreme Court decisions in **ADEKEYE v. FHA (2008) 11 NWR Pt. 1099** and **ALHAJI MADI MOHAMMED ABUBAKAR V BEBEJI OIL AND ALLIED PRODUCTS LTD & 2 ORS (2007) 18 NWLR PART 1066 @PAGE 319.**

8.1.7. At the very outset, we herein re-emphasize as we have done on previous occasions, that this Court, being an international court, is not bound by these decisions of the Nigerian Court, nor those of any other Member States of ECOWAS for that matter; we do however, recognize that they may be persuasive in appropriate circumstances.

8.1.8. We note that this Application is lodged in this Court by SERAP, a nongovernmental organization purportedly on behalf of alleged victims

of human rights violation, who are not specifically identified or identifiable, which alleged violations take the form of the victims being neglected by the Federal Government of Nigeria. This Application appears to be refutable because this Court has held that to plead a case before this Court one must have suffered a personal harm.

8.1.9. In support of this position, the texts controlling provides: "Access to the Court is open to ... individuals on application for relief for violation of their human rights" and the same text, for the purposes of accurate identification of such victims, adds that: *" ....the submission of the application for which shall not be anonymous."* See **Article 10(d) of the 2005 Protocol.**

8.1.10. The jurisprudence of the Court also aligns with this position; it requires that the harm done must be concrete in nature and must have affected the Applicant personally:

a. The case, **Ebrimah Manneh vs. The Gambia, June 5, 2008, Section 39:**

" ..... the object of human rights instruments is the termination of human rights abuses and in cases where the abuse has already taken place, restoration of the rights in question."

b. **Hadijatou Mani Koraou vs. Republic of Niger, Section 60:** The Court stated its mandate as consisting of ensuring ***"....the protection of the rights of individuals whenever such individuals are victims of violation of those rights which are recognized as theirs, and the Court does so by examining concrete cases brought before it."***

c. **Hissein Habre vs. Republic of Senegal, November 18, 2010,** wherein the Court held that ***"for an Applicant to bring a claim as a victim in a case, he must produce reasonable and convincing points of proof that the prejudice in question personally affects him."***

8.1.11. Therefore, from the case law as well as the legal texts, it is clear that only persons who have personally suffered violation of their rights are eligible to bring suits to this Court. At this point in our jurisprudence, we herein reaffirm and uphold the above principle as we have not found any reason to deviate from this long held and consistent view. Accordingly, we herein hold and rule that this Application is not admissible because the Plaintiff is not a direct victim of violation of any right(s) of its own.

8.2. AS TO PROOF OF VIOLATION

8.2.1. Now we turn to the substantive issue this case, of whether or not in the light of the totality of evidence adduced, the Defendants are in violation of the rights of the IDPs as alleged.

8.2.2. The Plaintiff has cited a litany of international legal instruments whose provisions we find are not in contention between the parties.

8.2.3. The Plaintiff contends that the Defendant has not fulfilled its obligations under the Charter and the Defendant on the other hand vehemently contends that it has fulfilled its obligations therein contained.

8.2.4. The Court here has to determine whether or not the Defendant has fulfilled its legal obligations to the IDPs under the international instruments.

8.2.5. As stated above, the Defendant averred that it has taken some concrete actions aimed at alleviating the suffering of the IDPs. It informed that the Government has set up a Victims Relief Fund and that funds have been systematically arranged and sums paid out to the victims; that it created a multinational Joint Task Force consisting of militaries from countries in the region, including the Republics of Benin, Cameroon, Chad, Niger, and Nigeria, with headquarters in Chad; that under that Task Force, the Defendant has been able to liberate all territories formerly held by Boko Haram.

8.2.6. The Defendant argued that terrorism and insurgency are global, and no country is spared from its scourge, and that Nigeria is doing

its best to deal with the menace and that it has created temporary centers, places or homes for these IDPs to settle until their various localities can be free, clear and suitable for their safe return. In these camps, the IDPs have and are being cared for and assisted with food, medical materials, and other basic necessities of life.

8.2.7. The Plaintiff, however, argued that these efforts are not sufficient to bring relief to the IDPs, who, they maintained, have been denied their rights to freedom of movement, respect, dignity and security of their persons as human beings, to participate in the governance of their country, the protection and promotion of their cultural and moral values, right to education, among others.

8.2.8. The question is, are these rights and freedoms of the IDPs being violated by the Defendant?

8.2.9. It is a general principle of law that he who asserts must prove.

8.2.10. In the instant case, the Plaintiff failed to adduce sufficient evidence in support of its claims against the Defendant. It failed to attach documentary evidence as to the number of IDP camps it claims to have been closed down, neither did it attach any evidence as to the particular IDP's that are directly affected by the alleged negligence of the Defendant. Of the three million IDPs' referred to and on whose behalf the application is alleged to be brought, not one person was called to testify for the Plaintiff.

8.2.11. The Plaintiff contended that the Nigerian Government is responsible for the displacement of the IDPs and has failed in its obligation to protect the population in order to avoid their displacement. This contention of Plaintiff is however an obvious contradiction of the averment in its own originating Application that the Defendant, Nigerian Government, is involved in a fight with the insurgents, Boko Haram, which gave rise to the displacements in the first place.

8.2.12. Furthermore, Paragraph 6 (2) (b) of the UN Guiding Principles justifies displacement in situation of armed conflict when the security of the countries are at stake or where the imperative military reasons so demand. The circumstances that led to the displacement

of the IDPs under reference are not in issue nor is the justification for the displacement.

8.2.13. There is therefore no basis to support the Plaintiff's contention that the Government of Nigeria is responsible for the displacement and is in breach of its obligation to protect the IDPs, as alleged.

8.2.14. In **ELSI'S CASE, R LILICH NEW YORK (1992) 77**, the International Tribunal stated on burden of proof, as follows:

"That the Applicant's case must be objectively and realistically seen crossing a 'bright line' of proof. Its case must be made by a preponderance of evidence and should be able to persuade the Court to tilt in their favour. Therefore, the burden of proof is weightier and is recognized as the twin burdens of proof and persuasion."

8.2.15. In the case **of FALANA & ANOR V. REP OF BENIN & 2 ORS (2012) UNREPORTED,** this Court held that ***"as always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the Court to believe the statement of the claim"***.

8.2.16. In **PETROSTAR (NIGERIA) LIMITED V. BLACKBERRY NIGERIA LIMITED & 1 OR CCJELR (2011),** this Court, in its consideration, reiterated the cardinal principle of law that ***"he who alleges must prove"***. Therefore, where a party asserts a fact, he must produce evidence to substantiate the claim.

8.2.17. It is an elementary principle of law that failure to lead evidence on pleaded facts is fatal to a case. The Plaintiff's submission on the alleged acts of the Defendant, which allegedly violate the rights of IDPs, has not been supported with documents or other forms of evidence to prove such averments.

8.2.18. On the other hand, we find that though the Defendant informed the Court and vehemently argued that it had taken several steps and actions to implement measures preventing displacement and ensuring that displacement does not last longer than required, the

Defendant also did not however support its averment with any evidence. Nevertheless, it is a general principle of evidence law that the Plaintiff cannot succeed on the weakness of the Defendant's case.

8.2.19. The Plaintiff submitted that the Defendant failed to lead evidence to substantiate the alleged actions it took and so urged the court to hold the Defendant in breach of its obligations.

8.2.20. In **SIKIRU ALADE V. FRN (2012) Unreported,** this Court holds fast to the notion that every material allegation of claim must be justified by credible evidence and the defense should also sufficiently satisfy every defense and put forward what will rebut the claim or take the risk of putting nothing at all if the claim by their estimation is weak and unproven.

8.2.21. In the light of the above, the Defendant, while defending itself, is much less required to lead evidence in proof of the actions it has taken and the Plaintiff cannot expect to succeed on the weakness of Defendant's case.

8.2.22. The United Nations Guiding Principles on Internal Displacement provides a framework on understanding the responsibility of government. The Guidelines set out benchmarks for assessing the effectiveness of government's response to the plight of IDPs. These include preventive measures, awareness creation, training of relevant officers on IDP rights, adoption of natural framework and natural plan of action, involvement of International and Regional Organizations, and provision of adequate resources to the extent possible.

8.2.23. Having said this, we have considered what the Defendant claims it has done in the circumstances of this case. The Defendant maintains it has liberated all areas formerly held and controlled by the Boko Haram and that it is encouraging the IDPs to return home to those areas liberated; it set up and is operating a Victims Relief Support Fund and is paying out monies to the victims for their sustenance; and has trained staff who constantly (i.e. monthly, quarterly, semi-

annually and annually) collect and update data on the Internally Displaced for planning and effective management of the plight of the IDPs, to include rehabilitation, reintegration, reconstruction and resettlement of the displaced persons.

8.2.24. Plaintiff is asking this court to make declarations in their favour against the Defendants.

8.2.25. It is trite that for a court to make a declaratory judgment, the issue upon which the declaration is sought must be established by evidence.

8.2.26. The law is firm and well established that in claims for declaratory reliefs the Plaintiff must plead sufficient facts to constitute a platform for the reliefs being sought and he must lead or proffer cogent and credible evidence to sustain or support the said reliefs. The reason for this is obvious. A Plaintiff seeking for a declaratory relief must rely and succeed on the strength of his own case and not on any perceived weakness in the Defendant's case.

8.2.27. In **METZGER & ORS. v. DEPARTMENT OF HEALTH AND SOCIAL SECURITY (1977) 3 ALL ER 444 page 451,** there, Megarry V.C held thus:

> *"**The Court does not make declarations just because parties to litigation have chosen to admit something. The Court declares what it has found to be the law after proper argument, and not merely the submission of the parties.***

8.2.28. In the instant case, the Plaintiff has not sufficiently adduced evidence in substantiation of the declarations sought and this Court cannot grant such declarations in a vacuum.

8.2.29. Having therefore failed to lead any evidence in support of their assertions, this court cannot make the Declarations sought by the Plaintiff and, as such, this Court finds holds and herein declares that in the circumstances, the Defendant has not shirked from or neglected its international legal obligations to the IDPs.

8.4. AS TO DAMAGES

8.4.1. Damages are monetary awards which compensate the victim of any loss resulting from a violation. General damages are awarded at the discretion of the court having regard to the peculiar circumstance of each case.

8.4.2. In **MRS. MODUPE DORCAS AFOLALU V. REP. OF NIGERIA (2014) Unreported,** this Court, in its analysis, recalled that the principle of reparation constitutes one of the fundamental principles of law regarding liability. The harm to be repaired must exist in reality, must be directly linked to the victim, and shall be true and capable of being evaluated.

8.4.3. In the instant case, the Plaintiff has not sufficiently proved its case to justify its claim for damages nor has it given a concrete assessment of the harm suffered by the IDPs. Further, the Plaintiff has not given the method of distribution of the damages, nor has Plaintiff specified who the beneficiaries are or would be, and how they were determined.

8.4.4. In the circumstance, this Court is not inclined to grant the damages sought and hereby declines to do so.

9. DECISION

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

9.1. **Considering** the fact that this Court does not exercise jurisdiction over Defendants who are not juridical persons, the Court ***sua sponte*** drops the name of the 2nd Defendant because he is not a juridical person in international law and as such is not a proper party before this Court, and hence not answerable.

9.2. As to the merits of this case, the Court **determines**, firstly, that the case is not admissible and secondly, that there is no factual merit in the suit and as such, the claim is denied and the case dismissed, and the Defendant discharged from further answering herein.

AS TO COST

9.3. The Court **rules** that costs shall be and are hereby assessed for the Defendant against the Plaintiff/ Applicant in accordance with Article 66 of the Rules of this Court.

9.4. Thus made, adjudged and pronounced in a public hearing at Abuja, this 15th day of June, A. D. 2016 by the Community Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT:

- **Hon. Justice Micah Wilkins WRIGHT** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

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

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

HOLDEN AT ABUJA, NIGERIA

THIS WEDNESDAY, 15TH DAY OF JUNE, 2016

SUIT N°: ECW/CCJ/APP/03/14
JUDGMENT N°: ECW/CCJ/JUD/20/16

BETWEEN
OBIOMA C. O. OGUKWE - *PLAINTIFFS*

VS.
REPUBLIC OF GHANA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **FEMI ADEDEJI (ESQ.)** - *FOR THE PLAINTIFFS.*
2. **DOROTHY AFRIYIE-ANSAH (CHIEF STATE ATTORNEY)** - *FOR THE DEFENDANT.*

Exhaustion of local remedies - State Responsibility - Effective investigation - Burden of proof - Human Rights violation -Right to life -Right to dignity -Right to security of person.

SUMMARY OF FACTS

The Plaintiff, Obioma C.O. Ogukwe is the father to the late Master Austine Chukwuebuka Ogukwe who was a student of the Ideal College, Tema, in Ghana. The Plaintiff filed this application for the violation of the right to life of his son by agents of the Defendant and failure by the Defendant to carry out effective investigation.

On the 16th of October, 2013, the Plaintiff received a call from the Tema Harbour Police Station to come and identify the body of his son. On getting there, the Plaintiff was reliably informed that the school headmaster asked the deceased to join other students for a road jogging exercise wherein the headmaster diverted the students to the Tema Sea Shore. The headmaster asked the students to swim, but the deceased who could not swim declined.

The Plaintiff states that the autopsy report given to him by the Ghana Police Hospital without his consent revealed that his son got drowned whereas his physical appearance showed wounds on his face and sides indicating signs of beating, torture and gruesome murder. The Plaintiff maintained that the Defendant failed to carry out an effective investigation or set up a coroner inquest to unravel the mystery behind the death of his son and hold accountable those found culpable.

The Defendant in response contends that the Plaintiff failed to establish any cause of action against it and further argued that the Plaintiff has not exhausted local remedies in the Court of Ghana against the Ideal College of Tema for negligence.

On the alleged failure to carry out effective investigation, the Defendant denied the averment stating that due to the peculiar circumstance of the death of the deceased it was impracticable to effect an arrest. That the Ghana Police service conducted a full-scale investigation and submitted its report to the office of the Attorney

General for advice and therefore it cannot be held responsible for the death of the deceased.

With regards to the autopsy report, the Defendant maintained that the Plaintiff was at liberty to seek a second opinion from independent medical experts but failed to do so.

Furthermore, the Defendant contends that the Plaintiff has failed to establish any cause of action and that there is no basis for the claim of compensation for a death not caused by unlawful or arbitrary means.

ISSUES FOR DETERMINATION

- *Whether or not the Plaintiff's application is barred by the requirement of exhaustion of local remedies as a precondition to lodging a complaint before this Court?*

- *Whether or not state responsibility is sufficiently established against the Republic of Ghana to warrant judgment in favour of the Plaintiff?*

DECISION OF THE COURT

The Court held:

- *That the exhaustion of local remedies is not a pre-condition for approaching this Court.*

- *That the state has the duty to protect all persons on its territory and to investigate and punish all acts of violence and violations committed in its territory.*

- *That there is no traceable act to the state, in this case the Republic of Ghana either directly or through its agents which contributed to the death of the boy.*

- *That the entire investigation is characterized by inadequate and imprecise records of the steps that were taken and therefore falls short of a proper, thorough, adequate and effective investigation*

- *That the burden of proof rests on he who alleges and where that person makes out a prima facie case, he carries the benefit of presumption and obligation to prove then shifts to the other party who has the burden of presenting evidence to refute the presumption.*
- *That Ghana is responsible by default for its failure and neglect to conduct a proper investigation into the boy's death.*
- *Awarded the sum of $250,000.00 (Two Hundred and Fifty Thousand) Dollars to the Plaintiff as compensation.*

JUDGMENT OF THE COURT

2. COUNSEL FOR THE PARTIES AND ADDRESSES FOR SERVICE

For the Applicants:
Femi Adedeji (Esq.),
Falana & Falana's Chambers,
22 Mediterranean Street, Imani Estate,
Maitama District, Abuja.

For the Respondents:
Dorothy Afriyie-Ansah,
Chief State Attorney.
For: Attorney General &
Minister of Justice of Ghana.

3. SUBJECT-MATTER OF THE PROCEEDINGS

3.1. Violations of Human Rights to life guaranteed by Articles 1, 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights

4. LAWS RELIED ON/ARTICLES VIOLATED

1. Articles 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights;
2. Sections 12, 13(1) 1992 Constitution of the Republic of Ghana;
3. Article 4 of the Revised Treaty of ECOWAS;
4. Articles 6 of the International Covenant on Civil and Political Rights;
5. The cases:
   - **Amnesty International and others vs. Sudan (2000)** AHRLR 297;
   - **Malawi African Association and others vs. Mauritania (2000)** AHRLR 149, at 164-165;

- **Mulezi vs. Democratic Republic of Congo (2004)** AHRLR 3
- **Sankara vs. Burkina Faso (2006)** AHRLR 23;
- **Karaou vs. Republic of Niger (2010)** CCJLR (pt3) 1.

5. EVIDENCE SUBMITTED (DOCUMENTS)

1. The African Charter on Human and People's Rights;
2. ECOWAS Protocol on Democracy and Good Governance;
3. ECOWAS Revised Treaty;
4. The International Covenant on Civil and Political Rights;
5. Daily Sun Newspaper publication of October 28, 2013;
6. Tuesday Blueprint Publication of November 26, 2013.

6. FACTS AND PROCEDURE

6.1. NARRATION OF FACTS BY THE APPLICANT

1. That at about l PM on the 16th of October, 2013, the Plaintiff received a call from Tema Harbour Police Station, Ghana, asking him to come and identify the body of his son, late Master Austine Chukwuebuka Ogukwe, a student of Ideal College, Tema, aged 15 years (fifteen) in Ghana.

2. Upon getting to Ghana, the Plaintiff was reliably informed that on the 15th of October, 2013, late Master Austine Chukwuebuka Ogukwe was asked by his school Headmaster to join other students out on road jogging and along the way; the Housemaster diverted the students to visit the Tema Sea Shore. The Housemaster thereafter asked the students to swim, an idea which late Master Austine Chukwuebuka Ogukwe was said to have rejected (because he did not know how to swim) and that rather he would prefer phone game play.

3. The Plaintiff was given an autopsy report produced by the Ghana Police Hospital without the consent or knowledge of the Plaintiff.

4. In the said autopsy report it was claimed that Master Austine Chukwuebuka Ogukwe got drowned.

5. The physical appearance of late Master Austine Chukwuebuka Ogukwe corpse shows a tortured body as against the contradictory autopsy report carried out by the Ghana Police Hospital. The wounds on his face and sides are all evident signs of beating, torture and gruesome murder.

6. It is pertinent to say that up till now the Ghanaian Police have not deemed it fit to question either the school authorities or the housemaster for proper investigation. The Ghanaian Authorities to whom letters have been written are very much aware that late Master Austine Chukwuebuka Ogukwe was entitled to human right to life as guaranteed by the African Charter on Human and Peoples Rights and under the Constitution of Ghana.

7. The Defendant has not taken any step to set up a coroner inquest in a bid to unravel the mystery surrounding the death of late Master Austine Chukwuebuka Ogukwe and prosecute any person(s) found culpable.

6.2. PROCEDURE

6.2.1. The initiating Application **(Document number 1)** was lodged in this Court on February 20, 2014, and was accordingly served on the Defendant, The Republic of Ghana.

6.2.2. The Defendant, on April 1, 2014, filed a Motion for Extension of Time, dated March 19th, praying to be allowed one month from the date of the said Motion within which to file its Defense **(Document number** 2). The Defendant premised its Motion on the following:

1. The Defendant being a nominal Defendant in the matter needs to be briefed by the various Ministries, Departments and Agencies (MDAs) and the school involved in the matter.

2. It is the contention of the Defendant that she has a valid and legal Defense to the Applicant's Action. Therefore, the need for the application to be heard on its merits and not to be determined on a procedural technicality.

3. It is the request of the Defendant that the time for the lodgment of her Defense be enlarged for a period of one month from the date of filing this Application to enable the Defendant file her Defense to the Action.

6.2.3. Subsequently, the Defendant, on April 28, 2014, filed its Statement of Defense **(Document number** 3).

6.3. CONTENTIONS BY THE DEFENDANT

The Defendant in its Defense to the Applicant's suit, contended as follows:

1. It is the Plaintiffs case as per paragraph 5 (five) of the narration of facts that *"The physical appearance of late Master Austine Chukwuebuka Ogukwe corpse (sic) shows a tortured body as against the contradictory autopsy report carried out by the Ghana Police Hospital. The wounds on his face and sides are all evident signs of beating, torture and gruesome murder"*. The Plaintiff would therefore desire the Defendant to make some arrests and prosecute the individuals involved in the killing.

2. It is respectfully submitted that the Police do not make arrests without proper investigations and given the peculiar circumstances of the death of Master Austine Chukwuebuka Ogukwe where no finger prints could be taken, nobody saw how it happened and the tip off was from an unknown informant no arrest could have been effected.

3. Indeed, the Autopsy Report makes mention of the marks of violence and concludes that the basic cause of death was drowning while the direct cause was Asphyxia by submersion. The Report says everything that has been said by Plaintiff and therefore cannot be contrary to the Plaintiffs version as stated in the Statement of Case.

4. The Defendant says that the Plaintiff, after identifying the deceased prior to the conduct of the *postmortem* examination of the body of Master Austine Chukwuebuka Ogukwe was at liberty to seek a second opinion from independent medical experts. As it turned out, that did not happen and that the Police issued and sent to the Coroner a form to the effect that the Plaintiff had not died from violence or unnatural causes.

5. The Defendant denies the Plaintiffs contention that it has failed or refused to direct the Ghana Police Service to investigate the matter and to conduct a Coroner's inquest to unravel the mystery surrounding the death of the late Master Austine Chukwuebuka Ogukwe and to prosecute the persons involved.

6. In further denial the Defendant says that it has neither failed nor refused to direct the Ghana Police Service to investigate the circumstances leading to the death of the Plaintiffs son and therefore the Republic of Ghana cannot be held liable for the death of Master Austine Chukwuebuka Ogukwe and should not be liable for the payment of compensation to the family of the deceased.

7. The Ghana Police Service conducted full scale investigations into the death of Master Austine Chukwuebuka Ogukwe and has since submitted a report to the Office of the Attorney General for advice. The Police report was submitted under cover of letter dated 27th January, 2014 and contained statements from all 46 students who took part in the alleged dawn jogging and ended up at the beach. It also had statements from the school authorities and the Housemaster who chaperoned the students on that fateful day.

8. The Police could not make any arrests due to several factors some of which are as follows: (i). the incident happened on a Tuesday (a non-fishing day for the fishermen) as a result not many fishermen were at the beach to be interviewed and (ii). The time the report was made to the Police was at a time most visitors/fishermen, who went to the beach, had left making it difficult to probe any further. (iii) all the teenage students and their tutor in their statements to the Police could not explain how Master Austine Chukwuebuka Ogukwe died.

9. The Defendant contends that the Plaintiff fails to establish any cause of action against it and therefore should it not be liable for payment of compensation.

10. Defendant however denies the commission of any illegal act necessitating the violation of Section 13(1) of the 1992 Constitution of the Republic of Ghana and Articles 2, 3, 4, 5, 18 and 23 of the African

Charter on Human and Peoples' Rights (ratification and enforcement) Act (Cap A 9) Laws of the Federation of Nigeria 2004.

11. The Defendant further submits that Plaintiff is not entitled to his claim for the sum of USD1OMillion as compensation as same is not borne out by the facts of this case and state that there is no basis for the claim for compensation for a death that was caused by drowning and not by unlawful or arbitrary causes.

7. ISSUES PRESENTED FOR DETERMINATION

7.1. Applicants' Application praying for orders / reliefs, filed on the 20th day of February, 2014, demanded the following, to wit:

1. A DECLARATION that the failure or refusal of the Defendant to investigate the killing of Master Austine Chukwuebuka Ogukwe is illegal as it violates Section 13(1) of the 1992 Constitution of the Republic of Ghana and Articles 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act (Cap A 9) Laws of the Federation of Nigeria 2004.

2. An ORDER directing the Defendant to investigate the killing of late Master Austine Chukwuebuka Ogukwe, a student of Ideal College, Tema, aged 15 years and a Community Citizen by some individuals in the Republic of Ghana through the Commission on Human Rights and Administrative Justice of Ghana.

3. An ORDER directing the Defendant to arrest and prosecute the individuals involved in the killing of late Master Austine Chukwuebuka Ogukwe in the Republic of Ghana forthwith.

4. An ORDER directing the Defendant to pay the sum of $1OMillion to the family of the deceased as compensation for the unlawful killing of their son, Master Austine Chukwuebuka Ogukwe.

7.2. **The Defendant,** on the other hand, has rejected claims for liability, stating the following:

1. The Defendant contends that the Plaintiff fails to establish any cause of action against it and therefore should it not be liable for payment of compensation.

2. Defendant however denies the commission of any illegal act necessitating the violation of Section 13(1) of the 1992 Constitution of the Republic of Ghana and Articles 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act (Cap A 9) Laws of the Federation of Nigeria 2004.

3. The Defendant further submits that Plaintiff is not entitled to his claim for the sum of USD10 Million as compensation as same is not borne out by the facts of this case and state that there is no basis for the claim for compensation for a death that was caused by drowning and not by unlawful or arbitrary causes.

4. Defendant has contended that there is no responsibility on the State but rather that the Plaintiff should seek a civil action for Negligence against the school and not against the government.

5. Defendant further argued that the Plaintiff has not exhausted local remedies in the courts of Ghana against the Ideal College of Tema for Negligence and therefore this suit should not be allowed.

6. Further, the Defendant says its State Responsibility under International Law has not been established in that there is no internationally wrongful act which qualifies under the rules whereby the acts of officials, or private individuals and other entities can be attributed to the State.

7.3. QUESTIONS

The above claims and counterclaims of the parties have raised some very important and interesting issues, but we are however left with the foundational question to be answered by this Court as follows.

7.3.1. Whether or not the Application of the Applicant is barred by the requirement of exhaustion of local remedies as a precondition to

lodging a complaint to this Honorable Court, and hence dismissible? Or, to put it another way, whether or not the Applicant can maintain this suit without exhausting local remedies in Ghana before coming to this Court, and is entitled to the reliefs sought?

7.3.2. Whether or not State Responsibility is sufficiently established against the Republic of Ghana to warrant a judgment in favour of the Plaintiff? In other words, did the Republic of Ghana do what was required of it in having the death of the Plaintiffs son properly investigated and brought to closure?

8. DISCUSSIONS AND FINDINGS

8.1. The first question this Court shall answer is whether or not the Application of the Applicant is barred by the requirement of exhaustion of local remedies as a precondition to lodging a complaint to this Honourable Court, and hence dismissible? We answer in the negative.

8.1.1. In the Statement of Defense lodged by the Defendant, it is contended that:

"the responsibility of a State may not be invoked if:

(b) The claim is one to which the rule of exhaustion of local remedies applies and available and effective local remedy has not been exhausted."

Article 44(b) of the Draft Articles on the Responsibility of States for international Wrongful Acts by the International Law Commission (ILC). See page seven (7) bottom of the Defendant's Statement of Defense.

8.1.2. The jurisprudence of this Court is rich in its decision that an Applicant to come before this Court does not need to exhaust local remedies as a precondition. The Applicant can come directly without having to first institute a suit in the domestic court, or, he can institute such a suit and still come to this Court while that other suit is still pending, thus it is possible to maintain both suits simultaneously. This Court is clear in its stance on this issue and thus there is no need to over flog this question. The position assumed by the Defendant is flawed in

relation to the jurisprudence of this Court, and hence is not sustained. **Suit N^{O}: ECW/CCJ/APP/05/08, Ocean King Nigeria Limited** Vs. **Republic of Senegal, Judgment N^{O}: ECW/CCJ/JUD/07/11; Suit N^{O}: ECW/CCJ/APP/07/11, Valentine Ayika** vs. **Republic of Liberia, Ruling N^{O}: ECW/CCJ/RUL/10/11, 19th December 2011; Suit N^{O}: ECW/CCJ/APP/18/12, Linda Gomez & 5 Others** Vs. **The Republic of The Gambia, Ruling N^{O}: ECW/CCJ/RUL/13/13, 6th November 2013.**

8.2.0. The second question presented for resolution is whether or not State Responsibility is sufficiently established against the Republic of Ghana to warrant a judgment in favor of the Plaintiff. Further, did the Republic of Ghana do all that was required of it in the handling / investigation of the death of the Plaintiff's son?

8.2.1. The Defendant said it was confronted with an impossible task because there are no clear suspects to be arrested; no eyewitnesses as to how the boy died; the Defendant also acknowledged that it was undeniable that there were marks of violence on the deceased person's body that could have been caused before or after the drowning; the police could not have taken fingerprints because of the nature of the death; also, it was unclear from the marks on the body the nature of the object if any that was used to cause those marks.

8.2.2. The Defendant then went into the legal principle of State Responsibility. The Defendant acknowledged that under the principles of State Responsibility, the State is under an obligation to safeguard the lives of every individual in its jurisdiction in accordance with universally accepted principles. The Defendant denies however the commission of any illegal act necessitating the violation of Article 13(1) of the 1992 Constitution of Ghana and Articles 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act (CAP A9) Laws of the Federal Republic of Nigeria.

8.2.3. Defendant has relied on the Draft Articles on the Responsibility of States for International Wrongful Acts (hereinafter referred to as the **DRAFT ARTICLES)** by the International Law Commission

(ILC) adopted August 2001. These Rules establish (1) the conditions for an act to qualify as internationally wrongful; (2) the circumstances under which actions of officials, private individuals and other entities may be attributed to the State; (3) general defense to liability and (4) the consequence of liability." The Defendant says that with the adoption of these Draft Articles, they now govern the responsibilities of the State.

8.2.4. The Defendant cited Article 56 of the Draft Articles, which says: "The applicable rules of international law continue to govern questions concerning the responsibility of a State for internationally wrongful act to the extent that they are not regulated by these articles." Therefore, Defendant says its submissions will go beyond the Draft Articles.

8.2.5. Defendant draws attention to Article 44(b) of the Draft Articles which provides:

"The responsibility of a State may not be invoked if:

(b) The claim is one to which the rule of exhaustion of local remedies applies and available and effective local remedies has not been exhausted."

Based on this provision, the Defendant contends that the Plaintiff should have taken recourse to civil litigation against the Ideal College for negligence in the courts of Ghana, which were open and available to the Plaintiff and he did not take advantage of, and thus, the case of Plaintiff in this court against the Defendant for State Responsibility is prematurely filed.

8.2.6. The Defendant, by this argument, is contending firstly that it is the wrong party sued and secondly that the Plaintiffs suit against the school for Negligence should have first been filed in the civil courts of Ghana.

8.2.7. The Defendant has raised the issue of whether the action of Ideal College with regards to negligence is attributable to the State of Ghana? Obviously, the Defendant answered this question in the

negative and relied on Article 8 of the Draft Articles, which provides as follows:

"The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state carrying out the conduct."

8.2.8. Further, the Defendant cited Article 2 of the Draft Articles to define the responsibility of State for Internationally Wrongful Acts, as follows: *"There is an internationally wrongful act of a State when conduct consisting of an action or omission; (a) attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."*

8.2.9. Another provision of the Draft Articles cited by the Defendant is Article 4: *"(a) The conduct of a State organ shall be considered as an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government, or of a territorial unit of the State; (b) An organ includes any person or entity which has that status in accordance with the internal law of the State."*

8.2.10. However, the Defendant contends that it is not provided anywhere that the conduct of private institutions in a State could be attributable to the State such as would make the State liable to compensation to victims. Defendant contends that in this instant case, the State institution would Fe the Police and not the Ideal College. Defendant says it discharged its duty when it launched the investigation into the drowning death of Plaintiff's son and it is unfortunate that the circumstances did not permit the Police to make any arrests and as such no prosecution. Defendant says it had nothing to do with the decision of the Ideal College Authorities on October 15, 2013 to embark on a dawn jogging and wash in the sea; that same was done not on instructions from the Government of Ghana.

8.2.11. On the other hand, the Plaintiff contends that the Government of Ghana through the Police failed to investigate the death of Plaintiff's son and as such, the said Government has failed in its obligation to protect and defend all persons within its territory.

8.2.12. Plaintiff contends that his son was deprived of his right to life and the Defendant has failed and refused to investigate his death or to constitute a coroner's inquest to unravel the mystery surrounding the death, especially since the body of the deceased showed signs of torture, beating and gruesome murder. Plaintiff says the right to life is guaranteed in and by several legal instruments including the Constitution of Nigeria, that of Ghana as well as the African Charter on Human and Peoples' Rights, as well as the International Covenant on Civil and Political Rights.

8.2.13. Plaintiff contends that States will be held responsible if they fail to act with due diligence to prevent violations of the rights or to investigate and punish acts of violence, and for providing adequate compensation. Plaintiff cited the case, **Amnesty International and others** vs. **Sudan (2000) AHRLR 297,** in which the Court held that the Government has a responsibility to protect all people residing under its jurisdiction and even when the country is going through a civil war, the State must take all possible measures to ensure that its citizens are treated in accordance with international humanitarian law. Plaintiff also relied on the case, **Malawi African Association and Others** vs. **Mauritania (2000) AHRLR 149 at 164-165.**

8.2.14. Plaintiff contended that the duty of due diligence in international law enjoins a State to take action to prevent human rights violations, and to investigate, prosecute and punish them when they occur and the State's failure or omission to take preventive or protective action itself represents a violation of basic rights on the State's part, which is because the State controls the means to verify acts occurring within its territory. Plaintiff says also that the State has an obligation to ensure that the victim has an effective remedy available for all victims of violations in the State. Plaintiff relied on the case, **Mulezi** vs. **Democratic Republic of Congo (2004) AHRLR3,** in which the Respondent was directed to (a) conduct a thorough investigation into

the killing of the complainant's wife; (b) to bring to justice those responsible for these violations; and (c) to grant appropriate compensation for the violations. Plaintiff also cited the case, **Sankara** vs. **Burkina Faso (2006) AHRLR 23 (HRC2006).**

8.2.15. The Plaintiff contended that the failure of the Defendant to investigate the unlawful killing of the late Master Austine Chukwuebuka Ogukwe is illegal. Plaintiff said that under the combined provisions of the Constitution of Ghana and the African Charter on Human and Peoples' Rights to which Ghana is a signatory, the Government of Ghana has infringed on the right of the deceased to life, dignity of his person and security.

8.2.16. Plaintiff finally contended that victims of arbitrary killing are entitled to adequate compensation from the State where the violation was committed. Further, that granting compensation is separate from the additional obligation on States to conduct prompt, transparent and effective investigations and punish perpetrators. For this position, Plaintiff relied on the case, **Karaou vs. Republic of Niger (2010) CCJLR (PT3) 1,** in which the Community Court of Justice, ECOWAS held that:

> ***"Hadijatou Mani Karaou was a victim of slavery and that the Republic of Niger is to be blamed for the inaction of its administrative and judicial authorities."***

The Plaintiff was therefore awarded CFA 15,000,000.00 (Fifteen Million CFA) payable by the Defendant.

ANALYSES OF THE COURT

8.3. From the foregoing positions of the parties, the Court is inclined to favorably consider the arguments of the Plaintiff, in that the State has the duty to protect all persons on its territory and to investigate and punish all acts of violence and violations committed on its territory. As this Court ruled in the **Karaou** case, supra, we agree, as Plaintiff has herein contended, that the duty of due diligence in international law enjoins a State to take action to prevent human rights violations, and to investigate, prosecute and punish them when they occur and

the State's failure or omission to take preventive or protective action itself represents a violation of basic rights on the State's part, which is because the State controls the means to verify acts occurring within its territory. ***The State has an obligation to ensure that the victim has an effective remedy available for all victims of violations in the State.***

8.4. We agree with the Defendant that the acts of private institutions operating within a State are not attributable to the State because they are not agents of the State except where they were acting on the instructions or for the benefit of the State. This notwithstanding, the State has an obligation to employ due diligence to investigate and punish for violations occurring on its territory, and also to ensure that the victim has an effective remedy available for all victims of violations in the State.

8.5. As stated herein above, the Plaintiff has complained of the Defendant's violation of the boy's human right to life. This seems to suggest that simply because a person dies on the territory of a State then the State is responsible for the death. If this were true, then the State would always be held responsible for every death that occurs in its territory. This position is unreasonable and indefensible.

8.6. We beg to differ and herein state categorically that we cannot sustain such position because there is no act traceable to the State, in this case, the Republic of Ghana, either directly or through its agents or organs, which contributed or led to the death of the boy.

8.7. On the other hand, however, we concede that it is possible to hold the State responsible from the vantage point of default, wherein the State failed and or neglected to properly investigate or institute an inquiry into the death of the boy.

8.8. This Court has on several occasions sanctioned such default and condemned the State, as follows:

> "The Court observes that in spite of this request which was reiterated several times by Plaintiffs, the authorities in Niger Republic, who are competent to bring this case to the

knowledge of the Niger Military Justice, in order that justice could be done, as requested by the heirs of Sidi Ali Amar and Ousmane Sidi Ali, abstained from acting, and initiating any court action... Thus, the Court is of the opinion that such abstention of the authorities of the Republic of Niger is tantamount to a violation of the Plaintiffs' right to effective remedy before the competent national courts in Niger Republic, as guaranteed in Article 7 of the African Charter on Human and Peoples' Rights and Article 8 of the Universal Declaration of Human Rights." **Sidi Amar Ibrahim & Anor** vs. **Republic of Niger, Sections 44 and 45 ECW/CCJ/JUD/02/11 delivered February 8, 2011.**

"The national judicial authorities are thus under obligation to act promptly as demanded by due process, such that at each of the stages of the criminal procedure (pre-trial inquiry, trial proceedings and judgment), there shall be no undue, unreasonable, or unjustified delay. Thus, any form of unreasonable or unjustified delay occurring at any of the stages of the procedure unavoidably affects the right to trial in reasonable time." **Baldini Salfo** vs. **Burkina Faso, Section 29 ECW/CCJ/JUD/13/12 delivered October 31, 2012.**

"... none of the steps undertaken as depicted above, yielded the least possible reaction from the recipients. The Court is of the view that the situation is indicative of undisputable negligence on the part of the judicial services, coupled with signs of a malfunctioning judicial machinery, all combining to jeopardize the rights of the Applicants (....). The inertia of the judicial authorities has led to an objective situation of denial of the rights of the victims." **Abla Azali & Anor** vs. **Republic of Benin, Section** 29, **ECW/CCJ/JUD/01/15 delivered April 23, 2015**

8.9. In its defense, the Republic of Ghana contended that they were limited in their investigation because there were no suspects, there were no fingerprints, no eyewitnesses, nothing; and nowhere to start from. They further said they conducted an autopsy and there was a

report on the cause of death. They admitted to the Plaintiff's contention that there marks on the body. Yet they made no effort to exonerate itself or relieve itself from responsibility by producing into evidence the said autopsy report, the medical report, the death certificate, photographs, and most importantly the Police investigation Report containing what actions they took.

8.10. The Plaintiff's contention is that the Defendant failed to carry out effective investigation into the death of his son. They contend that his physical appearance as against the Autopsy report showed a tortured body with wounds on his face and sides which to the Plaintiff, were evidence of beating, torture, and gruesome murder. That the Defendants have not taken steps to investigate the matter, neither have they taken any step to set up a Coroner Inquest in a bid to unravel the mystery surrounding the death of the deceased and prosecute any person found culpable.

8.11. The Defendant, who were out of time in filing their defense, brought an application for leave to file out of time, asked for and was granted 30 days extension to enable them prepare an appropriate defense to the Plaintiff's application.

8.12. The Defendant did not deny the existence of marks of violence on the body of the deceased but insisted the marks may be the result of several factors. They denied that the *postmortem* was carried out without Plaintiffs' consent, insisting that the Plaintiff was at liberty to seek a second opinion from independent medical experts.

8.13. They submitted that they interviewed all the 46 students that participated in the jogging exercise with the deceased as well as the house master that took the students for the exercise. They maintained that they carried out full investigation into the incident, the report of which was submitted to the office of the Attorney General. They concluded that they were left with an impossible task as there were no clear suspects to be arrested.

