AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

EMIL TOURAY AND OTHERS

V.

REPUBLIC OF THE GAMBIA

APPLICATION No. 026/2020

RULING

24 MARCH 2022

TABLE OF CONTENTS

The Court composed of: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice President; Ben KIOKO; Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO - Judges; and Robert ENO, Registrar.

In the Matter of

Emil TOURAY and OTHERS

Represented by:

1. Mr Gaye SOW, Executive Director, Institute for Human Rights and Development in Africa (IHRDA)
2. Ms Hawa Sisay SABALLY, Legal practitioner, IHRDA
3. Mr/Ms Sagar JAHATEH, Legal practitioner, IHRDA

Versus

REPUBLIC OF THE GAMBIA
represented by:

1. Hon. Dawda A. JALLOW, Attorney General and Minister of Justice
2. Cherno MARENAH, Solicitor General and Legal Secretary
3. Dinshiya BINGA, Director of Civil Litigation and International Law
4. Kimbeng T TAH, Principal State Attorney
5. Ajie Adam CEESAY, Senior State Counsel
6. Ms Ella R DOUGAN, Senior State Counsel
7. Momodou M MBALLOW, Senior State Counsel

after deliberation,

renders the following Ruling:

I. THE PARTIES

1. Emil Touray, Saikou Jammeh, Haji Suwareh, Isatou Susso, (hereinafter referred to as the “First Applicant”, “Second Applicant”, “Third Applicant” and “Fourth Applicant” respectively, or “the Applicants” jointly) are nationals of the Republic of The Gambia. The First and Second Applicants are journalists while the Third and Fourth Applicants are entrepreneurs. The Applicants challenge the validity of Section 5 of the Respondent State’s Public Order Act no. 7 of 1961 as revised in 1963 and 2009(hereinafter referred to as “Public Order Act”).

2. The Application is filed against the Republic of The Gambia (hereinafter referred to as “the Respondent State”) which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights on 25 January 2004. On 3 February 2020, it deposited with the African Union Commission, the Declaration provided for under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record that, on 9 May 2019, the Third and Fourth Applicants, members of a group named “3 years jotna”[1] submitted an

[1] “3 years *Jotna*” literally means “3 years have arrived” in Wolof

application to the Inspector General of Banjul for authorisation for a licence under Section 5 of the Respondent State's Public Order Act.[2]

4. Having not received a response**,** On 10 May 2019, the group assembled at the Senegambia area with the intention of holding the protest. However, they were arrested by the police and later charged with the offences of "unlawful assembly", "conduct likely to cause breach of peace" and "conspiracy to commit offences". The group subsequently re-applied for a licence to hold the protest but never received a response. On 9 July 2019, the group was informed by the police that the charges levelled against them had been dropped.

[2] (1)The Inspector-General of Police in the city of Banjul or the Kanifing Municipality or; in any of the regions, the Governor or other person authorized by the president may direct the conduct of all public processions and prescribe the route by which and the times at which any procession may pass. (2) A person who is desirous of forming any public procession shall first make application for a license to the Inspector-General of Police or the Governor of the region, or other person authorized by the President, as the case may be, and if the Inspector-General of Police or the Governor of the region or other person authorized by the President is satisfied that the procession is not likely to cause a breach of the peace , he or she shall issue a license specifying the name of the license and defining the conditions on which the procession is permitted to take place. (3) A condition restricting the display of flags, banners, or emblems section shall not be imposed under subsection (2) of this section except such as are reasonably necessary to prevent risk of a breach of the peace. (4) A magistrate or police officer not below the rank of Sub-inspector may stop any public procession for which a license has not been issued or which violates any of the conditions of a license issued under subsection (2) of this section, and may order it to disperse. (5) A public procession which- (b)Takes place without a license under subsection (2) of this section, or (c)Neglects to obey any order given under subsection (4) of this section, is deemed to be an unlawful assembly, and all persons taking part in the procession, and in the case of a public procession for which no license has been issued, all persons taking part in the convening, collecting or directing of the procession commit a cognizable offence and on summary conviction before a Magistrate, are liable to imprisonment for a term of three years . Quoted from the ECOWAS CCJ judgment

B. Alleged violations

5. The Applicants allege the following:
    i. Violation of the rights to freedom of assembly under Article 11 of the Charter and Article 21 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), and freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR;
    ii. Violation of Article 1 of the Charter and Article 2(2) of ICCPR.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was filed on 16 September 2020 and served on the Respondent State on 23 September 2020. The Applicants filed their submissions on reparations on 13 October 2020 and these were transmitted to the Respondent State on 16 October 2020.

