

COMMUNITY COURT OF JUSTICE  
ECOWAS  
COMMUNITY OF NATIONS  
SECRETARIAT  
TRIBUNAL OF THE ECONOMIC COMMUNITY  
CLOSED



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ON THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF  
WEST AFRICAN STATES HELD IN ABUJA, NIGERIA.

SUIT NO. ECOWAS/ABJ/2008/12

JUDGMENT IN THE WEST GAMBIA CASE,

DISTRICT:

- (1) Federal Society of African Journalists  
(2) Vizou Camera  
(3) Foton Law Monitor  
(4) Albagie Jabe  
5. Tariq Fahey



Plaintiffs

And

The Republic of The Gambia

Defendant

Before their Lordships,

Hon. Justice Friday Onyekwelu -- Presiding

Hon. Justice Maria De Ceu Silva Moreira -- Member

Hon. Justice Alimatu Sall -- Member

Assisted by: All season Attorney

Deputy Chief Registrar

## **II. REPRESENTATION OF THE PARTIES**

For the Plaintiffs:

- i. Nasib Ajami
- ii. Angel Umaru
- iii. Hadiza Sule

For the Defendants:

- i. Mohammed B. Alhassan
- ii. I.R. Douglas

For the Amici Curiae:

- i. M.D. Ogundina-Nkonye
- ii. Taiji Ajani
- iii. Nnamdi Wanyi

## **1. SUMMARY OF FACTS AND PROCEDURES**

The first Plaintiff who described herself as a leading representative body for journalists in Africa founded in Abuja Nigeria in 2002, an affiliate of the International Federation of Journalists having about six hundred thousand (600,000) Members including the territory of the Italian, brought this application in conjunction with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants are the Nationals of the Defendant and Ex-members of the army, city of West African States (FOODWAF), citizens who now live in exile. They averred that they feel the Plaintiff (the Defendant's "for lack of prosecution and other terms of punishment" behind bars, the time of physical and mental torture, as a consequence, their work as journalists.

The 2<sup>nd</sup> Plaintiff further avers that following false information in an article against the President of the Defendant, she was arrested and detained on the 10<sup>th</sup> of September 2013 by officers of the Security Agency of the Defendant; court martial which on the 10<sup>th</sup> of October, 2013, she was charged under the false news provisions of Section 629 of the Criminal Code 2006 and Section 75 of the Information and Communications (Amendment) Act 2009. She was sentenced to prison jail of Canadian Dollars 50M TD of ₦ 600,000 (Five million Nigerian Naira).

Six months after her trial had been politically motivated, she fled through transit to the United States where she remains in exile till date. (See the 2<sup>nd</sup> Applicant's witness Statement).

In the past, the Trial Court avers that following series of articles and public statements made in her service in September 2010 and October 2010, concerning the Government and President of the Defendant, she was detained on the 2<sup>nd</sup> of March 2013, interrogated charged and subsequently tried (according to the 3<sup>rd</sup> Defendant).

in the prosecution and publication of his speech. The speech was, in accordance with Article 18 of the Constitution of the Federal Republic of Germany, dated 25th August 1949 and fined SGD 250, 00,- (Two hundred and Fifty German Mark) payable within two weeks, in default of which he will go to jail for a year from that date.

The 3<sup>rd</sup> Plaintiff was able to pay the fine as a result of substantial contributions from the German Press Union, family and supporters. He subsequently fled the GDR and is now residing in the United States of America.

On this Part, the 4<sup>th</sup> Appellant alleges that he was arrested on the 7<sup>th</sup> of February 2003 as a result of the article in the scandal taken by one Meyer Leining Party against the execution of nine condemned Prisoners. He further alleges that while he stated he was involved in a completely different matter in those cases. He was also known with JAK and speaks to the point of unconsciousness, subjected the aggregate sum of SGD 5000.00 to the State. On the orders of a Supreme Officer, he was taken into criminal custody where he was treated (in disgrace from hospital). In was charged inter alia with production and possession of publications with seditious intent, under S.52 of the Criminal Code. He was detained and held in custody for over seven (17) months until the end of the trial in which he was acquitted. Following an instruction that the State appealed the acquittal and for reasonably fear of further persecuting him, the 4<sup>th</sup> Appellant fled to United States with other contestants.