8.14. They however did not attach any of the statements or a copy of the said report as evidence of the alleged investigation.

8.15. It is not in issue that the deceased died under questionable circumstances and both parties agree that the physical appearance of the deceased shows evidence of lacerations. The Plaintiff submits that the lacerations are indicative of beating and torture.

8.16. Generally, the burden of proof rests on he who alleges. Where however that person makes out a prima facie case, he carries the benefit of presumption and the obligation to prove then shifts to the other party who has the burden of presenting evidence to refute that presumption.

8.17. In **FERNANDEZ ORTEGA ET.AL V. MEXICO. INTER.AM CT.HR (SER C) N^{O}. 215 (Aug 2010),** the court noted that the state had the burden to provide conclusive information to disprove the alleged facts and having provided no evidence in contradiction of the Plaintiffs claim has failed to discharge that burden and so found the state responsible.

8.18. The question is whether the police did take all reasonable steps to unravel the cause of death by securing all the available evidence; in other words, is the investigation carried out by the Defendant sufficient as to be described as effective?

8.19. The burden is on the Defendant to show that it carried out effective investigation in the circumstances of this case.

8.20. For an investigation to qualify as effective, the Defendant must show that took all reasonable steps available to them to secure the evidence concerning the incident including inter alia, eye witness testimony, forensic evidence, and where appropriate, autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings.

8.21. The Defendants in this case contend that they have carried a full-scale investigation wherein they took statements of all the 46 students that went to the sea shore on that fateful day, gathered reports from the school authority as well as tutor all of which revealed that the deceased drowned. They however failed to attach any of the statements.

8.22. It is not enough to mention it *obita* that such statements were taken. The Defendants ought to attach such documents as will assist the court in determining the effectiveness or otherwise of the investigation. A summary of the investigative findings as mentioned in their defense is also not enough. All documents evidencing a thorough investigation must be annexed as exhibit and for examination by the court.

8.23. The death scene investigation is sometimes more important than an autopsy report. The purpose of having a forensic medical expert attend the death scene is in several folds. By viewing the body in the context of its surrounding, the forensic medical expert is better able to interpret certain findings than the autopsy and also advice the investigative agency about the nature of death.

8.24. The Defendant failed to record the initial appearance of the crime scene and physical evidence all which of are used to link the suspect to the scene, victims to the scene, and suspects to victims, this being the basic tenets why crime scenes are investigated.

8.25. Documentation of a crime scene is of paramount importance in an investigative process, this is because even when the investigation turns out to be unsuccessful, the courts would see that the state made attempts to carry out an effective investigation. The fact that an investigation did not succeed in identifying the perpetrator does not in itself render the investigation ineffective. Where however a crime is reported, investigations by the state or its agents have to be undertaken promptly, expeditiously, and with the required vigor.

8.26. Where there is a deficiency in the investigation which undermines its ability to establish the cause of death, or the person or persons responsible as in the instant case, it will fall foul of the above standard.

8.27. In the case of **ANGELOVA AND ILIEV V. BULGARIA ECHR 26th July 2007,** where the Applicant's brother was stabbed to death by a gang of teenagers, though the Applicants didn't suggest any direct involvement of the state, they complained of inadequacies in the police investigation. The court held that the absence of any direct state responsibility for death does not exclude the applicability of

Article 2. The court reiterated that in the circumstances of the present case, the obligation requires that there should be some form of effective investigation when there is reason to believe that an individual has sustained life threatening injuries in suspicious circumstances.

8.28. Also, in **CABRERA GARCIA AND RODIFO MONTIEL FLORES 735/01 Inter-Am CT.HR (2004),** the court found that the lack of an effective investigation or the lack of full analysis into the facts when faced with serious allegations generated responsibility for the Mexican State.

8.29. In **JUAN HUMBERTO SANCHEZ case, JUDGMENT INTER.AM CT. HR (SER C) No. 99 (June 7 2003),** where the state was not able to prove how the damage to the dead body occurred when it was found, the court and commission found that the burden of proof was not met and therefore held that Honduras was responsible for the violation.

8.30. In the present case there was no evidence or statement to the effect that a simple visual search was carried out to identify obvious physical evidence if any.

8.31. In **VELASQUEZ RODRIGUEZ** case, the Inter American Court stressed that the obligation to investigate must be fulfilled "In a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty not as a step taken by private interest that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. Obligation to investigate is an obligation means rather than result. Therefore, once state authorities are aware of an incident, they should without delay institute an impartial and effective means to unravel the truth"

8.32. In the light of the Defendants' defense, the entire investigation is characterized by inadequate and imprecise record of the steps that were taken and therefore falls short of a proper, thorough, adequate and effective investigation.

8.33. It is not sufficient merely to deny responsibility especially where the Defendant State seeks to set up a defense; the Defendant must produce evidence of steps or actions taken to show that it provided the Plaintiff with adequate and effective remedy to due process. This failure on the part of the Defendant is fatal. The Defendant suffers lashes for its woeful neglect and failure aforesaid, and for which Defendant is herein accordingly held liable.

9. CONCLUSION

9.1. States will be held responsible if they fail to act with due diligence to prevent violations of the rights or to investigate and punish acts of violence, and for providing adequate compensation.

9.2. That notwithstanding, this Court makes it clear that the Court is not holding Ghana responsible for the boy's death, but rather by default for its failure and neglect to conduct a proper investigation into the death and thereby provide an effective remedy to the Plaintiff. In other words, the Court does not uphold the Plaintiffs claim for Defendant's violation of the boy's right to life because the State did not cause the death, but the Court says the Defendant did not do enough to provide an effective remedy for the Plaintiff.

9.3. In this instant case, it is but fair and just that the Plaintiff be awarded some form of compensation for the irreparable loss he sustained. We are cautious however that claims for damages are addressed to the sound discretion of the court and ought not to be excessive or oppressive. In our view, the amount of USD $10,000,000.00 claimed by the Plaintiff is very oppressive and exorbitant and unreasonable, and therefore must be reduced to an amount reasonable under the present circumstances.

10. DECISION

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

As to Motions for Extension of Time

10.1. **Declares** that the Motion for Extension of Time filed by the Defendant be and the same is hereby granted.

As to the competence of the Court to entertain this suit because it is barred by the doctrine of Exhaustion of Local Remedies

10.2. **Declares** further that the Defendant's contention be overruled and denied because of the bountiful jurisprudence of this Court that that legal principle is not applicable to matters being brought to this Court. Accordingly, the Defendant's defense is hereby denied and the case sustained.

As to the merits of the case

10.5. Lastly, that this Court rules that the argument of the Defendant is not sustained and accordingly, the Court enters judgment for the Plaintiff against the Defendant for Defendant's failure to investigate the death of Plaintiff's son, and hereby orders the Defendant to pay compensation to the Plaintiff, albeit not in the amount prayed for in the Complaint/Application, Ten Million US Dollars USD$10,000,000.00), but rather an amount of USD $250,000.00 (Two Hundred and Fifty Thousand United States Dollars).

As to costs

10.6. The Court **rules** that costs are hereby awarded to the Plaintiff against the Defendants.

Thus made, adjudged and pronounced in a public hearing at Abuja, this 15th day of June, A.D. 2016 by the Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS RULING:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Tony ANENE-MAIDOH (Esq.) - *Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON THIS FRIDAY, 1ST DAY OF JULY, 2015

SUIT NO: ECW/CCJ/APP/32/15
JUDGMENT NO: ECW/CCJ/JUD/21/16

BETWEEN
MR. HAMA AMADOU - *PLAINTIFF*

VS.
THE REPUBLIC OF NIGER - *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **AMADOU BOUBACAR (ESQ.)** - *FOR THE PLAINTIFFS:*
2. **SECRETARY GENERAL TO THE GOVERNMENT, YACOUBA NABARA (ESQ.); MOUSSA MAHAMAN SADISSOU (ESQ.)** *AND* **MOUSSA COULIBALY (ESQ.)** - *FOR THE DEFENDANTS*

-Competence -Nature of proceedings -Right to defence - Compensation

SUMMARY OF THE FACTS

Mr. Hama Amadou, former President of the National Assembly, sued the Niger Republic to court for violation of his human rights and sought compensation.

He states that he and his wife were implicated and prosecuted in a case involving the trafficking of babies between Benin, Niger and Nigeria. That his parliamentary immunity was illegally removed by the National Assembly, on the request of the Prime Minister. He had to go into exile for more than a year, but that did not stop his arrest as soon as he returned home to participate in the 2016 presidential election. He believes that the Republic of Niger thus seriously violated his human rights.

The respondent State avails itself of the Court's lack of jurisdiction to entertain conditions for the waiver of the Applicant's parliamentary immunity and considers that the Applicant had ample opportunity to defend himself before the domestic courts under the conditions offered to all Nigerian litigants. He concluded that the conclusions and pleas of the Applicant are ill-founded.

ISSUES FOR DETERMINATION

- *Whether the Court is competent to hear the present case?*
- *Whether the proceeding against the Applicant is of a political nature?*
- *Whether the Applicant's right to defence is violated?*
- *Whether the Applicant is entitled to the compensation sought?*

DECISION OF THE COURT

The Court declares that it has no jurisdiction to hear all questions relating to the Application or interpretation of national law and, for the rest, admits the Application of the Applicant.

It declares the human rights violations alleged by the Applicant to be unsubstantiated and his dismissal as a result of his claim for compensation.

JUDGEMENT OF THE COURT

The Court thus constituted delivers the following Judgment:

I. PARTIES AND THEIR REPRESENTATION

The initiating Application was filed at the Registry of the Court on 3rd November 2015, by **Mr. HAMA Amadou**, a citizen of the State of Niger, who was represented by Amadou BOUBACAR (Esq.), Lawyer registered with the Bar in Niger, and who lives at Yantala Haut, in Niamey.

The Defendant State is the **State of Niger**, which was represented by the Secretary to the Government, living in his office within the State House, *Palais de la Presidence de la Republique*, whose Counsels are Yacouba Nabara (Esq.), Moussa Mahaman Sadissou (Esq.) and Moussa Coulibaly (Esq.), all Lawyers registered with Bar in Niamey, and living in the same town.

II. SUMMARY OF FACTS AND PROCEDURE

Plaintiff/Applicant who is the former President of the National Assembly in Niger came before the Court with a human rights violation case.

As a former ally of the political party in power, after the 2011 general elections, he left that alliance, following some internal wrangling with the governing party. He claimed that during the month of February 2014, various measures were taken by the Government, which aimed at depriving him, especially of police protection. But, mainly during the month of June 2014, after the media was awash with the news on the existence of a vast Baby Trafficking Network, whose bases were in Benin Republic, Niger Republic and Nigeria, revelations from investigations established the involvement of a wife of the Plaintiff/Applicant in the network, and thereafter, the Plaintiff/Applicant himself. They came under prosecution, and on 22 June, Mrs. HAMA Amadou was arrested, placed in police custody, and charges of child trafficking, being in possession of fake documents and using same, associating with evil doers and complicity in child trafficking were brought against her.

On 15 September 2014, the State Prosecutor forwarded a request to the Dean of Investigative Judges, to carry out an investigation on Mr. HAMA Amadou, on the same charges.

Thus, owing to his quality as an MP, and above all as the President of the National Assembly, a special procedure ought to be followed. It was in achieving this aim that the Prime Minister forwarded a correspondence to the Bureau of the National Assembly, requesting that MP HAMA Amadou be made available to face justice. The Bureau of the National Assembly gave a positive reply to this request, and informed the President of the Court of Appeal in Niamey.

On the same day, the 26th of August 2014, the Plaintiff/Applicant forwarded some correspondences to a certain number of personalities in Government, on what he considered to be an illegal procedure: these personalities were the Prime Minister, the First Vice-President of the National Assembly, and, above all, for strictly legal reasons, the Constitutional Court, seeking from these personalities, and judicial institution an interpretation of Article 88 of the Constitution of Niger, in regard to parliamentary immunity, and the conditions of the arrest of an MP.

Almost one month later, on 25 September 2014, a warrant of arrest was issued against Plaintiff/Applicant, who did not waste time to leave the country. He was in "exile" for more than one year. It was when he decided to return to his country, for the purpose of taking part in the Presidential Elections of 2016 that he was arrested and deprived of his liberties.

It was in these circumstances that he decided, through an Application filed at the Registry on 3 November 2015, to come before the ECOWAS Court of Justice, with a case on the violation of his fundamental rights, by the Authorities of the State of Niger.

Plaintiff/Applicant filed, simultaneously, a separate Application seeking that the matter be examined in an expedited procedure, in regard to an urgency that he claimed was at hand. By Order dated 14 December 2015, the Court set aside that request, and rather ordered the continuation of the investigations.

On its own part, the State of Niger filed a Memorial in defence on 1st December 2015, as well as a Supplementary Memorial in defence on 4th December 2015.

III. PLEAS-IN-LAW AND ARGUMENTS BY THE PARTIES.

Plaintiff/Applicant argued various grievances against the State of Niger.

He first evoked the violation of his parliamentary immunity, which was engineered purely on political considerations. The approval granted by the Bureau of the National Assembly for him to be prosecuted, was contrary, according to him, to the provisions of Articles 2, 3, 7 and 10 of the African Charter on Human and Peoples' Rights.

Plaintiff/Applicant equally argued that his right to fair hearing was violated, because the Bureau of the National Assembly took its decision, with disregard to the tenets of adversarial principle. On the overall, he criticized the irregularities in the case file of that procedure, because he had never had access to the files. This was due to a biased position taken by the Judicial Authorities, who, by so doing, have simultaneously violated his right to the presumption of innocence. Plaintiff/Applicant claimed that the sum total of all the violations led to the deprivation of his right of eligibility, because, as he strongly believes, all those transgressions carried out were aimed at preventing him from taking part in the electoral contest. Finally, Mr. HAMA Amadou argued for the "*nullity of the warrant of arrest*" that was issued against him, because it was "*contrary to the Law of Niger.*"

On the strength of all the above reasons, Mr. HAMA Amadou made some requests to the Court, which include, finding the violation, by the State of Niger, of some of his fundamental rights, an order on the Defendant to respect his right to parliamentary privileges and immunity, the cessation of the criminal proceedings initiated against him, an order on the State of Niger, to remove all impediments for him to participate in the 2016 Presidential Elections, and the cessation of all moves geared towards the implementation of the warrant of arrest issued against him. Finally, he sought an order from the Court, as to reparation, as follows: - i) the sum of seventy million CFA Francs as "appearance fees for his counsels", and ii) the sum of three hundred million CFA Francs for the prejudices suffered, without forgetting another order on the State of Niger to bear all costs.

The **State of Niger** replied by invoking the lack of jurisdiction of the Court over the parliamentary procedure, which paved the way for the Plaintiff/ Applicant to be tried, first, and generally, to raising any issue relating to the

Laws of Niger. To this effect, the Defendant State cited the settled case law of the ECOWAS Court of Justice.

Defendant equally reacted to the issue of the violations of the right of defence raised by Mr. HAMA Amadou, which it considered did not comply to the reality, because Plaintiff/Applicant had all the time to defend himself, in the circumstances available to any litigant, and that above all, the case he filed before the ECOWAS Court aimed at requesting the Court to forbid the Defendant State to carry out its responsibilities as to investigations, and, ultimately to try him.

In conclusion, the Defendant State sought from the Court a declaration on the case filed by Plaintiff/Applicant as ill-founded, and an order on Plaintiff/Applicant to bear all costs.

IV – **LEGAL ANALYSIS BY THE COURT**

As to form

Owing to the arguments held by parties before the Court, it is the opinion of the Court to first make a pronouncement as to its jurisdiction, in regard to some aspects of the initiating Application filed by Plaintiff/Applicant.

Indeed, it appears that Plaintiff/Applicant cited many provisions in the national law, in support of his Application. These provisions fall within the purview of the Constitution of Niger Republic (whose interpretation, especially as it relates to Articles 88 and 89 is at play here), and the Rules of procedure of the National Assembly of Niger.

Again, the national Legislation was challenged, when Plaintiff/Applicant avers, in the last part of his Application that: "*the nullity of the warrant of arrest issued against him, in regard to the Laws of State of Niger".* Indeed, Plaintiff refers here, to the provisions of the national laws, especially Article 172 of the Code of Criminal Procedure.

Beyond the formal national provisions, the initiating Application solicits from the Court, whether implicitly or explicitly, an examination of the decisions made by the national courts. In regard to the violation of parliamentary immunity, for example, Plaintiff/Applicant claims that "*the Constitutional*

Court (...) violated the principle of valorisation, strengthening of Parliaments, and the guarantee for the immunity of Parliaments" (p. 10 of the Application.)

It is necessary to add that Mr. HAMA Amadou equally criticised some other decisions made by the national courts, especially the judgment of the Appeal Court in Niamey of 13 January 2015.

Whereas on this aspect of the requests made to the Court, whether they are *abstract national judicial acts*, or proper judicial pronouncements, the ECOWAS Court follows its settled case law, which the Defendant State has cited, in the instant case: its jurisdiction over cases, a principle according to which the Court is not a court that examines formal legality of jurisdictional pronouncements by national courts, nor a court of reformation, neither of Cassation over the decisions made by the national courts of Member States.

In its Judgment in the case of "**Pascal A. Bodjona** v. **the State of Togo**", dated 24th April 2015, it was declared thus:

> "***Similarly, the Court shall note as irrelevant, all the references made to the domestic law of Togo by the Parties in their written pleadings. The Constitution of Togo in particular was frequently cited by the two Parties. Now, the Court has no powers to assess the constitutionality or legality of instruments adopted by the national authorities. That mandate is assigned to the domestic courts of the Member States, and the ECOWAS Court of Justice cannot assume their role. In examining the cases brought before it, the ECOWAS Court of Justice shall refer exclusively to the norms of international law as binding on the Member States which have subscribed thereto. For the same reason, the Court shall discountenance the point of defence put forth by the Applicant in relation to producing an exhaustive list of the measures involved in Togo's judicial probation. It is a known fact that Mr. Bodjona contests the ban imposed on him in regard to going out of the national territory, on the ground that it is not among the measures that may be adopted in connection with serving judicial probation. It naturally implies that the Court cannot but abstain from making a pronouncement on that issue; in reality, to do so would amount***

to assessing the legality or otherwise of the judicial instruments and legal measures adopted by the Judiciary of the State of Togo." (§37.)

In the Judgment in the case of "**The Heirs of Bare Maïnassara v. The State of Niger**", dated 23 October 2015, the Court held that:

> **"*At this juncture, the Court shall recall a fundamental principle of its jurisprudence: in referring, in principle, to the international norms subscribed to by States, this Court neither assumes the role of a judge over the constitutionality or legality of the measures adopted by those States. In the instant case, it has no mandate to arbitrate between the two domestic court proceedings, and it shall not interfere in the problems of interpretation of the Constitution of Niger, or of the amnesty law of Niger. Therefore, any position taken by the Court on the variations experienced regarding the case law of Niger, in respect of its amnesty laws, would inescapably draw the Court towards putting itself out as a judge over the legality of those laws, in the wider sense. The Court would indeed be led thereby, at least implicitly, to make a declaration as to whether or not one mode of interpretation is more in accord with the legal doctrine and tradition of Niger or not, and thus, finally make a value judgment on the decisions made by the judge in the domestic court of Niger. Such approach would be directly opposed to the well-established jurisprudence of the Court."*** (§38)

In the judgment in the case of **"Jerry Ugokwe v. Federal Republic of Nigeria"** dated 7 October 2005, the Court declared that:

> **"*Appealing against the decision of the National Court of Member States does not form part of the powers of the Court;"*** (§32).

In the judgment on **"Alhaji Hammani Tidjani v. Federal Republic of Nigeria and Others"** dated 28 June 2007, the Court held that:

> **"*Admitting this Application will amount to this Court interfering in the criminal jurisdiction of the Nigerian Courts, without justification.*"** (§45).

In the judgment in the matter of **"Alimu Akeem v. Federal Republic of Nigeria"** dated 28 January 2014, the Court recalls that:

> "***It is trite that in those cases where the subject-matter of the dispute essentially had to do with a re-examining of judgments already delivered by the domestic courts, the Honourable Court held that they be dismissed …"*** (§42)."

Finally, in the Judgment in the case of "**Convention Democratique et Sociale Rahama v. Republic of Niger**" of 23 April 2015, the Court held that:

> **"*On the basis of the principle behind this standpoint, it can be deduced that the requests of CDS Rahama concerning the decisions of the local courts of Niger cannot be granted, the reason being that the Court has no remit for examining such decisions; and more generally, after decisions are made by the domestic courts of Niger, the Court has no jurisdiction to examine whether those local courts of Niger adhered or not to their jurisprudence or generally, to the national law of Niger.*"** (§53.)

Thus, there are abundant references. They lead the Court to set aside, large chunk of the initiating Application that is filed before it, and to declare its lack of jurisdiction over issues that relate to the national law.

As to merit

At this juncture, the Court must examine two main issues: the alleged political motivations for the trials and the respect for the right of defence.

On the political nature of the case

First of all, it was alleged that the trials of Mr. HAMA Amadou had political undertone, in regard to the internal politics in the State of Niger.

However, the Court has always rejected any argument bordering on political undertone. As a judicial institution, which is saddled to solely examine the legal aspects of the cases filed before it, even if it does not ignore, either the eventual political context or repercussions on such cases, the Court has always refused to see in these political aspects, a decisive factor in its judicial exercise.

In the instant case before it, Plaintiff/Applicant made reference, at least twice, to the "political nature" of the case, thus, to the critic prone nature of the proceedings initiated against Mr. HAMA Amadou.

At page 9 of the initiating Application, it is stated thus: "*At the reading of the facts of the case, one can clearly observe the grounds upon which the Bureau of the National Assembly acted (...) within the purview of the sovereign decision of the party, for which Plaintiff/Applicant was the Chairman, to exit the ruling coalition.*" Further at page 20 of the initiating Application, Plaintiff/Applicant referred to a declaration by the Minister of Interior of the State of Niger, which the latter made in the French Published *"**Paris Match**"* dated 7th September 2015, as follows: - *"**As soon as Mr. HAMA Amadou returns to the State of Niger, he shall be arrested.**"* Finally, Plaintiff's whole arguments were based on the fact that the aim of the trial initiated against him was to eliminate, politically, a political opponent, or to prevent him from participating in the future Presidential Elections.

It is certainly regrettable, that declarations made by political office holders could affect pending judicial procedures. But the Court must recall that any time such arguments are presented before it, it always holds that such political considerations neither affect its principled jurisdiction, nor its traditional methodology in adjudication.

Thus, in the Judgment dated 8th November 2010, in the matter of *"***Mamadou TANDJA v. State of Niger***"*, the Court held that:

> ***"In principle, Article 9.4 of the Supplementary Protocol of 2005 does not make any distinction regarding the jurisdiction between politically induced human rights violation, and the other forms of human rights violations."*** (Page 10)

In the Judgment dated 23 March 2012, in the matter of *"***Barthelemy Dias v. State of Senegal***"*, the Court indeed clearly declared that:

> ***"the declarations made by the political office holders in Senegal, and which formed the grounds for the prosecution of Plaintiff, are personal opinions, for which their authors only can be held responsible (…) The Court is of the opinion that, even if such declarations emanate from high ranking officials, as in the instant case, they are not likely to compromise the independence and the impartiality of the trial judge…"***

In the decision of the Court in the matter of *"***Mamadou Baba Diawara v. State of Mali***",* it was also declared that:

> ***"This involvement of the Executive is undeniable, but the Court must recall that its mission is to examine the aspects of concrete human rights violation, and the measures that concern the people in their rights, or that affect them. The Court cannot waste its time on simple declarations, even in clear contradiction with the principle of the independence of the court: the Court does not examine statements or intentions, but judicial acts, or material actions that infringe upon the rights of the human person. In these circumstances, it cannot infer from mere declarations, a violation of human rights; the Court expects from every party that files a human right case before it that it should establish real, concrete, effective violations, in a nutshell, that effective declarations were backed-up with concrete acts, which are corroborated to be precise human rights violation, within the gamut of the rights of the human person."*** (§31.)

Then, in the jurisprudence of the *"***CDS Rahama v. State of Niger***"* of 23 April 2015, it was declared that:

> ***"The Court is well aware that once it is seised with a matter from a political body, the case will necessarily depict a political landscape. The Court shall however recall, as it has done in other decisions, that the political intents or declarations of one party or the other have no relevance to its legal mandate. More precisely, its mandate, in regard to disputes on human rights violation, is limited to examining, in reality and in concrete terms, whether there is violation of a well-defined right, and the Court does not unnecessarily entangle itself with political motives and statements."*** (§36.)

The same position was held in the Judgment in the matter of *"***Pascal Bodjona v. Republic of Togo***"*, which was delivered on 24 April 2015, when the Court held that:

> ***"there shall be no ground for the Court to be drawn into conducting its analysis upon such a political terrain. The Court shall reaffirm***

> ***its view, as corroborated by its well-established case law, that it shall not examine in any manner whatsoever, the political considerations or allusions contained in the pleadings brought before the Court, and that its mandate is simply to find, upon factual grounds, whether there have been occurrences of violation of the rights of the applicants coming before the Court. Consequently, the Court shall not countenance in the instant proceedings any of the purely political points raised by Mr. Bodjona in his Application."*** (§ 36.)
>
> (*See also* the Judgment in the matter of **Djibril Yippene Bassole v. Republic of Burkina Faso** of 2016.)

There is thus a solid case-law tradition which encourages the Court to exclude from the proceedings the political considerations raised by the Plaintiff.

On the respect for the right of defence.

The other segment of the argument held by Plaintiff/Applicant consisted in explaining the various infringements upon his rights, especially the fact that he was not heard, or did not have access to the case file, at some stages of the procedure. This aspect of his arguments was highlighted, when he claimed the disregard for the right to effective remedy, and the right to the presumption of innocence. On the one hand, it was indicated that the Bureau of the National Assembly acted without hearing Plaintiff/ Applicant, and, on the other hand that the case file of the procedure in Niger was never made available to Mr. HAMA Amadou (Pages 13 and 16 of the Application.)

However, in regard to the content of the case file, in the instant case, the Court finds it extremely difficult to examine, concretely the violation of the right of defence.

The Court finds that Mr. HAMA Amadou has never been effectively prevented from getting involved in the procedure that concerned him, through a formal action taken by either the political officials or judicial officers. At no time were his lawyers prevented from appearing, and the judicial decisions that were rendered (Judgment of the criminal tribunal of 30 January 2015, the Judgment of the Court of Appeal of 13 July 2015, *various practice*

directions issued by the criminal tribunal, Judgment of the Constitutional Court of 4 September 2014) were all made with respect for the adversarial principle.

Moreover, Plaintiff/Applicant had the opportunity to exercise his right to effective appeal, through the opportunities that were opened to him. Thus, he had the opportunity to write to the Prime Minister, the First Vice-President of the National Assembly, the Members of its Bureau, and, especially, he has duly seized the Constitutional Court, via correspondence dated 26 August 2014. As it were, it was due to the intervention of the constitutional judge that he has had the guarantee for the respect for his rights, if the terms of the afore-mentioned correspondence was anything to go by. In that case, the Constitutional Court delivered two judgments dated the same day (4 September 2014), upon two Applications filed, on the one hand by Mr. HAMA Amadou, and, on the other hand, by a group of 14 MPs, with both Applications seeking an interpretation of constitutional provisions on parliamentary immunity of an MP. It cannot be said that the right to justice, or the right to effective remedy was violated.

Thus, the Court has always considered, in such circumstances, that the States cannot be accused of human rights violation. To go beyond this position would lead the Court to examining the legality, or even the opportunity to examine criminal prosecution, a jurisdiction that the Court evidently lacks.

In support of this position, the Court can cite many Judgments that it has delivered, in this regard.

Thus, in the Judgment in the matter of *"***Mame Abdou Gaye v. the Republic of Senegal***"* dated 26 January 2012, the Court held that:

> ***"Plaintiff/Applicant neither related any violence against his person, nor any procedure, which was likely to have infringed upon his dignity, or the physical integrity of his person (…) Also, the Court finds that his arrest was not, in principle, a violation of the right to the presumption of innocence."*** (§§ 34 & 36.)

In the Judgment in the case of *"***Barthelemy Dias v. Republic of Senegal***"* dated 23rd March 2012, it was also stated that:

> ***"Plaintiff/Applicant failed to prove the selective prosecution for which he accused the State (…) The Court was led to find that the State of Senegal has not committed any human rights violation that could have prejudiced Plaintiff/Applicant."*** (§§ 24 & 27)

The Court equally delivered a Judgment in the matter of *"***Carmel Max Savi v. State of Togo***"* on 21st February 2013, in which

> ***"it noted that the arrest of Mr. Max-Savi Carmel (…) and his transfer to the Gendarmerie and the Detectives Office for interrogation took place within the framework of the execution of a competent court order, and, consequently, did not constitute an arbitrary arrest and detention."*** (Page 6)

Finally, in the Judgment in the matter of *"***General Amadou Haya Sanogo v. State of Mali***",* which was delivered on 17th May 2016, the Court struck out the claims made by Plaintiffs/Applicants, after observing that:

> ***"they have benefited, and continue to benefit from judicial assistance through their lawyers, that they exercised their right to effective remedy, unhindered, that the trial chamber has examined, within reasonable time-limit their request seeking to annul the proceedings initiated against them, without any proof, even with simple indices that that court was influenced by an external intervention, which likely compromised its independence, impartiality, or neutrality (…) The Court finds that Plaintiff/ Applicants have not brought any proof for the violation of their rights."*** (§§ 10 & 11)

On the strength of such a jurisprudential orientation, the Court must equally conclude that Plaintiff/Applicant failed to produce convincing evidence to establish the proof for the violation of his rights, within the framework of the criminal proceedings initiated against him. It is therefore normal that his claim should be stricken out, in this regard.

On reparation:

Plaintiff/Applicant did not bring any proof for the violation of his rights. His claim as per pecuniary reparation should therefore be rejected.

As to costs

Pursuant to Article 66 of its Rules of procedure, the Court orders Plaintiff/Applicant to bear all costs.

FOR THESE REASONS

The Court,

Adjudicating in a public sitting, in a case of human rights violation, and after hearing both parties, and in last resort.

As to form

- **Declares** its lack of jurisdiction over all issues brought by Plaintiff/Applicant in regard to the application and interpretation of the national law;
- Moreover, **declares** the Application filed by Plaintiff/Applicant as admissible.

As to merit

- **Declares** that the alleged human rights violation made against the State of Niger is not founded;
- Consequently, **rejects** the order sought by Plaintiff/Applicant on pecuniary reparation, and orders Plaintiff/Applicant to bear all costs.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, 01ST DAY OF JULY, 2016

SUIT NO: ECW/CCJ/APP/03/16
JUDGMENT NO: ECW/CCJ/JUD/22/16

BETWEEN
DJIBRIL YIPÉNÉ BASSOLÉ - *PLAINTIFF*

VS.
BURKINA FASO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE YAYA BOIRO** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE**-*MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION OF THE PARTIES:
1. **YERIM THIAM (ESQ.), MARC LE BIHAN (ESQ.), RUSTICO LAWSON-BANKU (ESQ.), DIEUDONNE BONKOUNGOU (ESQ.), WILLIAM BOURDON (ESQ.)** - *FOR THE PLAINTIFF*
2. **MR. YAO LAMOUSSA, MADAM STÉPHANIE ZOUNGRANA, MR. LANDRY YAMEOGO, MR. SALOMON OUABA** - *FOR THE DEFENDANT*

Jurisdiction - Admissibility - Failure to comply with international obligations - Ensure effectiveness of rights - Lack of jurisdiction - Inadmissibility - Damages and interests.

SUMMARY OF FACTS

The Applicant claims to have been deprived of the right to lawyers and telephone tapped outside of any legal framework, he is thus claiming for damages. The Defendant stated that the Court does not have jurisdiction and requests the inadmissibility of the application.

ISSUES FOR DETERMINATION

- *Are the objections raised by the Defendant justified?*
- *Whether the Applicant's rights were violated.*

DECISION OF THE COURT

- ***Rejects** as unfounded the objections raised by the Republic of Burkina Faso arising from the lack of jurisdiction of the Court and of litispendens;*
- ***Held** that the Applicant's right to freely choose his lawyers was violated;*
- *Therefore **orders** the Republic of Burkina Faso to reinstate him in his right.*
- ***Held** that there is no need to rule on the wiretapping for now;*
- ***Rejects** the Applicant's claim for pecuniary compensation as unfounded;*
- ***Order** the Republic of Burkina Faso to bear the cost.*

JUDGMENT OF THE COURT

I. THE PARTIES AND THEIR REPRESENTATION

The Initiating Application of the instant case was lodged at the Registry of the ECOWAS Court of Justice on 14 January 2016. It was submitted on behalf of Mr. Djibril Yipéné Bassolé, a Burkinabe, represented by:

- **Maître Yérim Thiam**, Lawyer registered with the Bar of Dakar (Senegal);
- **Maître Marc Le Bihan**, Lawyer registered with the Bar of Niamey (Niger);
- **Maître Rustico Lawson-Banku,** Lawyer registered with the Bar of Lome (Togo);
- **Maître Dieudonné Bonkoungou,** Lawyer registered with the Bar of Ouagadougou (Burkina Faso);
- **Maître William Bourdon,** Lawyer registered with the Bar of Paris (France).

The Defendant is Burkina Faso. Its Memorial in Defence was received at the Registry of the Court on 23 February 2016. The Defendant is represented by:

- **Mr. Yao Lamoussa**, Judicial Officer at the Treasury;
- **Madam Stéphanie Zoungrana**, Assistant Judicial Officer at the Treasury;
- **Mr. Landry Yameogo**, Assistant Judicial Officer at the Treasury;
- **Mr. Salomon Ouaba**, Assistant Judicial Officer at the Treasury.

II. SUMMARY OF FACTS AND PROCEDURE

On 29 September 2015, the Applicant, Mr. Djibril Yipéné Bassolé, a former Minister of Foreign Affairs of Burkina Faso, was summoned by the national gendarmerie for questioning, from his home, on the strength of letters rogatory dated 28 September 2015, made by a trial judge of a court martial

at the Ouagadougou Military Tribunal. The summoning was the aftermath of an attempted coup d'état in Burkina Faso which occurred on 16 September 2015, and formed part of the judicial inquires and proceedings instituted in connection with the failed coup d'état.

On 3 and 4 October 2015, Mr. Djibril Yipéné Bassolé was heard by officers of the Criminal Investigations Department (CID) of the military establishment, and was charged on nine (9) counts by the military trial judge, before he was put in detention. The principal charges made against him were: *"violation of State security", "colluding with foreign powers to destabilise internal security", "murder", "wilfully causing harm and injury", "wilful damage of property"*.

In mid-November 2015, the press reported on "rumours" of the telephone lines of Mr. Djibril Yipéné Bassolé having been tapped, and certain conversations recorded thereby. Again, it was in connection with those rumours concerning the tapping of his telephone lines, that recorded conversations alleged to have taken place between him and Mr. Guillaume Soro, President of the National Assembly of Cote d'Ivoire, may have been obtained and identified to have occurred on 27 September 2015. It is alleged that Counsel for Mr. Djibril Yipéné Bassolé asked the trial judge whether those allegations against his client had any basis at all, but the trial judge never deemed it fit to respond to the correspondences of the Plaintiff counsel.

In connection with the same procedure instituted against him, the Applicant was equally denied the choice of certain lawyers *"of foreign nationality"*, against whom the provisions of Article 31 of the Martial Code of Burkina Faso were applied thus: *"Subject to specific provisions provided for by international conventions, lawyers of foreign nationality are debarred from appearing before the military tribunals."*

It was under those circumstances that Mr. Djibril Yipéné Bassolé brought his case before the ECOWAS Court of Justice, asking the Court to:

"- *Declare that it has the jurisdiction to entertain the Application;*

- *Declare that the Application is admissible;*

- ***Find*** *that Burkina Faso did not respect its international obligations; it allowed the adoption of measures which jeopardised the actualisation of his rights, namely, that it allowed, outside the legal framework, the introduction and transcription of a recorded telephone conversation in a criminal trial proceeding in which he was a party, and secondly, it dismissed the lawyers of foreign nationality in the same trial, against his free will;*

- ***Order*** *Burkina Faso to scrupulously respect international instruments of its Constitution within the limits of his rights and consequently:*

  - ***Order*** *the withdrawal of all the recordings of the telephone conversation and their transcription;*

  - ***Annul*** *the order debarring the foreign lawyers from constituting counsel for him;*

  - ***Order*** *Burkina Faso to pay to him the sum of One Hundred and Fifty Million CFA Francs (CFA F 150,000,000) as damages for the economic harm done him, and a token sum of One CFA Franc (CFA 1) for psychological harm;*

  - ***Ask*** *Burkina Faso to bear the costs."*

Burkina Faso, on its part, lodged a memorial in response at the Registry of the Court on 23 February 2016, asking the Court to:

"***Declare*** *that it has no jurisdiction, in limine litis, to adjudicate on the Application filed by Mr. Djibril Yipéné Bassolé*;

As to formality**,**

Declare *the Application is inadmissible (...);*

As to merits**,**

Dismiss *the all the allegations of human rights violation and the charges made against Burkina Faso as ill-founded;*

Dismiss *the request to withdraw from the criminal trial, recordings of telephone conversation and SMS implicating the Applicant;*

Equally ***dismiss*** *the request for annulment of the order debarring the foreign lawyers from appearing before the military tribunal, as made by the trial judge of the military tribunal;*

Dismiss *purely and simply, the request for damages as legally baseless;*

Ask *the Applicant to bear the costs."*

The Burkina Faso Court of Cassation, seised by a complaint from Counsel to Mr. Djibril Yipéné Bassolé, delivered a judgment thereof on 26 May 2016, wherein it:

- **Declared** admissible the matters brought;
- **Dismissed** the matters brought by the foreign lawyers as ill-founded;
- **Quashed** Judgment No. 2015-003 of 22 December 2015, having declared inadmissible the appeal filed by Mr. Djibril Yipéné Bassolé;
- **Overturned** and **annulled** the judgment complained of;
- **Returned** the case before the Ouagadougou military trial chamber, as previously constituted;
- **Reserved** costs.

Hearing before the Community Court of Justice, ECOWAS was held on 7 June 2016 at Abuja.

III. ARGUMENTS AND PLEAS IN LAW OF THE PARTIES

THE APPLICANT (Mr. Djibril Yipéné Bassolé) insists in his written pleadings that the recordings of his conversations had no legal basis. He argues that there is no legal framework backing the tapping of the telephone conversation. As such, his right to privacy was violated, as provided for in the instruments binding on Burkina Faso.

Considering the lack of clarity of the circumstances within which the telephone recordings were done, the Applicant claims that he is entitled to challenge the authenticity of that procedure, on one hand, and on the other hand, call for a legal consideration of the legitimacy of the method applied. Now, he avers that the exercise of his rights is hampered by the trial judge of the military tribunal, who, till then, had not deemed it fit to reply the two mails his Counsel had addressed to him (mails dated 2 and 3 December 2015).

Given the foregoing circumstances, the Applicant maintains that the disputed telephone conversations be set aside from the criminal proceedings in which he is a party.

Mr. Djibril Yipéné Bassolé equally contests certain acts engaged in by the trial judge of the military tribunal, notably the issuing of the orders by which he dismisses the lawyers who constitute his Counsel as being *"of foreign nationality"* in Burkina Faso - be they of French nationality or citizens of UEMOA (West African Economic and Monetary Union) States. According to the Applicant, such exclusion is contrary to both the domestic law of Burkina Faso and the international commitments Burkina Faso has subscribed to (conventions ratified by Burkina Faso or the norms of UEMOA binding on Burkina Faso).

THE DEFENDANT STATE (BURKINA FASO) first of all advances an argument as to the Court's having no jurisdiction to adjudicate on the matter brought before it, at least as regards having to examine the provisions on the domestic law of Burkina Faso.

Secondly, the Defendant State cites inadmissibility of the Application, on the ground of the pendency of case (*lis pendence*) – that at the time the Court was seised with the matter before it, the same case was already pending before the domestic courts of Burkina Faso, and that it would be worthwhile for the Court to decline to hear the case.