7. On 26 October 2020, the Respondent State filed its list of representatives. On 10 December 2020, the Respondent State was reminded to file its Response but it failed to file a response.

8. On 15 April 2021, the Applicants filed a request for a judgment in default and this was transmitted to the Respondent State on 23 April 2021. On 17 June 2021, the Respondent State was further reminded to file its Response and that if it failed to file a Response within the stipulated time, the Court would proceed to deliver a judgment in default. The Respondent State has failed to file a Response.

9. Pleadings were closed on 22 September 2021 and the Parties were notified thereof.

IV. PRAYERS OF THE PARTIES

10. The Applicants pray the Court for the following:
    a. a Declaration that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of assembly under Article 11 of the Charter and Article 21 of ICCPR;
    b. a Declaration that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR;
    c. a Declaration that the rights of the Third and Fourth Applicants under Article 11 of the Charter and Article 21 on one hand, and further under Article 9(2)of the Charter and 19(2) of the ICCPR on the other hand, were violated by the disbandment of the 10 May 2019 protest and their subsequent arrest.
    d. a Declaration that the Republic of the Gambia has violated Articles 1 of the Charter and 2(2) of the ICCPR.
    e. Order the Republic of the Gambia to immediately repeal or amend Section 5 of the Public Order Act to align with provisions of the Article 9(2) and 11 of the Charter and Articles 19(2) and 21 of the ICCPR.
    f. An order for costs;
    g. Any other order that the Court deems fit in the circumstances.

11. The Respondent State did not participate in these proceedings and, therefore, did not make any prayers.

V. ON THE DEFAULT OF THE RESPONDENT STATE

12. Rule 63(1) of the Rules of the African Court on Human and Peoples' Rights (hereinafter referred to as "Rules") provides:

> Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.

13. The Court notes that Rule 63 (1) sets out three conditions for a decision in default: i) the notification to the Respondent State of all the documents on file ii) the default of the Respondent State; iii) application by the other party for a decision in default or the Court on its own motion decides to enter a decision in default.

14. On the first condition, the Court notes that, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. With respect to the second condition, the Respondent State, was granted sixty (60) days to file its Response. However, it failed to do so. The Court also sent two reminders to the Respondent State on 10 December 2020 and 17 June 2021 granting it thirty (30) days respectively to file its Response but it failed to do so. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.

15. With respect to the last condition, on 15 April 2021, the Applicants requested the Court for a decision in default thereby fulfilling this condition.

16. The required conditions having thus been fulfilled, the Court enters this decision in default.[3]

VI. JURISDICTION

17. The Court observes that Article 3 of the Protocol provides as follows:

> 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

[3] *African Commission on Human and Peoples' Rights v. Libya* (merits) (3 June 2016) 1 AfCLR 153 §§ 38-42; *Robert Richard v. United Republic of Tanzania,* ACtHPR, Application No. 035/2016, Judgment of 2 December 2021 (merits and reparations) § 16.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

18. Pursuant to Rule 49(1) of the Rules "[t]he Court shall conduct preliminarily examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules".

19. From the record, the Court finds that it has personal jurisdiction, as the Respondent State is a party to the Protocol and has deposited the Declaration provided for under Article 34(6) of the Protocol with the African Union Commission.

20. The Court has material jurisdiction because the Applicants allege the violation of the Charter and the ICCPR[4] to which the Respondent State is a party.

21. The Court has territorial jurisdiction as the facts of the case occurred in the Respondent State's territory.

22. As regards temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the impugned law remains in the laws of the Respondent State.[5]

23. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

[4] The Respondent State became a Party to the ICCPR on 22 March 1979.
[5] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

VII. ADMISSIBILITY

24. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter." Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

25. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. comply with the Constitutive Act of the Union and the Charter;
> c. not contain any disparaging or insulting language;
> d. not be based exclusively on news disseminated through the mass media;
> e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> g. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

26. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the parties. However, pursuant to Rule 50(1) of the Rules, the Court is required to determine if the Application fulfils all the admissibility requirements.

27. From the record, the Court notes that the Applicants have been identified by name, in fulfilment of Rule 50(2)(a) of the Rules.

28. The Court notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union stated in Article 3(h) is the promotion and protection of human and peoples' rights. The Court therefore considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and holds that it meets the requirement of Rule 50(2)(b) of the Rules.

29. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

30. The Application is not based exclusively on news disseminated through mass media but on legal documents in fulfilment of Rule 50(2)(d) of the Rules.

31. With regard to the requirement of exhaustion of local remedies, the Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are unavailable, ineffective, insufficient or the procedure to pursue them is unduly prolonged.[6]

32. In the instant case, the Court notes that the Applicants have made two claims. The first claim is related to the application of Section 5 of the Respondent State's Public Order Act, while the second claim is related to the alleged violations of the rights of the Third and Fourth Applicants.

33. For the first claim, the Applicants were required to seize the Supreme Court of the Respondent State to challenge the constitutionality of the Public Order Act. However, the Applicants adduced evidence showing that the Supreme Court of the Respondent State had already considered a case by other Applicants, that is Ousainou Darboe and others, challenging the

[6] *Zongo and Others v. Burkina Faso* (preliminary objections) *op. cit.* § 84.

constitutionality of Section 5 of the Public Order Act and it held that the impugned law was consistent with the Respondent State's constitution.[7]

34. In this regard, the Court holds that the Applicants could not have been expected to also seize the Supreme Court, the highest Court of the Respondent State, as there would have been no prospect of success, making the remedy ineffective.[8]

35. With regard to the claim that the rights of the Third and Fourth Applicant were violated in relation to the disbandment of the protest and subsequent arrest in 2019, the Court notes that the Applicants were required to file their claims at the High Court of the Respondent State and exhaust other local remedies before seizing this Court. However, they did not make any submissions or adduce evidence on exhaustion of local remedies. The Court therefore holds that this claim will not be considered further for lack of exhaustion of local remedies.

36. With respect to filing an Application within a reasonable time, the Court recalls that Article 56(6) of the Charter, requires that an Application be filed within: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

37. In the present Application, the Court notes that the local remedies were ineffective as regards the challenge of the Public Order Act. However, the Court notes that Article 56(6) of the Charter empowers the Court to set a date as the commencement of the time limit. In this regard, the Court notes that the Respondent State deposited its Declaration under Article 34(6) of the Protocol on 3 February 2020 and therefore, the Applicants could only seize the Court after that date. The Applicants filed their Application on 16

[7] See SC/03/2016 *Ousainou Darboe and 19 others v Inspector General of Police and 2 others*
[8] *Jebra Kambole v. United Republic of Tanzania,* ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits and reparations) §§ 37-38.

September 2020, that is seven (7) months and thirteen (13) days after the Respondent State filed its Declaration.

38. The Court notes that the Applicants filing of their Application within seven (7) months and thirteen (13) days after the Respondent State deposited its Declaration under Article 34(6) of the Protocol is reasonable, given that it was filed within the same year as the Declaration was deposited.

39. Lastly, according to Article 56(7) of the Charter and Rule 50(2)(g) of the Rules of Court, an application will only be considered if it has not been "settled" "in accordance with the principles" of the Charter of the United Nation or the Constitutive Act of the African Union or the provisions of the Charter.[9]

40. The Court notes that the notion of "settlement" implies the convergence of three major conditions: (i) the existence of a first decision on the merits (ii) the identity of the parties; (iii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case.[10]

41. With regard to a first decision on the merits, the Court recalls that on 20 January 2020, the Economic Community Of West African States, Court of Justice (hereinafter referred to as "ECOWAS CCJ") rendered judgment on the merits in *Ousainou Darboe and 31 others v the Republic of the Gambia*.[11] The ECOWAS CCJ held:

> In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter

[9] *Jean-Claude Roger Gombert v Cote d Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 44. *Dexter Johnson v. Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99 § 45.

[10] See *Gombert v Cote d'Ivoire* (jurisdiction and admissibility) § 45; Dexter Johnson v Ghana (jurisdiction and admissibility) § 48; See *Suy Bi Gohore v Cote D'Ivoire*, ACtHPR, Application No. 044/2019, Judgment of 15 July 2020 (merits and reparations) § 104.