It is in summary of note here that the Appellants sought the following in addition to the Court:

- + A Declaration, that the actions of the Republic of Zambia (+ the Defendants in this case) in enacting the statutory provisions that are subject of this application violate particularly Sections 31, 32, 33A, 39, 178, 180, 181 and 181A of the Criminal Code Cap 100(1) of 2009 and S. 173A of the Information and Communications (Amendment) Act of 2012, by means of deliberately targeting journalists by sending threatening the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants and causing them physical, psychological, emotional and reputational injury (+ that forcing them to flee) in essence the Zambia is in violation of the Appellants human rights under international law, namely, the right to receive information and express and disseminate opinion (under Articles 9(1) and 9(2) of the African Charter on Human and Peoples' Rights, "freedom of speech" under Article 9(2) of the ICPBC, the right of journalists under Article 56(1) of the Revised UNCACAS Treaty, the right to liberty and security under Article 6 of the African Charter and Article 9(1) of the ICPBC and the right of Community Organisations to operate freely under Article 2(2) of the African Charter and Article 12(4) of the ICPBC.

- vii. A Declaration that in subjecting the female Applicant to torture or other cruel, inhuman or degrading treatment or punishment, and causing her physical, mental, psychological and emotional injury, The Government violated his human rights, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment under Article 5 of the Charter and Article 7 of the ICR
- iii. A Declaration that in maintaining the statutory provisions mentioned in (i) above, the Republic of The Gambia have consented to act in gross violation of the Applicant's rights and in breach of their obligations under the Revised Geneva Treaty, African Charter and the ICCPR
- iv. A Declaration to the Court mandating and compelling the Republic of The Gambia to repeal the relevant statutory provisions immediately or otherwise amend its laws in order to meet its obligations under international law in full, under the African Charter, the ILC Principles of customary international law.
- v. An Order mandating and compelling the Respondent to effectively enact and implement laws, regulations, and safeguards to ensure that its obligations under treaties, conventions, laws prohibiting torture

and other civil, human or refugee treatment or punishment including under the Charter, the UNCRC and customary international law.

- v. An order for reparation, including physical, psychological, social and economic rehabilitation in respect of the violations of the second, third and fourth Appendixes cumulatively;
- vi. STEPHEN HERTZLER other remedy in mind of the Honourable Court. Curiously, with regard to reparation the Applicant did not ask for any sum.

However, the Appendix Goods I lists ... what he called "Applicant's speaking notes of the hearing" in which he asked the Court to award 20 million Canadian Dollars each to compensate ... the four Applicants for the violation of their rights under international law including the right to freedom from torture and the sum of 10 million Canadian Dollars each to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants for the violation of their human rights under section 14(1)(a) 2007.

2. On receipt of the Plaintiff's claim, the Defendant filed a notice of jurisdiction Objection pursuant to Article 87(1), 88(1) and 88 of the International Court. The Defendant urged the Court to strike out the two objections e.g. lack of jurisdiction.

When the matter came up for hearing on the 9<sup>th</sup> of April 2017, the Applicant's Counsel brought an application seeking the following relief:

1. An order directing the Clerk to accept the Application to sue John Evans as the 5<sup>th</sup> Applicant;
2. An order granting leave to the Applicants to file and serve a written affidavit on behalf of the 5<sup>th</sup> Defendant and the expected 6<sup>th</sup> Defendant, and thereafter continuing Paragraph 3 of the Originalizing Applications to rule on the motions, if general. The Clerk allowed the Applicants to move their application, which was opposed by the Defendants on the grounds that the proposed affidavit did not comply with the Evidence Act of Nigeria, such that its ruling the Court granted application to join Evans Party as the 5<sup>th</sup> Applicant as the Defendants did not satisfy the conditions set out in my prejudice or the account of the Application being so granted, the Applicants also sought to withdraw their application for acceptance, having which was deemed duly struck off.

Similarly, *America International, the Canadian Journalist for Freedom of Expression Committee* to protect journalists, Privacy House, Pen International, Reporters without Borders and Right to know campaign Such Affairs brought an application pursuant to section 4 of the Order,

and 89 of the Rules of this Court, seeking to join the suit as intervenors' Amici Curiae. The Defendants did not oppose the application. The Court granted the amicus Curiae party leave to file a consolidated brief instead of the briefs they originally filed as amici curiae.