On the issue concerning tapped telephone conversations, Burkina Faso makes the claim that the tapping of the telephone calls had a legal basis, notably Law 061-2008/AN of 27 November 2008, Regulations on Networks and Electronic Communication Services in Burkina Faso (Article 35 in particular, which provides that confidentiality shall be guaranteed: *"without*

prejudice to the powers granted for the conduct of investigations and for the security of the State"), and that the Code of Criminal Procedure (Article 427, states that: *"offences may be established by any mode of evidence"*).

Finally, regarding the rejection of foreign lawyers, Burkina Faso principally argues that the instruments cited by the Applicant, do themselves provide for legal restrictions to be consistently applied to the exercise of rights in general; and that specifically, the rules of UEMOA again provide for restrictions on certain rights, for the sake of public order, public safety, public health, *"or other reasons of general interest"* (Article 94 of the Treaty of UEMOA). Concerning the 24 April 1964 Convention signed between France and Upper Volta (former name of Burkina Faso), the Defendant State is of the view that its application is subject to the mechanism of reciprocity, and that the Applicant does not provide evidence of the provision made for such reciprocity.

During the court hearing of 7 June 2016, Burkina Faso advanced the argument that despite the progress made in the trial proceedings of the case at the national level, and notably by virtue of the judgments delivered by the Supreme Court of Burkina Faso, Burkina Faso was maintaining its position on the question of the presence of foreign lawyers among the constituted counsel for the Applicant and on the issue concerning tapped telephone conversations.

IV. ANALYSIS OF THE COURT

As to Formality

Burkina Faso raised two objections: one based on the Court's lack of jurisdiction in matters concerning application of the domestic law of Burkina Faso in general, and the Constitution of Burkina Faso, in particular; the other, based on *lis pendence*, that the judge at the local level of the Burkina Faso domestic court system was already seised with the same facts of the case, before the matter was brought before the ECOWAS Court of Justice.

Indeed, the written pleadings of the two Parties reveal numerous references to the domestic law of Burkina Faso, be it the Constitution or many other codes. The Applicant in particular meant to contest certain measures taken

against him by virtue of provisions of the Constitution. On its part, the Defendant State invoked a number of texts - such as Law 2008, Regulations on Networks and Electronic Communication Services in Burkina Faso, or the Burkinabe Civil Code - to justify, notably, the tapping of the telephone conversation.

Now, the norms referred to by the Court are, in principle, the norms of international law binding on the Member States. At any rate, that is the reason why only States are Defendants in proceedings before the Court for human rights violation. Therefore, and in accordance with a well-established jurisprudence, all the points of argumentation based on the domestic law must be set aside.

In another instance, the Defendant State raised an objection concerning *lis pendence*, in claiming that the Community Court of Justice, ECOWAS shall decline its jurisdiction in so far as the local courts of Burkina Faso had already been seised with the same case at the time it came before the said Community Court of Justice.

With regard to this point, and judged against the circumstances of the instant case, it remains permissible for the Court to examine the scope within which to adjudicate over the matter brought before it. The truth remains that in principle, where a case is lodged before the local judge under the domestic court system of a Member State, there is no bar on the Community Court preventing it from entertaining the same case. In the terms of Article 10 of the 2005 Supplementary Protocol on the Community Court of Justice, ECOWAS access to the Court is only impracticable where the same matter is instituted before "***another International Court***" for adjudication.

Hence, the fact that the Burkinabe courts may have been seised with the case, whether in part or in whole, does not constitute an obstacle for the Court to entertain that same case. In the same vein, it must be recalled that the rule of exhaustion of local remedies is not applicable before the ECOWAS Court of Justice.

As to Merits

Once the foregoing points are clear and precise, the Court now holds that in the light of the totality of all the facts and law produced before it in the

course of the proceedings, the instant case poses two problems. Firstly, the issue of disallowing Mr. Djibril Yipéné Bassolé from choosing lawyers of *"foreign nationality"*, and secondly, that of the legitimacy or otherwise of the telephone conversations which may have been tapped. The position of the Court shall condition the fate of the request for reparation, as made by the Applicant.

Regarding Restrictions Imposed on the Applicant's choice of Lawyers

To justify the restriction imposed on the Applicant's choice of his Counsel, Burkina Faso advances several arguments worth revisiting.

The first touches on the 24 April 1961 Convention on Judicial Co-operation signed between France and Upper Volta, whose Article 34 provides:

> "*Lawyers registered with the Bar Associations of Upper Volta may assist or represent parties before all the courts of France, both at the preliminary inquiry stage and during oral hearings, under the same conditions as lawyers registered with the Bar Associations of France. In reciprocal terms, lawyers registered with the Bar Associations of France may assist or represent parties before all the courts of Upper Volta, both at the preliminary inquiry stage and during the oral hearings, under the same conditions as lawyers registered with the Bar Associations of Upper Volta.*"

The Defendant State contests the right of the lawyer of French nationality, Counsel to the Applicant, to assume that capacity, principally because the said lawyer of French nationality did not provide evidence for the reciprocal terms stated in the aforesaid provision.

The Court shall reject such standpoint. Indeed, under the arrangement set out above, it would be unreasonable, and even unrealistic, to condition the enjoyment of the benefits of the subjects of such international law to the administration of the evidence of reciprocity. In cases of such nature, it shall be up to the person challenging the exercise of such right – and also having the means of determining whether or not the treaty may be applied by the other party – to bear the burden of proof, since the issue at stake concerns States. Neither the letter of the above-cited Article 34 nor the spirit of the condition regarding reciprocity, are of such nature as to shift

the burden of proof upon an individual, in terms of whether or not an aspect of the treaty is applicable by one party or the other.

Incidentally, in international practice, it is the States, in possessing the diplomatic means for so doing, which are responsible for proving the reciprocal terms of treaties signed among themselves, a condition which is often clearly stated in international conventions. In other words, the Defendant State has no right to contest Maître William Bourdon's right to represent and assist the Applicant before the Courts of Burkina Faso, since Maître William Bourdon is a lawyer registered with the Bar Association of Paris. It is up to Burkina Faso to provide proof if it considers that the condition regarding reciprocity is not fulfilled. Still, nothing in the case-file compels one to think that such reciprocal terms are lacking.

It must thereby be concluded that it is appropriate to dismiss this argument, as advanced by the Defendant State.

The second argument of Burkina Faso relates to the situation of other lawyers who plead UEMOA rules for the purposes of contesting the refusal by the trial judge of the Ouagadougou Military Tribunal to grant them the right of legal representation and assistance.

The text invoked by the lawyers is Article 7 of the 1 January 2015 Rules of Procedure No. 05/CM/UEMOA, which provides:

> "*Lawyers registered with the Bar Association of a Member State of UEMOA may practice their profession in the other Member States of UEMOA, or permanently establish their main firm there, or else create a subsidiary law firm there, in accordance with the provisions relating to the Regulations on Free Movement and Establishment of Lawyer Citizens of the Union in the UEMOA Space*".

The Court must first of all recall that it has no mandate whatsoever to act as a watchdog over the legality of a sister organisation such as UEMOA. In every instance it has been requested to interfere in the relations among organs of UEMOA, or to assume the role of any such organ of UEMOA, notably the Court of Justice of UEMOA, the ECOWAS Court of Justice has declined jurisdiction in the matter, in due regard for those alternate legal or judicial orders.

It shall be appropriate to recall that in its judgment of 4 March 2010 on *Case Concerning* **Dr. Mahamat Seid Abazene v. Republic of Mali**, the Court declared that *"the dismissal of Dr. Mahamat Seid Abazene had to do with a public service dispute within the African Union and that the ECOWAS Court of Justice had no jurisdiction to examine such a dispute"*. Further, the Court, in its judgment of 8 February 2011, held in **El-Hadji Tidjani Aboubacar v. BCEAO and Republic of Niger** that: "… ***if the Honourable Court does not decline its avowed rationae materiae jurisdiction, it will inevitably be led to assume a right it is depositary of and whose implementation is conferred expressly and unequivocally on another Regional Court***." (§31). In paragraph 32 of the same Judgment, the Court concludes thus: "***The Court is also of the opinion that although its rationae materiae jurisdiction is relevant, it is incumbent upon it to decline that jurisdiction in view of the exclusive jurisdiction of the Court of Justice of UEMOA over the facts of the instant case***."

The Court must reaffirm that position of principle in the case at hand. The ECOWAS Court of Justice has no mandate to keep watch over a legal system obtaining in the same sub-region but for which specific mechanisms of sanction are provided. The ECOWAS Court of Justice cannot therefore arrogate to itself the duty regarding the observance of the Rules of Procedure of UEMOA.

Nevertheless, by a more general scope of principles, the right to choose one's lawyer constitutes today an undeniable component of the rights to defence, a prerogative which arises from "human rights". The unfettered right to choose one's representative or lawyer before a court is thus consecrated by:

- The African Commission of Human Rights, in its Communication No. 48/90, in *Amnesty International* **v**. *Sudan*: "***The right to freely choose one's counsel is essential to the assurance of a fair trial. To give the tribunal the power to veto the choice of counsel of Defendants is an unacceptable infringement of this right***." (§64);

- The United Nations Human Rights Committee, while examining the meaning and scope of Article 14 of the International Covenant

> on Civil and Political Rights, was of the view that the right to choose one's counsel: "… *apply to all courts and tribunals within the scope of that article whether ordinary or specialised, civilian or military.*" (General Comment No. 32, Right to equality before the courts and tribunals and to a fair trial, 90th Session (2007) of the United Nations Human Rights Committee, Part III, paragraph 22).

This last point, at any rate, urges the Court to consider another aspect of the argument put forth by Burkina Faso, equally canvassed in the course of the hearing of 7 June 2016. That argument consists of particular emphasis being placed on the peculiar nature of the procedure in question - as having been initiated on the basis of the Martial Code of Justice, as applied to a military person and for offences relating to *"State security"* - so as to advance the claim that normal procedural rules may not apply in the case at hand; simply put, that the 'military' and 'political' nature of the case precludes the application of the ordinary criminal procedure, and does justify restrictions placed on the rights of a defence. It was by virtue of that narrowly-defined standpoint, founded upon the exceptional nature of the context within which the events unfolded, that Burkina Faso, the Defendant State, was thus able to affirm that certain instruments invoked by the Applicant *"... did not contain provisions relating to martial courts"*.

The Court holds that such argument can be refuted, even by virtue of the letter of the texts. Indeed, the texts clearly provide that the right to choose one's counsel shall be upheld before *"... all the courts ..."* (cf. above-cited Article 34 of the 24 April 1961 Convention on Judicial Co-operation signed between France and Upper Volta), or before *"... all courts and tribunals..."* (cf. above-cited General Comment No. 32, Right to equality before the courts and tribunals and to a fair trial, 90th Session (2007) of the United Nations Human Rights Committee).

The above-cited provisions equally enable one to object to the thesis which claims that military courts did not exist in France and so the reciprocal nature of the agreement was lacking. The texts indeed do talk of *"all courts ..."* and *"... all the courts and tribunals ..."*.

On the other hand, the case law of the ECOWAS Court of Justice itself has always held that the peculiar nature of a procedure, notably in regard

to political considerations, does not in any way constitute a factor which could on its own render the Court incompetent to adjudicate on a case or 'justify' an occurrence of human rights violation. It is therefore erroneous for Burkina Faso to invoke the exceptional nature of the political context which prevailed at that material time, as a ground for justifying the acts it engaged in.

The Court shall add two other points which go to consolidate the position that the Applicant is free to choose his own lawyers.

The first point relates to an instance in the judicial proceedings of the case, at the domestic level, wherein the very conclusions of the Government Commissioner at the Ouagadougou Military Tribunal, who, opposed to the position adopted by the Investigating Judge, declared at the hearing that: "*Whereas in regard to the foregoing, it shall be appropriate to admit, in the instant procedure, the constitution of lawyers of foreign nationality who are registered with the bars of the signatory States of the above-named conventions or rules, notably the Member States of the former OCAM, ANAD, UEMOA and the Republic of France*." The Republic of France is a signatory State to the Convention of 24 April 1961 as cited above.

The Court must finally recall a general principle of law which, on its own, would suffice to invalidate the stand adopted by Burkina Faso: the principle of superiority of international law over the national or domestic law. Indeed, no State may brandish its domestic law as a means of reneging on its international obligations; again, the State is duty bound to conform its domestic laws to its international obligations. In the case at hand, Burkina Faso is *ab initio* out of order in invoking its Martial Code of Justice, particularly as a means of narrowing down the scope of the international conventions to which it is a party. Besides, incidentally, it is because the commitments made under domestic law are subservient to municipal law, that Article 31 of the Martial Code of Justice itself stipulates that: "*Subject to specific provisions provided for by international conventions, lawyers of foreign nationality are debarred from appearing before the military tribunals*." Strangely, Burkina Faso cites this provision in its written pleadings without seemingly taking into account the exception made to the rule, by the text itself.

It would be relevant to state, at this juncture, that in its Judgment of 26 May 2016, the Burkina Faso Court of Cassation, among others, upheld the plea in law regarding violation of international conventions, as regards the legitimacy of clients having recourse to foreign lawyers to assist them in pleading their cases in court.

Upon the strength of all the reasons which have just been detailed out, above, the Court finds that Burkina Faso is ill-founded in restricting the Applicant in the choice of his lawyers. It is therefore appropriate to grant the Plaintiff Counsel access to the procedure, for purposes of the trial of Mr. Djibril Yipéné Bassolé.

Regarding Tapped Telephone Conversations and the Purpose they may have Served

The second wing of the argumentation engaged in before the Court relates to tapped telephone conversations. The Applicant makes a complaint by alleging that his telephone conversations were tapped on no legal grounds, and that the exercise was therefore carried out in violation of his rights, notably the right to protection of his privacy.

Basically, the Applicant contends that the charges made against him are related exclusively to the recorded telephone conversations. He avers that: *"The said recording, whose source remains unknown and whose authenticity is questionable, is the only basis upon which the investigation authorities have since relied, in claiming that he participated in a coup d'état."* (Refer to page 3 of Application). The Applicant therefore seeks *an order from the Court for withdrawal* of the recorded telephone conversations from the criminal trial proceedings.

In response to this argument, the Defendant State, Burkina Faso, maintains that the rules themselves which protect individuals' rights provide for restrictions on those rights. That restrictions on the privacy of individuals is a case in point; and that Article 29 of the Universal Declaration of Human Rights as well as provisions of the International Covenant on Human and Peoples' Rights legislate limits to the rights they proclaim. Hence, Burkina Faso concludes, that recourse to recorded telephone conversations, conducted as an integral part of a criminal trial, can be justified.

In the face of such arguments, the Court is of the view that its first duty consists of conducting an assessment as to the existence, and the impact, of the allegedly tapped telephone conversations, on the criminal case. In that regard, the Court has several remarks to make.

The Court detects a degree of inconsistency in the written pleadings of the Applicant. On one hand, the Applicant claims that *"in the course of the hearings and interrogations, no recorded telephone conversation was tendered in court against him"* (page 3 of Application); but on the other hand, he pleads that *"the trial proceedings is going to be exceptionally and fully furnished with the transcriptions of the telephone conversations"* (page 3 of Application).

Mr. Djibril Yipéné Bassolé's Application, at any rate, makes reference to those conversations, but as a means of corroborating the existence of same, he defers to newspapers meant for the general public, which themselves are not assertive enough of the statements made on the subject; thereby, he even defers to mere *"rumours"*. This last word (*i.e. "rumours"*) is often resorted to in the written pleadings of the Applicant, and as frequently used as the word *"press"*. No particularly exact court process is filed in the case-file in respect of the alleged telephone conversations. The impression of uncertainty and perplexity is reinforced by the Applicant himself, who paints a picture which only seems to "suggest" that there may have been *"a fabricated court process dating back to ... whoever knows"* (page 4). In other instances, the Applicant uses the conditional tense – a tense denoting uncertainty – in speaking of his alleged recorded telephone conversations, as on page 6, where he again writes that: *"The disputed recorded telephone conversations may have been carried out from 17 September 2015 onwards."*

The Court must admit that this leaves a huge gap to be filled in the case; the Court finds that the case-file does not contain any decisive pleading which may provide evidence for proving that the said telephone conversations had any effect on the Applicant's criminal status, to any such extent that may warrant that the Court pays any particular attention to his case. The issue of the recorded telephone conversations is surrounded by shadowy images and conjectures, opacity and approximations, preventing the Court from making any pronouncements thereupon. Nothing was produced before the Court concerning the telephone conversations alleged.

The Court notes that even if the two Parties did profusely argue on the very principle concerning restricting the right to privacy through the instrumentality of tapping conversations on the telephone, the two Parties did not in any way indicate with certainty, the impact such recorded telephone conversations may have had during the procedure.

Given the circumstances of the case, it will not suffice to demonstrate the mere existence of such conversations, as to having been tapped, so as to win one's case; it must still be proved that the recorded conversations did indeed seriously affect the rights of the Applicant.

The act of tapping telephone conversations is not in itself illegal. Several judicial systems admit the principle underlying it, for the purposes of the necessities of an inquiry. In such circumstances, one cannot criticise its mere application, but adduce evidence to the effect that at a given time of the procedure, the conditions under which it was applied violated the rights of the person targeted. Without that convincing requirement, without any proof of concrete violation, the Court would purely and simply be making pronouncements on the domestic legislations of the Member States, but to engage in such an exercise is contrary to the time-held case law of the Court. As held by the Court in its Judgment of 27 October 2008, in **Hadijatou Mani Koraou v. Republic of Niger**: ***"… the Court … does not have the mandate to examine the laws of Member States in abstracto, but rather, to ensure the protection of the rights of individuals whenever such individuals are victims of violation of those rights which are recognised as theirs, and the Court does so by examining concrete cases brought before it."*** (§60)

In other words, the Applicant will be required to produce evidence which establish that wrongful acts were committed against him, and that such violation must have occurred in relation to the contentious recorded conversations. It is only on that condition that one may assert that the admission of the recorded conversations formed part of the procedure, and that such admission harmed the rights of Mr. Djibril Yipéné Bassolé. A direct and concrete violation would therefore be found. In the current state of affairs, no court process has been produced to clearly demonstrate that there is a link between the telephone conversations alleged to have been recorded and the criminal attributions made concerning the status of the Applicant.

Furthermore, the Court has always held that it lacks the jurisdiction to interfere with the acts of trial judges in the domestic courts of Member States, except where such acts substantially affect the rights of a person. The Court has therefore had to decline the jurisdiction for examining certain measures of trial proceedings. In the Judgment of 7 October 2011 on **Cheikh Abdoulaye Mbengue v. Republic of Mali**, the Court was of the view that: ***"… the requests to re-open the judicial inquiry and annul the arrest warrant derive from the sphere of the domestic judicial competence of the Republic of Mali, and that in that respect, the Court recalls its consistently held case law and declines jurisdiction on any application brought seeking to overturn decisions of the domestic courts of Member States …"*** (§38). Then in *Case Concerning* **Barthélémy Diaz v. Republic of Senegal** (Judgment of 23 March 2012), the Court recalls in paragraph 25, regarding a committal order by a judge, that ***"all the concepts at stake called for a closer look to be taken at the facts of the case, in relation to the individuals indicted, and therefore fell exclusively within the ambit of the domestic courts; as contrasted with the jurisdiction of the Community Court, when seised with a matter on human rights, and instituted against a Member State of the Community"*** (§25). Finally, in the case law of **Aziagbede Kokou and Others v. Republic of Togo** (Judgment of 3 July 2013), the Court finds that: "… ***it is not within its human rights protection mandate to substitute its own viewpoint on the facts of a case for that of the domestic courts seised with the same case, in terms of determining the authenticity of certain exhibits pleaded in relation to charges of a criminal nature. The issue would have been completely different if the question before the Court were to be limited to determining the fairness of the entire procedure which may have been employed at the national level***." (§40)

The Court concludes that it is impossible for it to make a pronouncement on the disputed recorded telephone conversations, given the failure to demonstrate a direct effect of the said recordings on the procedure. The Court therefore dismisses the claims made by the Applicant in that regard.

As to the Applicant's Requests for Relief

The Applicant equally requested the Court to award him the sum of One Hundred and Fifty Million CFA Francs (CFA F 150,000,000) "in legal fees and honorariums".

The Court is however of the view that any request for monetary compensation shall be buttressed by adequate proof, and must be as a result of a physical or psychological harm suffered by an Applicant. In the instant case, the Court has rectified the procedural aberration amounting to human rights violation, which consisted of putting impediments in the way of Applicant in the exercise of his right to free choice of counsel. The Applicant's counsel can now fully exercise the mandate of representing him, for the purposes of putting up his defence:

> There is no apparent link between the violation of that right which has been restored and the request for monetary compensation. As things stand, the Applicant does not prove any loss to be redeemed or denial to be claimed; he does no more than cite *"legal fees and honorariums of lawyer"*, as the one and sole justification for his request.

In the instant case, the transgressed right is restored, and that suffices for the Court. Like other courts, this Court is of the view that having found that there was violation of a right may constitute in itself a fair and sufficient satisfaction, and a relief for the injury suffered.

Thus, the Court shall reject the application for compensation as filed.

As to Costs

Pursuant to Article 66 of its Rules of Procedure, the Court holds that considering the circumstances of the case, it shall be normal for Burkina Faso to bear the costs.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing both Parties, in a matter on human rights violation, in first and last resort;

As to formal presentation,

- **Dismisses** as ill-founded the objections raised by Burkina Faso regarding incompetence of the Court to sit on the case and *lis pendence* of the case before another Court;

As to merits,

- **Adjudges** that the Applicant's right to the free choice of his lawyers was violated;

- **Orders**, as a result, Burkina Faso to restore the Applicant back to his right to free choice of counsel;

- **Adjudges** that given the current state of affairs, there is no ground for making a declaration on the recorded telephone conversations as alleged;

- **Dismisses** the Applicant's request for monetary compensation as ill-founded;

- **Asks** Burkina Faso to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, Nigeria, on the day, month and year stated above.

On the Bench for this Judgment were:

- **Hon. Justice Yaya Boiro** - *Presiding.*
- **Hon. Justice Hamèye F. MAHALMADANE** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Aboubacar Djibo DIAKITE, (Esq.)** - *Registrar.*

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

HOLDEN AT ABUJA, NIGERIA

ON MONDAY, THE 11RD DAY OF APRIL, 2016

SUIT NO: ECW/CCJ/APP/01/16
RULING NO: ECW/CCJ/RUL/04/16

BETWEEN
COL. MOHAMMED SAMBO DASUKI (RTD). -*PLAINTIFF*

VS.
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** -*PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT**-*MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **ROBERT EMUKPOERUO (ESQ.), WALE BALOGUN, ABIOLA ADEDIPE, TITILAYO AJAO, VIVIAN UMERIE (MISS), JENNIFER ADIKE (MISS) AND BAMAIYI ADEJO** - *FOR THE PLAINTIFF.*
2. **T.A GAZALI,** *WITH* **U.C OKOLI, A.O OKOLI, A.O OLORUNTOGBE (MISS), U.A. LAWAL** - *FOR THE DEFENDANT.*

Human Rights Violation - Freedom from Arbitrary Arrest and Detention -Right to be informed - Right to liberty - Right to human dignity -Right to private and family life -Freedom of movement - Right to own Property.

SUMMARY OF FACTS

The Plaintiff, Mohammed Sambo Dasuki, a retired Colonel from the Nigerian Army was appointed as the National Security Adviser of the Federal Republic of Nigeria. He brought an action before the ECOWAS Court alleging a violation of his human rights provided for under Articles 5, 6 & 12 of the African Charter, Articles 3, 5, 9 & 13 of the Universal declaration of Human Rights, and Articles 9 & 12 of the International Covenant on Civil and Political Rights. He contended that his arrest, detention and continued detention is not in accordance with any known law or judicial proceedings and has inflicted physical, emotional and psychological torture on him. Also, that if the Defendant and its agents are not restrained, his rights to life, human dignity, personal liberty, privacy, family life, freedom of movement and right to own properties, which have been impaired and violated, will continue to be impaired, violated and put in jeopardy. The Applicant also filed with the originating Application a motion for expeditious hearing of the suit.

The Defendant neither entered appearance nor entered a defence within the period required by the Rules for them to do so. Consequently, the Defendant filed a Motion seeking the order of this Court for the extension of time to file a Memorandum of Conditional Appearance and Statement of Defence as well as Preliminary Objection.

The Defendant brought a Preliminary Objection challenging the jurisdiction of the Court to entertain the Application, predicated on the ground that the Applicant's action was initiated without regard to due process of law and the reliefs sought by the Applicant were based on contempt of the order of the Defendant's Municipal Court. They further contended that the Court lacked jurisdiction to entertain the Application due to the pendency of the main case before the Nigerian Municipal Courts.

ISSUES FOR DETERMINATION:

- *Whether from the totality of the facts presented by the Applicant, the subject matter of this proceeding falls within the jurisdiction of this Court.*

- *Whether the pendency of the case or similar cases before the Municipal Courts of the Defendant is a bar to the jurisdiction of this Court.*

DECISION OF THE COURT

The Court dismissed the objection regarding incompetence and lack of jurisdiction and held that it is vested with special jurisdiction mainly in the area of the protection and enforcement of human rights. That the Court does not exercise, appellate or supervisory jurisdiction over Domestic Courts of Member States.

RULING OF THE COURT

2. COUNSEL FOR THE PARTIES:

i. **Robert Emukpoeruo (Esq.)** *with*
Wale Balogun
Abiola Adedipe
Titilayo Ajao
Vivian Umerie (Miss).
Jennifer Adike (Miss), And
Bamiyi Adejo
of summit chambers,Obalende Lagos.

- for the Applicants.

ii. **T. A. Gazali** *with*
U. C. OKoli
A. O. Okoli
A. O. Oloruntogbe (Miss)
U. A. Lawal
Federal Ministry of Justice, Abuja

- for the Defendant.

2. SUBJECT-MATTER OF THE PROCEEDINGS:

The detention and continued detention of the Applicant by the agents of the Defendant, unlawful violation of the Applicant's rights to personal liberty and freedom of movement, unlawful invasion of the Applicant's privacy and seizure of his properties.

4. ARTICLES OF TREATIES ALLEGED TO HAVE BEEN VIOLATED

The Applicant avers that at about 6.40pm on the 16th July, 2015, while he was about breaking his Ramadan fast, his house was unlawfully invaded and several items and properties including cars and monies were taken away by the agents of the Defendant, that during this invasion, the Applicant

and Members of his family, who were in his Abuja home, were subjected to severe psychological and emotional torture and were restrained from receiving any visitor or allowed to leave the house. That this was done without any lawful order or warrant. That the Applicant's homes were subsequently vacated by the agents of the Defendant on the 17th July, 2015 without any reason given for the 24 hours invasion and with a promise to be back for him. That Applicant further avers that his aged father of about 90 years old staying in his Sokoto home was psychologically shaken and was treated so shabbily by the agents of the Defendant that the old man was traumatized for several days after the invasion.

The Applicant was arraigned before a Federal High Court, Abuja on 1st September, 2015 on a one count charge of illegal possession of firearms. He made a bail application before the Court and was admitted to bail on self- recognizance on the condition that his International Passport number A500033168 be deposited with the Court.

That he subsequently applied to the Court on the 23rd October, 2015 for leave to travel abroad for medical attention and this was granted by the Court on the 3rd November, 2015 for which he purchased his travel ticket and was issued a boarding pass.

However, a day after the order was granted, the Defendant through its agents laid siege on the Applicant's residence at No.13 Khadiya Street, Asokoro, Abuja in Nigeria for a period of one Month, blocking all entrance and exit from the premises and thereby preventing him from travelling to London for medical attention in defiance of the Court order.

On the 13th December, 2015, the Applicant was arraigned before another Court, High Court N0.4 of the Federal Capital Territory, Abuja Nigeria wherein he was charged for another set of offences. Again, he applied for and was granted bail on 18th December, 2015.

Meanwhile, the Applicant was at the same time, on 15th December, 2015 arraigned before a 3rd Court, High Court No. 24 of the Federal Capital Territory, Abuja for another set of offences in charge **No. FCT/HC/CR/42/2015** between **FEDERAL REPUBLIC OF NIGERIA Vs. BASHIR YUGUDA & 5 OTHERS** for which he again applied for and was granted bail on the 21st December, 2015.

Having met all the bail conditions imposed by the High Courts, the Courts signed and issued his Release Warrants (orders) to the authorities of Kuje Prison but rather than release the Applicant he was rearrested in defiance of the Court order.

The Applicant's family are seriously worried and troubled about the condition of the Applicant's detention and more worrisome is the fact that the Applicant's state of health has deteriorated significantly his not having been able to attend to his medical needs which were granted to him by the Court since 3rd November, 2015 and the Defendant has refused to honour the Court order.

The Applicant's family concern and apprehension became compounded recently when the President of the Federal Republic of Nigeria, in his maiden Presidential Media Chat on the 30th December, 2015, said that Applicant will not be released because according to the President, the weight of the crimes allegedly committed by the accused against the Nigerian State, if he is allowed to enjoy any form of freedom, he is likely to jump bail.

Accordingly, in bringing this Application, the Applicant contended that his arrest, detention and continued detention is not in accordance with any known law or judicial proceedings and has inflicted physical, emotional and psychological torture on the Applicant.

That if the Defendant and its agents are not restrained, his rights to life, human dignity, personal liberty, privacy, family life, freedom of movement and right to own properties, which have been impaired and violated, will continue to be impaired, violated and put in jeopardy.

THE APPLICANT THEREFORE SOUGHT THE FOLLOWING RELIEFS FROM THE COURT;

i. **A DECLARATION** that the ***continued detention*** of the Applicant by the officers, servants, agents, privies of the Defendant in defiance of orders for his bail granted by Courts of competent jurisdiction in Nigeria, namely the Federal High Court of Nigeria in charge No. FHC/ABJ/CR/319/2015, **FEDERAL REPUBLIC OF NIGERIA Vs COL MOHAMMED SAMBO DASUKI** and the High Court of

the Federal Capital Territory, Abuja, Nigeria in charge N°.FCT/HC/CR/42/2015 between **FEDERAL REPUBLIC OF NIGERIA Vs. BASHIR YUGUDA & 5 ORS** and charge. No FCT/HC/CR/43/2015 between **FEDERAL REPUBLIC OF NIGERIA Vs. COL. MOHAMMED SAMBO DASUKI (RTD) & SORS** is *unlawful, arbitrary and an egregious violation of the Applicant's Fundamental Human Rights* as guaranteed by Sections 34, 35 and 41 of the **Constitution of the Federal Republic of Nigeria** 1999 (As amended), Articles 5, 6, and 12 of the **African Charter on Human and Peoples' Rights** (Ratification and Enforcement) Act Cap D9 Laws of the Federation of Nigeria 2004; Articles 9 and 12 of the **International Covenant on Civil and Political Rights** and Articles 3, 5, 9 and 13 of the **Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments.

ii. **A DECLARATION** that *the detention and continued detention* of the Applicant by the officers, servants, agents, prives of the Defendant, after the Applicant met and fulfilled all the bail conditions for his release and after service on the appropriate authorities of the Defendant of release warrants issued by both Federal High Court of Nigeria and the High Court of the Federal Capital Territory, Abuja, Nigeria, *is unlawful, arbitrary and constitutes an egregious violation of the Applicant's human rights* as guaranteed by Sections 34, 35 and 41 of the **Constitution of the Federal Republic of Nigeria** 1999 (As amended), Articles 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990; Articles 9 and 12 of the **International Covenant on Civil and Political Rights** and Articles 3, 5, 9 and 13 of the **Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments.

iii. **A DECLARATION** that it is an unlawful violation of the Applicant's human rights to *personal liberty and freedom of movement* as

guaranteed and protected by **Sections 35 and 41 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 6 of the African Charter on Human and Peoples' Rights, Article 9 of the International Covenant on Civil and Political Rights and Articles 3 and 13 of the Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments, for the Defendant to unlawfully detain the Applicant after he was granted bail by Courts of competent jurisdiction and fulfilled all the bail conditions for his release.

iv. **A DECLARATION** that it is an unlawful violation of the Applicant's Human Rights to dignity of human person, privacy and family life guaranteed and protected rights under **Section 34 and 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 17 of the International Covenant on Civil and Political Rights** and **Article 12 of the Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments, for the Defendants' agents, privies, servants to have unlawfully detained the Applicant under a de-humanizing condition after he had been granted bail by Courts of competent jurisdiction and fulfilled all the bail conditions for his release.

v. **A DECLARATION** that the invasion of the Applicant's *Privacy, Home and or Correspondence* at No. 13 John Kadiya Street, Asokoro, Abuja, Nigeria and at both Sultan Abubakar Road, Sokoto and Sabo Bini Road Sokoto, Sokoto State, Nigeria sometimes on the 16th and 17th July, 2015 and the *forceful and unlawful seizure of the Applicant/s properties listed in schedule of seized properties (Annexure* A) by the Defendant, without any lawful order or warrant of a Court of competent jurisdiction constitutes a gross violation of the Applicant's fundamental rights guaranteed under **Section 44 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 14 of the African Charter on Human and Peoples' Rights (Ratification and enforcement) Act Cap A9 Laws of the Federation of Nigeria 2004 and Article 17 of the**

International Covenant on Civil and Political Rights and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above listed legal instruments is therefore illegal and unlawful.

vi. **AN ORDER** directing the Defendant and its agents to forthwith release the Applicant.

vii. **AN ORDER** directing the Defendant and its agents to forthwith release the Applicant and or his agents/solicitors and all his unlawfully seized properties listed in Annexure A, during the invasion of the house/ home of the Applicant on the 16th and 17th July, 2015 without any lawful order or warrant of any Court of competent jurisdiction.

viii. **AN ORDER OF INJUNCTION** restraining the Defendant, its officers, servants, agents, privies and anyone taking instruction from them from further harassing, threatening, intimidating or in any other manner infringing on or interfering with the fundamental rights of the Applicant as guaranteed by the Constitution of the Federal Republic of Nigeria 1999 (As amended), Articles 4, 5, and 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap D9 Laws of the Federation of Nigeria 2004, Articles 9, 12 and 17 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

ix. **N500,000,000.00 (Five Hundred Million Naira Only)** as compensatory damages against the Defendant for its egregious violation of the Applicant's Human Rights as guaranteed and protected by the Constitution of the Federal Republic of Nigeria 1999 (As amended), Articles 4, 5, and 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria 2004, Article 17 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

In compliance with Article 59 of the Rules of this Court, the Applicant also filed with the originating Application a motion for expeditious hearing of the suit (Document 2).

At the expiration of the period allowed by the Rules for the Defendant to enter appearance and file their defense to the claim, the Defendant failed to file a defense. Consequently, pursuant to Article 90 of the Rules of this Court, the Applicant brought an application urging the Court to enter Judgment in default, in his favour (Doc. No 3).

For the purpose of clarity, the initiating Application (Doe. No 1) was filed on the 4th of January 2016, accompanied by the Motion for Expedited Procedure (Doc. No 2). The Motion for Judgment in Default was subsequently filed on the 18th of February, 2016 after the expiration of the period of one Month after the service of the Application on the Defendant as required by Article 35 of the Rules of this Court.

6. DEFENDANT'S CASE.

As earlier noted, the Defendant neither entered appearance nor entered a defense within the period required by the Rules for them to do so. Consequently, the Defendant filed a Motion seeking the order of this Court for the extension of time to file a Memorandum of Conditional Appearance and Statement of Defense as well as Preliminary Objection (Document No 4) and deeming same as having been properly filed and served. She also filed the said Preliminary Objection (Document No. 5) and a Statement of Defense (Document No, 6). At the hearing of the suit on the 15th day of March 2016, the Motion of the Defendant seeking the extension of time was moved and granted by the Court, not having been opposed by the Applicant. The Applicant also withdrew the Motion for Judgment in Default in view of the development stated above. The Court then proceeded to hear the Defendant's Preliminary Objection.

The Defendant brought this Preliminary Objection pursuant to Article 9 of the Supplementary Protocol of 2005 on this Court and also according to him, under Articles 6 and 133 of the Criminal Procedure Code, S. 6(b) of the Constitution of the Federal Republic of Nigeria and Order 35 of the Federal High Court Civil Procedure Rules 2013, as amended as well as under the Court's inherent jurisdiction.

The Defendant contends that the action by the Applicant was initiated without regard to due process, the reliefs sought by the Applicant were

predicated on contempt Order of Nigeria's Municipal Court and as such stripped this Court of Jurisdiction to try this Application due to the pendency of the main cases before the Nigerian Municipal Court.

More specifically, the Defendant stated that;

> **"This Honourable Court lacks jurisdiction to try this application pursuant to the reliefs sought by the Applicant which are squarely predicated on the contempt of Orders of Nigerian Municipal Courts".**

The Defendant formulated one issue for determination in this application namely;

> **"Whether the Honourable Court has the requisite jurisdiction to hear and entertain this Applicant's notice of registration of application as constituted and conceived".**

He submitted that it is settled law that before a Court can exercise jurisdiction to entertain a suit, three basic conditions must be fulfilled by the litigant who initiated the action, namely;

a. The Court must be properly constituted;

b. The subject-matter of the suit must be within the jurisdiction of the Court;

c. The suit must come before the Court having been initiated by due process. He cited the Nigerian case of **MADUKOLU VS. NKEMDILIM** (1962) 1 A 11 NLR 58.

The Defendant contended that the crux of the Applicant's suit is predicated on contempt of Nigerian Courts and posited that this Court cannot entertain applications regarding violation of Nigerian Municipal Court orders, as Nigerian laws have made adequate provisions for redress. He further contended that the appropriate procedure is to file Form 48 in the Judgment Enforcement Rules. To her, the Applicant's action in this suit is essentially one and the same thing with the one the Applicant brought before Nigerian Municipal Courts. He urged the Court to follow its decision in **ALIYU TASHEKU Vs FEDERAL REPUBLIC OF NIGERIA (2012)** Judgment N°. ECW/CCJ/RUL/12/12.

Similarly, the Defendant also relied on the decision in **ALHAJI HAMMANI TIDJANI Vs FEDERAL REPUBLIC OF NIGERIA & 4 ORS Suit** No: ECW/CCJ/APP/01/06 P. 77 at 79.

The crux of the decision in these cases is that this Court cannot retry a case on which a judgment of the domestic Court of a member State has already been delivered against which no contestation has been raised.

She finally, on this count, submitted that the Applicant is tried under an existing Nigerian Domestic law as such he cannot properly file this suit before this Honourable Court.

Furthermore, the Defendant argued that the Application was initiated by a wrong procedure and as such incompetent, thereby divesting this Court of jurisdiction to adjudicate on the same. To her, the entire action is predicated on alleged disobedience of the Orders of Nigerian Courts, and that the procedure provided for by Nigerian laws have not been complied with. He cited some Nigerian authorities and urged the Court to dismiss and/or strike out this action for want of jurisdiction stemming from incompetency in initiating the Application against the Defendant.