[11] ECOWAS, Suit no. ECW/CCJ/APP/27/1 – *Ousainou Darboe and 31 others v the Republic of the Gambia*

> and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review.[12]

42. With respect to the identity of the parties, the Court notes that the Respondent State is the same in both cases, it is therefore only necessary to establish the identity of the Applicants. The Applicants before this court are Emil Touray, Saikou Jammeh, Haji Suwareh and Isatou Susso while the Applicants in the ECOWAS case were Ousainou Darboe and 31 others. None of the thirty-two Applicants in the ECOWAS case appear before this Court in the Emil Touray Application. However, in relation to this requirement, the Court recalls its previous judgment where it held that:

> …nowhere in the file before the Court is there a connection between APDH and the Applicants suggested, let alone established. However since the current Application and *APDH v Cote D'Ivoire* (merits) can be qualified as public interest cases, the "identity of parties" can be considered as being similar, to the extent that they both aim to protect the interest of the public at large rather than only specific private interests.[13]

43. Consequently, given that the Applicants in the Emil Touray application challenge the validity of the law, which had been challenged at the ECOWAS CCJ, then both parties can be said to have filed public interest cases and thus both sets of Applicants are closely associated with the claim and can be deemed identical.

44. With regard to the identity of the claims, the Court must decide whether the legal and factual basis of the claims are the same. The Court notes that both cases challenge the validity of Section 5 of the Respondent State's Public Order Act in relation to international instruments ratified by the Respondent State and the facts in both cases arise from the protests and the subsequent

[12] *Ibid* at page 34.
[13] *Suy Bi Gohore v Cote D'Ivoire* (merits and reparations) § 105.

arrests and detention of the protesters. Furthermore, the prayers in both cases are similar in that they request that the Section 5 of the Public Order Act be declared inconsistent with the provisions of the Charter. In light of the foregoing, the Court finds that the claims in both the ECOWAS CCJ and this Court arise from the same legal and factual basis and are therefore identical.

45. In light of the foregoing, the Court finds that, the claim against Section 5 of the Public Order Act has been settled in accordance with the principles of the Charter and therefore, the Application fails to meet the requirement set out under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules and is declared inadmissible.

VIII. COSTS

46. The Applicant prays the Court, for the Respondent State to pay for the costs of the Application. The Respondent State did not file a Response.

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47. The Court notes that Rule 32(2) of its Rules[14] provides that "unless otherwise decided by the Court, each party shall bear its own costs."

48. Therefore, the Court decides that each Party shall bear its own costs.

IX. OPERATIVE PART

49. For these reasons,

THE COURT,

[14] Rule 30(2) of the Rules of Court, 2 June 2010.

Unanimously:

On jurisdiction

i. *Declares* that it has jurisdiction;

By a majority of Nine (9) for, and Two (2) against, Justice Blaise TCHIKAYA, the Vice President and Justice Rafaâ BEN ACHOUR Dissenting

On admissibility

ii. *Declares* the Application inadmissible;

On costs

iii. *Orders* each Party to bear its own costs.

Signed:

Imani D. ABOUD, President;

Blaise TCHIKAYA, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

M- Thérèse MAKAMULISA Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Modibo SACKO, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Joint Dissenting Opinion of Justice Blaise TCHIKAYA and Justice Rafaâ BEN ACHOUR is appended to this Ruling.

Also, in accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Joint Separate Opinion of Justice Ben KIOKO and Justice Stella I. ANUKAM is appended to this Ruling.

Done at Arusha, this Twenty-Fourth Day of March in the Year Two Thousand and Twenty-Two in English and French, the English text being authoritative

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JOINT SEPARATE OPINION OF JUDGE BEN KIOKO AND JUDGE STELLA ANUKAM

1. We are in agreement and fully subscribe to the majority decision on the issues before this Court for determination as articulated in the body of the Ruling. However, there are two issues on which we feel that the reasoning of the Court could have been strengthened for purposes of clarity and precision. There is also a related issue that the Court did not address at all.

2. In the instant Application, one of the main issues for determination relates to the application of the admissibility condition in Article 56 (7) of the African Charter, which provides that disputes that have been settled by a competent tribunal are not admissible.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

3. The second issue forming the basis of this separate opinion relates to the right to freedom of Assembly under Article 11 of the African Charter and Article 21 of the International Covenant on Civil and Political Rights ("the ICCPR") and; freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR. The Application raises for determination the important issue of what are the permissible limitations to the enjoyment of the right to freedom of assembly, which has implications for other rights and which, the ECOWAS Community Court of Justice (ECOWAS Court)[1] alluded to in the body of its judgment.

FORUM SHOPPING AND DUPLICATION

4. We shall now proceed to deal with the first issue on application of Article 56 (7) of the Charter and Rule 50(2)(g) of the Rules of Court, which has already been settled in the Court's jurisprudence in *Jean-Claude Roger Gombert v Cote d Ivoire and Dexter Johnson v. Republic of Ghana* .[2] In those two matters, the claims had been settled by the ECOWAS Court and the Human Rights Committee, respectively, and the court decided that the applications were inadmissible since they had been settled. Article 56 (7) stipulates that the communications relating to human and peoples' rights….shall be considered if they *"do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter*".