The issues having been joined, the Court proceeded to hear Defendants' preliminary injunction.

## 2. ANALYSIS BY THE COURT

The Complaint is brought by the Plaintiffs against the government of Gambia, a member of the ECOWAS, on the grounds of unlawful detention, and violation of Human Rights of journalists across The Gambia.

The 1<sup>st</sup> Plaintiff Appellant is a leading representative body of journalists in Africa and was granted official NGO Observer status by the African Commission on Human and Peoples' Rights in April 2013.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> and 5<sup>th</sup> Plaintiff Appellants are Gambian journalists and citizens of the Economic Community of West African States (ECOWAS).

The 1<sup>st</sup> Plaintiff avers that the Gambian government has stood upon its discriminatory laws (sections 5, 75 and 51 of the Criminal Code), criminalised press freedom (sections 178, 179, 180 and 181) of the constitution. Article 10, section 2,

and general journalistic sources. This Court has made multiple occasions over the past 15 years.

The 2<sup>nd</sup> Plaintiff avers that she was un lawfully arrested and detained on 29 September 2012 by the officers of the Georgian National Intelligence Agency (NIA). Subsequently in October 2013, she was charged and convicted of being a source of unauthorised classified information relating to the situation around the 2010 European Union Parliamentary election, failing to provide full MUGELI 5,000,000.

In view of further prosecution, the 2<sup>nd</sup> plaintiff fled via Senate to the United States, where she remains in exile till date.

The 2<sup>nd</sup> Plaintiff avers that she was detained on the 28th March 2007, on the grounds of series of articles and public statements published by her against the Georgian President and government between September 2006 and October 2007, and was subsequently charged of violation and publication of false news under the law. On 15<sup>th</sup> April 2008, she was sentenced on 17 months and imposed in jail of GBD 290,000 fine, payable within 2 hours, or in default of payment, four years imprisonment.

The 3<sup>rd</sup> Plaintiff further avers that she made the payment to fulfill the stipulated time with the end of evaded obligations natives and subsequently fled. The Plaintiff fled is now residing in United States, where she remains in exile.

The 4<sup>th</sup> Plaintiff avers, that on the 7<sup>th</sup> of February 2013, he was arrested and unlawfully detained on the grounds of researching and publishing material relating to the actions taken by Major General Trinay against the members of the environmental protesters. He was detained in an isolated room and physically tortured with brutality by the NCA to the point of being hospitalized. After his discharge from the hospital, he was charged with producing and possessing publication with seditious intentions, contrary to the criminal code. Being released on bail pending trial, he was remanded to an administrative cell and was held in solitary confinement for 17 months, throughout of his trial in which he was acquitted.

The 5<sup>th</sup> to the 7<sup>th</sup> of the prosecution and injuries inflicted on the 4<sup>th</sup> Plaintiff, forced him to go into exile and he now resides in Dakar, Senegal.

The Application was later amended to include the 5<sup>th</sup> Applicant as a party.

The Applicants aggrieved by the alleged acts of the Defendants have filed this suit to the enforcement of their fundamental rights as guaranteed under the African Charter on Human and Peoples Rights, and International Convention on Civil and Political Rights.

The Plaintiff upon receipt of the above-mentioned application filed a preliminary objection dated 1<sup>st</sup> January 2016 raising the following issues:

- a. There is no paragraph in the main or files in support of the substitute application which shows that the 1<sup>st</sup> Plaintiff is a juristic person duly registered and duly authorized member countries of ECOWAS.
- b. The 1<sup>st</sup> Plaintiff lacks the necessary standing to institute this action.
- c. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' claim is premature and cannot be maintained for it does not constitute any cause of action.
- d. The 3<sup>rd</sup> Plaintiff's claim is statute-barred.
- e. The Plaintiff-Respondents suit before this court is an attempt to be external sovereignty of the Defendants/Applicants.

The Defendant supported the above objections with legal documents and decided authorities.