The Applicant, in his reply to the issues raised by the Defendant, submitted as follows;

a. That the Application is not for contempt of Nigerian Courts but for enforcement of the human rights of the Applicant as contained in the narration of facts;

b. That the Court has jurisdiction to entertain this suit by virtue of the provisions of Article 9 (4) of the Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice which confers jurisdiction on the Community Court of Justice to determine cases of violation of human rights that occur in any Member State. That the Defendant is a Party to that treaty and therefore, bound by it;

c. That the Defendant is also a signatory to the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights

which this Court is enjoined to interpret and apply by virtue of the treaty establishing it;

d. That the crux of the Applicant's complaint is that he is being detained without any lawful justification in disregard of the Defendant's International obligations and the Preliminary Objection is based on misconception of the juridical and jurisdictional powers of this Court.

e. That by Article 10(d) of the Supplementary Protocol relating to this Court, it has concurrent jurisdiction with Municipal Courts over Human Rights issues.

f. That the decision of this Court in **MUSA SAIDY KHAN Vs. REPUBLIC OF GAMBIA** ECW/CCJ/RUL/04/09 is germane to the determination of this suit and that **ALIYU TASHEKU Vs. FEDERAL REPUBLIC OF NIGERIA** (2012) ECW/CCJ/RUL/12/12 is not applicable in this case mainly because in **Aliyu Tasheku's** case the Applicant was **lawfully arrested** whereas here the Applicant complains about his unlawful arrest and detention without recourse to due process after being granted bail by three Courts in Nigeria. The Applicant relied on the cases of **MAMADOU TANDJA** Vs. **NIGER** ECW/CCJ/JUD/05/10; **BAKARY SARRE & 28 ORS** Vs. **REPUBLIC OF MALI** ECW/CCJ/JUD/03/11 (2011 CCJ ELR); **HISSEIN HABRE** Vs. **SENEGAL** ECW/CCJ/JUD/02/10 of 14th May 2010, paragraph 53, 58 and 59 and the decision in **CENTRE FOR DEMOCRACY AND DEVELOPMENT & 2 ORS VS. MAMADOU TANDJA & ANOR** ECW/CCJ/JUD/05/11 to invoke the jurisdiction of this Court in this Application.

7. ANALYSIS BY THE COURT.

For the purpose of emphasis, the Defendant brought this Preliminary Objection challenging the jurisdiction of this Court to entertain the Application of the Applicant. Their objection is predicated on the ground that the Applicant's action was initiated without regard to due process of law and the reliefs sought by the Applicant were predicated on contempt

of the order of the Defendant's Municipal Court. They further contended that the Court also lacked jurisdiction to entertain the Application due to the pendency of the main case before Nigerian Municipal Courts.

In his reply to the Preliminary Objection, the Applicant stated that his Application before this Court is not founded or predicated on contempt of the orders of Nigerian Courts. He maintained that the major issue before this Court is the detention of the Applicant by the agents of the Defendant without any lawful justification, he having been originally released by the order of Municipal Courts. In the same vein, that Nigerian Municipal Courts having held that its order admitting the Applicant to bail was not flouted by the Defendant, their assertion that this action is based on the Defendant's contempt of the Municipal Court order is incorrect.

Accordingly, it is also incorrect as alleged by the Defendant that the remedy available to the Applicant lies in the pursuit of proceedings provided for in Form 48 of the High Court Procedure Rules at the national level. The Applicant cited a plethora of decisions by this Court to the effect that once the allegation before this Court is the violation of human rights, the Court has jurisdiction to entertain same and concluded that the current Application, as can be gleaned from the facts, is for the violation of the human rights of the Applicant and that is sufficient to invoke the Court's jurisdiction.

Before considering the issues for determination raised by this Application, it is pertinent to observe as follows:

i. The Defendant's objection (Document 5) which according to her is brought inter alia, under 5.6 (6) of The Constitution of the Defendant and Order 35 of the Federal High Court Civil Procedure Rules, as well as 5.1 Sections 6 and 133 of the Criminal Procedure Code also of the Defendant, is legally faulty. For the avoidance of doubt bringing this Application on these planks is unfounded. This is because this Court is a Sub-Regional International Court that does not derive its powers or jurisdiction from any of the domestic laws of Member States of the Economic Community of West African States (ECOWAS). The Court's powers are as contained in the 1991 Treaty relating to the Court and the Supplementary Protocol of 2005.

8. ISSUES FOR DETERMINATION IN THIS PRELIMINARY OBJECTION.

From an analysis of the Defendant's Preliminary Objection together with the argument and pleas in law in support, as well as the Reply of the Applicant, two major issues call for the determination of this Court, namely:

i. Whether from the totality of the facts presented by the Applicant, the subject matter of this proceeding falls within the jurisdiction of this Court.

ii. Whether the pendency of the case or similar cases before the Municipal Courts of the Defendant is a bar to the jurisdiction of this Court as claimed by the Defendant.

On the first issue, whether from the facts presented by the Applicant in this application, this action falls within the jurisdiction of this Court. It is trite law that jurisdiction is the cornerstone or foundation for the exercise of the judicial powers of a Court and any determination by a tribunal devoid of jurisdiction is not only a nullity but also an exercise in futility.

A Nigerian Court *Per Belgore JSC,* in the case of **PETROJESSICA ENTERPRISE LTD Vs. LEVENTIS TECHNICAL CO.LTD (1992)** 5 NWLR (PT 244) 675 AT 693 have rightly observed inter alia that:

> ***"Jurisdiction is the very basis on which any tribunal tries a case. It is the lifeline of all trials; a trial without jurisdiction is a nullity…. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, and on appeal to Court of Appeal or to this Court, a fortiori the Court can suo moto raise it. It is desirable that Preliminary Objection be raised early on issue of jurisdiction, but once it is apparent to any party that the Court may not have jurisdiction, it can be raised even Viva Voce as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and avoid a trial in futility"***

It is equally settled that for a Tribunal or Court to exercise jurisdiction over a suit before it, it must satisfy itself as to the existence of three basic conditions; namely:

a) The Court must be properly constituted

b) The subject matter of the suit must be within the jurisdiction of the Court and

c) The suit must have been initiated by due process.

In this regard, jurisdiction is inferred from the facts presented by the Applicant (Plaintiff) and not from the defence. A careful examination of the facts relied upon in this Application and the reliefs being sought by the Applicant show that the crux of his allegation is that he was arrested and detained without any lawful justification and in violation of his rights as guaranteed by Article 3, 6, 12, 14 of the African Charter on Human and Peoples' Rights and other International Human Rights Instruments to which the Defendant is a party.

In addition, the Applicant further contends that the unlawfulness of his arrest is reinforced by the Statement purportedly made by the President of the Defendant that the Applicant will never be released.

It must be noted that the Court at this stage is not determining whether these allegations are true or not but whether it has power to inquire into the merits of the case. The jurisdiction of the Court over human rights and the accompanying jurisprudence is contained in Article 9(4) of the Supplementary Protocol 2005 which provides that:

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

In the same vein, Article 10(d) of the said Supplementary Protocol provides for who can access the Court for human rights violations as follows:

Access to the Court is open to the following:

d. Individuals on application for relief for violation of their human rights, the submission (or application) of which shall not be anonymous nor be made while the same matter has been instituted before another International Court for adjudication.

In expounding the import of the above provisions, this Court, in **HISSEN HABRE Vs. SENEGAL** (2010) CCJ LR P 65, held that in order to determine whether or not it has jurisdiction to hear a case, the Court has to examine if the issue(s) submitted to it for adjudication deals with rights enshrined for the benefits of the human person and arising from the International or Community Obligation of the State as human rights to be observed, promoted, protected and enjoyed and whether the alleged violations were committed by a Member State of the Community.

Similarly, in **HAMMANI TIDJANI Vs. FEDERAL REPUBLIC OF NIGERIA & 8 ORS,** this Court laid down the condition precedent to its assumption and exercise of jurisdiction as follows;

The combined effect of Article 9(4) of the Protocol of the Court (as amended), Article 4(g) of the Revised Treaty and Article 6 of the African Charter on Human and Peoples' Rights is that the Plaintiff must invoke the Court's jurisdiction by:

i. Establishing that there is a right recognized by Article 6 of the African Charter on Human and Peoples' Rights (or other International Human Rights Instruments to which the Defendant State is a party) (words in parenthesis are ours);

ii. That this right has been violated by the Defendant;

iii. That there is no action pending before another international Court in respect of the alleged breach of his rights; and

iv. That there was no previously laid down law that led to the alleged breach or abuse of his right.

The question that arises is whether the Applicant has sufficiently satisfied these conditions precedent to invoking the jurisdiction of this Court. The answer is in the affirmative.

International Human Rights Law aims at protecting individuals from abusive actions by States and States' agents.

Where, therefore an individual alleges an infringement by a Member State or its agents of his right under any international instruments to which the

State is a party, this Court in the absence of anything to the contrary is competent to hear the case.

The Applicant in the case alleges that the agents of the Defendant:

i. Without warrant invaded and barricaded his house for 24 hours, conducted searches and carted away his properties in violation of his rights guaranteed under the Nigerian Constitution, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, as well as the Universal Declaration of Human Rights;

ii. From 3rd of November to 13th December, 2015 without lawful authority blocked all access to and from his house thereby denying him access to travel for medical care, in violation of his right to personal liberty, freedom of movement, privacy and family life;

iii. Re-arrested and detained him in an unknown location without charge in total disregard of orders of Court for his release on bail, in violation of his rights to be free from arbitrary arrest and detention.

These issues enumerated above in the opinion of this Court certainly raise questions of fundamental human rights violations and are within the subject matter of jurisdiction of this Court as provided for under Article 9 of the Supplementary Protocol 2005 of this Court.

The Plaintiff in his originating application not only itemized the subject matter of the proceedings, but also the particular Articles of the Human Rights Instruments violated and orders sought from the Court. There is nowhere either in the summary of facts presented, or in the orders sought by the Applicant can an inference of the Applicant's case be founded on contempt proceedings be deciphered.

A contempt proceeding refers generally to a wilful disobedience of a Court Order or any misconduct before a court or action that interferes with the judges' ability to administer justice or that insults the dignity of the Court. It is a proceeding commenced by the Court itself against a Party guilty of the Contemptuous act.

Indeed, contempt proceedings and alleged human rights are two distinct aspects of law. It appears that the Defendant misread the Applicant's Application, which to all intents borders on human rights violations. More so, the Defendant admitted that the National Court in its decision made an order that the Plaintiff's bail, previously granted by the Court has in no way been breached or flouted.

Similarly, it is obvious that the Defendant's Notice of Preliminary Objection is built on a misconception of the definition and import of due process.

In other words, the issue of due process canvassed by the Defendant in this Objection does not relate to this case. The case pending before the National Court is a criminal case while the case before this Court is an alleged violation of the Applicant's human right guaranteed under international human rights instruments.

The Applicant approached this Court via an Application containing his full particulars and as such is not anonymous. The present suit is also not pending before any international Tribunal or Court. Thus, the issue of due process raised by the Defendant is misconceived and goes to no issue.

The Court in **BAKARE SARRE Vs. MALI** (2011) CCLR 57 categorically stated that once the human rights allegedly violated involves the international or Community obligations of a State, it will exercise jurisdiction.

On the face of the Application presented by both parties, it is beyond contention that the issues raised above are human rights issues and within the subject matter jurisdiction of this Court as provided under Article 9 of the Supplementary Protocol, and the Court so holds.

The second issue is "whether the pendency of the case before a domestic Court ousts the jurisdiction of this Court as alleged by the Defendant".

Ouster of a Court's jurisdiction is not a matter of course. For a Court's jurisdiction to be ousted, it must be clearly shown that the particular action complained against falls outside its defined jurisdiction.

For further emphasis, Article 10 (d) of the Supplementary Protocol of 2005 relating to this Court provides that:

> 'Access to the Court is open to individuals on application for relief for the violation of their rights and such application should neither be anonymous nor be made whilst the same matter has been instituted before another International Court for adjudication. The above provisions are clear and unambiguous requiring no further rigorous interpretation.'

LORD GRIFFITH has correctly stated the position in the English case of **PEPPER** Vs. **HART** (1993) ALL E.42 at 50 that;

> *"The days have long passed when the Court adopted a strict constructionist view on the interpretation which required them to adopt the literal meaning of the language, the Court now adopts a purposive approach which seeks to give effect to the true purpose of the legislation and is prepared to look at much extraneous material that bears upon the background against which the legislation was enacted".*

LORD WENSLEYDALE in GRAY Vs. **PEARSON** (1857) 6 HLC 61 at 106 equally opined that in construing written instruments, the grammatical and ordinary sense of the word is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

In view of the foregoing, it is clear that as in the present case, the words of the Protocols establishing the Court are unambiguous and the Court is duty bound to apply them.

The Defendant's contention that a similar action is pending before the Nigerian Court and as such this Court cannot entertain this issue is unfounded.

In VALENTINE AYIKA Vs. **REPUBLIC OF LIBERIA** (2011) CCJ LR P.233, the Defendant's objection to the Court's jurisdiction was based on the fact that there is a pending case before the Liberian Supreme Court, this Court held that the Supreme Court of Liberia and for that matter any

Domestic Court in a Member State does not qualify as an international Court within the meaning of Article 10 (d) of the Supplementary Protocol of this Court. (*See* also **AZIAGBEDE KOKOU Vs. REPUBLIC OF TOGO** Suit N^{O}: ECW/CCJ/APP/08/13.)

The effect and significance of the cases cited above is such that a party who alleges a violation of his human rights not only has access to this Court even if the same suit is pending in National Courts but also can maintain such action even without exhausting local remedies. (*See* **ETIM MOSES** Vs. **GAMBIA (2004-2009)** CCLR 95.)

A careful perusal of the Application shows that the case pending before the Domestic Court of the Defendant as presented by the Defendant shows that they are based on allegation of commission of crime which is outside the jurisdiction of this Court, but they are not the same with the present Application. Cases pending before two Courts are considered the same if and only if the parties are the same and the subject matter is the same.

Where, therefore, as in this case, the parties and the subject matter of the proceedings are not the same, the Defendant's contention on the similarity of the cases cannot be sustained. For the avoidance of doubt, this Court is a special one and vested with special jurisdiction and its visibility is mainly in the area of the protection and enforcement of human rights. It does not exercise, appellate or supervisory jurisdiction over Domestic Courts of Member States.

As this Court stated in **Dr. MAHAMAT SEID ABAZENE Vs. REPUBLIC OF MALI:**

> **"The Court is not a Court of Appeal against decisions delivered by National Courts of ECOWAS Member States regarding their area of jurisdiction".**

It is a Court of *sui generis* character whose jurisdiction is founded on alleged violation of human rights of individuals by Member States of ECOWAS and it must act within the ambit of those powers.

Accordingly, this Application is declared admissible.

Consequently,

FOR THESE REASONS

The Court,

In a public sitting after hearing the parties in the first and last resort,

- **Dismisses** the objection regarding the incompetence and lack of jurisdiction by the Court as raised by the Defendant, the Federal Republic of Nigeria.

AS TO COSTS

Costs will abide final determination.

Thus made, adjudged and pronounced in a public hearing at Abuja on the 11th day of April, 2016.

THE FOLLOWING JUDGES HAVE SIGNED THE RULING:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by
Athanase ATTANON (Esq.) - *Deputy Chief Registrar.*

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

HOLDEN AT ABUJA, NIGERIA

ON THE 04TH DAY OF OCTOBER, 2016

SUIT NO: ECW/CCJ/APP/01/16
JUDGMENT NO: ECW/CCJ/JUD/23/16

BETWEEN
COL. MOHAMMED SAMBO DASUKI (RTD) - *PLAINTIFF*

VS.
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **ROBERT EMUKPOERUO (ESQ.), WALE BALOGUN, HENRY NWAKPA, OLUKAYODE OLOJO, WALIU ADENIRAN, TITILAYO AJAO (MISS), JENNIFER ADIKE (MISS)** - *FOR THE PLAINTIFF.*
2. **T. D AGBE, A. O OLORUNTOGBE, ELEDIMUO E., O. OLABIMTAN, M. AKANLE** - *FOR THE DEFENDANT*

Human Rights Violation - Freedom from Arbitrary Arrest and Detention - Right to be informed - Right to liberty - Right to human dignity - Right to private and family life - Freedom of movement - Right to own Property.

SUMMARY OF FACTS

The Plaintiff, Mohammed Sambo Dasuki is a Nigerian Citizen and a retired Colonel from the Nigeria Army appointed as the National Security Adviser of the Federal Republic of Nigeria.

The Plaintiff/Applicant filed this Application alleging a violation of his human rights provided for under Articles 5, 6 & 12 of the African Charter, Articles 3, 5, 9 & 13 of the Universal declaration of Human Rights, and Articles 9 & 12 of the International Covenant on Civil and Political Rights.

The Plaintiff/Applicant's house was invaded by agents of the Defendant without lawful authority as a result of which his properties including cars were forcefully removed. During the said invasion, the Plaintiff/Applicant and his family members were subjected to severe psychological and emotional torture and were prevented from leaving the house and receiving visitors. The Plaintiff/Applicant was subsequently arraigned before a Federal High Court in Abuja, on a one count charge of illegal possession of firearms and was granted bail on self-recognizance. The agents of the Defendant blocked all entries to and exits from the Plaintiff's house making it impossible for him to travel for medical attention. The Plaintiff/Applicant was further arraigned before two Courts in Abuja for different sets of offences and was granted bail but was rearrested and detained without court order. The Plaintiff/Applicant states that his arrest and continued detention is not in accordance with any known law or judicial proceedings.

In its defense, the Defendant stated that the Plaintiff/Applicant misappropriated the sum of 2.1 Billion Dollars allocated to his office for the purchase of arms, ammunitions, and welfare of the armed forces

while he was serving as the National Security Adviser. Furthermore, that the Applicant has been in illegal possession of dangerous firearms capable of wiping out the entire Federal Capital Territory.

The Defendant maintained that the Applicant's re-arrest and detention was on suspicion of having committed or planning to commit offences bordering on national security which the Applicant misconstrued as breach of his right to bail. That if the Applicant is released, he may make it impossible for the Courts to determine the criminal charges against him.

ISSUES FOR DETERMINATION

- *Whether the invasion of the Applicant's residence and seizure of his properties as alleged is unlawful and attributable to the Defendant as to hold it responsible for same*

- *Whether the action of the Defendant's agents in re-arresting and detaining the Applicant without charge is unlawful and constitutes a violation of the Applicant's rights as provided in the African Charter.*

DECISION OF THE COURT

The Court held:

- *That the arrest, detention and continued detention of the Applicant by agents of the Defendant since November 5th, 2015, without charge or judicial order having been granted bail by three (3) different domestic Courts and released is unlawful, arbitrary and constitutes a violation of Articles 9 & 12 of the International Covenant on Civil and Political Rights, Articles 3, 5, 9 & 13 of the Universal Declaration of Human Rights and Articles 5, 6, & 12 of the African Charter on Human and Peoples Rights.*

- *That the invasion of the Applicant's home, privacy and correspondence and the forceful removal and seizure of his property without lawful authority violates the Applicant's right to own property contrary to Article 14 of the African Charter on*

Human and Peoples Rights and Article 17 of the International Covenant on Civil and Political Rights

- *Ordered the Defendant and or its agents to forthwith release the Applicant and all his unlawfully seized properties during the invasion of his home.*
- *Ordered the Defendant to pay the sum of N15, 000,000.00(Fifteen Million Naira) Only, to the Applicant for the violation of his rights.*
- *Rejected the application for injunction against the Defendant as same will amount to interference on the right of the Defendant to prosecute and punish offences committed within its territorial jurisdiction provided such is done in accordance to due process recognized by international human rights law.*

JUDGEMENT OF THE COURT

1. FACTS AS PRESENTED BY APPLICANT

The Applicant is a Nigerian Citizen and a retired Colonel of the Nigerian Army who upon retirement was made the Managing Director of the Nigerian Minting and Printing Company. He was subsequently appointed by the immediate past President of Federal Republic of Nigeria (the Defendant) as the National Security Adviser to the Federal Republic of Nigeria, an office he held until removed in July, 2015 by the present Administration.

The Defendant is a Member State of the Economic Community of West African States (ECOWAS) and a signatory to its Treaty, Protocols, Directives and Regulations as well as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights.

The Applicant avers that at about 6.40pm on the 16th July, 2015, while he was about breaking his Ramadan fast, his house was unlawfully invaded and several items and properties including cars and monies were taken away by the agents of the Defendant, that during this invasion the Applicant and Members of his family who were in Abuja home, were subjected to severe psychological and emotional torture and were restrained from receiving any visitor during or allowed to leave the house. That this was done without any lawful order or warrant.

That the Applicant's homes were subsequently vacated by the Agents of the Defendant on the 17th July, 2015 without any reason given for the 24 hours invasion and with a promise to be back for him. That Applicants further avers that his aged father of about 90 years old staying in his Sokoto home was psychologically shaken and was treated so shabbily by the agents of the Defendant that the old man was traumatized for several days after the invasion.

The Applicant was arraigned before a Federal High Court, Abuja on 1st September, 2015 on a one count charge of illegal possession of fire Arms. He made a bail application before the Court and was admitted to bail on self- recognizance on the condition that his International Passport number A500033168 be deposited with the Court.

That he subsequently applied to the Court on the 23rd October, 2015 for leave to travel abroad for medical attention and this was granted by the Court on the 3rd November, 2015 for which he purchased his travel ticket and was issued a boarding pass.

However, a day after the order was granted, the Defendant through its agents laid siege on the Applicant's residence at No.13 Khadiya Street, Asokoro for a period of one Month blocking all entrance and exit from the premises and thereby preventing him from travelling to London for medical attention in defiance of the Court order.

On the 13th December, 2015, the Applicant was arraigned before another Court, High Court N0.4 of the Federal Capital Territory, Abuja Nigeria wherein he was charged for another set of offences. Again, he applied for and was granted bail on 18th December, 2015.

Meanwhile the Applicant was at the same time, on 15th December, 2015 arraigned before a 3rd Court, High Court No. 24 of the Federal Capital Territory, Abuja for another set of offences in charge **No. FCT/HC/CR/42/2015** between **FEDERAL REPUBLIC OF NIGERIA Vs. BASHIR YUGUDA & 5 OTHERS** for which he again applied for and was granted bail on the 21st December, 2015.

Having met all the bail conditions imposed by the high Courts, the Courts signed and issued his Release Warrants (Orders) to the authorities of Kuje Prison but rather than release the Applicant he was rearrested after release in defiance of the Court Order.

The Applicant's family are seriously worried and troubled about the condition of the Applicant's detention and more worrisome is the fact that the Applicant's state of health has deteriorated significantly having not been able to attend to his medical needs which was granted to him by the Court since 3rd November, 2015 and the Defendant has refused to honour the Court order.

The Applicant's family concern and apprehension became compounded recently when the president of the Federal Republic of Nigeria in his maiden Presidential Media Chat on the 30th December, 2015 said that Applicant will not be released because according to the President, judging by the

weight of the crimes allegedly committed by the accused against the Nigeria State, if he is allowed to enjoy any form of freedom, he is likely to jump bail.

The Applicant's arrest, detention and continued detention is not in accordance with any known law or judicial proceedings and has inflicted physical, emotional and psychological torture on the Applicant.

That if the Defendant and its agents are not restrained, his rights to life, human dignity, personal liberty, privacy, family life, freedom of movement and right to own properties which have been impaired and violated, will continue to be violated and put to jeopardy.

The Applicants therefore instituted this action praying this Court for the following:

i. **A DECLARATION** that the ***continued detention*** of the Applicant by the officers, servants, agents, privies of the Defendant in defiance of orders for his bail granted by Courts of competent jurisdiction in Nigeria, namely the Federal High Court of Nigeria in charge No. **FHC/ABJ/CR/319/2015, FEDERAL REPUBLIC OF NIGERIA Vs COL. MOHAMMED SAMBO DASUKI** and the High Court of the Federal Capital Territory, Abuja, Nigeria m charge N°. FCT/HC/CR/42/2015 between **FEDERAL REPUBLIC OF NIGERIA Vs. BASHIR YUGUDA & 5 ORS** and charge N° FCT/HC/CR/43/2015 between **FEDERAL REPUBLIC OF NIGERIA Vs. COL. MOHAMMED SAMBO DASUKI (RTD) & 5 0RS** is *unlawful, arbitrary and an egregious violation of the Applicant's Fundamental Human Rights* as guaranteed by sections 34, 35 and 41 of the **Constitution of the Federal Republic of Nigeria** 1999 (As amended), Articles 5, 6, and 12 of the **African Charter on Human and People's Rights** (Ratification and Enforcement) Act Cap D9 Laws of the Federation of Nigeria 2004; Articles 9 and 12 of the **International Covenant on Civil and Political Rights** and Articles 3, 5, 9 and 13 of the **Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments.

ii. A **DECLARATION** that *the detention and continued detention* of the Applicant by the officers, servants, agents, prives of the Defendant, after the Applicant met and fulfilled all the bail conditions for his release and after service on the appropriate authorities of the Defendant of release warrants issued by both Federal High Court of Nigeria and the High Court of the Federal Capital Territory, Abuja, Nigeria, *is unlawful, arbitrary and constitutes an egregious violation of the Applicant's human rights* as guaranteed by sections 34, 35 and 41 of the **Constitution of the Federal Republic of Nigeria** 1999 (As amended)), Articles 5, 6 and 12 of the African Charter on Human and peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990; Articles 9 and 12 of the **International Covenant on civil and Political Rights** and Articles 3, 5, 9 and 13 of the **Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments.

iii. **A DECLARATION** that it's an unlawful violation of the Applicant's human rights to *personal liberty and freedom of movement* as guaranteed and protected by **section 35 and 41 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 6 of the African Charter on Human and Peoples' Rights, Articles 9 of the International Covenant on Civil and Political Rights and Articles 3 and 13 of the Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments, for the Defendant to unlawfully detain the Applicant after he was granted bail by Courts of competent jurisdiction and fulfilled all the bail conditions for his release.

iv. **A DECLARATION** that it an unlawful violation of the Applicant's Human Rights to dignity of human person, privacy and family life guaranteed and protected rights under **section 34 and 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 17 of the International Covenant on Civil and Political Rights** and **Articles 12 of the Universal Declaration of Human Rights** and a most egregious violation of the treaty

obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments, for the Defendants' agents, privies, servants to have unlawfully detained the Applicant under a de-humanizing condition after he has been granted bail by the Courts of competent jurisdiction and fulfilled all the bail conditions for his release.

v. A **DECLARATION** that the invasion of the Applicant's *Privacy, Home and or Correspondence* at N°13 John Kadiya Street, Asokoro, Abuja, Nigeria and at both Sultan Abubakar Road, Sokoto and Sabo Bini Road Sokoto, Sokoto State, Nigeria sometimes on the 16th and 17th July, 2015 and *forcefully and unlawfully seizure of the Applicants' properties listed in schedule of seized properties (Annexure A)* by the Defendant, without any lawful order or warrant of a Court of competent jurisdiction constitutes a gross violation of the Applicants' fundamental rights guaranteed under **Section 44 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 14 of the African Charter on Human and Peoples' Rights (Ratification and enforcement) Act Cap A 9 Laws of the Federation of Nigeria 2004 and Articles 17 of the International Covenant on Civil and Political Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above listed legal instruments is therefore illegal and unlawful.

vi. **AN ORDER** directing the Defendants and its agents to forthwith release the Applicant.

vii. **AN ORDER** directing the Defendant and its agents to forthwith release the Applicant and or his agents/solicitors all his unlawfully seized properties listed in **Annexure A,** during the invasion of the house/home of the Applicant on the 16th and 17th July, 2015 without any lawful order or warrant of any Court of competent jurisdiction.

viii. **AN ORDER OF INJUNCTION** restraining the Defendant, its officers, servants, agents, privies and anyone taking instruction from them from further harassing, threatening, intimidating or in any other manner infringing on or interfering with the fundamental rights of the Applicant as guaranteed by the Constitution of the Federal Republic

of Nigeria 1999 (As amended), Articles 4, 5, and 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap D9 Laws of the Federation of Nigeria 2004, Articles 9 and 12 of the International Covenant on Civil and Political Rights and Articles 17 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

ix. **N500,000,000.00 (Five Hundred Million Naira Only)** as compensatory damages against the Defendant for its egregious violation of the Applicant's Human Rights as guaranteed and protected by the Constitution of the Federal Republic of Nigeria 1999 (As amended), Articles 4, 5, and 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria 2004, Article 17 of the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights.

The Plaintiff in addition filed an application for expedited hearing on the grounds that his health has been deteriorating since July, 2015 when he was scheduled to urgently meet with his Doctor in London to undergo necessary surgical operations. The application was heard and granted.

The Defendant having failed to file a defense, the Plaintiff brought an application for default judgment. Subsequently the Defendant filed a motion for extension of time in which they file their Defense and Preliminary Objection out of time. In the light of the Defendant application for extension of time to file their defense, the Plaintiff withdrew the application for default judgment which was struck out by the Court. The Defendant application for extension of time to file their defense and Preliminary Objection was moved and granted. The Defendant then filed a Preliminary Objection to the jurisdiction of the Court to entertain the suit on grounds that the action was founded on contempt of the orders of Nigerian Court and that a similar action is pending before the Nigerian Court.

The Preliminary Objection was argued and the Court ruled that it has jurisdiction and dismissed the Application.

2. **DEFENDANT'S CASE.**

The Defendant filed a statement of defense and averred:

2.1. That the facts and circumstances as stated by the Applicant before this Honourable Court are misleading and do not in any way reflects the truth of the facts leading to the commencement of this suit.

2.2. The Defendant is a Federation observing and enforcing the rule of law in accordance with its Constitution (the Constitution of the Federal Republic of Nigeria, 1999 as amended), the Treaties and Protocols establishing the Economic Community of West African States, the African Charter on Human and Peoples' Rights etc. and makes all possible efforts in reaching its Regional and International obligations

2.3. The Defendant averred that in its current fight against corruption, financial crimes, misappropriation and terrorism to meet its Regional and International expectations, the Defendant's discovered that the sum of 2.1 billion dollars allocated to the office of the Applicant for purchase of arms, ammunition and welfare of the armed forces of the Defendant was misappropriate and shared amongst the well-wishers of the Applicant while serving as the National Security Adviser in the immediate past Administration of the Defendant.

2.4. That the decision to investigate the Applicant was triggered by the apparent lack of success on the part of the Nigerian Anny in combating the Boko Haram Group. That various searches on the Applicant's houses and premises revealed that the Applicant has been in illegal possession of firearms which include Rocket Propelled Grenade (RPG), General Purpose Machine Gun (GPMG), five Bullet Proofs Cars and varieties of weapons.

2.5 That the responsibility to investigate financial crimes lies in the Economic and Financial Crimes Commission (EFCC), the Department of State Security Service (SSS) and the National Drug Enforcement Agency (NDLEA).

2.6 That the Applicant's investigation led to the filling of different charges on separate offences before the Defendant's Courts in charge N°: - FHC/HC/CR/43/2015.

2.7 That upon the release of the Applicant on bail, the Department of State Security Services deemed it necessary to investigate the Applicant on suspicion of having committed or planning to commit offences bordering on National Security of the Defendant based upon which the Applicant was further arrested and detained.

2.8 That the act of further arresting the Applicant on and fresh allegations was misconstrued as constituting the breach of his rights to bail granted by the Defendants' Court.

2.9 That the Applicant before approaching this Honourable Court, has rightly complained and instituted actions in the Defendant's Court on the legality of his subsequent arrest. The claims in the said suit are same as in this suit and in delivering its ruling, the court held that his bail was adequately enjoyed by him and if he has any grievance on his subsequent arrest, he should sue the State Security Services of the Defendant claiming his right.

2.10 That the Applicant now seeks to re-litigate that case before this Honourable Court.

2.11 That it is justifiable under the Defendant's law to detain the Applicant as the allegation borders on offence which affects the National security of the Federal Republic of Nigeria.

2.12 That the Applicant was a high-ranking military officer in the Defendant with a wide range of vulnerable escape route out of the country and thereby poses a serious threat to the security of the Defendant as a nation.

2.13 That the Applicant, if released may make it impossible in Nigeria for Courts to sit and determine the criminal charges against him.

2.14 The Applicant has varieties of means to substantially intervene with the investigation and put the national security of the Defendant and other neighbouring West African nations in jeopardy.

2.15 That the Defendant had not in any way prevented or denied the Applicant his right to bail as granted by the courts.

The Applicant Subsequently filed with the leave of Court additional reliefs as follows:

1. **A DELCARATION** that the re-arrest and the subsequent detention on or about 5th November, 2015 of the Applicant by the officers, servants, agents, privies of the Defendant is unlawful, arbitrary and an egregious violation of the Applicant's Fundamental human rights as guaranteed by Sections 34, 34 and 41 of the **Constitution of the Federal Republic of Nigeria** 1999 (As amended), Articles 5, 6 and 12 of the **African Charter on Human and peoples' Rights** (Ratification and Enforcement) Act Cap D9 Laws of the Federation of Nigeria 2004; Articles 9 and 12 of the **International Covenant on Civil and Political Rights** and Articles 3, 5, 9 and 13 of the Universal **Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments.

2. **A DECLARATION** that the detention and continued detention of the Applicant on or about 5th November, 2015 by the officers, servants, agents, privies of the Defendant is unlawful, arbitrary and constitutes an egregious violation of the Applicant's human rights as guaranteed by Sections 34, 35 and 41 of the **Constitution of the Federal Republic of Nigeria** 1999 (As amended), Articles 5, 6 and 12 of the **African Charter on Human and Peoples' Rights** (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990; Articles 9 and 12 of the **International Covenant on Civil and Political Rights** and Articles 3, 5, 9 and 13 of the **Universal Declaration of Human Rights** and a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above legal instruments.

3. **A DECLARATION** that it is an unlawful violation of the Applicant's human rights to personal liberty and freedom of movement as guaranteed and protected by **Section 35 and 41 of the Constitution of the Federal Republic of Nigeria 1999 (As amended), Article 6 of the African Charter on Human and Peoples' Rights; Articles 9 of the International Covenant on Civil and Political Rights and Articles 3 and 13 of the Universal Declaration of Human Rights** a most egregious violation of the treaty obligations of the

Defendant under and by virtue of its being a signatory to the above listed legal instruments, for the Defendant to unlawfully detain the Applicant without any justification since 5th November, 2015.

4. A **DECLARATION** that it is an unlawful violation of the Applicant's Human Rights to dignity of human person, privacy and family life guaranteed and protected rights under **Section 34 and 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended); Article 17 of the International Covenant on Civil and Political Rights** and **Articles** 12 of the **Universal Declaration of Human Rights** a most egregious violation of the treaty obligations of the Defendant under and by virtue of its being a signatory to the above listed legal instruments, for the Defendant's agents, privies, servants to have unlawfully detained the Applicant under a de-humanizing condition since 5th November, 2015.

The Applicant relies on all processes already filed before this Court and adopt the facts therein and incorporate same as if they were repeated herein and submits that the detention and continued detention of the Applicant has no legal or any judicial procedure in both domestic law of the Federal Republic of Nigeria and any International Law/Treaty/Convention;

The Defendant also filed an amended statement of defense in which it stated as follows:

1. That the facts and circumstances as stated by the Applicant before this Honourable Court are misleading and do not in any way reflect the truth of the facts leading to the commencement of this suit.

2. The Defendant is a Federation observing and enforcing the rule of law in accordance with its Constitution, the Treaty establishing the Economic Community of West African States, the African Charter on Human and Peoples' Rights etc. and makes all possible efforts in observing its regional and international obligations.

3. That Contrary to the facts presented by the Applicant in his application, it is important to state that the Defendant in its current fight against corruption, financial crimes, misappropriation and terrorism to meet its regional and international expectations, discovered that the sum of

$2,100,000,000 Billion dollars allocated to the office of the Applicant for the purchase of arms, ammunition and welfare of the armed forces of the Defendant was dishonourably misappropriated and shared amongst the well-wishers of the Applicant while in his position as the National Security Adviser in the immediate past Administration of the Defendant in this suit.

4. That instead of buying arms for the Federal Republic of Nigeria so that she can fulfil the above-mentioned obligation, the Applicant decided to share the entire money among his friends and political associates.

5. The decision by the Defendant to investigate the Applicant was triggered by the apparent lack of success on the part of the Nigerian Army in combating the Boko Haram group, the increase in territorial gain by the armed group in Nigeria, Cameroon, Chad Republic, Niger and the threat to the entire West Africa and the world at large.

6. That various searches on the Applicant's houses and premises revealed that the Applicant has been in illegal possession of firearms which include Rocket Propelled Grenade (RPG), General Purpose Machine Gun (GPMG), five Bullet Proof cars and varieties of weapons which put the National Security of the Defendant at imminent threat. That after the coming into power of the present Administration and looking at the handover books, the Government of the Federal Republic of Nigeria, discovered that money worth of Billions of Dollars budgeted for the purchase of arms were not utilized for the said purpose.

7. The Security Agencies and Anti-graft Agencies after investigation effected the arrest of the Applicant.

8. On further investigation it was discovered that the Applicant was in possession of very powerful arms and same was discovered in his personal bedroom and not the security post in his house; the said firearms were Tavor X95 Assault Riffles and UZI Riffles that apart from the arms mentioned in paragraph 2.07 above.

9. That the Arms discovered from the Applicant's private bedroom are very dangerous and capable of sacking the entire Federal Capital Territory within a twinkle of an eye.

10. That Tavor is one of the category of firearms strictly prohibited to be carried by unauthorized people, even the security personnel; and the weapon can only be legally procured under the authorization of the Federal Government.

11. That the searching of the Applicant's house followed a top security intelligence that the Applicant intends to wage war on the Nigeria State either by a coup d'état or by destabilizing the new Administration with the aid of trained hoodlums who will make use of the Arms illegally purchased and kept by the Applicant.

12. That though earlier the Federal Republic of Nigeria only charged the Applicant to Court on the offence of being illegally in possession of firearms, on further investigation, the Security Agencies of the Defendant discovered that Applicant is a security risk to over millions of Nigerians if released on the streets of Nigeria.

13. That if the Applicant is released on bail, he will pose a danger and hinder the smooth investigation of the serious allegations of crimes which are connected to treasonable offences.

14. The Defendant states that during the investigation it was discovered that the Applicant is not working alone and there is need to conduct a prolonged investigation without the interference of the Applicant.

15. That the domestic investigative function of the Defendant is statutorily divided with specific class of offences assigned to different Departments (Agencies) of the Defendant. The responsibility to investigate financial crimes vested in the Economic and Financial Crimes Commission (E.F.C.C), the Department of State Security Service (SSS) with the statutory duty, of investigating crime affecting National Security of the Defendant, the National Drug Law Enforcement Agency (NDLEA) saddled with the powers to investigate drug related offences, and so applies to host of other Departments.

16. The Applicant was thoroughly investigated on the alleged misappropriation of Two billion One Hundred Million dollars, and his investigation led to the filing of different charges on separate offences

before the Defendant's Courts in Charge No: FHC/ABJ/CR/319/2015, Charge No: FHC/HC/CR/42/2015 and Charge No: FHC/HC/CR/43/2015.

17. That bail has been granted in all the Charges filed above. The inability of the Applicant to fulfil the bail conditions on time made him spend more time in detention. However, upon the release of the Applicant, the Department of State Security Service deemed it necessary to investigate the Applicant on suspicion to have committed or planning to commit offences bordering on National Security of the Defendant.

18. That it is justifiable under the Defendant's law to detain the Applicant as the allegation borders on offence which affects the National Security of the Federal Republic of Nigeria, and the investigation so far has revealed that more weapons and ammunition are still in different locations in the territory of the Defendant and the Applicant is unwilling to reveal.

19. The Applicant being the former National Security Adviser has varieties of means to substantially intervene with his investigation and **put the National Security of the Defendant and other neighbouring West African nations in jeopardy.**

20. That the Federal Republic of Nigeria is committed to the protection of life and property of all Residents and Citizens of the Federal Republic of Nigeria since it is one of her obligation under the African Charter on People and Human Right.

Defendant also relied on the following documents attached to the Defendant's amended defense and Marked Exhibits FRN1 - FRN4:

1. A letter titled: Re Request for clarification on issuance of license to private persons to own Tavor Assault rifles dated 4th April, 2016.

2. A letter titled: Request for ballistic experts' opinion on the capacity of Tavor X 95- Assault 5.56MM and Uzi Riffles. Dated 12 March, 2016 and all the attached documents.

3. Charge sheet 1 suit No. FHC/ABJ/CR/319/2015 and all the document attached to same.

4. The Amended Charge in suit No. FHC/ABJ/CR/319/2015 and all the documents attached thereto.

Plaintiff filed a reply to the Defendants amended statement of defense in opposition to the application, and averred;

1. That Defendants made no reference to a Domestic Legislation authorizing the detention of the Applicant in the manner and circumstance of this case.

2. That Defendants reliance on the provision of Section 35(1)(c) 1999 Constitution (as amended) and section 45 thereof is misconceived.