5. Article 56(7) of the African Charter on Human and Peoples' Rights is closely related to the doctrine of *Res judicata* which emphasizes that there should be finality in litigation. Furthermore, a decision from a competent tribunal is binding upon the parties and therefore cannot be subject to re-litigation. [3] The binding nature of judgments is buttressed by "…centuries-old practice of attributing a 'final and binding' effect to arbitral awards and other international judicial decisions and to the practice of recognising the validity of judgments as manifested in numerous international instruments, including the constitutive instruments of most major international courts and tribunals."[4]

6. The aim of this rule is to avoid forum shopping, whereby a party that is not satisfied with a judgment of a tribunal would move from one tribunal to the other in search of a satisfactory remedy. This is also linked to the doctrine of *electa*

[1] ECOWAS, Suit no. ECW/CCJ/APP/27/1 – *Ousainou Darboe and 31 others v the Republic of the Gambia*
[2] *Jean-Claude Roger Gombert v Cote d Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 44. *Dexter Johnson v. Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99 § 45.
[3] L.G.P.Specker "remedying the normative impacts of forum shopping in international human rights tribunal" THE NEW ZEALAND POSTGRADUATE LAW E-JOURNAL (NZPGLeJ) - ISSUE 2 / 2005
[4] Y. Shany *The Competing jurisdictions of International Courts and Tribunals*, (Oxford University Press, Oxford, 2003) at 245.

una via which provides that once a party chooses a forum to address their claims, they are precluded from seeking the same reliefs in other forums.[5]

7. The principle of *res judicata* signifies that a dispute that has been adjudged, has been settled in totality and thus the parties or "their privies" are precluded from bringing a similar claim to another tribunal.[6]

8. Another objective of the *res judicata* rule is to avoid conflicting judgments which may leave the matter unresolved and also "threaten the stability and legitimacy" of international human rights law. Moreover, it also seeks to avoid "double compensation" and the time and cost of constant litigation over the same issue.[7]

9. The Human Rights Committee does not have the same rule, rather it has the *lis pendens* rule, however, in relation to the European Court of Human Rights (ECHR), parties to both courts can make a reservation to the effect that an applicant cannot seize either tribunal after a decision by the other. The reservation is so strict that the Human Rights Committee has even rejected cases which the ECHR had dismissed at the admissibility stage.[8]

10. It is for the above reasons that we share the view of the majority, pursuant to the consistent jurisprudence of the Court that a matter that has been resolved by another extra territorial competent tribunal cannot be entertained. The Court cannot but discourage forum shopping and avoid conflicting decisions among different international bodies. Indeed, it is with this in mind that the Court has been engaging and holding judicial dialogues with the Regional Economic Communities' Courts such as the ECOWAS Court of Justice and the East African Court of Justice, which have human rights mandate. To do otherwise is to put in place a fertile ground for conflicting decisions and legal uncertainty.

THE RIGHT TO FREEDOM OF ASSEMBLY UNDER ARTICLE 11 OF THE CHARTER AND ARTICLE 21 OF THE ICCPR;

11. The Applicants sought from the Court a Declaration, inter alia, to the effect that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of assembly under Article 11 of the Charter and Article 21 of ICCPR; that the section is a violation of the right to freedom of expression under Article 11 of the

[5] Y. Shany *The Competing jurisdictions of International Courts and Tribunals*, (Oxford University Press, Oxford, 2003) at 22.
[6] Nkhata "*Res judicata* and the Admissibility of Applications before the African Court on Human and Peoples' Rights : A fresh look at *Dexter Johnson* v *the Republic of Ghana*" The law and practice of international courts and tribunals (2020) 19 470-496 at 481.
[7] J Pauwelyn and L. E. Salles "Forum Shopping before International Tribunals: (Real) concerns, (Im) possible solutions" 42(1) *Cornell international law journal* (2009) at 83.
[8] P.R. Ghandhi P.R. *The Human Rights Committee and the Right of the Individual Communication: Law and Practice* (Ashgate Publishing Ltd, London, 1998) at 229.

Charter and Article 21 of ICCPR; that the the disbandment of the 10 May 2019 protest and the subsequent arrest of the Third and Fourth Applicants violated their rights, and for an order that the Respondent State immediately repeals or amends Section 5 of the Public Order Act to align with provisions of the Article 9(2) and 11 of the Charter and Articles 19(2) and 21 of the ICCPR.