In response; (a) the objection raised by the defendant, the Applicant contends that the 1<sup>st</sup> Applicant is a legal person duly registered and registered under Senegalese law. A proof of such registration was the notice attached to the indicated "Annex 2". The Applicant further pointed out that this Court has already granted standing to the 1<sup>st</sup> Applicant, in a previous proceeding; the 1<sup>st</sup> Applicant under its alternative name 'International Federation of Journalists Africa' was the 3<sup>rd</sup> Applicant in the case of *Hydara V. The Comptroller ECW/10/2017/P/501*.

The Appellant further submits that the Respondent's second point is irrelevant and does not advance its case as there is no relevant law in this court's rule on established NGO human rights cases which requires that, in the case of non-governmental organizations, only entities with membership exclusively from ICPRAS member states are entitled to bring applications before the court. The Applicants submit that, moreover, as the position of national non-governmental organization is relevant, it must be taken into account of the country in which it is registered, and whether it is officially recognized there or not.

The applicants submit that the 7th applicant continues living in exile even till date, to suffer a violation of her rights as a journalist, the rights of freedom of expression and liberty by virtue of her being forced to remain in exile.

In addition, they submitted that the Court's persistent and continuous omission in failing to recall the relevant criminal laws under which the 7th Applicant's rights were violated, also means that the Court's violation right to be violated is continuing until this day, since it was previously violated in force.

In conclusion, the Applicants submit that, even if the 7th Applicant were to be held to have gone out of time to bring her claim (which is denied), then this Court ought to exercise its discretion to extend "the interest of justice".

The applicants filed an Application for an exequatur hearing dated 19th January, 2016. A writ of Summons application dated 28th day of March 2016 and application granting leave to the Amici Curiae to intervene and to observe the cited Trial Mater, 2016.

As earlier noted, the applicants file for re-examination of the substantive issues raised by the Applicants, while the Court granted the amici's Curiae permission to file a consolidated brief.

A critical purpose of the application and the corresponding defence times tables is to have and fact find at the preliminary level and to sustain on, suit, A, according, in our considered opinion, this calls for the examination of the preliminary issues first before delving into the issues, if any raised by the substantive application.<sup>14</sup>

### 2.1. PRELIMINARY OBJECTION.

With regard to the preliminary objection, the following issues calls for determination;

i. Whether the Plaintiff is a legal person and whether it has the locus standi to institute this action.

- ii. Whether from the nature of facts before the Court, as set forth above, it is established,

- iii. Whether the "law of" this application discloses a cause of action against the Defendant.

We shall now consider the issues raised.

1. Whether the 1<sup>st</sup> Plaintiff is a legal person and whether it has the legal status to institute this action

In order to find an answer to this question, we shall take an excursion into the meaning of the term "legal person".

The term *legal personality* is defined in the Black's Law Dictionary 9<sup>th</sup> Edition as "the particular status by which the law creates or recognizes and to which it ascribes certain powers and capacity". A legal person therefore is any person (human or non-human) that is endowed by law with legal rights and obligations including the capacity to enter into a contract, the right to sue and be sued. A legal person may either be a natural person or a human or juridical.

In the second instance – a question of law, in all national systems of law, legal personality whether natural or juridical is a requirement for litigating in a particular court or tribunal. It is a pre-requisite for legal capacity.

Legal personality can be conferred either by law or by registration and it is a pre-requisite for both natural persons to institute action either for themselves or on behalf of others.

The submission of the Defendant's preliminary objection is that he is not being a juristic person in the opinion of the law of any ECOWAS member state which brings the present application.

The 1<sup>st</sup> defendant in response to the Defendant's contention, attached a proof of general registration under the Senegalese law and made the following:

The submission of an certificate of registration without "etc." is a prima facie case of evidence of its registration under the laws of Senegal, a member State of ECOWAS. This fact was not contradicted by the Defendant.

In *SHERAP V THE PRESIDENT OF THE FDN & 8 ORS* 2010 UGELR Pg. 247 para 34 this Court held that

"that importers are entitled to the Plaintiff's bill and the payment of its claimants under Nigerian law, notwithstanding the existence without index and note in the Plaintiff's summary copy and legal documents under the name and address of the Plaintiff, of the 'Office of the Federal Republic of Nigeria with residence at Lagos', stated as contained by sentence 4, in the absence of the corresponding reference in the witness, the Plaintiff is a fictitious entity not known."