3. That the Nigerian Constitution made adequate provisions for the procedures for lawfully arresting and detaining persons consistent with the obligations of the Defendant under International Treaties which it subscribes to.

4. That the arms allegedly found in Plaintiffs house is the subject matter of a pending Criminal Trial in charge no. **FHC/ABJ/CR/319/2015** for illegal possession of firearms, wherein the Applicant has also been granted bail and he has fulfilled all the bail conditions as rightly admitted by the Defendant.

5. That Applicant upon his re-arrest on the 4th November, 2015 has not been informed till date whether orally or in writing the reason for his detention and has not been shown any detention warrant or warrant of arrest since the time of arrest till date.

ANALYSIS BY THE COURT

It is our view that the following issues call for determination:

1. **Whether the invasion of Applicants' residence and seizure of his properties as alleged is unlawful and attributable to the Defendant as to hold it responsible for same;**

2. **Whether the actions of the Defendants agents in re arresting and detaining the Applicant without charge as they did is unlawful and a violation of Applicants rights as provided under**

Articles Article 6 of the African Charter, Article 9 of the international covenant on civil and political rights and Articles 3 and 13 of the Universal declaration of human rights.

Before going into the issues raised above it is necessary for the avoidance of doubt to clarify the content and limit of the present case.

The Defendants, while addressing this Court relied on Section 3 of the firearms Act Cap 28 which provides:

"No person shall have in his possession or under his control any firearm of one of the categories specified in Part I of the Schedule to this Act (in this Act referred to as a "prohibited firearm") except in accordance with a license granted by the President acting in his discretion".

We submit that the above provision is not in any way relevant to the case before this Court. Apparently, the Defendants have misconceived the matter before this Honourable Court to a criminal matter.

A careful perusal of the Defendants amended defense shows that emphasis has been persistently made on the weapons discovered and seized at the Applicants Residence and its adverse effect to the Country at large. The Defendant having laid emphasis on the dangerous weapons seized, such as Tavor X95 assault rifle, UZI riffles, rocket propelled grenade etc. have failed to put up a proper defense as to the substantive application before this Court which borders on arbitrary arrest and detention, right to liberty, and right to health which is the crux of this case especially since these are already the subject of a criminal charge of illegal possession of firearms for which the Applicant was granted bail. Furthermore, the firearms aforementioned are already in possession of the Defendant.

It is a well-established fact that this Court does not have criminal jurisdiction as has been has held in a plethora of its decisions. The allegation misappropriation of funds and unlawful possession of ammunition is not before this Court and even if it is, the Court lacks jurisdiction to entertain same.

We are therefore not deciding on the guilt or otherwise of the Applicant on the charges before the National Court and has only assumed jurisdiction

based on the facts before it to establish whether the human rights of the Applicant as alleged has been violated.

1. Whether the invasion of Applicants' Residence and seizure of his properties as alleged is unlawful and attributable to the Defendant as to hold it responsible for same.

Section 28 of the Nigerian Police Act provides;

1. A superior police officer may by authority under his hand authorize any police officer to enter any house, shop, warehouse, or other premises in search of stolen property, and search therein and seize and secure any property he may believe to have been stolen, in the same manner as he would be authorized to do if he had a search warrant, and the property seized, if any, corresponded to the property described in such search warrant.

2. In every case in which any property is seized in pursuance of this section, the person on whose premises it was at the time of seizure or the person from whom it was taken if other than the person on whose premises it was, may, unless previously charged with receiving the same knowing it to have been stolen, be summoned or arrested.

The Administration of criminal justice Act 2015 makes provisions for issuance of search warrants and provides in sections 143,144 and 146 thus:

143. Where an investigation under this Act is being made by a police officer, he may apply to a Court or Justice of the Peace within the local limits of whose jurisdiction he is for the issue of a search warrant.

144(1). Where a Court or Justice of the Peace is satisfied by information on oath and in writing that there is reasonable ground for believing that there is in any building, ship, carriage, receptacle, motor vehicle, aircraft or place:

(a) Anything upon or in respect of which any offense has been or is suspected to have been committed;

(b) Anything which there is reasonable ground for believing will provide evidence as to the commission of an offence; or

(c) Anything which there is reasonable ground for believing is intended to be used for the purpose of committing an offence.

The Court or Justice of Peace may at any time issue a warrant authorizing an officer of the Court, Member of the Police Force, or other person named to act in accordance with subsection (2) of this section.

(2) A search warrant issued under subsection (1) of this section shall authorize the officer of the Court, a Police Officer, or other person to:

a. search such building, ship, carriage, receptacle, motor vehicle, aircraft or place for any such thing and seize any such thing until further trial proceeding before the Court issuing the search warrant or some other Court to be dealt with according to law; and

b. arrest the occupier of the house or place where the thing was found where the Court deems fit to direct on the warrant.

146. (1) A search warrant shall be under the hand of the Judge, Magistrate or Justice of the Peace issuing it.

(2) A warrant shall remain in force until it is executed or cancelled by the Court which issued it.

The Administration of Criminal Justice Act is later in time than the Police Act and applying the rule of interpretation the later provision supersedes the earlier. The applicable law in this case is therefore the 2015 Administration of Criminal justice Act.

Applying the above provisions therefore, it is clear that for the Police or any other person so empowered by law to lawfully enter and conduct a search in a building it must be done with a warrant issued by a Judge Magistrate or Justice of the Peace.

Sections 143, 144 & 146 of the Administration of Criminal Justice Act of the Defendants Statutes expressly states how a Search Warrant should be issued and executed.

Section 37 of the 1999 Constitution (As Amended) provides for the right to privacy which is why whenever a constitutional or statutory right of a citizen is to be derogated from, maximum care must be taken to ensure that derogation is for good cause and every provision relating to such 'derogation must be complied with.

The Applicant contend that the Defendants and its Agents conducted an unlawful search upon his premises in that same was done without a Search Warrant. It falls on the Defendant to satisfy this Court that the search was under the authority of a duly executed Search Warrant.

The Defendants attached a copy of search warrant as an annexure to their defense. In their oral testimony stated that they went to the Applicant's premises with a duly signed Search Warrant, but effort to serve the Search Warrant was resisted by the Soldiers, as they claimed they could not access the Applicant because according to them he was upstairs.

They contacted their office who in liaison with the Military authority advised the soldiers to allow them access as they were there legally. The said copy of the Search Warrant is not certified. Consequent upon this, a minimal weight will be attached to it. A Search Warrant should be served on the person to be searched. In this case there is no evidence that it was so served.

Although the Applicant signed the list of recovered items seized from his residence, this does not validate the process adopted by the Agents of the Defendant. Similarly, the purported warrant was not certified, thus its authenticity is questionable.

We are therefore not convinced that the search warrant, if any, was served on the Plaintiff and so hold that the search was carried out without a warrant and illegal.

The Applicant has an inherent right to the peaceful enjoyment of his property as provided by law.

Section 44(1) of the constitution of Nigeria provides: -

1. No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or

interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by a law that, among other things.

a. Requires the prompt payment of compensation therefore; and

b. give to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

The right to property is further guaranteed in Article 14 of the African Charter on Human and Peoples' Rights, as follows:

> **"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."**

Right to property generally implies that an owner is entitled to no interference in the enjoyment of his property, in particular, by the government. The action of the Agents of the Defendant is therefore unlawful and a violation of Article 14 of the African Charter and Article 17 of the International Covenant on Civil and Political Rights. It is trite that the rules of state responsibility applies to International Human Rights Law.

Article 122 of the UN Draft Article on Responsibility of States for Internationally wrongful acts, adopted by the ILC at its 53rd session and submitted to the UN General Assembly provides:

1. Every internationally wrongful act of a State entails the internal responsibility of that State.

2. There is an internationally wrongful act of a State when conduct consisting of an action or mission.

   (a) Is attributable to the State under Internal Law; and

   (b) Constitutes a breach of an International Obligation of the State.

In **Ranken v. Islamic Republic of Iran** (Award No. 326-0913, 23rd November, 1957 Iran - United States Claims report vol. 17 pg. 141. The Tribunal in determining whether it has jurisdiction over the case considered that part 1 of the Articles provisionally adopted by the International law Commission constituted the most recent and authoritative statement of current International law on the organs of state responsibility for international wrongful acts. (Note that part 1 was finally adopted in 2001) and observed that only injuries which are not the result of an act of the Government of Iran are excluded from its jurisdiction.

See also this Court's Decision in **Tidjane Konte v. Republic of Ghana** Judgment No. ECW/CCJ/JUD/11/14 of 13th May, 2014.

For the purpose of International Law, the State consists of different organs with different functions and is treated as a unit so that the action of any of its organs is considered the action of that single legal entity.

In the light of the above the Defendant is liable for the wrongful acts of its Agents.

2. Whether the actions of the Defendants Agents in re arresting and detaining the Applicant without charge as they did is unlawful and a violation of Applicants rights as provided under Article 6 of the African Charter, Article 9 of the International Covenant on Civil and Political Rights and Articles 3 and 13 of the Universal Declaration of Human Rights.

The right to enjoy respect for their liberty and security by all human beings is recognized by law. It is axiomatic that without an efficient guarantee of the liberty and security of the human person, the protection of other individual rights is vulnerable and illusory. Despite this recognition, arrest and detention without reasonable cause and devoid of legal remedies to victims are commonplace in most jurisdictions, the world over.

In the course of such arbitrary arrests and deprivation of liberty, the victims are also deprived access both to their lawyers, their own families and subjected to torture and other forms of degrading and inhuman treatment.

Article 9(1) of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples 'Rights (the relevant International Instrument for the determination of this case) guaranteed a person's right to personal liberty and security. The diction of the International Court of Justice (ICJ) in the Hostages in Teheran case (**America vs. Iran**) ICJ REP (1980) p. 42 para. 91 is instructive viz:

> ***"Wrongfully to deprive human beings of their freedom and to subject them to physical and constraint in conditions of hardship is in itself incompatible with the principle of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights Article 3 of which guarantees the right to life, liberty and security of the human person".***

Even where a State have not ratified or adhered to any of the international human instruments stated above, it is nonetheless bound by other legal sources, especially Customary International Law to ensure that a person's right to respect for his or her liberty and security.

Article 9 (1) of the International Covenant on Civil and Political Rights provides as follows;

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

Similarly, Article 6 of the African Charter on Human and Peoples' Rights provides that:

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

An analysis of these provisions suggests even if in different terms, that deprivation of liberty must in all cases be carried out in **accordance with the law,** (the principle of legality). Furthermore, deprivations of liberty must not be **arbitrary.**

With regard to the principle of legality, it has been held by the Human Rights Committee of the United Nations that;

> **"It is violated if an individual is arrested or detained on grounds which are not clearly established legislation".**

In other words,

> **"the grounds for arrest and detention must be established by law."**

See: Communication No 702/1996 **MCLAWRENCE Vs. JAMAICA** (views adopted 18th July, 1997) UN doc. GAOR A/52/40 (Vol 11) pp.230-231 Para. 5.5

In a case where a person was arrested without a warrant, which was issued more than three days after arrest, the Human Rights Committee hereinafter referred to as the (Committee), concluded that there has been a violation of Article 9(1) because the author had been 'deprived of his liberty in violation of a procedure as established by law' **(Grindin Vs. Russian Federation)** (views adopted on 20th July, 2000). In UN doc. GAOR A/55/40 (Vol. II) p. 175 Para 8.1.

With regard to **"arbitrary arrest",** the Committee in interpreting Article 9(1) of the Covenant on Civil and Political Rights observed (and rightly in our view)

> **"arbitrariness is not to be equated with against the law', but must be interpreted more broadly to include elements of inappropriateness injustice, lack of predictability and due process".** (Underlining for emphasis)

This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime"

See: Communication No 458/1991. **A W. MUKONG** Vs. **Cameroun** (views adopted on 21 July 1994) UN. doc GAOR A/49/40 (vol. 11) para 9.8.

Accordingly, remand in custody pursuant to lawful arrest must not only be **"lawful"** but also reasonable and necessary in all circumstances for the aforementioned purposes. It is for the State party concerned to show that these factors are present in the particular case.

In **MUKONG Vs. Cameroun** (supra) the Applicant alleged that he had been arbitrarily arrested and detained for several months, an allegation rejected by the State party on the basis that the arrest and detention has been carried out in accordance with the Domestic Law of Cameroun. The Committee concluded that Articles 9 (1) has been violated since the author's detention 'was neither reasonable nor necessary in the circumstances of the case'. For instance, the State party had not shown that the remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime, but had merely contended that the author's arrest and detention were clearly justified by reference to Article 19 (3) of the Covenant which allows restriction on the right of freedom of expression.

However, the Committee considered that 'National Unity' under difficult Political circumstances cannot be achieved by attempting to muzzle advocacy of multiparty democratic tenets and human rights and that the author's right to freedom of expression had therefore been violated. Clearly, when a person is arrested without warrant or summons and then simply kept in detention without any Court order, this also amounts to a violation of the right to freedom from arbitrary arrest and detention set forth in Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

It is also evident that where a person is kept in detention in spite of a judicial order of release, this is also contrary to Article 9(1) of the Covenant. It is equally against the spirit of that article when a person is rearrested without due process after release from initial detention; following the grant of bail as it renders the bail granted Superfluous.

The African Commission on Human Rights have also held that;

> **"indefinite detention of persons can be interpreted as arbitrary as the detainee does not know the extent of his punishment, article 6 of the Charter had been violated in this case because the victims concerned were detained indefinitely after having protested against torture"**

(*See*. **ACHPR Organization Contre La TOTURE & ORS Vs. Rwanda**; Communications NOS. 27/28, 47/91 and 99/93, decision adopted during the 23rd ordinary session, October, 1996, para. 28.

In the same vein, it constitutes arbitrary deprivation of liberty within the meaning of Article 6 of the African Charter to detain people without charges and without possibility of bail in a case against Nigeria, the victims had been held in these conditions for over three years following elections. (See: **ACHPR Constitutional Rights Projects and Civil Liberties Organization Vs. Nigeria, communication** N° 102/93, decision adopted 31st October, 1998, para.55).

A suspicion of having committed an offence does not justify indefinite detention. By Article 9(3) of the Covenant, the suspect has a right to be tried "within a reasonable time or to release" pending trial. Liberty is the rule detention must be the exception. Indeed Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures, the so-called **"Tokyo Rules"**,

> **"pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim"**.

With regard to Administrative Detention i.e. detention ordered by the Executive. The power of administrative and Ministerial authorities to order detentions is highly controversial, and should be abolished, it is not outlawed by International Law, even though it is surrounded by safeguards some of which have been enumerated above.

According to the General Comment N° 8 of the Human Rights Committee, Article 9(1) is applicable to all deprivations of liberty whether in criminal cases or any other purpose.

Where the detention is for reasons of public security or public order presents some difficulty even in a State governed by the rule of law in view of the difficulty in defining the terms ***"public security"*** and ***"public order"*** with precision. A guide is however, provided by the Human Rights Committee of the United Nations as follows:

> **"..... if so called, preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and be based on grounds and procedures established by law (para. 1) in formation of the reasons must be given (para. 2) and Court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5) And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3) as well as Article 14, must also be granted".**
>
> (*See*: Comment N° 8 United Nations Compilation of general Comments).

In summary, as earlier noted, liberty is the rule and detention the exception. Deprivation of a person's liberty must at all times be **Objectively**, justified in that the reasonableness of the grounds of detention must be assessed from the point of view of an objective observer and based on facts and not merely on subjective suspicion.

The most common grounds for a lawful judicial deprivation of liberty are:

a). After conviction by a competent independent and impartial Court of law;

b). On reasonable suspicion of having committed an offence or in order to prevent the person from doing so; and

c). In order to prevent a person from fleeing after having committed a crime.

All these situations and circumstances must be established by cogent, convincing, credible and unequivocal evidence.

Applying these principles and law to the case at hand, can it be succinctly stated without fear of contradiction that the arrest and detention of the Applicant is arbitrary and unlawful. The answer is an obvious yes.

The Plaintiff contends that he was arrested, has been detained without charge in an undisclosed place.

The Defendant contends that the reason behind the continued detention of the Applicant is based on different allegation of offences relating to National Security of the Defendant and that considering the Applicants antecedents, and top security reports indicting him, he stands a security risk to over millions of Nigerians if released on the Streets of Nigeria.

On the other hand, DWI testified to the contrary during his oral testimony where he acknowledged that the Applicant has been in their custody since November 2015 till date for the following reasons:

1. For his own interest and personal protection;

2. There is intelligence indicating that the Applicant can get out of the Country thereby evading justice.

Furthermore, in the initial statement of defense particularly para. 3.07, the Defendants argued that S. 1 of the State Security (Detention of Persons) Act Cap 414 empowers the Federal Government to detain persons for acts prejudicial to State security for a period not exceeding six months at a time and to provide for a review of such detention.

Section 1 (1) of the State Security (Detention of Persons) Act, Cap 414 provides:

> **"If the Chief of General Staff is satisfied that any person is or recently has been concerned in acts prejudicial to State Security or has contributed to the economic adversity of the Nation, or in the preparation or installation of such acts and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that person be detained in a Civil Prison or Police Station or such other place specified by him, and it shall be the duty of the person or persons in charge of such place or places, if an order is made in respect of any person is delivered to him, to keep that person in custody until that order is revoked."**

Under that law that the detention order has to made "in writing", and same be delivered to the person so detained. The Defendants did not deliver any such order to the Applicant, neither have they shown this Honourable Court that there was a written order upon which they acted.

During cross examination, DW1 said he wouldn't know if a detention order was sought before detaining the Applicant. He also said he is not aware that the Applicant requested for their protection, but that it is within their mandate to detain if for any reason they discover that the Applicant's life will be in danger. DW1 also acknowledged that the Applicant was granted bail and the bail conditions were satisfied. On the question about the Applicant being detained not pursuant to any judicial procedure, DW1 admitted in the affirmative.

However, the said State Security (Detention of Persons) Act to which the Defendants hinge their argument on has since been repealed on the coming into force of the Constitution of the Federal Republic of Nigeria 1999. This is evident in the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No: 63 of 1999, LFN which provides as follows:

1. Subject to section 6 of the Interpretation Act (which relates to the effect of repeals, expiration and lapsing of enactments), the enactments set out in the Schedule to this decree, including all amendments thereto, are hereby repealed or consequentially repealed with effect from 29th May 1999. The schedule in question included the State Security (Detention of persons) Act, 1990.

In para 2.25 of the Defendants amended defense, the Defendant argued that the Applicants arrest is on further and fresh allegations independent of the charges upon which bail was granted. The question is, was the Applicant charged to Court for the said "further and fresh" allegations"

The subsequent re-arrest and detention without an Arrest Warrant, or a Detention Order or even being informed of the reasons upon which the arrest and detention is made and keeping the Applicant in custody for 7 Months without being charged to Court is unknown to our laws, against the principle of Natural Justice, a contravention of the internationally guaranteed right to personal liberty, as well as other fundamental rights.

In the General Observation No. 13 regarding the "Equality before the Courts and the right of every person to be heard publicly by a competent Tribunal established by law (Art. 14)", the Human Rights Committee of the United Nations stated that:

The right to be informed "without delay" of the charges requires that the information be provided in the form described as soon as the accusation is formulated by a competent authority; in the Committee's opinion, this right must appear when, during the course of an investigation, a Tribunal or an Authority of the Office of the Public Prosecutor decides to adopt procedural measures against a person suspicious of having committed a crime or designated publicly as such. The specific demands of section (a) of paragraph 3 may be satisfied by formulating the accusation either verbally or in writing, as long as they include both the law and the alleged facts on which the information is based.

As earlier noted, the right to personal liberty is one of the most fundamental human rights recognized under International Human Rights Law.

Section 41 of the Nigerian Constitution provides:

1. Every Citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no Citizen of Nigeria shall be expelled from Nigeria or refused entry thereof or exit therefrom.

2. Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a Democratic Society.

    (a) Imposing restrictions on the residence or movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria; or

    (b) Providing for the removal of any person form Nigeria to any other country to:

        (i) be tried outside Nigeria for any criminal offence; or

        (ii) undergo imprisonment outside Nigeria in execution of the sentence of a Court of law in respect of a criminal offence of which he has been found guilty; Provided that there is reciprocal agreement between Nigeria and such other Country in relation to such matter.

Articles 3 and 9 of the Universal Declaration of Human Rights (UDHR) provides;

> *3 "everyone has a right to life, liberty and security of person" and 9 "no one shall be subjected to arbitrary arrest, detention or exile".*

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

> *"everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".*

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

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

The concept of freedom from arbitrary arrest and detention dates back to the Magna Carta wherein Article 39 provides:

> *"No freeman shall be taken or imprisoned or be disseized of his freedom, or liberties, or free customs or be outlawed or exiled or any otherwise destroyed, nor will we not pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land"*

The 1789 French Declaration of the Rights of man and the citizen provides under Article 7 that no man may be indicted, arrested or detained except in cases determined by law and according to the forms which it has prescribed."

The UN Committee on the study of the Rights of everyone to be free from Arbitrary Arrest, Detention, and Exile defines Arrest as "The act of taking a person into custody under the authority of the law or by compulsion of another kind and includes the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him" and defines detention as the act of confining a person to certain place, whether or not in continuation of

arrest and under restraint which prevent him from living with his family or carrying out his normal occupational or social activities.

Article 9(4) of ICCPR provides:

> *"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a Court, in order that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*

The act of applying for bail is thus a fundamental right of any person arrested and detained by a State or its Agents.

The facts of this case as presented by the Applicant has been summarized above. His contention here is that he applied for and was granted bail by the Courts before which he was arraigned. On satisfying the bail conditions he was ordered to be released from custody. He then applied for and was granted leave to travel for medical treatment but was not able to do that because the Agents of the Defendant barricaded all entrances and exits to and from his house. He was subsequently rearrested on fresh charges and arraigned before a high Court.

Again, he applied for and was granted bail on conditions which he fulfilled. He was again ordered to be released but the Defendant's agents intercepted him in the prison and detained him in undisclosed location in complete disregard of the Court Order.

The Applicant is now asking this Court to declare his arrest and detention as unlawful and arbitrary and a violation of his human rights to personal liberty and security.

The concept of arbitrariness under Article 9 of UDHR has been severally examined with a consensus that it imposes a larger international standard on the context of the domestic laws providing both substantive and procedural protection from arrest and detention.

The European Court of Human Rights in **Steel and Ors. Vs The United Kingdom,** Judgment of 23rd Sept Nov. 1998 Report 1998 VII. P2735 para 54 referring to Art 5 of the European Convention on Human Rights held that **"the expression "lawful"** and **"in accordance with a procedure**

prescribed by law" in Article 5.1. stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary.

Black's Law Dictionary Ninth Edition, Bryan Games, defines "Arbitrary" as (1) Depending on individual discretion; determined by a judge rather than by fixed rules, procedures or law (2) of a judicial decision founded on prejudice or preference rather than on reason or fact.

An otherwise legal act can at the same time be arbitrary. Arbitrary thus connotes not just illegality but unreasonableness.

All the legal provisions on restriction of movement as can be seen above are derogable. However, in order to derogate from them the law and process must not only be valid but reasonable.

It is trite that the decision of a court is valid until set aside. It therefore will not be a ground of disobedience to contend that the decision is unreasonable or not backed by law. The proper channel when dissatisfied is appeal.

In **HR, Cesti Hurtado V. Peru, September 29 1999, P.445. 141-143 Gustavo** Cesti Hurtado against a threat of re-arrest by the state filed a habeas corpus application. The order was granted by the Public Law Chamber pursuant to article 7(1), 7(2) and 7(3) of the American Convention and ordered that the arrest be revoked and the restriction on his travelling abroad be lifted and the procedure under military jurisdiction should be suspended. In defiance of the order, the military authorities set up a special military tribunal, arrested, tried and convicted Gustavo Cesti Hurtado. The state argued that Gustavo Cesti Hurtado ought to have appealed against his arrest and the jurisdiction of the tribunal to try him in that any person prosecuted under military jurisdiction, should have opted for presenting a jurisdictional dispute or requested provisional liberty. They argued further that at the time the order was made Gustavo was not in detention and as such there was no corps to bring before the Public law chamber.

The Court in rejecting the defense arguments held that the habeas corpus petition filed by Gustavo fulfils all when there is a hypothetical conflict between laws, the one which is most favourable to the fundamental right in

question should be applied and, when in doubt, it should also be resolved in favour of the right to liberty because liberty is the Prius of law.

That it is evident that the military authorities defied the order of the public law Chamber in its entirety and proceeded to detain, prosecute and convict Gustavo Cesti Hurtado That as this Court has already determined, the petition for habeas corpus filed by Gustavo Cesti Hurtado fulfils all the requirements set forth in the Convention, which establishes an appropriate method to ensure the liberty of the affected person. Once Gustavo Cesti Hurtado sought and obtained the pertinent remedy, the existence of other remedies became irrelevant, even if it could be shown that they were equally effective. As a result of the refusal of the Military authorities to obey and execute the legitimate order of the Public Law Chamber and of the subsequent detention, prosecution and sentencing of Gustavo Cesti Hurtado, the State violated his right to personal liberty as guaranteed in Article 7(1), (2) and (3) of the Convention.

Nigeria is under democratic governance where the Rule of Law reigns and Separation of Power practiced. The three arms of government should perform their respective duties without any hindrance or interference from the other.

This Principle of Rule of Law is a safeguard against arbitrary governance and the foundation of good governance.

Lord Denning in Gouriet V. Union of Post Office Workers (1977) 1 Q.B 729@ 761-762 said: ***"be you so high, the Law is above you"***.

The Nigerian Supreme Court in **Lagos State V. Ojukwu (1996) 1 NWLR (Pt 18) 621** noted that:

> ***"The rule of law presupposes that the State is subject to the law, that the judiciary is a necessary agency of the rule of law, that the Government should respect the right of individual Citizens under the rule of law and that to the judiciary, is assigned both by the rule of law and by our constitution the determination of all actions and proceedings relating to matters in disputes between persons, Governments or Authority."***

Emphasizing the centrality of the concept of rule of law to Constitutional Democracy and Good Governance the Supreme Court of the Defendant in *Miscellaneous* Offences **Tribunal v. Okorafor (2001) 18 NWLR (Pt 745) 310 at 327** stated:

> **"Nigerian constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary powers."**

Under the Nigerian legal system, a person is deemed innocent until proven guilty. The Applicant alleged that the President of the Federal Republic of Nigeria in His maiden presidential media chat dated 30th December, 2015 announced that the Applicant will not be released because of the weight of crimes he committed against the Nigerian state, and because he is likely to jump bail.

The above statement if established offends the principle of presumption of innocence of the accused, smirks of utmost disrespect of the concept of Separation of Powers and is an encroachment of the executive in the functions of the Judiciary likely to embolden its Agents to shun Court Orders.

Re-arresting the Applicant immediately after he has been granted bail by a court of competent jurisdiction makes a mockery of the Country's Democracy which is anchored on the Rule of Law and Separation of Powers. A Party not satisfied with a ruling of a Court has a right to apply for judicial review and also apply for a stay of execution of the said ruling but not to ignore it or carry on as though the Court's Order is not binding on it. See: **Attorney-General of Lagos State V Attorney-General of the Federation (2005) 2 WRN 1 at 150.**

Democratic governance is based on the will of the people wherein people live in dignity and freedom. The rule of law protects the fundamental, political, social, and economic rights of the people who will otherwise be vulnerable. Where the Judicial function is interfered with by the executive this destroys the concept of separation of powers and the rule of law will transform to the Rule by Might and enthronement of tyranny.

In **Oko-Osi V. Akindele (2013) LPELR-20353 (CA)** the Nigerian Court of Appeal held:

> **"Yet, it's a trite veritable principle, that obedience to lawful orders of Court is fundamentally a sine qua non to the good order, peace and stability of the Nigerian Nation, nor any notion for that matter. Paradoxically, the alternative to obedience of lawful Court Order is brute self-help and anarchy. As authoritatively held by the Supreme Court: Disobedience to an order of Court should, therefore, be seen as an offence directed not against the personality of the judge who made the order, but as a calculated act of subversion of peace, law and order in the Nigerian society."**

The principle of presumption of innocence posit that everyone is presumed innocent until the contrary is proved. The constitutional provisions cited earlier provide a time frame within which a person so arrested and detained is to be brought before the Court of law. The Defendant in the instant case took laws into their hands when they re-arrested, and continued to detain the Applicant without any legal justification.

It is trite law that every person is presumed innocent until the contrary is proved.

Likewise, the 36th principle of Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment of the United Nations, states that:

> [a] detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

In the case of **ACOSTA-CALDERON V. ECUADOR JUDGMENT OF 24th JUNE 2005**, Inter-American court of Human Rights, the court held that:

> ***"the principle of presumption of innocence constitutes a foundation for judicial guarantees. The obligation of the State is not to restrict the detainee's liberty beyond the limits strictly***

necessary to ensure that he will not impede the efficient development of the investigations and that he will not evade justice derived from that established in Article 8 (2) of the Convention. In this sense, the preventive detention is a cautionary measure and not a punitive one. This concept is laid down in multiple instruments of International Human Rights Law. The International Covenant on Civil and Political Rights provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Article 9 (3). It would constitute a violation to the covenant to keep a person whose criminal responsibility has not been established detained for a disproportionate period of time. This would be tantamount to anticipating a sentence, which is at odd with universally recognized general principles of law."

In the instant case the criminal responsibility of the Applicant has not been established, he has not been brought before any judicial authority nor charged for any criminal offence. The continued detention of the Applicant without being tried is unlawful and a violation of his rights under the various international instruments referred to above.

The act of the Defendant in the continued detention of the Applicant in circumstances where he had been granted bail in three different Courts of the Defendant, satisfied the conditions of bail and released, only to be re-arrested by the Defendant and detained incommunicado and without charge is to say the lease condemnable. Granted the Applicant may have committed a heinous crime for which charges are already pending in three Domestic Courts of the Defendant, which had granted him bail, he is entitled to due process.

Even if he is suspected of additional crime he is still entitled to being charged expeditiously and either released or properly detained on the orders of a competent Court, if not entitled to bail. It must be stated that the administrative or preventive detention of a person suspected of having committed a crime, as the Applicant in this case, does not disentitled him to due process. Any detention for a considerable period of time, as in this case over seven months is a gross violation of the right to personal liberty and security of the Applicant and a violation of the obligations of the Defendant as a signatory to the African Charter on Human and Peoples'

Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of Human rights and Customary International Law.

The Courts, Domestic, or International must rise up to the occasion by asserting their independence, providing succour to persons, even in the face of suspicion of having committed offences, no matter how heinous, discourage to the barest minimum executive lawlessness and impunity. If not so, our democratic society and its tenets will be drastically endangered. It may be the Applicant today and other persons tomorrow. The presumption of innocence which is the fulcrum of our criminal justice system must be preserved and respected no matter whose ox is gored.

IN **CONCLUSION,** it is clear from the evidence and annexures produced before the Court, there is no legal basis for re-arrest of the Applicant after having been granted bail by three Domestic Courts of the Defendants. It appears that the sole aim of the re-arrest is to circumvent the grant of bail and by keeping the Applicant in custody through executive fiat unsupported by any law or order of Court.

Furthermore, the search warrants purportedly produced by the Defendant as the basis of the search of the Applicant's house is neither certified as to determine its authenticity and the usual procedure required by law for the execution of such warrant was not complied with.

There is no prima facie evidence that the search warrant was signed by the Applicant as required by law, even though the list of items recovered were purportedly endorsed.

Accordingly, it is our considered view that the search warrant was an afterthought aimed at perverting the course of justice. In this regard the search of the Applicants premises both at Abuja and Sokoto, Nigeria and the seizure of his personal properties listed is illegal, not having been carried out in accordance with law. Consequently, the privacy, right to family life, integrity and to own property of the Applicant was violated.

For the avoidance of doubt any person who have violated the criminal laws of a State especially the ones impeding the development of the State and destruction of its Commonwealth are liable to be tried and if found guilty should face the consequences of their action(s).

However, in doing so, States must respect all International obligations with regard to due process and respect for fundamental rights of the suspects. Failure to do so will impute responsibility to the State regarding such violations of rights while leaving intact their right to prosecute and punish offences against their criminal laws.

DECISIONS

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

AS TO THE MERITS;

DECLARES;

i. That the arrest, detention and continued detention of the Applicant by the Agents of the Defendant since November, 5th 2015 without charge or judicial order after having been granted bail by three different Domestic Courts of the Defendant and released is unlawful, arbitrary and Constitutes a violation of Article 9 and 12 of the International Covenant on Civil and Political Rights, Articles 3, 5, 9 and 13 of the Universal Declaration of Human Rights and more particularly, Articles 5, 6 and 12 of the African Charter on Human and Peoples' Right.

ii. That the invasion of the Applicant's home, privacy and correspondence at No. 13 John Kadiya Street, Asokoro Abuja, Nigeria and Sultan Abubakar Road Sokoto Nigeria sometimes on 16th July and 17th July, 2015 and the forceful removal and seizure of property listed in Annexure A to this Application without lawful authority violates the Applicant's right to own property contrary to Articles 14 of the African Charter on Human and Peoples' Rights and Articles 17 of the International Covenant on Civil and Political Rights.

iii. **ORDERS:** the Defendant and or its Agents to forthwith release the Applicant and all his UNLAWFULLY seized properties during the invasion of his house or home on the 16th and 17th July, 2015 and listed in Annexure A to this Application.

iv. **ORDERS:** the Defendant to pay the sum of 15, 000,000.000 (fifteen million Naira) as damages to the Applicant for violation of his rights guaranteed under Articles 4, 5 and 14 of the African Charter on Human and Peoples' Rights and Article 17 of the International Covenant on Human and Peoples Rights as well as the Universal Declaration of Human Rights.

v. DECLINES: to issue on Order of Injunction against the Defendant as such will amount to an interference on the right of the Defendant to prosecute and punish offences committed within its territorial jurisdiction provided such is done in accordance to due process recognized by International Human Rights law.

AS TO COSTS

Cost is **awarded** against the Defendant's as assessed by the Registry of the Court.

Thus, made and Adjudged and pronounced in a public hearing this day 04th day of October 2016.

THE FOLLOWING JUDGES HAVE SIGNED THE JUDGMENT

1. **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
2. **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
3. **Hon. Justice Yaya BOIRO** - *Member.*

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

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

HOLDEN AT ABUJA, NIGERIA

ON THIS 6TH DAY OF OCTOBER, 2016

SUIT NO: ECW/CCJ/APP/37/15
JUDGMENT NO: ECW/CCJ/JUD/24/16

BETWEEN
VISION KAM JAY INVESTMENT LIMITED - *PLAINTIFF.*

VS.
1. PRESIDENT OF THE COMMISSION
2. ECOWAS COMMISSION } *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE -** *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT -** *MEMBER*
3. **HON. JUSTICE YAYA BOIRO -** *MEMBER*

ASSISTED BY:
ATHANASE ATTANON (ESQ.) - *DEPUTY CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **GEORGE IBRAHIM &.**
   O. OLADUMMOYE - *FOR THE PLAINTIFF.*
2. **SAMBO ISHAKU** - *FOR THE DEFENDANTS*

Breach of Contract - Cause of action - Uncontroverted Evidence - Default Judgment

SUMMARY OF FACTS

*The Plaintiff a limited liability company in Nigeria entered into a two-tranche contract with the Defendants for the supply, installation and maintenance of power equipment. The first contract was valued at Thirty-Five Million, Seven Hundred and Sixteen thousand, Four Hundred and Twenty-Two Naira (**N35,716,422**) and the second contract was valued at the sum of twenty million, six hundred and ninety-eight thousand, nine hundred and twenty naira(**N20,698,920**).*

The Plaintiff avers that after successfully completing the contract within the specified time limit, he was issued a job completion certificate. That the Defendants failed to pay the full sum stated in the contract after duly discharging its obligations. That pursuant to the contract agreement, full payment shall be made within 30 days of acceptance of the contract and where payment is delayed up to 120 days after the time due for payment, interest between 0.5% and 10% per day shall apply to the contract sum.

The Defendants failed to file a defence but sent a letter addressed to the President of the Court purportedly giving reasons why they could not file their defence within the stipulated time.

The Plaintiff thus filed an application for judgment to be entered in default against the Defendants.

ISSUES FOR DETERMINATION:

- *Whether from the totality of facts adduced by the Plaintiff, a default judgment can be entered in its favour?*
- *Whether the Plaintiff has established a reasonable cause of action?*
- *Whether from the evidence put forward, the Plaintiff has proved his case to entitle him to the reliefs sought?*

DECISIONS OF THE COURT

The Court held:

- *That by virtue of Rule 90 (1) of the Rules of Court, default judgment maybe entered on behalf of the Plaintiff where the Defendant fails to enter appearance or file a defence.*
- *That from the uncontroverted evidenced presented by the Plaintiff, it is clear that the Plaintiff and the Defendant entered into a valid contract.*
- *That the action of the Plaintiff is competent and admissible.*
- *That the Plaintiff has proved his case by preponderance of evidence and is entitled to the reliefs sought.*
- ***Ordered** the Defendants to pay the sum of N20,698,920 (Twenty Million, Six Hundred and Ninety Eight Thousand, Nine Hundred and Twenty Naira) being the debt owed to the Plaintiff by the Defendants for services rendered pursuant to the contract entered into by the parties.*
- ***Directs** the Defendants to pay 1% interest on the sum N20,698,920 from the 16th April, 2015 till the judgment debt is liquidated.*
- ***Rejects** the Plaintiff's claim for general damages as the Defendants cannot pay for the Plaintiff's impecuniosity.*

JUDGMENT OF THE COURT

SUMMARY OF FACTS AND PROCEDURE

1. The Plaintiff, a limited liability Company incorporated under the laws of Nigeria entered into a two tranche contract with the Defendants for the supply, installation and maintenance of power and Associated Equipment.

   The first contract was valued at thirty five million, seven hundred and sixteen thousand, four hundred and twenty two naira **(N35,716,422.00).** The second tranche was for the sum of Twenty Million, six hundred and Ninety eight thousand, Nine hundred and twenty Naira **(N20, 698, 920.00).**

   The Plaintiff completed the contract within the stipulated four weeks completion period and was issued a certificate of job completion on the 18th of December, 2014 by the Defendants.

   The Plaintiff contends that by Article 16 (4) of the special condition contract (SCC), full payment shall be made within 30 days of acceptance of the contract and where payment is delayed up to 120 days after, the time due for payment, interest of between 0.5% and 10% per day shall be applied to the contract sum.

   That while the first sum of Thirty-five million seven hundred and sixteen thousand, four hundred and twenty two naira **(N35, 716,422.00)** only has been paid to the Plaintiff, the balance of twenty million, six hundred and ninety eight thousand, nine hundred and twenty naira **(N20, 698, 920.00)** only has remained unpaid till date despite several demands from the Defendants.

   Accordingly, the Plaintiff seeks the following reliefs from this Court:

   1. AN ORDER, compelling the Defendants to pay the Plaintiff the sum of Twenty million, six hundred and ninety eight thousand, nine hundred and twenty naira **(N20, 698,920.00)** being the balance of the contract sum of goods and services rendered to the Defendant since 15th December, 2014.

2. 10% Interest per day on the sum of twenty million, six hundred and ninety eight thousand, nine hundred and twenty naira **(N20, 698,920.00)** only from the 16th of April 2015 till the sum is finally paid to the Applicant.

3. General damages in the sum of five hundred million naira **(N500,000,000.00)** against the Defendants.

2. NATURE OF EVIDENCE IN SUPPORT.

In support of his claim the Plaintiff provided the following documentary evidence:

i. Quotation dated October 15, 2014;

ii. Provisional Award letter dated 21/11/2014;

iii. L. P. O. dated 20/11/2014;

iv. Notification of commencement of work dated 21/11/2014;

v. Contract agreement dated 21/11/2014;

vi. Job completion certificate dated 18/12/2014;

vii. Letter of demand dated 13/3/15;

viii. ECOWAS letter dated 24th April 2015;

ix. Notice of withdrawal of license dated 19th August, 2015;

x. Plaintiff's solicitors' letter dated 1/11/2015;

xi. Notice to apply interest dated 14/ 04/2015;

xii. Notice of intention to commence Arbitration dated 23/09/2015;

xiii. Proposal for the Appointment of an Arbitrator dated 27/10/2015.