12. These requests were litigated before the ECOWAS Court which correctly held, *inter alia,* that the factors governing the imposition of restrictions on enjoyment of human rights are necessity and proportionality[9]. The said Court also considered the African Commission's Guidelines on Freedom of Association and Assembly,[10] which prescribes that the ability to participate and organise Assemblies is a right and not a privilege and that authorisation to exercise this right should not be a requirement. General Comment number 37 of the Human Rights Committee also requires that state interventions "should be guided by the objective to facilitate the enjoyment of the rights rather than seeking unnecessary or disproportionate limitations to it".

13. On this issue, the ECOWAS Court concluded that the provisions of section 5 of the Public Order Act of the Republic of the Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the Court went on to find that the Section of the law, gives unfettered discretion to the authorities to deny permits for assemblies and that "**the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review".**[11]

.

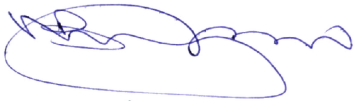
14. This Court ought to have considered whether these findings are in harmony with each other and more significantly whether having underlined the need for that requirement to be reviewed, but not making any orders to that effect in the operative part of its judgment, has any implications in determining whether this claim can be said to have been settled.

15. It is our considered opinion that this pertinent observation in the body of the judgment was so crucial that it ought to have found its way into the operative part of the judgment of the ECOWAS Court, in the absence of which we consider this to be *obiter dicta,* and of no effect. Quite apart from the legal effect of the omission, very few readers may end up seeing that observation by the ECOWAS Court. As was observed by Lord Burrows "*there are few people who read every word of a judgment"*[12]and most readers will go straight to the

[9] Application 004/2013, Lohe Issa Konate v Burkina Faso, African Court. See also Communication No: 140/94; 141/94;145/95; Constitutional Rights Project, Civil liberties Organization and Media Rights Agenda v Nigeria African Commission on Human & Peoples' Rights, Para 41- 42.
[10] Part II, Para 71
[11] *Ibid* at Page 34.
[12] See Lord Burrows, Justice of the Supreme Court of the United Kingdom 20 May 2021, on **"**Judgment-Writing: A Personal Perspective" at the Annual Conference of Judges of the Superior Courts in Ireland,

operative part of the judgment. The above notwithstanding, we stand with the majority opinion

Signed: **Signed**



Ben KIOKO, Judge Stella I Anukam, Judge

Done at Arusha, this 24 th Day of March in the year Two Thousand and Twenty Two, in English and French, the English text being authoritative.

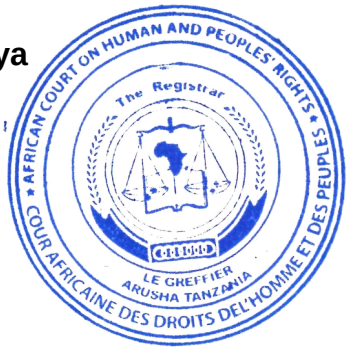
page 2 in which he stresses the three Cs (clarity, coherence and conciseness). Lord Burrows asserts "There are few people who read every word of a judgment. …. So, for example, an academic, unlike the parties, is rarely interested in the ins and outs of the facts and will often rely on a headnote for the facts, if there is one. What the academics are interested in is the law. It makes no difference to an academic if the judgment has 300 paras on the facts or 30 paras on the facts. All that fact-finding will be skipped or quickly flicked through in any event although he or she may have to dip into it further at some stage".

CASE OF EMIL TOURAY AND OTHERS v. REPUBLIC OF THE GAMBIA

Application No. 026/2020

Joint Dissenting Opinion of Judges

Rafaâ Ben Achour and Blaise Tchikaya



1. We deeply regret that we were unable to vote in favour of the Court's decision to declare Application No. 026/2020 *Emil Touray et al. v. The Republic of The Gambia* inadmissible pursuant to Article 56(7) of the African Charter on Human and Peoples' Rights (hereinafter "the Charter") and Rule 50(2)(g) of the Rules of Court (hereinafter "the Rules").
2. Indeed, in paragraph 41 of the judgment, the Court "[r]ecalls that on 20 January 2020, the Economic Community of West African States, Court of Justice (hereinafter referred to as "ECOWAS CCJ") rendered judgment on the merits in *Ousainou Darboe and 31 others v the Republic of the Gambia*[1]. The ECOWAS CCJ held as follows:

> In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review[2].