3. THE PLAINTIFF'S CASE:

By an Application dated the 08th of December, 2015, the Plaintiff brought an action against the Defendants for breach of contract and failure of the Defendants to pay the Plaintiff the full sum stated in a contract, after duly discharging its obligations thereunder.

The Plaintiff thus specifically averred that:

1. The 2nd Defendant represented by the 1st Defendant, by a publication in specific papers, particularly The Guardian Newspaper of June 12, 2014, invited bids for the production of SAP infrastructure in three separate lots.

2. The Plaintiff indicated interest in Lots 1, 2, 3 and submitted its bids after purchase of the bid documents.

3. Having satisfied the requirements of the bid, the Plaintiff was awarded the contract for the supply, installation and maintenance of power Associated Equipment by the Defendants.

4. The place for the supply installation and maintenance of power and Associated Equipment was to be the 2nd Defendant's Headquarters in Abuja while the renovation of the ECOWAS Data Recovery Centre (DRC) site was stated to be the ECOWAS Commission Liaison Office, Lagos.

5. That being satisfied with the performance of the Plaintiff in the initial contract, the Defendants approached the Plaintiff to give a proposal for direct contract for the supply, installation and maintenance of two additional inverters (15KVA) for the server rooms at Niger House and River Plaza ECOWAS Commission Office Annexes in Abuja (the subject-matter of this Dispute).

6. By a proposal submitted the Plaintiff, the indicative price schedule for the supply, installation and maintenance of two additional inverters (15KVA) for the server rooms at Niger House and River Plaza office Annexes in Abuja was to cost fifty six million, four hundred and fifteen thousand, four hundred and twenty two naira **(N56, 415, 422.00)** only, the 2nd Defendant received the quotation from the Plaintiff, vetted and approved same.

7. The 2nd Defendant drafted and prepared a contract which was approved by both parties.

8. The Plaintiff completed the contract and was issued a completion certificate by the Defendants.

9. By the terms of the contract, the Plaintiff was to be paid within thirty (30) days of acceptance of the contract. The Contract document further provided that where payment is delayed up to 120 days, interest of between 0.5% and 10% per day will be applied to the contract sum.

10. That the Defendants have failed and refused to pay the sum owed the Plaintiff after the expiration of the 120 days.

11. By a letter dated 14th April, 2015 the Plaintiff gave notice to the Defendants of its intention to apply the interest rate on the contract sum as stipulated in the contractual document.

12. That the failure of the Defendants to pay the Plaintiff resulted in the withdrawal of the Plaintiff's operational license by Outback power, a solar electricity company from the United States of America.

13. That the failure of the Defendants to pay the sum owed have resulted in untold hardship to the Plaintiff.

14. By a letter dated 24/04/2015, the Defendants agreed to pay the sum of fifty six million, four hundred and fifteen thousand, four hundred and twenty two naira only (N56, 415,422.00) owed in the two tranches of the contract.

15. That the Defendants have paid the sum of Thirty five million, seven hundred and sixteen thousand, four hundred and twenty two naira only **(N35, 716, 422.00)** representing the sum of the first tranche of contract, leaving the balance of twenty million, six hundred and ninety eight thousand, nine hundred and twenty naira only **(N20, 698, 920.00),** representing the sum of the second tranche unpaid till date despite several demands.

THE PLAINTIFF THEREFORE CLAIMS FOR:

1. AN ORDER compelling the Defendants to pay to the Plaintiff the sum of twenty million, six hundred and ninety eight thousand, nine hundred and twenty naira **(N20, 698, 920.00)** only being the balance

of the contract sum for goods and service rendered to the Defendant since the 15th of December, 2014.

2. 10% interest per day on the sum in (1) above from 16th April, 2015 till the said sum is finally paid to the Plaintiff.

3. General damages in the sum of five hundred million **(N500,000,000.00)** against the Defendants.

4. DEFENDANTS CASE:

The Defendants were served with the originating application on the 10th of December, 2015. After the expiration of the thirty days period for entry of appearance and filling of a defence, the Defendants did not file any defence. However, by a letter addressed to the President of the Court dated 22nd January, 2016, the 1st Defendant purportedly an advanced reasons why the Defendants could not file their defence out of time. This is indeed a strange procedure unknown to law. By a document titled statement of defence filed on the 18/02/2016, the Defendants' purported to file a statement of defence without leave of Court and took no further steps to defend the action.

5. ANALYSIS BY THE COURT

The facts of this case are not in dispute. The Defendants entered into a contract for the supply and maintenance of SAP infrastructure with the Plaintiff for a sum of **N56, 415, 422.00.** This was evidenced by a contract document dated 21st November, 2014 and signed by both parties.

The Plaintiff completed the contract on schedule and was issued a job completion certificate by the Defendants on the 18th of December 2015 which was within the four weeks completion period stipulated by the contract.

By the executed contract document, full payment of the contract sum was to be made within 30 days after the acceptance of the contract, and that where the payment is delayed up to 120 days, after the payment was due, an interest of between 0.5 to 10% of the contract sum per day shall be applied to the contract sum.

Following the neglect, failure and refusal of the Defendants to pay the Plaintiff, the Plaintiff, by a letter dated 14th April, 2015 gave notice to the Defendants of its intention to apply the interest in accordance with terms of the special condition of the contract.

By a letter dated 24th April, 2015 the Defendants admitted owing the Plaintiff the sum of fifty-six million, four hundred and fifteen, four hundred and twenty-two naira **(N56, 415, 422.00)** to be paid in two tranches. The first tranche of the sum of **N35, 717, 422** (Thirty-five million, seven hundred and sixteen thousand, four hundred and twenty-two naira only). The second tranche will be **N20, 698, 920.00** (Twenty million, six hundred and ninety eighty thousand, nine hundred and twenty naira. The Defendants have paid the sum indicated in the first tranche but the second tranche of **N20, 698, 920.00** (Twenty million, six hundred and ninety-eight thousand nine hundred and twenty naira only), has remained unpaid till date despite repeated demands.

The Plaintiff, by a letter dated 23rd September, 2015, indicated its intention to initiate arbitration proceeding against the Defendants in accordance with the provisions of the contract but the Defendants did not respond or indicate intention to pursue that option.

Similarly, on the 29th October, 2015 the Plaintiff through its Solicitor, wrote to the Defendants making a proposal for the appointment of an Arbitrator, a letter the Defendants failed to reply.

Accordingly, all efforts by the Plaintiff to recover the outstanding sum of **N20, 698, 920. 00** (Twenty million, six hundred and ninety-eight thousand, nine hundred and twenty naira only, from the Defendants has proved abortive, hence the commencement of this suit against the Defendants.

From the records before the Court, the originating application was dated the 5th of December, 2015 and filed on the same day. The Defendants were served with the originating application and other processes in this suit on the 10th of December, 2015.

By the Rules of this Court, the Defendants had one month to file a defence after the service of the originating application, but failed to do so after the expiration of the period.

The Plaintiff then filed an application for judgment by default and also an application to call oral evidence.

The Defendants, acting through the 1st Defendant, wrote a letter dated 22/01/2016 to the President of this Court, purporting to advance reasons why the Defendants did not file their statement of defence. There was no application for leave of Court to file their statement of defence out of time.

On the 18th of February, 2016, the Defendants filed a document titled **STATEMENT OF DEFENCE** with no application for extension of time. Accordingly, there was no defence to this action.

When the matter came up for hearing on the 15th March, 2016, the Defendants were not in Court nor were they represented.

The Counsel to the Plaintiff, Mr. George lbrahim Esq., presented the case of the Plaintiff. He argued that the Defendants were served with all the processes in this case and are aware of the case and the date for hearing but took no steps to answer to the same. He further argued that the letter written by the 1st Defendant is neither a statement of Defence nor a recognizable process and urged the Court to discountenance the letter and bold that there is no defence before the Court.

The Plaintiff then moved his application for judgment in default dated 18th January, 2016 and asked the Court to enter judgment in favour of the Plaintiff for the Defendants' failure to enter appearance or file a defence. He urged the Court to grant all the reliefs sought in the originating application since the Defendants have no defence.

The Plaintiff, after much hesitation, withdrew the application to call witness. The Court granted his prayers and adjourned to 26th May, 2016 for judgment.

However, the business of the Court did not permit it to sit on that day and the matter was adjourned to 06th June, 2016 for judgment.

On the said day, the judgment was not ready and the matter adjourned to the 5th of July, 2016, however, the Court did not sit on that day due to the *Eid-el Fitri* holiday.

As earlier noted, there is no dispute to the facts of this case especially as the Defendants did not file a defence. The Rules of this Court, particularly Rule 90(1), enjoins the Court to enter default judgment on behalf of the Plaintiff where the Defendant fails to enter appearance or file a defence.

However, entering judgment in default is not a matter of course. The Court must examine the totality of evidence provided by the Plaintiff to determine whether there is a cause of action and if the claim has been satisfactorily proved.

From the uncontroverted evidence presented by the Plaintiff the following facts were clearly established:

a. The Plaintiff and the Defendants entered into a contract evidenced by a written document attached to this claim.

b. The Contracts were in two tranches, the first tranche was for the sum of supply and maintenance of SAP equipment and services for the sum of **N35, 716, 422.00** (Thirty-five million, seven hundred and sixteen thousand, four hundred and twenty-two naira only. This sum have been fully paid by the Defendants to the Plaintiff

c. The second tranche of the contract was for the sum of **N20, 698,920.00** (Twenty million, six hundred and ninety-eight thousand, nine hundred and twenty naira only). The job was executed on schedule for a certificate of job completion issued to the Plaintiff by the Defendants. However, the Defendants have refused or neglected to pay the sum outstanding dispute several demands by the Plaintiff.

d. The Defendants have not denied any of these allegations (even from the purported statement of defence, which the Court discountenanced, the debt was clearly admitted).

Accordingly, it is obvious that the Plaintiff has proved his case by a preponderance of evidence and is entitled to reliefs.

First the contract is clear as to the terms and period of payment which the Defendants have breached. The payment of the contract sum was due since December, 2014 but the Defendants have refused to pay the sum well over 120 days period provided for by the contract prepared by the Defendants and agreed to by the Plaintiff. The Defendants inserted a penalty clause for purposes of ensuring compliance and is now the offending party.

It will therefore serve the interest of justice to award some interest against the Defendants for breach of the contract it voluntarily entered into with the Plaintiff, and thus the Court makes the following decisions:

i. **Orders** and **directs** the Defendants to pay the sum of **N20, 698, 920.00** (Twenty million, six hundred and ninety-eight thousand, nine hundred and twenty naira only being the debt owed the Plaintiff by the Defendants for services rendered pursuant to the contract entered into by the parties.

ii. **Directs** the Defendants to pay 1% interest on the sum in paragraph (1) above from the 16th of April, 2015 till the judgment debt is liquidated.

iii. **Rejects** the claim for general damages as the Defendants cannot pay for the Plaintiffs' impecuniosity.

The Defendants are advised to exhibit some measure of responsibility and commitment in executing contracts entered into by the Institution in the future. It is unfortunate that the laxity on the part of the officers and the legal Department of the Defendant Commission have occasioned loss to the Defendants. This should be avoided in future dealings.

The Court holds that the action of the Plaintiff is competent and admissible.

FOR THESE REASONS,

Adjudicating in public session, after hearing both parties in the first and last resort,

THE COURT

IN TERMS OF MERITS

- In regard to this claim **holds** that, the Defendants have breached the contract and are therefore liable to pay the sum of **N20, 698,920.00** together with interest of 1% per day on that sum from the 16th of April, 2015 till the Judgment debt is fully paid.

AS TO COSTS,

- **Directs** the Defendants to bear the cost of this action as assessed by the Registry.

Thus made, adjudged and pronounced in a public hearing at Abuja on the 06th day of October, 2016.

AND THE FOLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
- **Hon. Justice Yaya BOIRO -** *Member;*

Assisted by:

Athanase ATANNON (Esq.) - *Deputy Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, 11TH DAY OF OCTOBER, 2016

SUIT NO: ECW/CCJ/APP/33/15
SUIT NO: ECW/CCJ/APP/34/15
JUDGMENT NO: ECW/CCJ/JUD/25/16

BETWEEN
DJIBRIL YIPENE BASSOLE & ANOR.- *PLAINTIFFS*

VS.
THE STATE OF BURKINA FASO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE YAYA BOIRO** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **YÉRIM THIAM (ESQ.)**; **MARC LE BIHAN (ESQ.)**; **ANTOINETTE N. OUÉDRAOGO (ESQ.); RUSTICO LAWSON-BANKU (ESQ.); ALEXANDRE VARAUT (ESQ.);** *A SOCIÉTÉ CIVILE PROFESSIONNELLE D'AVOCATS* **(S.C.P.A THEMIS-B)** - *FOR THE PLAINTIFFS*
2. **M. SAVADOGO MAMADOU (ESQ.) ; LA SCPA KAM & SOME,** *SOCIETE CIVILE PROFESSIONNELLE D'AVOCATS* - *FOR THE DEFENDANT*

- Jurisdiction - Enforcement of Judgment

SUMMARY OF FACTS

Despite the Decision of the Court dated 13 July 2015 Ordering the Republic of Burkina Faso to remove all obstacles excluding certain citizens from participating in the elections, the Applicants: Djibril Bassolé and Léonce Koné were excluded from the electoral competition following the decision of the Constitutional Council. It is for this reason that the Applicants brought the matter before the Court; because, in their submission, the Republic of Burkina Faso refused to submit to the Decision of the Community Court of Justice, ECOWAS and thus violated not only its obligations under the ECOWAS Treaty, but also the principles of law deriving from the international instruments to which it is party to.

ISSUES FOR DETERMINATION

i. Whether the Court have jurisdiction to entertain this matter?

ii. Is the Judgment of the Court dated 13 July 2015 well executed by the Republic of Burkina Faso?

DECISION OF THE COURT

The Court held that the execution of the Judgments delivered by it falls within the exclusive competence of the Member States of the Community, upheld the plea of lack of jurisdiction raised by the Defendant and declared itself to lack jurisdiction.

JUDGMENT OF THE COURT

I- Parties

M. Djibril Yipéné BASSOLE living at Ouagadougou and **Mr. Léonce Siméon KONE**, a retired banker, a Burkina Faso citizen, presently detained at the Military Prison at Ouagadougou, all having as Counsels:

- **Maitre Yérim Thiam**, Lawyer registered with the Court, former President of the Bar, 68, rue Wagane Diouf, Dakar, Senegal;
- **Maitre Marc le Bihan**, Lawyer registered with the Court, former President of the Bar, 86 Avenue du Diamangou, Niamey Niger;
- **Maitre Antoinette N. Ouédraogo**, Lawyer registered with the Court, former President of the Bar, Ouagadougou, Burkina Faso;
- **Maitre Rustico LAWSON-BANKU**, Lawyer registered with the Court, President of the Bar, 703, Rue de France (Rue 18, Doulassamé), Lomé, Togo;
- **Maitre Alexandre VARAUT**, Lawyer registered with the Court of Appeal in Paris, rue de l'université-75007 Paris, France;
- **La société civile professionnelle d'avocats (S.C.P.A Themis-B),** Associate Lawyers, with address at Samandin, secteur 07, 161, Rue Moro Naaba, BP 353 Ouagadougou, Burkina Faso.

- PLAINTIFFS

AND

STATE OF BURKINA FASO represented by the State Litigations Officer at the State Public Treasury, within the (AJT) Ministry of Economy and Finance, having as Counsels:

- **M. SAVADOGO Mamadou**, Lawyer registered with Bar in Burkina Faso, 212, Avenue de la Cathédrale, 01 BP 6042 Ouagadougou; and

- **La SCPA KAM & SOME**, *Société Civile Professionnelle d'Avocats* (Civil Law Firm), registered with the Bar in Burkina Faso, 35, Rue 38, Ouagadougou,

- DEFENDANT

THE COURT

- **Having regard** to the Revised Treaty establishing the Economic Community of West African States (ECOWAS) of 24th July 1993;

- **Having regard** to the Protocol of 06 July 1991 and the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;

- **Having regard** to the Rules of procedure of the ECOWAS Court of Justice of 3rd June 2002;

- **Having regard** to the Universal Declaration of Human Rights of 10 December 1948;

- **Having regard** to the African Charter on Human and Peoples' Rights of 27th June 1981;

- **Having regard** to the initiating Application filed on 9th November 2015 by Mr. Djibril Yipené Bassolé and by Mr. Léonce Siméon Martin KONE, together with all annexure;

- **Having regard** to the Defence Writ dated 14th and 22nd December 2015 by the State of Burkina Faso;

- **Having regard** to processes filed in the course of this procedure;

- **Having heard** the parties, through their respective Counsels;

II- FACTS AND PROCEDURE

1- Following the initiating Application dated 21st May 2015 filed by a group of political parties and Burkina Faso citizens, the ECOWAS Court of Justice delivered Judgment N°: ECW/CCJ/JUG/16/15 dated 13th July 2015, whose operative part read thus:

« *The Court*

Adjudicating publicly, in first and last resort, in a human rights violation case, and having heard both parties,

As to form:

- ***Rejects*** *the preliminary objection raised, as to lack of jurisdiction, by the State of Burkina Faso;*
- ***Declares*** *its jurisdiction over the initiating Application filed before it;*
- ***Declares*** *as admissible the initiating Application filed before it;*
- ***Declares*** *equally as admissible the Defence writ filed by the State of Burkina Faso;*
- ***Declares*** *as inadmissible the Application for intervention filed by the Law Firm know and called « Falana and Falana's Chambers »;*

As to merit*:*

- ***Declares*** *that the Electoral Law of Burkina Faso, as amended by Law N° 005-2015/CNT of 07 April 2015, is a violation of the right to free participation in elections, following such amendment;*
- *Consequently,* ***orders*** *the State of Burkina Faso to remove all imediments to free participation in elections, following such amendment;*
- ***Orders*** *the State of Burkina Faso to bear all costs»;*

2- In the aftermath of this decision, and following Order N°2015-059/CC/CENI/SG of 12 August 2015, the Independent National Electoral Commission (CENI) of Burkina Faso published the list of candidates in the Presidential and Legislative Elections, on which the names of the afore-mentioned Plaintiffs appeared.

3- As some of the candidates felt unsatisfied, and in total disregard for the decision of the ECOWAS Court of Justice, they took a case before the Constitutional Court of Burkina Faso, seeking an order that the afore-mentioned Plaintiffs, who were candidates in the same election be declared ineligible, on the strength of Law N°005-2015/CNT of 07 April 2015, with reason that they took part in a Draft Reform of the Constitution of Burkina Faso, which paved the way for Mr. Blaise Compaoré to secure a supplementary term in office.

4- Following the decisions of the Constitutional Council of Burkina Faso N°2025-21/CC/EL dated 25 August 2015 and N°2015-26/CC/EPF of 10 September 2015 relating to the said elections, the afore-mentioned Plaintiffs were excluded from the electoral contest.

5- By the above referred initiating Applications, Plaintiffs came again before the Honourable Court, seeking from the Court:-

- To **find** and declare that the Decision N°2015-21/CC/El of 25 August 2015 and the one N°2015-26/CC/EPF of 10 September 2015 were delivered by the Constitutional Council of Burkina Faso in total disregard for Judgment N°ECW/CC/JUG/16/15 of 13 July 2015 delivered by the ECOWAS Court of Justice;

- To **enjoin** the State of Burkina Faso to respect the authority of the ECOWAS Court of Justice and the international conventions that it has ratified;

- To **declare**, consequently that the above stated judgment of 13 July 2015 carries, within itself, the annulment of the new provisions of the Electoral Law, through which Plaintiffs were purportedly prevented from taking part in the Presidential elections;

- To **declare** that the elections that were organised against the pronouncement made in the decision of the ECOWAS Court of Justice are illegal, null and of no effects whatsoever;

- To **declare** as null and void the list that was published via Order N° 2015-062/CENI/SG of 20 October 2015, and to draw all the legal consequences from there;

- To **order** Burkina Faso to conform itself, without any reservations to the spirit and letters of the above-mentioned judgment delivered by the ECOWAS Court of Justice;

- To **order** the State of Burkina Faso to bear all costs, including legal fees for their counsels.

6- On its own part, the State of Burkina Faso solicits that the Court should decide as follows:-

- On the main argument, to **declare** its lack of jurisdiction to examine the instant case;

- As an auxiliary plea, to **declare** as inadmissible the initiating Applications filed by Plaintiffs;

- As a very auxiliary plea, to **declare** that the decisions of the Constitutional Council of Burkina Faso relating to the Presidential and Legislative Elections were not delivered in disregard for the above-mentioned judgment by the ECOWAS Court of Justice;

- To **find** the political circumstances of the instant case, by accepting the outcome of the Presidential and Legislative Elections of 29th November 2015 as democratic gains;

- Consequently, to **reject** all claims made by the Plaintiffs as ill-founded, and **order** them to bear all costs.

III- PLEAS-IN-LAW BY PARTIES

7- Plaintiffs aver that since Judgment N°: ECW/CC/JUG/16/15 dated 13 July 2015 of the ECOWAS Court of Justice has confirmed and supported everybody's right to partake in the electoral contest, and ordered Burkina Faso to remove all impediments to the said participation, it must be binding, as of law, on Burkina Faso and its parastatals, especially the Constitutional Council.

8- As such, according to the Plaintiffs, the State of Burkina Faso clearly refuses to submit itself to the judgment of the said Court, thus violating

not only its international obligations derived under the ECOWAS Treaty, but also the principles of law derived from international legal instruments to which Burkina Faso is signatory.

9- To start with, the State of Burkina Faso raises a preliminary objection as to the lack of jurisdiction *rationae materiae* of the Court, to examine the instant case. In support of its claims, the Defendant recalled an earlier jurisprudence of the Honourable Court, where it held that it (The Court) sanctions only the disregard, by Member States for the obligations resulting from Community and international Texts that are binding on the Member States.

10- Thereafter, the State of Burkina Faso raised other preliminary objections as to inadmissibility of the instant case filed by Plaintiffs, as well as the lack of quality for them to act. In support of its claims, Defendant argues that the proceedings initiated by Plaintiffs seeks to enable them to partake in the Presidential Elections, whereas that election has already taken place since the 29th November 2015 and the results that were released were credible and accepted by both the political stakeholders in Burkina Faso, and the international Community thus this Application has become of no useful purposes.

11- The State of Burkina Faso further claims that Plaintiffs hold it against it, more precisely against its Constitutional Council failure on its part to respect one Community obligation, for refusing to regard the above-mentioned judgment by the ECOWAS Court of Justice. Whereas, according to the Defendant, Plaintiffs lack quality to introduce an Application relating to a Member State's failure towards its Community obligations, a quality that is the preserve of Member States only, pursuant to Article 10 of the Supplementary Protocol on the Court.

IV- LEGAL ANALYSIS BY THE COURT

As to formal presentation

1- On the joinder of the two proceedings

12- At the public hearing of 8th June 2016 of the Court, the above-mentioned Plaintiffs, through their Counsels, solicited from the Court the joinder

of the two Applications that were filed by each of them separately, and the State of Burkina Faso declared there that it was not averse to such request.

13- After examination of the processes filed during the procedure, the Court found that there exists a connection between the two Applications and the orders sought by each of them, and, as such, it will be in the best interest of good administration of justice to order a joinder of the two Applications, pursuant to the provisions of Article 38 of the Rules of Court**.**

2- Sur les exceptions soulevées par l'Etat du Burkina Faso

14- Considering that it is expedient for the Court, to start examining the objection as to lack of jurisdiction raised by the State of Burkina Faso, before examining, if need be, the other objections on inadmissibility of the initiating Applications filed, for lack of quality for Plaintiffs to act.

15- In regard to the objection on lack of jurisdiction of the Court, after examining the processes filed in the proceedings, the Court notes that Plaintiffs solicit that the Court should make a pronouncement on the conditions in which the afore-mentioned judgment dated 13th July 2015 by the Court was enforced.

16- In other words, Plaintiffs aim at requesting the Court to turn its attention towards, and examine the manner in which the Authorities in Burkina Faso interpreted and/or enforced the said judgment. Whereas the Court considers that by acceding to this request, it would be seen, contrary to its calling, to be interfering in the domestic procedure of enforcement of its judgments, and this will incite Plaintiffs to be seizing it each time to know how the enforcement of its judgments is being handled in Member States.

17- The Court equally notes that the instant case filed before it is not brought with a likelihood of soliciting more light to be shed on any of its judgments, for an adequate enforcement, otherwise, it would be a case seeking interpretation of judgment, but this is a specific case where the Court is requested to do a follow-up for the enforcement procedure for its afore-mentioned judgment.

18- Also, it is important to recall that in regard to the enforcement of the judgments of the Court, the Court is always guided by some legal provisions that govern its jurisprudence. These are mainly:

1- **Article 15 (4)** of ECOWAS Treaty, which provides that: « *Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.* »

Article 24 of the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice, which provides, among other things that:

(1) «*… Execution of any decision of the Court ...shall be according to the rules of civil procedure of that Member State;*

(2) All Member States shall determine the competent national authority for the purpose of receipt and processing of execution and notify the Court accordingly. »

19- On the strength of the above legal provisions, it appears clearly that the enforcement of the judgments of the ECOWAS Court of Justice is the exclusive preserve of ECOWAS Member States, hence the lack of an enforcement provision reserved for the Court, in regard to its own decisions, (for this purpose, see Judgment in the case of Mamadou Tandja against the State of Niger of 8th November 2010, & 20 others.)

20- Thus, any refusal or resistance by a Member State to the enforcement of a judgment delivered against it by the Court, within the framework of a human right litigation proceedings constitutes failure on the part of such a State towards one of its obligations under the Treaty, as well as other norms governing ECOWAS, and exposes the Member State to legal and political sanctions, as provided for under Articles 5 to 21 of the Supplementary Act A/SA of 13th February 2012 on the Regime of sanctions against the said Member State of the ECOWAS Community.

21- Above all, the Court points out that an action on failure by Member States towards their obligations is pursuant to some specific legal

provisions, and it cannot be an individual's preserve to use the avenue of human rights violations litigation to want to seek the Court to find a probable failure committed by a Member State, as the Court maintained this position in its judgments **« H. Habré against State of Senegal »** and **« Bartélémy Diaz against Senegal. »**

22- From the foregoing, the Court considers that the objection raised by the Defendant State has grounds, and that there is need for the Court to declare its lack of jurisdiction over the instant case.

3- As to costs

23- Considering that Plaintiffs fell, there is need to order them to bear all costs, pursuant to the provisions of Article 66 of the Rules of Court.

FOR THESE RESONS

The Court

Adjudicating publicly, in first and last resort, after hearing both parties on the issue of human rights violation.

As to formal presentation

- **Orders** the joinder of the two initiating Application filed separately by Plaintiffs;
- **Declares** as admissible the preliminary objections raised by Burkina Faso as to lack of jurisdiction of the ECOWAS Court of Justice over the instant case;
- **Declares** that this objection has grounds;
- **Withholds** jurisdiction over the instant case;
- **Orders** Plaintiffs to bear all costs.

Thus made, adjudged and pronounced publicly in Abuja (Nigeria) by the Community Court of Justice, ECOWAS on the day, month and year above

And the following have appended their signatures:

- **Hon. Justice Yaya BOIRO** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

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

HOLDEN IN ABUJA, NIGERIA

THIS WEDNESDAY, 12TH DAY OF OCTOBER, 2016

SUIT NO: ECW/CCJ/APP/17/15
JUDGMENT NO: ECW/CCJ/JUD/26/16

BETWEEN
MR. GODSWILL TOMMY UDOH - *PLAINTIFF*

VS.
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:
1. **S. M. JIMMY (ESQ.)** - *FOR THE PLAINTIFF.*
2. **ATTORNEY GENERAL OF THE FEDERATION & MINISTER FOR JUSTICE** - *FOR THE DEFENDANT.*

Right to liberty -Right to dignity of human person -Right to property

SUMMARY OF FACTS

The Plaintiff, a Nigerian, alleged that he was arbitrarily detained by Officers of the Department of State Security (DSS), an agent of the Nigerian Government, from 24th - 26th of January, 2015. The Plaintiff averred that he was not informed of the charges against him when he was arrested by the DSS and that he was only informed subsequently that he was being detained in order to aid the DSS to trace a suspect, 'Mr. Shola', who was accused of impersonating a DSS agent. The Plaintiff averred that when he was arrested, he was deprived of his personal belongings and he was physically assaulted, harassed and tortured by officers of the DSS. The Defendant on their part alleged that the Plaintiff was arrested on lawful grounds. The Defendant averred that the Plaintiff was arrested in furtherance of an investigation by the DSS to ascertain his level of involvement in an impersonation case and to enable the DSS arrest 'Mr. Shola'.

ISSUES FOR DETERMINATION

1. *Whether the Plaintiff's arrest and detention was lawful and justifiable.*

2. *Whether the Plaintiff was subjected to human and degrading treatment by the Defendant.*

3. *Whether the Defendant unlawfully deprived the Plaintiff of his personal belongings.*

DECISION OF THE COURT

The Court declared that the Defendant had failed to show any lawful basis upon which the Plaintiff was arrested and detained. Having failed to do so, the Court held that the arrest was unlawful and arbitrary.

The Court held that the Plaintiff failed to persuade the Court with credible evidence of the alleged inhuman and degrading treatment

meted out to him by agents of the Defendant. Hence, the Plaintiff contentions on this ground failed.

The Court held that the Defendant did not act contrary to the laid down laws of the Defendant in temporarily depriving the Plaintiff of his properties while in detention.

JUDGMENT OF THE COURT

2. COUNSEL FOR THE PARTIES AND ADDRESSES FOR SERVICE

For the Applicant/Plaintiff
S. M. Jimmy (Esq.)
Jimmy & Jimmy Associates
Suite 204 Danyadado House
Plot 855, Tafawa Balewa Way
Area 11, Garki Abuja.
08033003624

For Service on the Defendant:
Federal Republic of Nigeria
C/o The Hon. Attorney General of the Federation & Minister for Justice,
Federal Ministry of Justice,
Opp. Bayelsa House (Izon Wari),
Off Shehu Shagari Way, Maitama District
Garki, Abuja.

3. SUBJECT-MATTER OF THE PROCEEDINGS

A. Violation of the Applicant's right to personal liberty and freedom of movement as enshrined in Articles 6 & 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter IV Laws of the Federation of Nigeria, 1990.

B. Violation of the Applicant's right to the respect of the integrity and dignity of his human person, as enshrined in Articles 4 & 5 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter IV Laws of the Federation of Nigeria, 1990.

4. SUMMARY OF PLEAS-IN-LAW:

A. The African Charter on Human and Peoples' Rights (ratification and enforcement) Act Chapter IV Laws of the Federation of Nigeria, 1990.

B. The Revised Treaty of The ECOWAS, 1993; Article 4 of the Revised Treaty of ECOWAS, 1993, provides for the applicability of the Terms of the African Charter on Human and Peoples' Rights to Member State of ECOWAS as follows:

THE HIGH CONTRACTING PARTIES, in pursuit of the objectives stated in Article 3 of the Treaty, solemnly affirm and declare their adherence to the following principles:

> 4(g) .... Recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter or Human and Peoples' Right.

Whereas the Federal Republic of Nigeria has ratified and adopted the provision of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act Chapter IV Laws of the Federation of Nigeria 1990, Article 1 of the African Charter on Human and Peoples' Rights (ratification and enforcement) Act Chapter IV Laws of the Federation of Nigeria 1990 provides that:

> *"The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedom enshrined in this Charter and shall undertake to adopt legislative or other · measures to give effect to them"*

Article 2 provides:

> *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or other status.*"

It is provided under **Article 12 (1) and (2)** of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter IV Laws of the Federation of Nigeria 1990 that:

> *"Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law"*

It is humbly submitted that the arrest and detention of the Plaintiff was without any legal basis or justification. Accordingly, the said arrest and detention of the Plaintiff was unwarranted, illegal, unconstitutional and a gross violation of his rights to personal liberty and freedom of movement as guaranteed under Articles 6 and 12 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap. IV. Laws of Federation of Nigeria 1990.

It is provided under **Article 4** of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter IV Laws of the Federation of Nigeria 1990 that:

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

Article 5 further provides:

> *" Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All form of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"*

We submit further that the arrest, detention and inhuman treatment of the Plaintiff under the above circumstances are infringement on the fundamental rights of the Plaintiff under Articles 4 & 5 of the African Charter on Human & people's Rights (Ratification and Enforcement) Act, Cap. IV, Laws of Federation of Nigeria 1990.

Article 14 provides:

> *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of the appropriate laws."*

We submit that the seizure and detention of the Plaintiffs Telephone handset, wristwatch, belt and shoes under the above circumstances amount to torture and inhuman treatments contrary to the fundamental rights of the Plaintiff

under Articles 4 & 5 of the African Charter on Human & people's Rights (Ratification and Enforcement) Act, Cap. IV, Laws of Federation of Nigeria 1990.

5.0. FACTS AND PROCEDURE

5.1 NARRATION OF THE FACTS BY THE PLAINTIFF:

I. The Plaintiff avers that he is a community citizen and a businessman.

II. The Plaintiff avers that on the 24th of January, 2015, he was in a guest house at 22 Gana Street, Maitama with a business partner Otumba Taiwo where they were to have a meeting with one Dr. Ben who was coming from Makurdi to meet with them in Abuja.

III. The Plaintiff avers that after waiting for Dr. Ben for a while, Otumba Taiwo left briefly to see a friend within Maitama while the Plaintiff kept waiting for Dr. Ben.

IV. The Plaintiff avers that as he was waiting, he got a call from a friend, Noel Mian Dallo who asked him where he was and that he wanted to see him.

V. The Plaintiff avers that he requested Noel to tell him why he wanted to see him and he responded by saying that he just wanted to see him.

VI. The Plaintiff avers that Noel told him where he was and he said he was coming soon.

VII. The Plaintiff avers that after some time Noel called to say that he was at the gate of 22 Gana Street, Maitama.

VIII. The Plaintiff avers that he told him to come inside the compound but he refused and instead requested the Plaintiff to come outside.

IX. The Plaintiff avers that he went outside to meet him but to his surprise he met a blue highlander jeep with two other vehicles loaded with armed men. His friend, Noel was sitting inside and two men came outside, one with a gun telling him he was under arrest.

X. The Plaintiff avers that he was scared and surprised because he was not shown any arrest warrant and the men did not identify themselves. They asked the Plaintiff to enter the car and that he should not move.

XI. The Plaintiff avers that he entered the car and they immediately put a veil on his eyes to blindfold him with a warning that he should not say anything. The Plaintiff wanted to ask his friend Noel what the problem was and they shouted that both of them should not say anything.

XII. The Plaintiff avers that when they drove off, he noticed that some other cars were coming behind them and the men were communicating with the people in those cars on phone. They were driven to Aso Drive, Maitama office of the State Security Services.

XIII. The Plaintiff states that he got to know because they raised the veil a little for him to know where he was. They asked him if he knew where he was and the Plaintiff answered them; yes.

XIV. The Plaintiff avers that he was a little bit relieved to know that he was arrested by the DSS personnel even though he didn't know the offence he was arrested for. They took the Plaintiff into one of the rooms within the DSS Office Complex, seized his phone and asked him if he knows a man called Shola or if he knows anybody ever called Shola.

XV. The Plaintiff avers that after thinking for a while, the Plaintiff told them that he knows one Shola whom he met in 2009 in the course of a business transaction with the Emir of Daddare, Musa Balarabe, a long time ago. They asked if he knows Shola's house and he told them that the last time he went to Shola's house was 3or 4 years ago. And that the last time he saw Shola briefly was when a friend, Best Mbang, invited him to Harmonia Hotel and when he entered the Hotel, he saw Shola passively sitting in the Restaurant. He greeted him and went ahead to discuss with Mbang.

XVI. The Plaintiff says that he told the security operatives that he does not have dealings with Shola and does not even know why he was arrested. At that point they chained the Plaintiffs hands and legs with handcuff and blindfolded him again. The Plaintiff was made to sit on the floor while the DSS officials left with a warning that they are coming back around 11 PM to take him to lead them to Shola's residence.

XVII. The Plaintiff avers that they came back around 2am in the morning and picked the Plaintiff to Abacha Road in Mararaba, Nasarawa State where Shola was staying. As they were going late in the night the DSS officials threatened the Plaintiff seriously that if he does not show them Shola's residence, they will shoot his leg and leave him by the road side.

XVIII. The Plaintiff avers that he was scared and had to tell them that they should inquire about him from the Chief Security Detail to the Director General, DSS, that he is a friend and an in-law because he married from the Plaintiffs place. That they should ask the Chief Detail if he is of a questionable character.

XIX. The Plaintiff avers that in the car that night, one of the men asked the Plaintiff why he was impersonating the DSS. The Plaintiff told them he can't do such a thing and has never done such and will never do so. The Plaintiff told them that he has a profession and that he loves what he is doing. That if he is interested in becoming a security personnel, he will do so but that he loves what he is doing.

XX. The Plaintiff complains that they took him to Abacha road and he tried to trace Shola's house but a lot of building had sprung up in the area and some of the areas that were covered with bushes were cleared coupled with the fact that it was already too late at night, so it was hard to trace the building.

XXI. The Plaintiff alleged that he told them that the Shola he knows is very popular and has been living for up to eight years and that they can locate him by coming during the day.

XXII. The Plaintiff states that when they could not find him, they took the Plaintiff back to the DSS building, placed him in the same building, covered his eyes and handcuffed his hands and feet.

XXIII. The Plaintiff avers that he went through the travails without knowing or being told of his offence. That it was much later that his friend, Noel explained to him the situation and the reason for the arrest.

XXIV. The Plaintiff states that his friend Noel said he was driving from Mararaba to Abuja. Along the way, he, Noel, picked three persons (passengers) to enable him augment his fuel money. As they were going, Federal Road Safety Officers waived him to stop and he stopped for them.

XXV. The Plaintiff avers that one of them (Road Safety Officials) went to the car behind Noel's car and asked the man seating in front of that car to put on his seat belt. The man showed his Identity Card, and the Road Safety Officer allowed the vehicle to go without any penalty.

XXVI. It was then that one of the passengers in Noel's car commented that if you are not somebody in Nigeria, you are in trouble. Noel then narrated to them how he went for a function with some people in a car. He said they were stopped by a policeman. He said the owner of the car named Shola brought out an Identity Card and showed to them, which made the policeman to allow them pass.

XXVII. The Plaintiff avers that while Noel was narrating the story, he didn't know that one of the passengers in the car was a DSS personnel. It was then the DSS personnel requested Noel to take him to DSS headquarters after dropping the other passengers.

XXVIII. The Plaintiff avers that on getting to the DSS headquarters, the man went up and informed other personnel that came down to arrest Noel. He said they asked him to take them to Shola that showed a fake Identity Card. Noel replied them that he didn't say the identity card was fake and that the incident took place a long time ago.

XXIX. The Plaintiff avers that they asked Noel to take them to Shola's place, but he said he doesn't know the place. They asked him to

mention any other friend that knows the place and that was how he mentioned the Plaintiffs name.

XXX. The Plaintiff avers that that was how he had to pay the price for a matter he knew nothing about.

XXXI. The Plaintiff complains that the next day being Sunday, the Plaintiff was not allowed to go to church, and nobody attended to him. He was left alone with handcuff on his hands and feet and was sleeping on the bare and very hard floor in the cell which led to an injury on his head (back of his head).

XXXII. The Plaintiff avers that on Monday morning, the personnel came and asked him and Noel to write their statements. After writing their statements, they asked them to call people to take them on bail.

XXXIII. The Plaintiff avers that at that point, they came to tell the Plaintiff that they could not find his handset (i.e. phone) which they seized from him. They said they have been searching for the phone for hours.

XXXIV. The Plaintiff avers that the DSS personnel that asked him and Noel to write the statements gave him Three Thousand Naira only in place of his phone that got lost.

XXXV. The Plaintiff and his friend, Noel, left the premises of the DSS around 6.00pm of January, 26th, 2015.

XXXVI. The Plaintiff avers that he later got to know the name and phone number of the personnel that took their statements to be Paul.

XXXVII. The Plaintiff states that apart from Paul who gave his name and phone number 08035791686, to Noel to call him when he gets in touch with Shola, all the other security operatives including the one that took Noel to DSS office did not disclose their identity. All efforts to get them to disclose their identities e.g. names and ranks, proved abortive.

XXXVIII. The Plaintiff states that Noel didn't know Shola through him and that he only met Shola once together with Noel. The second meeting was very brief at the hotel. Noel got to know Shola through one Mr. Gbenga.

XXXIX. The Plaintiff avers that he was maltreated unjustly for what he knew nothing about. It is a pity and very unfortunate that the Plaintiff who used to believe that, the DSS is a highly specialized security service capable of investigating matters diligently and professionally before drawing conclusions and effecting arrest, was a victim of unprofessional and unethical conduct by the DSS.

XL. The Plaintiff avers that he was bundled into a vehicle blind folded like a notorious criminal and subjected to dehumanizing treatment of being handcuffed (hands and legs) simply because the very organization that is funded with tax payers money needed him to help in tracing a person who may, after all, be one of the its employees.

XL I. The Plaintiff states that even if Mr. Shola is not an employee of the DSS, due diligence and common sense dictate that Mr. Noel and the Plaintiff ought to have been treated in a most civilized and friendly manner that would have enabled them to willingly assist in fishing out Shola.

XLII. The Plaintiff states that this is a case of gross violation of his fundamental human rights and he is accordingly seeking redress in this Honourable Court.

XLIII. The Plaintiff avers that he regained his freedom at exactly 6pm on Monday, 26th January, 2015 after spending two nights and three days in SSS cell and he and Noel were requested to report back to DSS on Tuesday, 27th Jan, 2015 which they did. But before going there, Noel called Mr. Paul on his phone and he said they should come.

XLIV. The Plaintiff avers that on getting to DSS office, Mr. Paul asked them whether they were able to establish contact with Shola and the Plaintiff and Noel answered in the negative.

XLV. The Plaintiff avers that they were allowed to go, but asked to report back after one week, which they did, but unfortunately Mr. Paul did not answer Noel's phone calls and the Plaintiff and Noel were not allowed entry at the gate of the DSS Office when they arrived there.

XLVI. The Plaintiff states that after reporting at DSS office on the 27th Jan, 2015, he caused his Solicitors (Jimmy & Jimmy Associates) to write to the Director General of DSS complaining about the unlawful arrest, detention and inhuman treatment mete out to him.

XLVII. The Plaintiff avers that the Solicitor's letter was dated 11th February, 2015 was ignored by DSS and even the second letter dated 10th March, 2015 was equally ignored.

XLVIII. The following is a graphic detail of what transpired between the Plaintiff and Agents of the Defendants, viz:

a) Plaintiff was arrested without warrant;

b) Plaintiff was bundled into a waiting car without any disclosure of the offence against him;

c) He was whistled away against the midnight to a lonely area in Abacha Road, Mararaba in search of Shola;

d) He was stripped of his belt, wristwatch, shoes and telephone handset;

e) He was left bear footed;

f) He was lumped together with other detainees;

g) He was blindfolded for many hours;

h) He was detained from Saturday 6PM to Monday 6PM;

i) He was refused access to his family and starved of food for three days;

j) He was blindfolded, handcuffed and made to sleep on hard floor for two nights;

k) Insults, harassments, intimidations and abuses were constantly hurled at him.

ORDERS SOUGHT BY THE APPLICANT:

1) A DECLARATION that the arrest and detention of the Plaintiff at Office of State Security Service, Aso Drive, Asokoro, Abuja from 24th to 26th January, 2015 by the Defendant is arbitrary, illegal, unlawful and constitutes a gross violation of the Plaintiffs fundamental rights to personal liberty and freedom of movement guaranteed under *Articles 6 and 12 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap. IV Laws of the Federation of Nigeria, 1990.*

2) A DECLARATION that the physical assault, torture, harassments, intimidations, abuses and insults on the Plaintiff at Office of the State Security Service, Aso Drive, Maitama, Abuja from 24th to 26th January, 2015 by the Defendant constitute a violation of the right to respect of human dignity of the Plaintiff as guaranteed under *Articles 4 and 5 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap. IV Laws of the Federation of Nigeria, 1990.*

3) A DECLARATION that the seizure and detention of the Plaintiffs wristwatch, belt, shoes and Telephone handset for three days by the Defendant is unlawful and a violation of the right to property of the Plaintiff as guaranteed *under Article 14 of the African Charter on Human & People's Rights (Ratification and Enforcement) Act, Cap. IV Laws of the Federation of Nigeria, 1990.*

4) AN ORDER of injunction restraining the Defendant and its agents from further arresting, detaining or in any way whatsoever violating the human rights of the Plaintiff as guaranteed under *Articles 4, 5, 6, 12 and 14 of the African Charter on Human & People 's Rights (Ratification and Enforcement) Act, Cap. IV Laws of the Federation of Nigeria, 1990.*

5) AN ORDER that the Defendant shall pay the sum of NI50, 000, 000 (One Hundred and Fifty Million Naira) only as compensation for

violation of the Plaintiffs Human Rights to the dignity of his person, right to personal liberty and right to property.

5.2 PROCEDURE

5.2.1 The initiating Application **(Document number 1)** was filed in this Court on May 14, 2015 and duly served on the Defendant on the same day, May 14th.

5.2.2 By June 15, 2015, the Defendant had not yet filed a defense or made any other form of appearance, and the Registry of this Court issued a Certificate of Non-Lodgment on June 19, 2015 confirming that up to that date, the Defendant had not filed its defense.

5.2.3 The case was called for hearing on October 13, 2015 and during that sitting, only the Plaintiff and his counsel were in court while the Defendant was absent without excuse. The Plaintiff applied to be permitted to present evidence and prove his case; the court decided to adjourn the case to a later date and by that time if the Defendant still had not filed its defense then the Plaintiff would be permitted to prove his case.

5.2.4. Accordingly, the case was thus suspended until November 26, 2015. The hearing did not take place on the assigned date and the case was reassigned for January 20, 2016.

5.2.5. Finally, at the call of the case on March 14, 2016, all parties and their respective counsel were present and the Defendant brought to the Court's attention that it did not oppose the application for adjournment to file its processes; the Plaintiff did not oppose the application for adjournment, and the Court granted the request and adjourned the case to May 11, 2016 for hearing.

5.2.6. Later on, that very same day after the convening of the court, the Defendant filed a Motion for Extension of Time **(Document number** 2) along with its Statement of Defense **(Document number** 3). Both of these documents were served on the Plaintiff on April 04, 2016.

5.2.7. These are all the pleadings in the case; in other words, the Plaintiff did not file a Reply to the Defendant's Defense.

5.3. DEFENDANT'S STATEMENT OF DEFENSE

SAVE AND EXCEPT AS HEREINAFTER SPECIALLY ADMITTED, the Defendant denies each and every material allegation of fact contained in the Statement of claim as if same were herein set out and traversed *seriatim*:

1. The Defendant denies paragraphs i, ii, iii, iv, v, vii and viii of the Plaintiff/Applicants claim.

2. In specific answer to the Plaintiffs averment, the Defendant states that one Noel, who was arrested in connection with this case of impersonation of being a staff of DSS mentioned the names of the Plaintiff/Applicant together with that of one Shola, whom the DSS were long before trying to arrest for the same offence of impersonation.

3. That during the cause of the interrogation the said NOEL, the name of the Plaintiff was mentioned, wherein he was alleged to have known one SHOLA (suspect) in person and his contact address which thus necessitated the arrest of the Applicant.

4. The Plaintiff/Applicant was arrested on lawful grounds; as his arrest was made in furtherance of investigation by the DSS to ascertain his level of involvement in the impersonation case and to enable the DSS arrest one SHOLA (who is still at large).

5. The Defendant denies paragraphs xi, xiii, xiv, xvi and xix of the Plaintiff's claim and therefore put the Plaintiff to the strictest proof of same.

6. The Defendant further states that it was the Plaintiff/ Applicant who took the DSS to an area in Abacha Road of Karu L.G.A, Nasarawa State and located the house of SHOLA (the prime suspect)

7. The Defendant also denied paragraphs xxii, xxiii, xxiv, xxv, xxvi and xxviii of the Plaintiff/Applicant's Statement of Facts and thus put the Plaintiff/ Applicant to the strictest proof of same.

8. The Defendant in specific answer to paragraph xviii of the Plaintiff/Applicant's claim states that it was the Applicant who unveiled the identity of one SHOLA to the DSS.

9. That the said SHOLA was still at large at the time of the arrest of the Plaintiff/Applicant, hence the risk of releasing the Applicant will enable the Plaintiff to connive with the SHOLA and thereby temper with the ongoing investigation in the matter.

10. The Defendant states that, at no time did it receive any money from the Plaintiff during or after his arrest and in the course of investigation of the alleged offense of impersonation.

11. The Defendant further states that, the Plaintiff/Applicant's handset was not taken away by the DSS.

12. The Defendant further states that after thorough investigation of the Plaintiff and one NOEL, their statements were recorded and they were released pending further investigation of the matter.

13. The Defendant equally denied paragraphs xxiv, xxxvi, xxxvii, xxxiii, xxxix and xi of the Plaintiff's claim and thus put the Plaintiff to the strictest proof of same.

14. In a specific answer to paragraph xlii and xlii, the Defendant states that SHOLA is not an employee of the DSS and the Plaintiff's arrest and detention were on reasonable suspicion that the Plaintiff is impersonating himself as one of the staff of DSS.

15. The Defendant admits paragraph xiv of the Plaintiffs claim only to the extent that the Plaintiff and one NOEL were allowed to go after thorough investigation but denies every allegation of facts contained therein.

16. In response to paragraph xlvi and xlvii of the Plaintiffs claim, the Defendant states that he never at any time ignored a letter written

by the Plaintiff or any other person and puts the Plaintiff to the strictest proof of the allegation of facts contained in the said paragraph.

17. In further response to paragraph xlviii of the Plaintiffs claim, the Defendant states as follows:

    a) The Plaintiffs arrest was made lawfully in furtherance of an investigation to enable the DSS carry out proper investigation on allegation of impersonation of DSS officials by the Plaintiff and one SHOLA.

    b) The Plaintiff was at no time maltreated during and after the investigation. The offence for which he was arrested was disclosed to him instantly at the point of arrest by the Defendant.

    c) The Plaintiff was not arrested at mid night and taken away to any lonely area at all.

    d) The Defendant never blind-folded the Plaintiff/Applicant or any other person in the course of investigation carried out by it.

    e) The Plaintiff was never disallowed access to his lawyers, family or to any other person that came to see him.

6.0. ISSUES FOR DETERMINATION

6.1. The three areas of disagreement between the parties are:

(A.) Whether or not the Plaintiffs arrest and detention by the Defendant were lawful and justifiable?

(B.) Whether the Plaintiff was subjected to inhuman and degrading treatment by the Defendant?

(C.) Whether or not the Defendant unlawfully deprived the Plaintiff of his personal belongings.

7.0. ANALYSES OF THE COURT

7.1. We observe the following: That,

(a.) there has not been any challenge to the competence of this Court to entertain this suit;

(b.) further, we observe that the Defendant did not file any Preliminary Objection against the suit as constituted;

(c.) the Plaintiff did not file a reply to the defense of the Defendant; and,

(d.) we also observe that it is not in contention or dispute that the Plaintiff was indeed arrested and detained by the Defendant by and through its agents of the DSS.

7.2. The Plaintiff filed this application against the Defendant for gross violation of his human rights occasioned by his being unlawfully arrested and detained as a means of arresting a prime suspect of impersonation and on unfounded allegation of impersonation as a DSS Staff. He further alleges that he was maltreated and deprived of his personal belongings while in detention.

7.3. The Defendant, while denying Plaintiffs allegations, starts out by saying that the Plaintiff was lawfully arrested firstly, as the only means of getting to one Mr. Shola, who was the prime suspect in a case they were investigating **(See paragraph 3 on page 1 of the defense),** and that it was risky for them to have released the Plaintiff since Mr. Shola was still at large because the Plaintiff could have connived with Shola and thereby tamper with on-going investigation they were conducting **(See paragraph 9 on page 2 of the defense).** Thirdly, the Defendant claims that the Plaintiff was arrested because he was impersonating himself as a staff of the DSS **(See paragraph 14 on page 2 of the defense**), thus his arrest was lawful and once they had taken his recorded statement and those of the other suspect, Mr. Noel, they were released pending further investigation **(See paragraph 12 on page 2 of the defense).** Finally, the Defendant denied any form of maltreatment meted out to the Plaintiff or denying him access to his lawyer, etc. **(See paragraph 17 on page of the defense**).

7.4. To fully address the issues raised here there is need to bring out the relevant International and National provisions.

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

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

Article 9 of the International Covenant on Civil and Political Rights provides as follows:

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

The 1999 Constitution of the Federal Republic of Nigeria (as amended) also protects this right. **Section 35** of the Constitution protects the liberty of persons, and states that such liberty can only be deprived in accordance with a procedure permitted by law.

Section 24 of the Nigerian Police Act provides for the powers to arrest without warrant as follows:

(1) In addition to the powers of arrest without warrant conferred upon a police officer by **Section 10 of the Criminal Procedure Act,** it shall be lawful for any police officer and any person whom he may call to his assistance, to arrest without warrant in the following cases

(a) any person whom he finds committing any felony, misdemeanor or simple offence, or whom he reasonably suspects of having committed or of being about to commit any felony, misdemeanor or breach of the peace;

(b) any person whom any other person charged with having committed a felony or misdemeanor;

(c) any person whom any other person:

(i) suspects of having committed a felony or misdemeanor; or

(2) The provisions of this section shall not apply to any offence with respect to which it is provided that an offender may not be arrested without warrant.

Section 10 of the Nigerian Criminal Procedure Act provides: (1). Any police officer may, without an order from a Magistrate and without warrant, arrest:

(a) any person whom he suspects upon reasonable grounds of having committed an indictable offence against a federal law or of any other state, unless the written law creating the offence provided that the offender cannot be arrested without a warrant.

(b) any person who committed any offence in his presence.

Section 7 of the Administration of Criminal Justice Act (2015) is clear and provides that: "A person shall not be arrested in place of a suspect."

7.5. As can be deduced from the above provisions, the watch words for the validity of any arrest are *"lawfulness and reasonableness"*.

It follows therefore that powers of arrest must not only be provided for under the law but the grounds upon which it is exercised must be reasonable, otherwise it becomes arbitrary.

The word **arbitrary** has been defined by Bryan Gamer in the Black's Law Dictionary Ninth Edition as: *"(1) depending on individual discretion; determined by a judge rather than by fixed rules, procedures or law (2) of a judicial discretion founded on prejudice or preference rather than on reason or fact."*

Arbitrary arrest and detention therefore are the arrest or detention of an individual in a case in which there is no likelihood or evidence that they committed a crime against legal statute, or which was done without regard to due process of law.

7.6. As a general rule, the burden of establishing the existence of any facts lies on he who alleges. However, where the facts are admitted, they need no further proof.

Ordinarily, the Plaintiff in this case has the burden of presenting evidence to prove the allegations he has made in his Originating Application. However, the Defendant has not denied the arrest and detention of the Plaintiff but sets up a defense of justification. The burden thus shifts from the Plaintiff to the Defendant to establish the justification of the lawfulness of the arrest and detention of the Plaintiff.

The Defendant contends that the Plaintiffs arrest was necessitated by the information they gathered that the Plaintiff had knowledge of the whereabouts of the suspect they were looking for. That is their sole justification for the arrest.

The justification given by the Defendant for the arrest and detention of the Plaintiff runs contrary to the express provisions of **Section 7 of the Administration of Criminal Justice Act, of Nigeria.**

From the totality of facts before this court, there is no factual evidence of reasonable grounds or legal provision upon which the arrest and detention are based.

7.7. The Defendant has not therefore satisfied this Court nor has it put forward any lawful basis upon which the Plaintiff was arrested and detained. Having failed to do so, we hold that the arrest was unlawful and arbitrary.

This court has held in a plethora of cases that an arrest must be reasonable and also be premised on legal ground to be justified. See the case of **MAMADOU TANDJA V. REPUBLIC OF NIGER & 1 OR (2010), CCJELR.**

In the case of A. **W. Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc.GA OR, A/49/40 (vol. 11), p. 181 para. 9.8,** the Applicant alleged that he had been arbitrarily arrested and detained for several months, an allegation rejected by the State party on the basis that the arrest and detention had been carried out in accordance with the domestic law of Cameroon. The Committee

concluded that article 9(1) had been violated, since the author's detention *"was neither reasonable nor necessary in the circumstances of the case"*.

See also the decision of the Inter-American Court of Human Rights in **Castillo Paez V. Peru, judgment of November 3, 1997 Annual Report InterAmerican Court of Human Rights 1997, p. 263, para. 56.**

7.8 The next issue for consideration is the Plaintiffs allegation of inhuman and degrading treatment meted to him by the Defendant.

The Plaintiffs allegation is that the armed agents of the Defendant blind folded him, chained his hands and legs and carried him away; that they also threatened to shoot his leg and leave him by the road side if he fails to show them the house of the suspect they were looking for; that he was made to sleep on a bare and very hard floor which made him sustain an injury at the back of his head without, his being informed of the offense he had committed.

7.9. **Article 5 of the African Charter on Human and Peoples Rights** provides:

> *"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*

Section 5 of the Administration of Criminal Justice Act (2015) provides that:

> *"A suspect or Defendant may not be handcuffed or otherwise bound or be subjected to restraint except:*
>
> *(a) There is reasonable apprehension of violence or an attempt to escape;*
>
> *(b) The restraint is considered necessary for the safety of the suspect or Defendant; or*
>
> *(c) By order of a Court."*

Applying the above provisions of the **Administration of Criminal Justice Act (2015),** it is apparent that a suspect may be validly handcuffed if the circumstance warrants it without falling foul of **Article 5 of the African Charter** or other similar international instruments.

7.10. The Plaintiff is urging this court to hold that the Defendants are in violation of his right to human dignity by handcuffing him, threatening to shoot him and making him sleep on bare floor. These assertions are facts within the Plaintiffs knowledge.

7.11. As stated herein above, it is the general rule of evidence that the burden of proof of facts rests on him who alleges the existence of those facts and who will fail if no evidence is led in proof.

7.12. The rule that proof rests on he who asserts the affirmative and not on he who denies is an ancient rule founded on the consideration of common sense and should not be departed from without strong reasons. The burden of proof and persuasion is therefore placed on the Plaintiff. Mere saying that he was subjected to such treatment does not suffice. There has to be some form of evidence either oral or documentary (e.g. photographs, eye witness reports, expert evidence, medical certificate, etc.) to substantiate his claim, notwithstanding the fact that the arrest is undisputed.

7.13. As we found supra, the Plaintiff did not file a Reply controverting the allegations and specifically the denials contained in the defense. Thus, the denials by the Defendant stand unrebutted and unrefuted.

According to the Plaintiff, he was arrested and taken to the detention center together with his friend, and he did not bother to call that friend to corroborate any of his allegations; neither did he lead any evidence in support of these allegations which were denied by the Defendant. The Plaintiff also did not offer any scintilla of evidence to prove the injury he allegedly suffered to his head after spending a night on the floor; there is nothing concerning the security officer whose name is Paul (*see* **page 6 of the Application**); no proof that the alleged attempts to obtain the names and grades of the other

officers actually took place (*see* **page 6 of the Application**); there is nothing to serve as proof for the said report of January 27, 2015 supposedly addressed to the security services department (*see* **page 7 of the Application**); there is no proof of the complaint he claims to have lodged the same day (*see* **page 7 of the Application**); finally, there is no evidence of the letters of February 11, 2015 and March 10, 2015 which his lawyer is alleged to have addressed to the headquarters of the State Security agencies (*see* **page 8 of the Application**).

In **PETROSTAR (NIGERIA) LIMITED V. BLACKBERRY NIGERIA LIMITED & 1 OR CCJELR (2011)**, the court in its consideration reiterated the cardinal principle of law that "he who alleges must prove". Therefore, where a party asserts a fact, he must produce evidence to substantiate the claim.

In **RANGAMMAL V. KUPPUSWAMI AND ORS, CIVIL APPEAL NO. 562 OF 2003**, the court held that the burden of proof lies on the person who asserts the fact and not on the person who denies the fact to be true. The responsibility of the Defendant to prove a fact to be true would start only when the authenticity of the fact is proved by the Plaintiff.

7.14. The Plaintiff having failed to persuade the court with credible evidence as to the alleged inhuman and degrading treatment meted out on him by agents of the Defendant, his contentions on this ground lack proof and thus fails.

7.14. The last issue to be considered is whether or not the Defendant is in violation of the Plaintiff's right to property.

The Plaintiff contends that the Defendant is in violation of his right to property when they seized his handset, shoes, belt, and wrist watch.

7.15. Article 14 of the African Charter on Human and Peoples' Rights provides:

> *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the*

general interest of the community and in accordance with the provisions of the appropriate laws".

Section 10 of the Administration of Criminal Justice Act provides:

(1) A police officer making an arrest or to whom a private person hands over the suspect, shall immediately record information about the arrested suspect and an inventory of all items or properties recovered from the suspect.

(2) An inventory recorded under subsection (1) of this section shall be duly signed by the police officer and the arrested suspect, provided that the failure of the arrested suspect to sign the inventory shall not invalidate it.

(7) Where any property has been taken from a suspect under. this section, and the suspect is not charged before a court but is released on the ground that there is no sufficient reason to believe that he has committed an offence, any property so taken from the suspect shall be returned to him, provided the property is neither connected to nor a proceed of offense.

7.16. A reading of the above provision shows that personal belongings of suspects heading for detention are temporarily seized to be returned on their release in accordance with laid down provisions.

The Defendant has not satisfied this Court that the procedures were complied with in this case by failing to show an inventory of the suspects property which they seized and later returned.

The Plaintiff however, averred that the properties were seized for 3 days with the exception of his phone in lieu of which he was given three thousand naira. This averment is an admission that at some point in time his properties were returned to him, except for the wristwatch. The Defendant however exhibited an unprofessional attitude with regards to the Plaintiff's phone which it allegedly misplaced and gave him the sum of N3000 in lieu.

Therefore, the declaration sought by the Plaintiff in this regard fails.

7.0. DECISION

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

AS TO THE MERITS OF THE CASE

7.1. The Court **determines** that the Plaintiff has made out a cause of action against the Defendant and, considering that there is no denial by the Defendant of the acts of arrest and detention but sought to offer justification, the Court declares that no further proof is required of the Plaintiff.

7.2. The Court therefore, **declares** that the conduct of the Defendant in arresting and detaining the Plaintiff were arbitrary, unwarranted, unjustifiable and illegal, and in violation of the Plaintiff's Fundamental Rights to freedom of movement and freedom against arbitrary arrest.

7.3 The court, on the other hand, **declares** as unsubstantiated the Plaintiff's allegation of inhuman and degrading treatment by the Defendant.

AS TO DAMAGES

7.4. The Court, having determined that the arrest and detention of the Plaintiff were unlawful, hereby awards the Plaintiff damages in the amount of N5,000,000 (Five Million Naira only) for all the pain and suffering, humiliation, embarrassment and inconvenience he suffered because of his arrest and detention.

AS TO COST

7.5. In accordance with Article 66 of the Rules of this Court, the Court rules that costs shall be and are hereby awarded to the Plaintiff/ Applicant against the Defendant, in an amount to be assessed by the Registry of this Court.

7.6. Thus made, adjudged and pronounced in a public hearing at Abuja, this 12th day of October A.D. 2016 by the Community Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT

1. **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
2. **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
3. **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Mr. Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

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

HOLDEN AT ABUJA, IN NIGERIA

ON THIS THURSDAY, 9TH DAY OF NOVEMBER, 2016

SUIT N°: ECW/CCJ/APP/25/15
JUDGMENT N°: ECW/CCJ/JUD/27/16

BETWEEN
NNENNA OBI - *PLAINTIFF*
(ON BEHALF OF OTHER DEATH ROW PRISONERS IN NIGERIA)

VS
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANSE ATANNON (ESQ.) - *DEPUTY CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **CHINONYE EDMUND OBIAGWU (ESQ.), STANLEY CHIDUBEM UGWUOKE, MELISSA OMENE (MS), AUGUSTA NNAJIOFOR (MRS)** - *FOR THE PLAINTIFF*
2. **I.T. HASSAN & MAIMUNA LAMI SHIRU (MRS.)** - *FOR THE DEFENDANT*

Competence to amend laws of Member States -Legality of the Death Penalty

SUMMARY OF FACTS

The Plaintiff, a death row inmate in Nigeria, who had exhausted all her appeals, instituted this action on behalf of herself and all death row inmates in Nigerian Prisons, challenging the legality of the provisions relating to mandatory death sentence contained in the Defendant's Statutes. The Plaintiff argued that the said provision violated the Defendant's obligations under Article 4(g) and 5 of the Revised Treaty, Article 1 of the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and other laws and treaties respecting the right to life and the rights to freedom from torture, cruel and inhuman and degrading treatment. The Plaintiff further avers that while on death row she and other inmates were subject to torture, inhumane and degrading treatment. The Defendant on its part, failed to file a Defence to the Application, rather it filed a preliminary objection, challenging the jurisdiction of the Court to alter or amend the laws of the Defendant, to hear appeals from the Supreme Court of the Defendant, amongst others.

ISSUES FOR DETERMINATION

1. *Whether the Court has the jurisdiction to interpret and amend laws of Member States*

2. *Whether the Plaintiff's human rights has been violated by the Defendant*

DECISION OF THE COURT

The Court declared that it does not interpret the legislations of Member States or determine their violation but acts or omissions of states which violates the rights of its citizens in international obligations assumed by such Member States.

The Court in dismissing the case, declared that the Plaintiff failed to cite any legal instrument binding on the Defendant in respect of prohibition of death sentence. The Court thus held that the provision for the death sentence as punishment for certain offences within the jurisdiction of the Defendant, does not infringe on the human rights of the Applicant or any other person.

The Court then dismissed the case in its entirety as being an academic exercise lacking in substance.

JUDGMENT OF THE COURT

2. COUNSEL FOR THE PARTIES AND ADDRESS FOR SERVICE;

i. PLAINTIFFS

a. Chinonye Edmund Obiagwu
b. Stanley Chidubem Ugwuoke
c. Melissa Omene (Ms)
d. Augusta Nnajiofor (Mrs).

Ledap legal Defence and Associate project
Hb Christ Avenue, off Admiralty Road, Lekki Phase 1, Lagos, or
4 Manzini Street, Wuse Zone 4, Abuja, FCT.

ii. DEFENDANTS:

I.T Hassan
C/o. Hon. Attorney General of the Federation,
Federal Ministry of Justice, Shehu Shagari Way,
Central Area Garki, Abuja.

3. SUBJECT MATTER OF THE PROCEEDINGS:

i. Violation of Plaintiffs fundamental rights to life and dignity of human person guaranteed under S.33 and S.34 of the Constitutions of the Federal Republic of Nigeria and Articles 4 and 5 of the African Charter on Human and Peoples' Rights.

ii. Violation of the Plaintiffs fundamental rights to fair trial and appellate review under Article 7(1) of the African Charter on Human and Peoples' Rights.

iii. Violation of the Legal principles of separation of powers to the detriment of the Plaintiffs' under Article 26 of the African Charter on Human and People's Rights.

iv. Imposition of mandatory death sentence in the Defendant's statute books in violation of Articles 4 (g) and 5 of the Revised Treaty of ECOWAS, Article 1 of the African Charter on Human and People's Rights, The International Covenant on Civil and Political

Right and Other laws of Treaties respecting the rights to life and the right to freedom from torture, cruel, inhuman and degrading treatment.

4. FACTS AND PROCEDURE:

4.1.1. The Plaintiff are Citizens of the Federal Republic of Nigeria (The Defendant). The Defendant is a signatory to the Revised Treaty of the Economic Community of West African States (ECOWAS) 1993.

4.1.2. The Plaintiff was charged and convicted of the offence of murder on 23rd April 2005 and was sentenced to death. Her Appeal to the highest Court of Appeal of the Defendant failed.

4.1.3. As a result of her conviction and sentence to death, the Plaintiff has remained in the death row till date.

4.1.4. The Plaintiff and other 'death row' prisoners have been mandatorily sentenced to death in accordance with S. 319 of the Criminal Code and S. 1(2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act, and have been on the death row since 23rd April, 2005.

4.1.5. The Plaintiffs were not given the opportunity to show why death sentence should not be applied to them.

4.1.6. The Plaintiff and other death row Prisoners are subjected to torture, cruel, inhuman and degrading treatment in Prison, where they are awaiting execution.

4.1.7. The Plaintiff brought this action challenging the legality of the Provisions relating to mandatory death sentence in the Defendant's statute books arguing that such provision violated her obligations under Articles 4(g) and 5 of the Revised Treaty of ECOWAS, Article 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) Cap 10 Laws of the Federation of Nigeria 1990, the International Covenant on Civil and Political Rights, and other laws and Treaties respecting the right to life and the rights to freedom from torture, cruel, inhuman and degrading treatment.

5. SUMMARY OF PLEAS IN LAW:

i. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Cap 10 Laws of the Federation of Nigeria 1990;

ii. Revised Treaty of ECOWAS 1993;

iii. The Defendant have ratified the African Charter on Human and Peoples' Right and the ECOWAS Revised Treaty and thus bound by it. Article 4 of the African Charter provides that;

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

Article 7(1)

'Every individual shall have the right to have his cause heard'.

This comprises;

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

The Plaintiff submits that Article 4 of the African Charter on Human and Peoples' Rights was violated for the following reasons:

1. The imposition of death sentence on the Plaintiff is arbitrary because it was pre-determined by the legislature;

2. The death sentence provisions in the Criminal law statute of the Defendant subjected the Plaintiffs' to torture, inhuman and degrading treatment;

3. Mandatory death sentence under the law violates the rights of the Plaintiff to fair trial as it derives the right to appellate review of their sentence contrary to Article 7 (1) (a) of the African Charter on Human and Peoples' Rights;

4. The Provision on mandatory death sentence under the Defendant's Criminal law amounts to legislative judgment which

deprives the Court of its inherent discretionary powers in sentencing;

5. Mandatory death sentence violates the Principle of Separation of Powers.

All these violates the Revised ECOWAS Treaty of 1993 and the African Charter on Human and Peoples' Rights.

6. ORDERS/ RELIEFS SOUGHT BY THE PLAINTIFFS:

Accordingly, the Plaintiff seeks the following reliefs from the Court;

i. **A Declaration,** that the provisions for death sentence in the laws of Nigeria (The Defendant) particularly section 319 of the Criminal Code and S.1(2) (a) and (b) of the Robbery and Fire-Arms (Special Provisions) Act are inconsistent with the provisions of the Revised Treaty of ECOWAS, The African Charter on Human and Peoples' Rights, The International Covenant on Civil and Political Rights and other laws and treaties respecting the rights to life and freedom from torture, cruel inhuman and degrading treatment.

ii. **A Declaration,** that the provisions of mandatory death sentence for anyone convicted of murder or armed robbery under S.319 of the Criminal Code and 1(2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act respecting are gross violation of the rights of the Plaintiffs and other death rows inmates as ECOWAS Citizens to be subject to mandatory death sentence under Nigeria law.

iii. **An Order** directing the respondent to amend, revise and alter in all its statute books, at the Federal and State levels, the said mandatory provisions of sentencing under S.319 of the Criminal Code and S. 1 (2) (a) and (b) of the Robbery and Firearms Act or any other enactment with such mandatory death sentence provision and replace them with provisions that give the Court discretion of sentence in all matters.

iv. **An Order,** directing the respondent to reconsider the sentences of the Plaintiffs and other death row inmates who are sentenced under mandatory sentence provisions in order to allow the Courts that convicted them to determine the appropriateness of their sentence and where necessary reduce their sentence to terms of imprisonment.

7. THE DEFENDANT'S CASE:

The Defendant did not file a defence to the suit but rather brought a Preliminary objection pursuant to Articles 87 and 88 of the Rules of this Court as well as Articles 9 and 10 of the Supplementary Protocol A/SP./ 01/05 relating to this Court.

In the Preliminary Objection (Document No. 2) the Defendant argued that the Court lacks jurisdiction to entertain the suit on grounds *interlia*.

a. The suit challenges the exant criminal law provisions of the Defend and which have been judicially settled by Nigerian Courts.

b. That the Supreme Court, (the final Court of the Defendant) has disposed fully the case on an appeal by the Applicant and this Application amounts to an appeal.

c. The Applicant did not complain that she was denied the right to fair hearing or any other right relating to due process.

d. The Applicant have not shown that she was subjected to torture or any form of inhuman treatment while in custody and thus the suit discloses no reasonable cause of action.

e. The Applicant lacks the *locus standi* to challenge the constitutionality of the death sentence in Nigeria.

f. That this Court can neither exercise supervisory jurisdiction over the National Courts nor act as an appellate Court over the decisions of National Courts of member States of ECOWAS.

In his legal argument, the Defendant submitted as follows;

i. That by virtue of the Constitution of the Defendant, S.1 (1) the Constitution is supreme and thus outside the jurisdiction of the

Court. He cited a plethora of local Nigerian decisions to buttress her point, and it will be unnecessary to recite them here as they have no direct bearing on the jurisdiction of this as stated by the International instruments establishing it.

ii. The Defendant also submitted that by Articles 9 and 10 of the Supplementary Protocol 2005 relating to this Court does not authorize the Court to deal with subject matter within the competence of National Courts of member States; and concluded that by virtue of the subject-matter of the suit, the Court lacks jurisdiction to entertain it, and urged the Court to dismiss the suit as being inadmissible.

8. **ANALYSIS BY THE COURT**:

The crux of this case is that the Applicant who was sentenced to death for the offence of murder in accordance with the laws of the Defendant and who appealed up to the highest Court in Nigeria unsuccessfully against the sentence of death imposed on her, and who has been awaiting execution of the sentence for some years now, brought this Application before this Court, seeking a declaration against the Defendant for violation of her right to life and for cruel, inhuman and degrading treatment.

The Defendant did not file any defence to the action but have raised a preliminary objection; even without the preliminary objection which in most parts relies heavily on the provisions of the decisions of its Court, this matter can be determined, without considering the merits of the objection as in most parts, it raises substantive issues that can only be determined on the merits.

Accordingly, it is our considered view that the mandate of this Court is to determine *interlia* cases of violation of human rights occurring in territory of a Member State of ECOWAS and not to interpret its National laws. The laws that bind the Court in exercising its function in the ECOWAS Treaty, the Protocols and Supplementary Protocols relating to the Court and other Institutions of the Community, instruments decisions and other subsidiary instruments. Where necessary, the provisions of Article 38 of the statute of the International Court of Justice, the African Charter on Human and

Peoples' Rights and other International Human Rights Instruments to which a member State of ECOWAS is a party.

Accordingly, this Application, in our view calls for several remarks:

1. The request addressed to the Court refers, in several instances, to the Domestic laws of Nigeria (The 1999 Constitution, the Criminal Code Law among others) (see especially pages 1, 2, 4 etc. of the Application.) It is appropriate to recall that the rules applied by this Court are international rules binding on States which have subscribed to those rules and not the domestic norms of States.

   This Court has reiterated this established principles of International law in various cases. In its judgment of 24th April 2015 (unreported) in the case of **Bodjona Vs. Republic of Togo** at P. 37, the Court stated as follows;

   > ***"Similarly, the Court shall note as irrelevant all the references made to domestic law of Toga by the Parties in their written pleadings. The Constitution of Togo in particular was frequently cited by the two parties. Now the Court has no powers to access the Constitutionality or legality of instruments adopted by national authorities. That mandate is assigned to domestic Courts of Member States, and the ECOWAS Court of Justice cannot assume their role. In examining the cases brought before it, the ECOWAS Court of Justice shall refer exclusively to the norms of International law as binding on Member States who have subscribed thereto".***

   In **CPD and others Vs. Burkina Faso,** delivered on the 13th of July, 2015 at (pp 24- 25); The Court stated as follows;

   > ***"The Court has indeed always reiterated that it is not a body set up with a mandate for settling cases whose subject matter is the interpretation of the law or the constitution of the Member States of ECOWAS. (Unless where they have a direct bearing on the consideration of whether the law or Act constitutes a violation of States International human rights treaty obligation). The first is that the present judicial***

argument must be devoid of reliance on domestic law, be it the constitution of Burkina Faso or any other norms whatsoever related to the constitution of Burkina Faso" (Words in parenthesis is ours).

2. The Applicants on two occasions (pages 3 and 9 of the Application) averred acting 'for and on behalf of all the prisoners' awaiting the enforcement of the capital punishment which has been imposed on them. But, she did not show any evidence of the powers to act on behalf of such persons. This Court has held in several cases that such power of attorney to act for those persons shall be required in action brought on collective grounds *See;* **Bakare Sarre and 28 others Vs. Republic of Mali** (judgment of 17 March 2015 and **Saoro Victims Vs. Republic of Guinea** (ruling of 25th March 2015. It is thus appropriate to dismiss such action filed as a **«collective suit**».

This is not to suggest that the Court cannot adjudicate on **«collective suit»** in appropriate circumstances especially where collective rights have been infringed upon.

With regard to the merits of the case, the main issue for determination is:

Whether the provisions for Death sentence in the Criminal laws of Nigeria are inconsistent with the provisions of the Revised Treaty of ECOWAS and other International human rights instruments to which Nigeria is a party.

To answer this question is, is it necessary to review briefly the status of death penalty as a punishment for crimes under international human rights law.

The right to life is provided for by Article 6 of the International Covenant on Civil and Political Rights (ICCPR), 1966 and represents the most fundamental of all human rights. This rights is also protected by all international and regional human rights instruments, including the African Charter on Human and Peoples' Rights. The import of that Article is that every human being has the inherent right to life and no one shall be arbitrarily deprived of his life. Thus, Article 6 does not provide an absolute prohibition of taking life but only arbitrary deprivation of life. Article 6 does not abolish capital punishment.

Thus, it can be stated that the most important treaty provision in international law relating to death penalty which is widely accepted as forming part of customary International law on the subject is Article 6 of the ICCPR. Under that Article as earlier noted, there are a number of clear limitations placed on the imposition of the death penalty especially in Countries where it has not been abolished, namely:

1. First, it may only be imposed for most serious crimes and cannot be imposed if;

    i. A fair trial has not been granted;

    ii. Other ICCPR rights have been violated;

    iii. The crime was not punishable by death penalty at the time the offence was committed;

    iv. The offender is not entitled to seek pardon or lesser sentence;

    v. The offender is under the age of 18 years;

    vi. The offender is pregnant.

With regard to limitation of the death penalty to serious crimes, the term 'serious crimes' is devoid of any generally accepted definition and agreement. The United Nations General Assembly has endorsed the phrase to mean International crimes with lethal or other extremely grave consequences.

Death penalty cannot be imposed, if all the provisions of the ICCPR regarding due process have not been complied with. These include but not limited to, the presumption of innocence, informing the accused the nature of the offence committed by him, the accused right to counsel of his own choice, giving the accused reasonable time to which to prepare and present his defence, trial before an independent and impartial tribunal and the right to review by a higher tribunal.

The Application before the Court actually contests the very existence of capital punishment in the Nigeria judicial system. However, he does not provide any strict and concrete evidence of violation of her rights outside

the general critique she made on capital punishment. There is no evidence before this Court that the Defendant have signed and or ratified any International human rights instrument bending on her with regard to the abolition of the death penalty. Granted that International human rights instruments especially the ICCPR and the African Charter on Human and Peoples' Rights guarantees every human being the right to life, but such right is not absolute. The life of an individual can be taken in execution of a sentence of a Court of competent jurisdiction, provided there has been a fair trial.