3. The Court draws a conclusion in § 43 unrelated to the foregoing, that: "Consequently, given that the Applicants in the Emil Touray application challenge the validity of the law, which had been challenged at the ECOWAS CCJ, then both parties can be said to have filed public interest cases and thus both sets of Applicants are closely associated with the claim and can be deemed identical". In other words, the Court considers that the case was not settled by the ECOWAS Court notwithstanding the fact that the parties are not identical.
4. In our view, the case before the Court was not "settled" by the ECOWAS Court of Justice. First, the identity of the parties before the ECOWAS Court

[1] ECOWAS, Application No. ECW/CCJ/APP/27/1 - *Ousainou Darboe and 31 others v. the Republic of The Gambia.*
[2] Ibid., § 34.

on the one hand, and before this Court on the other, is not established (A). Secondly, and assuming that the identity of the parties is certain, we consider that the case was not settled by ECOWAS and that its referral to the Court was in order (B).

A - The identity of the parties is not established in the instant case

5. Article 56(7) of the Charter, which restates *in extenso* the provisions of Article 50(2)(g) of the Rules of Procedure, sets out the admissibility requirements of communications to the African Commission on Human Rights (hereinafter "the Commission") and Applications brought before the Court, namely that they “do not raise any matter or issues previously settled[3] by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. As recognised by the doctrine, "[this condition is a factor of legal certainty. It refers to the concept of *'res judicata'* and suggests that rules made on the basis of the African Charter have the force of *res judicata*]".[4]
6. According to the jurisprudence of the African Commission,[5] the purpose of such a provision is to avoid accusing member states twice for the same alleged violations of human rights. Indeed, this principle is linked to the recognition of the force of *res judicata* of decisions rendered by international and regional courts and/or institutions such as the African Commission.
7. However, as is clear from the concordant jurisprudence of the Commission and the Court, applying this condition requires that the parties, the case and the subject of the communication submitted to the Commission or the

[3] "Settled” in English
[4] Fatsah Ouguergouz, "Article 56", in Maurice Kamto (Direction), *La Charte africaine des droits de l'homme et des peuples et le Protocole portant création de la Cour africaine des droits de l'homme et des peuples, commentaire article par articles*, Brussels. Éditions Bruylant and Éditions de l'Université de Bruxelles, 2011, pp. 1024 - 1050.
[5] ACtHPR, Communication 260/02: *Bakweri Land Claims Committee v. Cameroon*, 36th Ordinary Session of November 23 to December 7, 2004, § 49.

Application brought before the Court be the same as in the case already settled in accordance with the Charter.[6]

8. The African Court thus agrees with the position of the European Court that the Application must not be essentially the same as another Application, that is, the facts, parties and claims must not be the same.
9. In the instant case, the Court explicitly admits that the Applicants before the ECOWAS Court and those before the ACtHPR are not the same. Indeed, in § 43 of the judgment, this Court explicitly notes that "The Applicants before this court are Emil Touray, Saikou Jammeh, Haji Suwareh and Isatou Susso while the Applicants in the ECOWAS case were Ousainou Darboe and 31 others.".[7] The Court elaborates on this finding in no uncertain terms by stating that "None of the thirty-two Applicants in the ECOWAS case *appear before this Court* in the Emil Touray Application".
10. Curiously, the Court disregards this first fundamental requirement and draws a conclusion which could not be more astonishing, by ending § 43 with an erroneous reference to its own judgment in *Suy Bi Gohoré v. Côte d'Ivoire.*[8] In the said judgment, the Court considered if the parties were the same in the applications, namely, *Suy Bi Gohoré* and *APDH*, both of which were before it. It should be noted that, contrary to what this judgment suggests, the Court did not find that the *Suy Bi Gohoré* Application was inadmissible, but did deal with it on the merits, despite the fact that the parties were the same.

[6] In this sense, see the judgments of the Court of Appeal: *Gombert v. Côte d'Ivoire*, Judgment of March 22, 2018; *Dexter Johnson v. Ghana, Judgment of March 28, 2019*; *Suy Bi Gohoré v. Côte d'Ivoire*, Judgment of July 15, 2020.