The Applicant did not complain that she was not given a fair trial other than that the very existence of the punishment for death penalty does not give the Courts discretion matters of sentencing or that her right of appeal was violated but admitted that she exhausted her right of appeal up to the highest Court of the Defendant which upheld the death sentence imposed on her for murder; a very serious crime.

Thus, the Applicant did not provide any evidence of rights violation outside the general critique, she made on capital punishment, the application therefore appears devoid of any substance.

For two reasons the Application must equally be dismissed. First, the Application would drag this Court into engaging in a theoretical discussion, an academic exercise, in principle, by way of having to examine the law in the absence of any relevant consideration for the violation of a right, which is the fulcrum of the Court's jurisdiction.

The Court has consistently stated that it adjudicates on concrete issues especially ones relating to the violation of human rights occurring in Member States of ECOWAS and not on violation of legislations.

The Court does not interpret the legislations of Member States or determine their violation; but acts or omissions of States which violates the rights of its citizens as contained in International obligations assumed by such Member States (See; judgment of 18 November, 2010 on **Hissein Habre Vs. Republic of Senegal** (48 and 49) and **CPD and Ors Vs. Burkina Faso** (2015).

Further, as earlier noted, the Application does not cite any legal instrument binding on the Respondent in respect of the Prohibition of death sentence. Although such instrument(s) may exist in certain regional jurisdictions, (for example Additional Protocol N°. 6 of 28th April 1983 and Protocol No 13 of 13th May 2002, relating to the abolition of death sentence within the States of European Union) but such convocations are neither found in Africa in general nor with the ECOWAS Region in particular.

Thus, the provision for the death sentence as punishment for certain offences within the jurisdiction of the Respondent States does not infringe on the human rights of the Applicant or any other person.

As for the thesis according to which the death sentence is contrary to the **'right to life, as envisaged by international Conventions, it is simply refuted by case law of comparable international Courts; particularly The European Court of Human Rights (which cites Article 2 of the European Convention, which after recognising the right to life, soon admits the death sentence under certain conditions)**,' and the Inter-American Court of Human Rights (Judgment on **Neira Algeria and others Vs. Peru** 19th January 1995 series C. No 20.

The abolition of death sentence may be envisaged as a future project and as an ideal measure to be adopted, but nothing in law as of now, permits one to say that the Respondent violates human rights by maintaining the death penalty. This Court deals with *lex lata* and not *lex feranda* (i.e. law as it is not law as it ought to be).

Accordingly, mere existence of the death penalty in the Criminal laws of the Defendant does not amount to the violation of the human rights of the Plaintiff under the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights or any known International human rights instrument to which the Defendant is a party and therefore the action must be dismissed.

9. DECISION:

The Court adjudicating in public sitting, after hearing both Parties in the last resort, after deliberating in accordance with law.

10. AS TO THE PRELIMINARY OBJECTION:

The Court **holds** that the objection is not relevant to the determination of the suit and dismisses same.

11. AS TO THE MERITS OF THE CASE:

- **Rejects** the case and declines to issue any of the declarations and orders sought for by the Plaintiff as the action of the Defendant did not violate any known human rights of the Plaintiff and dismisses the suit in its entirety as being an academic exercise and lacking in substance.

12. AS TO COST:

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

Thus, made and adjudged and pronounced in a public sitting at Abuja on the 09th day of November, 2016 by the Community Court of Justice of the Economic of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT.

- **Hon. Justice Friday Chijioke Nwoke** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase Atannon (Esq.) - *Deputy Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY 6TH DAY OF DECEMBER, 2016

SUIT NO: ECW/CCJ/APP/23/15
JUDGMENT NO: ECW/CCJ/JUD/28/16

BETWEEN
SAHABI MOUSSA - *PLAINTIFF*

VS.
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **SALAOU MANO (ESQ.)** *AND*
   SCPA JUSTICIA - *FOR THE PLAINTIFF.*
2. **THE SECRETARY GENERAL OF THE GOVERNMENT** - *FOR THE DEFENDANT*

Violation of human rights - Jurisdiction - Right to a fair trial - Inadmissibility - Article 66.2 Rules of the Court - Costs.

SUMMARY OF FACTS

Following the death of Mr. Garba Sidy (District chief of Dioundou from 1976 to 2006) during the year 2007, a succession dispute arose to provide for his replacement. That the list of the candidates drawn up following the investigation of morality carried out by the gendarmerie, and which mentioned the name of the Applicant was confirmed by the order No. 383/MI/SP/DAC-R of 10 September 2007 of the Minister in charge of the interior and public security.

On the appeal of some candidates contesting the legitimacy of others including the Applicant, the administrative chamber of the Supreme Court of Niger by judgment No. 08-20 of 14 May 2008, annulled the candidacy of the concerned. He was also dismissed of his third-party appeal against the judgment raised by the Supreme Court in its Judgment No. 09-37 of 08 July 2009.

Moreover, with a criminal decision (Judgment No. 11-205/Civ. of 22 November 2012, the Applicant who asked for his registration on the list of candidates for the chiefdom of the canton of Diounndou was confronted with the inertia of the administration, and the rejection of its contentious appeal by judgment No. 27-15 of 13 May 2015, by the Counsel to the Republic of Niger for foreclosure.

The Applicant accused the respondent State for violating his human rights because he was denied a fair trial and also deprived of his right to participate in the management of the public affairs of his community.

ISSUES FOR DETERMINATION

- *Can the Applicant validly support the violation of his human rights when he had the opportunity to assert and exercise all legal remedies?*

- *Can the Applicant submit for the examination of the Court the decisions of the national courts of Niger on the ground that they did not receive a fair trial?*

DECISION OF THE COURT

The Court held that:

- *The Applicant does not provide any tangible evidence of any violation of his right to a fair trial, as soon as he was able to assert all his defences, and to exercise all legal remedies.*

Consequently, the Court cannot substitute its own assessment of the facts submitted before it to that of the national courts.

JUDGMENT OF THE COURT

1- THE PARTIES

Sahabi Moussa acting through his counsel, Maître Salaou Mano lawyer at the Niger Bar, Avenue de l'Arewa, KL 27, BP 2043, Niamey and SCPA Justicia, avocats associés, Dar Es Salam, 52 Rue de la Radio, BP: 13851 Niamey, Niger,

- **Applicant**

The Republic of Niger, through the person of the Secretary General of the Government, situated at the *Palais de la Présidence* of the Republic of Niger,

- **Defendant**;

Having regard to the Revised Treaty Establishing the Economic Community of West African States (ECOWAS) of 24 July 1993;

Having regard to the Protocol of 06 July 1991 and the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;

Having regard to the Rules of the ECOWAS Court of Justice of 3 June 2002;

Having regard to the Universal Declaration of Human Rights of 10 December 1948;

Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981

Having regard to the Application dated 20 July 2015 from the aforementioned Applicant;

Having regard to the statement of defence dated 17 September 2015 of the Republic of Niger;

Having regard to the documents in the file;

II- **FACTS and PROCEDURE**

1. Following the death of Mr. Garba Sidy (chief of canton of Dioundiou from 1976 to 2006) during the year 2007, a dispute of succession arose in order to replace him. According to the traditional procedure, the local gendarmerie carried out a morality inquiry on about twenty candidates, including the Applicant Sahabi Moussa.

2. By Order No. 383/MI/SP/DAC-R of 10 September 2007, the Minister of State in charge of the Interior and Public Security of Niger ratified the report of the Regional Consultative Commission establishing the list of candidates authorised to run for election to the chieftaincy of the Dioundiou Canton, Gaya Department, which included the name of the Applicant

3. Following a petition by certain candidates (eight in total) who contested the legitimacy of four applicants (including the Applicant), the Administrative Chamber of the Supreme Court of Niger, following decision No. 08-20 dated 14 May 2008, annulled the candidacy of Sahabi Moussa without his knowledge.

4. In June 2008, Sahabi Moussa filed a third-party opposition against the said ruling before being dismissed by the Supreme Court following ruling No. 09-37 of 08 July 2009. At the same time, Sahabi Moussa initiated criminal proceedings against one of the candidates named Mahamadou Hambali (whose name appears on the contested administrative act), for forgery and use of forgery and the latter was sentenced by the District Court of Gaya to six (6) months imprisonment suspended and a fine of 20,000 FCFA by Judgment No. 313 of 27 October 2009. This decision was first confirmed by the Court of Appeal of Niamey in judgment No. 161 of 22 November 2010, then by the Judicial Chamber of the Court of Cassation in judgment No. 11-205/ Civ. of 22 November 2012.

5. On the strength of this criminal decision, Mr. Sahabi Moussa sent a letter dated 19 December 2012 to the Minister of Interior requesting his inclusion on the list of candidates for the chieftaincy of the Canton of Dioundiou.

6. Faced with the inertia of the administrative authority, he filed an appeal for withdrawal dated 27 May 2013 against the decision of the Supreme Court No. 08-20 dated 14 May 2008 cancelling his candidacy for the said elections. By judgment No. 27-15 of 13 May 2015, the Litigation Chamber of the Council of State of Niger rejected the said appeal for foreclosure.

7. On 25 June 2015, a new chief of canton of Dioundiou was elected.

8. By application dated 20 July 2015, registered at the registry on 24 July 2015, Mr. Sahabi Moussa applied to the Community Court of Justice, ECOWAS to request the following:

   - To **Declare** that he did not receive a fair trial in disregard of his rights as protected by Article 14 of the International Covenant on Civil and Political Rights and Article 7 of the African Charter on Human and Peoples' Rights;

   - To **Declare** that his right to participate in the conduct of public affairs of his community, recognised by article 25 of the said covenant and article 13 of the aforementioned Charter, was violated;

   - **Declare** that the Republic of Niger is responsible for these violations;

   - **Order** the Republic of Niger to provide him, as reparation, adequate satisfaction including the cancellation and resumption of the election of the chief of canton;

   - **Order** the Republic of Niger to pay him ten (10) million (10) million as legal costs.

III- **ARGUMENTS AND PLEAS IN LAW OF THE PARTIES**

9. Considering that the Applicant stated that he is a victim of two forms of violations of his rights; these are, first, the violation of the right to a fair trial enshrined in Article 14 of the International Covenant on Civil and Political Rights of 16 December 1966 and Article 7 of the African Charter on Human and Peoples' Rights of 1981 and, second, the

violation of his right to participate in the conduct of public affairs (of his community) provided for in Article 25 of the said Covenant and Article 13 of the aforementioned Charter.

10. In support of the first plea, he argued that the administrative chamber of the Supreme Court of Niger, contrary to its jurisprudence, rejected without reason the Hausa custom in force to invalidate his candidacy for the vacancy of chief of canton of Dioundiou. More importantly, the said Court, without any legal grounds, gave retroactive effect to its decision of 8 July 2009 instead of limiting its effects between the parties and for the future.

11. With regard to the second plea, the Applicant argued that the right to participate in the conduct of public affairs is imposed on both public authorities and local authorities, particularly traditional rulers. According to him, the law of Niger elevates traditional chieftaincy to the rank of state institutions whose leaders are democratically elected if they meet the criteria required by custom. That in this way, the government of Niger shall not in any case and for any reason whatsoever obstruct his candidacy to participate in the governance of the public affairs of his community.

12. Considering that the Republic of Niger objected on two grounds, one relating to the form, the second relating to the substance of the case.

    On the form, the Republic of Niger excludes the inadmissibility of the application of Mr. Sahabi Moussa on the grounds that the Applicant exhausted all local remedies before applying to the Court of Justice in desperation. According to the Defendant, the exhaustion of these local remedies sufficiently proves that the Applicant had access to justice in his country and that, in any event, it does not demonstrate how his rights as provided for by the international standards he relied upon, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, were violated.

13. Contrary to the assertions of the Applicant, on the merits and alternatively, the Republic of Niger affirmed that the Supreme Court of Niger did not set aside the custom but considered that Mr. Moussa Na Dodo (the father of the Applicant) did not have, with regard to the

rules of custom, the quality to claim the throne of Dioundiou. Nor did it give retroactive effect to its decision, but rather sought to motivate it on the basis that "no man can give more rights than he possesses". The Government of Niger added that in the present case, it is common knowledge that Mr. Moussa Na Dodo, father of the Applicant, could only be authorised to stand for election in 1976 due to exceptional circumstances and that this state of affairs cannot call into question what is alleged concerning the filiation of the latter. For all these reasons, the Defendant sought the dismissal of the action of the Applicant as unfounded.

III- **ANALYSIS OF THE COURT**

Formal presentation

14. In accordance with its jurisprudence, the Court considers that the application submitted by Mr Sahabi Moussa is admissible since it meets all the formal conditions required by Article 33 of the Rules of Procedure dated 3 June 2002 and by Article 10 of the Supplementary Protocol dated 19 January 2005, relating to the jurisdiction of the Community Court of Justice, ECOWAS.

15. It follows from these legal provisions that any person claiming to be a victim of human rights violations may bring a case before the Court by simple application, provided that his application is not anonymous or brought before another competent international court.

16. The Court also considers as impertinent the argument of the Defendant according to which the Applicant is inadmissible in his action for having unsuccessfully exhausted all local remedies before bringing his action before the Court; it considers that in the light of the above-mentioned texts, the exhaustion or non-exhaustion of the said remedies has no bearing on any proceedings brought before it.

Merits of the case

1- On the merits of the claims of the Applicant

17. Given that the Applicant alleged both the violation of the right to a fair trial enshrined in Article 14 of the International Covenant on Civil and

Political Rights of 16 December 1966 and Article 7 of the 1981 African Charter on Human and Peoples' Rights, as well as the violation of his right to participate in the conduct of public affairs (of his community) provided for in Article 25 of the said Covenant and Article 13 of the aforementioned Charter.

Given that, as a general rule, it is up to the Applicant to provide proof of his allegations and that, in application of this principle, the Court consistently holds (see for example its judgment of October 7, 2015 in the case of Mr. Wiyao et al. against the Republic of Togo), that all cases of human rights violations that are invoked before it must be specifically supported by sufficiently convincing and unequivocal evidence.

18. That in the present case, the Court notes, at the end of the debates and on the basis of the pleadings, that the Applicant does not provide any tangible proof of any violation of his right to a fair trial before the courts of Niger within the meaning of Article 14 of the Covenant on Civil and Political Rights, since he had the opportunity to put forward all his defence and to exercise all legal remedies.

19. Moreover, it is clear that the Applicant, by the allegations he cited, seeks to lead the Court to assess, if not to criticise the merits of the decisions rendered against him by the national courts of Niger, as evidenced by the claims made at the end of his application.

20. In other words, the Applicant asked the Court to interfere in the internal judicial procedures of Niger, that it be instituted as a kind of judge of appeal or cassation of national decisions.

21. However, the Court, in accordance with consistent jurisprudence, has always decided that it is not part of its role of protecting human rights to substitute its own assessment of the facts submitted to it for that of the national courts.

22. Thus, in **Alhadji Hammani Tidjani v. Federal Republic of Nigeria and others**, the Court held that ***"to admit this application would be tantamount to interfering with the jurisdiction of the courts of Nigeria ... without justification"***.

Similarly, in the case of **Bakary Sarré and 28 others, against the Republic of Mali**, the Court held that ***"it emerges from the analysis of the action brought by the applicants that the said action seeks substantially to obtain from the ECOWAS Court of Justice, the reversal of judgments Nos. 116 and 118 handed down by the Supreme Court of Mali and tends to establish the first as a court of cassation of the second...."*** (Judgment of 13 March 2012, §7).

23. In view of this position of principle, the Court is of the opinion that the claims made by the Applicant in relation to the decisions of the courts of Niger cannot prosper.

24. Therefore, the claims of the Applicant must be dismissed.

2- Regarding the costs

25. Given that the Applicant succumbed, he should therefore be ordered to pay the costs in accordance with the provisions of Article 66.2 of the Regulations of the Court.

FOR THESE REASONS,

The Court, adjudicating in a public hearing, after hearing both parties, on the subject-matter of human rights, and after deliberating in accordance with the law, as a last resort,

Formal presentation

- **Declares** admissible the application filed by Mr. Moussa Sahabi;
- **Dismisses** his motion for the reopening of the proceedings;

Merits of the case

- **Holds** that the Court is not a court of review of the decisions of national courts;
- In consequence, **dismisses** the claims of the Applicant;
- **Asks** the Applicant to bear the costs.

Thus adjudged and pronounced at a non-public hearing, on the day, month and year above.

And the following have appended their signatures:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Hamèye-Founé MAHALMADANE** - *Member;*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by:
Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, IN NIGERIA

ON TUESDAY, 6TH DAY OF DECEMBER, 2016

SUIT NO: ECW/CCJ/APP/12/15
JUDGMENT NO: ECW/CCJ/JUD/29/16

BETWEEN

1. MR. AZIAGBEDE KOKOU & 33 ORS
2. MRS. TOMEKPE ABRA LANOU & 29 ORS } *PLAINTIFFS*
3. MR. ATSOU KOMLAVI & 4 ORS

VS

THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:

1. HON. JUSTICE JÉRÔME TRAORE - *PRESIDING*
2. HON. JUSTICE HAMÈYE F. MAHALMADANE - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. ZEUS ATA MESSAN (ESQ.),
CLAUDE AMEGAN (ESQ.) - *FOR THE PLAINTIFFS.*
2. OHINI KWAO SANVEE (ESQ.) - *FOR THE DEFENDANT.*

- Non-execution of a decision of the Court

SUMMARY OF FACTS

By Application dated 21 April 2015, Mr. AZIAGBEDE Kokou and 33 Others, Mrs. Tomekpe Abra Lanou and 29 Others, Mr. ATSOU Komlavi and 4 Others, seised the Court to obtain the execution of the Decision No. ECW/CCJ/JUD/07/13 of the Community Court of Justice, ECOWAS.

In addition, by another Application, the Applicants asked that the case be subject to an expedited procedure.

The Applicants asked the Court to adjudge and declare that:

- *The acts of the Government of Togo, failing to execute the decision of the Court, violate the provisions of Article 62 of the Rules of Court, Article 20 paragraph 2 of the Supplementary Protocol on the Court and Article 7.1. (d) the African Charter on Human and Peoples' Rights, Articles 9.3 and 14.3 (c) of the International Covenant on Civil and Political Rights.*
- *To find the violation of the Articles referred to above;*
- *To finding that the non-execution of the Judgment of the Court caused certain harm to the Applicants, aggravating circumstances existing even before the decision of the Court;*
- *Order the Republic of Togo to pay damages in the amount of thirty million (30,000,000) CFA to each of the Applicants for damages suffered for excessive delay in the investigation of complaints.*
- *To Order the Republic of Togo to bear the entire costs;*

In its defence received at the Registry on 9 June 2015, the Republic of Togo asked the Court to declare lack of jurisdiction or if the Court retains jurisdiction, to declare the action inadmissible as res judicata.

For Togo, pursuant to Article 24 of the Supplementary Protocol of 19 January 2005, the Court is not responsible for enforcing its Judgments but rather the national courts.

ISSUE FOR DETERMINATION

- *Does the Court have jurisdiction to enforce its decision?*

DECISION OF THE COURT

The Court declared that it lacks jurisdiction to proceed or have the execution of the judgments made by it.

It claimed that it lacks jurisdiction to hear the present application.

The Court ordered the Applicants to pay the entire costs.

JUDGMENT OF THE COURT

The Court thus constituted delivered the following judgment:

I- PROCEDURE

1. On 21 April 2015, Mr. AZIAGBEDE Kokou and 33 Others, Mrs. TOMEKPE Abra Lanou and 29 others, Mr. ATSOU Komlavi and 4 others, filed an Application at the Registry of the Court, through their Counsels, seeking an order on the enforcement of Judgment N°. ECW/CCJ/JUD/07/13 of the Court of Justice of the ECOWAS Community;

2. On the same day, and through a separate document lodged, they sought for the leave of the Honourable Court, to admits their initiating Application to an expedited procedure;

3. On 9 June 2015, The Republic of Togo filed its Memorial in defence, through its Counsel;

4. On 16 February 2016, the Presiding Judge of the panel that examined the case took an order declaring that there was no need to admit the case to an expedited procedure;

5. The case was slated for hearing on 15 June 2016, after which it was adjourned the same day for deliberation, for judgment to be delivered on 10 October, 2016. At this hearing, Counsel to the Republic of Togo was not present in Court but endeavoured to send information that he was not averse to the case being put for deliberations.

6. It was adjourned for deliberations, and judgment to be delivered on 10 October, 2016.

7. At this date, the deliberation was still prorogated to 3 November 2016.

8. It again postponed to 6 December 2016.

II- FACTS- CLAIMS AND PLEAS-IN-LAW BY PARTIES

9. By Application filed at the Registry of ECOWAS Court of Justice on 21 April 2015, Mr. AZIAGBEDE Kokou and 33 others, Mrs.

TOMEKPE Abra Lanou and 29 others, Mr. ATSOU Komlavi and 4 others, came before the Court and plead that the Court should declare and adjudge that:

- The actions of the State of Togo, which are geared towards refusing to enforce the Judgment of the Court, is in flagrant and manifest violation of the provisions of Article 62 of the Rules of Court, Article 20 (2) of the Supplementary Protocol on the ECOWAS Court of Justice and Article 7.1 (d) of the African Charter on Human and Peoples' Rights, Articles 9.3 and 14.3 (c) of the International Covenant on Civil and Political Rights;

- This situation causes certain prejudices to the victims;

Consequently

- To **find**, on the one hand, the violation of the above-mentioned Articles;

- To **find** that the non-enforcement of the Judgment of the Court has caused certain prejudices to Plaintiffs/Applicants, thus constituting aggravating circumstances of the existing prejudices, prior to the delivery of the Judgment by the Honourable Court;

- To **order** the State of Togo to pay the sum of thirty million (30.000.000) FCFA to each Plaintiff/Applicant, as reparation, for the prejudices suffered, owing to undue delay in examining their complaints;

- To **order** the Stated of Togo to bear all costs;

10. In support of their claims, Plaintiffs/Applicants aver that, by Judgment N°: ECW/CCJ/JUD/07/13 of 3 July 2013, the Community Court of Justice, ECOWAS, sitting in a public hearing, in a human rights violation matter, and after hearing both parties, in the case of Messrs. AZIAGBEDE Kokou and 33 others, TOMEKPE Abra Lanou and 29 others and ATSOU Komlavi and 4 others, on a massive human rights violations committed before, during and after the period of the Presidential Elections of 2005 in Togo, the Honourable Court declares,

in substance*: « That the Application asking the Court to find the violation of the right to life, the security of the human person, and torture resulting from acts of violence, the rights that are enshrined under Articles 4 and 5 of the African Charter on Human and Peoples' Rights is, as at now, premature, and therefore inadmissible »* ;

11. That the Court has abundantly recognised that the Republic of Togo violated the right to be tried within reasonable period, as provided for under Article 7.1 (d) of the Charter, and consequently, the Court has ordered the State of Togo to enjoin the national courts, to examine, without delay, the complaints filed by Plaintiffs/Applicants, in a way as to give effect to their rights as enshrined under Article 7.1 (d) of the Charter »;

12. That since the delivery of this judgment, the State of Togo has not deemed it fit to enforce it;

13. That the attitude of the State of Togo, which is consistent with refusing to enforce the Honourable Court's Decision, is a violation of the provisions of Article 20 (2) of the Supplementary Protocol on the Community Court of Justice, and Article 62 of the Rules of Court, Article 7. (d), 9.3 and 14.3 (c) of the International Covenant on Civil and Political Rights;

14. In its Memorial in Defence filed on 9 June 2015 at the Registry of the Court, the State of Togo requested from the Court:

    - To **withhold** jurisdiction over the instant case;

    - Or if the Court **holds** jurisdiction, to declare the Application filed as inadmissible, due to the *res judicata*;

    - To **order** Plaintiffs/Applicants to bear all costs;

15. Defendant claims that the instant case filed by Plaintiffs/Applicants relates to the non-enforcement of the decision of the Honourable Court;

16. That pursuant to Article 24 of the Supplementary Protocol A/SP.1/01/15 of 19 January 2005, it is not part of the responsibilities of the Honourable Court to ensure the forced enforcement of its decisions, rather, that of the national courts of Member States;

17. Therefore, it was through manifest error that Plaintiffs/Applicants have brought the instant case before the Honourable Court;

III- GROUNDS FOR THE DECISION

1. On the jurisdiction of the Court

18. Whereas the Community Court of Justice, ECOWAS draws its jurisdiction under Article 9 of the Supplementary Protocol A/SP.1/01/05) of 19 January 2005 on the Court; Whereas pursuant to this proviso, the Court is not empowered to enforce or to cause to enforce the forced execution of its judgments that it delivers; Whereas furthermore, enforcement of the decisions of the Court is as provided for under Article 24 of its Supplementary Protocol of 2005;

19. Whereas indeed, under Article 24.2 of the afore-mentioned Supplementary Protocol *« the forced execution, which shall be submitted by the Chief Registrar in the Tribunal of the concerned Member State shall be in accordance with the rules of civil procedure in the said Member State »*;

20. Whereas it can be deduced from this provision that the beneficiary of a decision of the Court, who seeks its enforcement, against a Member State, must act according to the positive law of the said Member State, particularly to the rules of civil procedure in vogue in the said Member State;

21. Whereas in the instant case, Plaintiffs/Applicants request from the Honourable Court to proceed to the forced execution of its Judgment N°ECW/CCJ/JUD/07/13 of 3 July 2013, by the State of Togo;

22. Whereas however, and as evoked above, the Honourable does not have competence to proceed to, or cause a forced execution of the judgments that it delivers;

23. Therefore there is need for the Court to declare its lack of jurisdiction to examine the Application;

2. On costs

24. Whereas under Art 66.2 of the Rules of the Community Court of Justice, ECOWAS:

> « *The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings*. » ;

Whereas in the instant case Plaintiffs/Applicants have fell.

25. It therefore behooves the Court to order them to bear all costs.

FOR THESE REASONS

The **Court**,

Sitting in a public hearing, in first and last resort, after hearing both parties;

- **Declares** its lack of jurisdiction to examine the instant Application;
- **Orders** Plaintiffs/Applicants to bear all costs.

Thus done, adjudged and pronounced in a public hearing at Abuja, in the Federal Republic of Nigeria, by the Community Court of Justice, ECOWAS, on the day, month and year as stated above;

And the following have appended their signatures:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member;*
- **Hon. Justice Alioune SALL** - *Member;*

Assisted by **Athanase ATANNON (Esq.)**- *Registrar.*

[ORIGINAL TEXT IN FRENCH]

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 6TH DAY OF DECEMBER, 2016

ADVISORY OPINION
NO: ECW/CCJ/ADV.OPN/01/16

ADVISORY OPINION REQUESTED BY THE PRESIDENT OF THE ECOWAS COMMISSION

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

- Admissibility of an Advisory Opinion
- Administrative sanctions - Effect of Regulations signed in error
- Withdrawal of Regulations

SUMMARY OF FACTS

The President of the ECOWAS Commission brought a request before the Court, for the purposes of constituting a Commission of inquiry to conduct investigations into alleged fraud charges brought against officers of the Community. The Applicant alleged that officers of the Department of Finance may have been implicated in the fraudulent bank operations which culminated in the squandering of sums of money taken out of the Community Levy.

That considering the gravity of the charges made, and the possible consequences on the image of the Community, a commission will have to be set up, with a mandate to carry out all the investigations required to establish the truth in those matters, and to submit to the President of the Commission a comprehensive report that will determine the share of blame to be apportioned to each of the persons implicated, towards the adoption of consequent administrative measures, before the next ordinary session of the Council of Ministers.

ISSUE FOR DETERMINATION

- *Whether the President of the Commission can constitute a Commission of inquiry to investigate allegations of fraud and embezzlements brought against ECOWAS Staff and make recommendations.*

OPINION OF THE COURT

In conclusion, the Court held the opinion that:

- *The President of the Commission may bring the matter before the Joint Disciplinary Board, in line with Article 67 of the ECOWAS Staff Regulations and ask the Board to conduct an inquiry into, and make recommendations on the charges brought; such charges*

capable of being described in the terms of fraudulent acts and embezzlement of funds to the detriment of the Community;

- *On a tentative basis, the President of the Commission may suspend the application of the disputed Regulation;*
- *The President of the Commission may also issue administrative sanctions, as stipulated in Article 71 of the ECOWAS Staff Regulations, and/or initiate criminal proceedings before the domestic courts of ECOWAS Member States (i.e. lodge a complaint before those courts);*
- *The contentious Regulation can only be permanently withdrawn by a decision of the Council of Ministers, in the event of the Regulation proving to have been signed by error;*
- *If it is proven however that the signature which is featured on the Regulation was fraudulently obtained, then the President of the ECOWAS Commission may serve a formal notice of non-existence of the Regulation;*
- *The withdrawal of the Regulation at stake shall imply retroactive annulment of all the acts carried out on the basis of that Regulation.*

ADVISORY OPINION REQUESTED BY THE PRESIDENT OF THE ECOWAS COMMISSION

By correspondences dated respectively 10 and 20 November 2016, the President of the ECOWAS Commission submitted a request before the Honourable Court, for the purposes of constituting a commission of inquiry to be vested with the responsibility of conducting investigations into charges amounting to infractions, brought against officers of the Community.

The charges in question concern the production of a legal instrument (a Regulation) which may turn out to be a fraudulent document, and involvement in illegal bank operations - offences alleged to have been committed by officers of the Department of Finance of the ECOWAS Commission.

The Applicant requests a legal advisory opinion from the Court:

- As to the fate of the Regulation in question, and thereby, a determination of what is to become of the legal situations which may have resulted from the application of that Regulation; and as well, a clear guidance as to the modalities for revoking or withdrawing the legal instrument put in place;

- As to the sanctions which may have to be taken against the officers who illegally compromised their actions in the course of the bank operations.

THE FACTS OF THE CASE

The Applicant avers, in support of his request, that it has been brought to his notice that a copy of a Regulation referenced C/REG.13/12/15 on Organogram of ECOWAS Commission has been found in circulation within the administrative departments of the Commission. According to him, the Regulation in question is highly suspected of being a fraudulent document, in the sense that the person in authority who was chairing the Council of Ministers at the supposed time of adoption of the said Regulation, has stated that he never signed that document.

The Applicant further maintains that officers of the Department of Finance may have been implicated in the fraudulent bank operations which

culminated in the squandering of sums of money taken out of the Community Levy.

Considering the gravity of the charges made, and the possible consequences on the image of the Community, the President of the Commission deemed it appropriate to bring the case before the Court, so that a commission will be set up, with a mandate to carry out all the investigations required to establish the truth in those matters, and to submit to the President of the Commission a comprehensive report that will determine the share of blame to be apportioned to each of the persons implicated, towards the adoption of consequent administrative measures, before the next ordinary session of the Council of Ministers.

AS TO FORMALITY

Pursuant to Article 10 of Protocol A/P.1/7/91: "**The Court may, at the request of the Authority, Council, one or more Member States, or the President of the Commission, and any other institution of the Community, express in an advisory capacity, a legal opinion on questions of the Treaty**."

Within the meaning of the same Article 10, such requests for advisory opinion shall be made in writing and shall contain a statement of the questions upon which the advisory opinion is required. It is further provided therein that requests for advisory opinion must be accompanied by all relevant documents likely to throw light upon the question or questions submitted before the Court.

The request made by the President of the Commission falls within that context, and it was lodged in line with the formality required by the above-cited Protocol. The application for advisory opinion thus submitted by the President of the Commission shall therefore be declared admissible.

AS TO THE MERITS OF THE CASE

1. Regarding the request for the opening of an inquiry

A careful look at the request from the President of the ECOWAS Commission shows that he brought the case before the Court to enable

him constitute an independent commission of inquiry to be vested with the mandate to conduct inquiries and hearings on the charges of fraud, use of fraudulent documents, and embezzlement of funds.

It is appropriate to point out that as far as this point is concerned, and viewed in the light of applicable texts, the Court has no powers to take any steps for the setting up of a commission of inquiry, as requested by the President of the Commission, and less, to conduct investigations on the accusations alleged.

However, when charges amounting to the offences stated in Article 70 (c) of the ECOWAS Staff Regulations are brought before him, the President of the ECOWAS Commission may, pursuant to the prescriptions of Article 67 of the same ECOWAS Staff Regulations, and in consultation with the other Heads of Institution, set up a Joint Disciplinary Board.

The Board, whose composition is fixed by the provisions of Article 67 (c) and (e) of the ECOWAS Staff Regulations, is empowered to inquire into the most serious offences, notably cases of embezzlement, theft, abuse of trust to the detriment of the Community, fraud or bribery.

The Committee thus set up, shall take all the steps it considers necessary for the manifestation of the truth, and shall submit its recommendations to the Head of Institution concerned.

In the instant case, given the seriousness of the charges made, concerning embezzlement of funds to the detriment of the Community, coupled with fraud regarding a Community legal instrument, it may be advocated that the case be brought before the said Joint Disciplinary Board.

2. Regarding the fate of the Regulation in contention

No provision in the primary law or the derived law of the Community provides guidance as to how a Community Institution may legally withdraw or repeal a legal instrument which confers rights on a person, in the event of the instrument ending up as fraudulently adopted.

That situation compels the Court to resolve the issue submitted before it by drawing upon general principles derived from the law constituting

ECOWAS, the case law of Community Courts, doctrines, and any other relevant legal instrument.

In matters concerning revocation of a legal instrument, the principle which guides legal practice reposes on the constant search for the leverage that enables one to balance the imperative need to root out the supposed illegal instrument from the legal order, on one hand, and the necessity to preserve the sanctity of that same legal system, on the other hand, in taking account of the particular situations which may have been generated by the legal instrument in question.

In following that line of reasoning, it shall be admitted that an administrative authority may, at any point in time, withdraw from its legal order, any irregular legal instrument which does not confer any rights on any person. On the other hand, if the legal text in question has conferred certain rights on any person, its withdrawal, in principle, comes under strict conditions.

The case law of the Court of Justice of the European Communities (CJEC), which later became the Court of Justice of the European Union (CJEU), can enlighten us in that regard, and may appropriately be cited in the instant case. Largely governed by the same rules as the ECOWAS Court of Justice, the European Court, as far as the matter at stake is concerned, has succeeded in establishing an interesting doctrine which carefully considers the right balance to be struck between public and private interests, where one envisages the likelihood of conflict between private and public interests, in the event of a Community organ revoking or withdrawing a legal instrument adjudged to be illegal. From the judgment on the *Algeria Case*, delivered in 1957, the European Court legislated a guiding principle which clearly holds that an executive organ may, in all validity, withdraw an irregular legal instrument which is capable of generating rights, on the condition that such withdrawal is done within a reasonable time. This jurisprudence, founded upon the so-called theory of *balance of interests*, was streamlined and it has been sustained for several years now. The theory was at any rate reiterated on several occasions by the Court, which, for example, in the *Case Concerning* **Henri de Compte v. European Parliament**, held that ***"the revocation of an unlawful act which grants a benefit to the individual concerned is only permissible if it takes***

place within a reasonable period" (cf. 26 January 1995, Judgment of the CJEU on **Henri de Compte v. European Parliament**, T-90/91 and T-62/93).

In considering the Regulation in dispute, it is apparent from the accompanying exhibits tendered in support of the request for advisory opinion, that the Senegalese Minister of Integration stated in a correspondence dated 11 October 2016, that at the end of the proceedings of the 75th Ordinary Session of the Council of Ministers held under his chairmanship, at Abuja on 13 and 14 December 2015, a draft law approving the organisational structure of ECOWAS was submitted to him for signature. Having noticed discrepancies between the organisational structure which had been drawn up for the draft law and the one which was examined by the Council of Ministers, he abstained from appending his signature to it. He maintained that he had never signed nor initialled the said Regulation, a legal instrument whose authenticity is now rendered questionable.

It is appropriate to state that it is not incumbent upon the Court, in such request for advisory opinion, to make a determination on the validity of a signature whose existence on the disputed Regulation has not been challenged.

The Court can however point out that the presence of the signature of a competent authority on a legal instrument unquestionably constitutes an essential condition for establishing the validity of that legal instrument. It therefore appears obvious that any legal document devoid of an authentic signature produces a null effect. Two scenarios may be distinguished here:

First Scenario:

If at the end of the inquiry, it turns out that the signature affixed to the Regulation was done in error, then the Regulation shall be considered irregular, and its revocation shall be carried out with retrospective effect; all the more so when the time lapse between the date of signing and the discovery of such irregularity is not unusually long. In that case, the effects of the abrogation of the Regulation will legitimately be brought to bear on the legal situations which had been constituted on the basis of the annulled Regulation.

Second Scenario:

Conversely, if the signature of the Regulation in contention was appended by way of proven fraud, then there will be a ground to consider that the Regulation was legally non-existent, and also that it is incapable of producing any legal effect. It shall indeed be so because a fraudulently obtained legal instrument, with a clearly manifest intent to defraud, cannot constitute a source of law for the purposes of creating rights for any persons.

In which case, all the legal situations which may have been constituted on the basis of the fraudulent document will simply be annulled, since the Regulation shall be deemed to have never existed. One notices that in the second scenario, the concept of reasonable time is not even considered, since a fraudulent document can be withdrawn from a legal system at any time; such a drastic effect derives from the adage that *"fraud corrupts completely."*

3. Regarding modalities for the withdrawal of the Regulation

It goes without saying therefore, that one can only talk of the "withdrawal" of a legal document where such document is deemed to have previously existed, as arising, for example, from a situation where one erroneously signs a legitimately drafted document (and not, of course, in the case of a situation where one appends a signature to a document with the intent to defraud).

Where therefore it is a case of the Regulation having been signed in error, the President of the Commission may tentatively suspend the Regulation in question. The power to do so is derived both from his status as legal representative of the Community and from the general powers he holds, for the purposes of the effective functioning of the administrative departments and divisions placed under his authority, pursuant to Article 10 of the Principles of Staff Employment of ECOWAS.

All the same, the ultimate withdrawal of the said Regulation, the latter having been enacted in accordance with Article 12 of the Revised Treaty, can only be effected through an instrument by the Council of Ministers adopted through the same formality.

That has to do with a general principle known as *the principle of congruent forms*, which the Court of Justice of the European Communities upheld in the judgment on **Sandro Gherardi Dandolo v. Commission of the European Communities**, in the following words: "***It must first be determined whether the decision of 21 June 1982 was withdrawn, as the Applicant submits. It should be emphasised in that regard that an act of a Community institution can be withdrawn only by an act of the same institution which either expressly repeals the earlier decision or contains a new decision taking its place.***" (CJEC, Judgment on ***Sandro Gherardi Dandolo* v. *Commission of the European Communities***, 20 May 1987, Paragraph 13).

It is appropriate to state further that where the charges brought against the persons indicated are proven however, the Community may, in addition to the administrative sanctions provided under the ECOWAS Staff Regulations, institute a criminal action before the competent domestic courts of the Member States of ECOWAS.

CONCLUSION

In conclusion, the Court holds the opinion that:

- The President of the Commission may bring the matter before the Joint Disciplinary Board, in line with Article 67 of the ECOWAS Staff Regulations and ask the Board to conduct an inquiry into, and make recommendations on the charges brought; such charges capable of being described in the terms of fraudulent acts and embezzlement of funds to the detriment of the Community;

- On a tentative basis, the President of the Commission may suspend the application of the disputed Regulation;

- The President of the Commission may also issue administrative sanctions, as stipulated in Article 71 of the ECOWAS Staff Regulations, and/or initiate criminal proceedings before the domestic courts of ECOWAS Member States (*i.e*. lodge a complaint before those courts);

- The contentious Regulation can only be permanently withdrawn by a decision of the Council of Ministers, in the event of the Regulation proving to have been signed by error;

- If it is proven however that the signature which is featured on the Regulation was fraudulently obtained, then the President of the ECOWAS Commission may serve a formal notice of non-existence of the Regulation;

- The withdrawal of the Regulation at stake shall imply retroactive annulment of all the acts carried out on the basis of that Regulation.

Legal Advisory Opinion given this day, Tuesday, the 6th day of December 2016, at Abuja, by the panel of Judges whose signatures are appended hereunder:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Registrar.*

978-978-55680-4-2

THONIMARTINS (+234) 0803 398 2433; 0805 666 6580