[7] The Applicants before the ECOWAS Court of Justice are: Oussainou Darboe, Kemmesseng Jammeh, Femi Peters, Lamin Dibba, Lamin Jatta, Yaya Bah, Baboucarr Camara, Fakebba Colley, Ismaila Ceesay, Mamodou Fatty, Dodou Ceesay, Samba Kinteh, Mamudu Manneh, Nfamara Kuyateh, Fanta Darboe-Jawara, Lamin Njie, Juguna Suso, Momodou L. K Sanneh, Yaya JammehMasaneh Lalo Jawlan, Lamin Sonko, Modou Toura ,Lansana Beyai, Lamin Marong, Alhagie Fatty, Nogoi Njie, Fatoumata Jawara, Fatou Camara, Kafu Bayo , Ebrima Jadama, Modou Ngum, United Democratic Party (UDP), The Gambia (suing for himself and for the succession of *Ebrima Solo Sandeng (deceased)*

[8] § 105 of the *Suy Bi Gohore* decision.

B - The case has not been settled by the ECOWAS Court of Justice

11. In paragraph 45 of its judgment, the Court "[c]onsiders the claim against Section 5 of the Public Order Act has been settled in accordance with the principles of the Charter and therefore, the Application fails to meet the requirement set out under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules and is declared inadmissible".

12. The notion of settlement of a case refers, *a priori, to* a cardinal principle of international law, namely, the principle of peaceful settlement of international disputes enshrined in Article 2 § 3 of the Charter of the United Nations and specified in Chapter Vi of the same Charter, particularly in Article 33 which sets out the various modes of settling disputes. This principle is also stated in Article 4(e) of the Constitutive Act of the African Union.
13. However, although commonly used, the notion of settlement, which, *a priori,* is simple, is by no means clear. In the context of this case, the settlement referred to is jurisdictional settlement. Jurisdictional settlement is defined as "[the process of ending an international dispute by the decision of a body that is external to the parties, empowered to render a decision that is based on law and is binding on the parties]"[9]
14. The European Court considers that, when it finds that the conditions laid down in Article 35 § 2 (b) have been met owing to the existence of a decision on the merits at the time it examines the case, it must declare inadmissible an application that has already been examined by another international body. According to the European Court, a decision on the merits of a case requires the following characteristics: the decision must be taken after an adversarial procedure; [10] the decision must be reasoned, [11] notified to the parties and published; *the decision must aim to put an end to the violation*; the victims must be able to obtain reparation.

[9] Jean Salmon (Direction), *Dictionnaire de droit international public*, Brussels - Paris, Bruylant - AUF, 2001, p 962.
[10] ECHR, Application no. 21449/04, *Celniku v. Greece*, Judgment of 5 July 2007, §§ 39-41
[11] ECHR, Application No. 2096/05, *Peraldi v. France*, Decision on admissibility of April 7, 2009.

15. To come back to the ruling of the ECOWAS Court of Justice, it should be noted that the decision of the sister court did not put an end to the dispute over the inconsistencies between section 5 of the Public Order Act and Articles 1, 9(2) and 11 of the Charter and Articles 19(2) and 21 of the International Covenant on Civil and Political Rights. The Abuja Court did not stop the violation. It even implicitly admitted that the impugned section 5 of the Public Order Act and the requirement to obtain the approval of the Inspector General of the Gambia Police Force could lead to abuse: “In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review”.
16. In view of the foregoing, we believe that the Court could have declared the Application admissible and ordered the amendment of the challenged law in accordance with the Charter and the ICCPR.
17. In this regard, we recall the words of the Human Rights Committee's General Comment No. 37 to the effect that a prior authorisation procedure is incompatible with the very principle of freedom: "[Requiring authorisation from the authorities undermines the principle that the right to peaceful assembly is a fundamental right]. [12] Notification systems requiring those intending to hold a peaceful assembly to inform the authorities in advance and to provide some important details are permissible to the extent necessary to assist the authorities in facilitating peaceful assembly and protecting the rights of others. [13] However, this requirement must not be misused to discourage peaceful assembly and, as with other interferences with this right, must be justified based on one of the grounds set out in

[12] CCPR/C/MAR/CO/6, para. 45; CCPR/C/GMB/CO/2, para. 41; and African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para. 71.
[13] *Kivenmaa v. Finland*, para. 9.2. See also African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para 72.

Article 21.[14] The application of a prior notification procedure cannot become an end in itself.[15] Prior notification procedures should be transparent and not unnecessarily burdensome;[16] the conditions they impose on organisers should be proportionate to the impact the meeting is likely to have on the public, and they should be free of charge."

Judge Rafaâ Ben Achour

Judge Blaise Tchikaya

[14] *Kivenmaa v. Finland*, para. 9.2. See also *Sekerko v. Belarus*, para. 9.4.
[15] *Popova v. Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.5.
[16] *Poliakov v. Belarus*, para. 8.3.