See also National Coordination of Departments' Delegates of the Civilian Control Sector (CNDP) v. Republic of the Central African Republic (2009) CCR 2009-5.

Thus, *locus standi* denotes the certificate of incorporation in case of a claim. The Court will presume in the absence of any contrary evidence that the certificate is regular and that the 1<sup>st</sup> Applicant is a legal entity with capacity to sue and be sued. Consequently, the objection of the Defendant to this report is rejected by the Court.

The Defendant further submits that the 1<sup>st</sup> Applicant fails to file a complaint in accordance with Article 10.

The term "locus standi" denotes an interest to institute proceedings in a Court of law or to be heard in a given cause. In other words, the strict application of locus standi denotes that a Plaintiff wishing to sue must have sufficient interest in the subject matter in order to have standing to initiate suit.

There is however need to state here that the position in law globally has moved beyond insistence in the strict rule of standing of human rights violation cases. The Courts has adopted a more flexible approach to standing in order to allow persons not directly affected by the alleged violation to have access to Court to seek justice on behalf of the actual victim. See SERAP V FEDERAL REPUBLIC OF NIGERIA & 4 ORS 2014 ECW/CC/TU/16/14 Unreported.

to SOCIAL AND ECONOMIC RIGHTS ACTION CENTRE (SERAC) AND ANOTHER V. NIGERIA (2001) AHRLR 60; ACHPR 2001; the African Commission commended the role of NGOs and the "usefulness of action, esp. mass which is widely allowed in the African Charter".

In *Uttam Singh SERAP v Federal Republic of Nigeria & Anor* 2010 FCFIR p 195-197, the Court held that the term 'manner of administration' was developed under the Indian law whereby to allow any citizen to challenge a breach of a public right is nothing but a way of ensuring that the restrictive approach to the issue of challenge would not prevent public spirited individuals from challenging a breach of a public right in Court.

The Court was influenced by the authorities relied upon by the Plaintiff. See *29 Corporation Kamgar Union v Union of India* (1981) AIR (sc) 244; and *Abraham Aksoyek v President Federal Republic of Niger* (1951) 1 All N. R. 1 at 30 and references.

"Public interest cases have greater merit as they have no basis of securing their rights and having an independent system such as a committee, which consists of the concerned citizens, the plaintiff need not show that he has suffered any personal injury or loss or damage, the court is free to give justice. The court does not require that there is a legal rule which is directly affected or which has already been tested and the plaintiff is justified to file his suit."

having found that the 1<sup>st</sup> Applicant is a duly registered non-governmental organization, it is a juristic person with a right to sue and be sued. A fortiori, the 1<sup>st</sup> Applicant on the strength of the above decisions has standing to bring the present action for and on behalf of its members. Indeed some victims can be in this case be considered as done against, the corporation of journalists, are not agents and persons, thus "the victim" is the whole professional association which can be regarded as affecting all the members of that profession, in accordance with our jurisprudence which held that only the victims' federation of journalists can be regarded as a victim.

2. Whether from the totality of facts before this Court, 3<sup>rd</sup> Plaintiff's claim is statutorily barred.

The defendant contends that the 3<sup>rd</sup> Plaintiff's action is statute-barred, having been brought within the limitation period provided by Article 9(3) of the Supplementary Protocol 2005.

The 3<sup>rd</sup> Applicant's claim is that she was arrested after leaving a Bangui International Airport for her father's funeral on the 28<sup>th</sup> March 2003. She was taken to the National Intelligence Agency (NIA) Headquarters by two (two) police officers where she was detained on six cases and interrogated. On the 2<sup>nd</sup> of April 2003, she was charged with invasion of privacy, addition, publication of salacious words,

publication of false or misleading information. On the 18<sup>th</sup> of August 2012, the 3<sup>rd</sup> defendant was sentenced on 7 counts and sentenced to a GH¢1294,000 fine to be paid within two years or five years imprisonment with hard labour instead of payment. Upon studying the convictions, one of the reasons for conviction being prosecution as such has been the case with other journalists.

Statute of limitations are now prolonged by legislative bodies, local, national or international which sets the maximum time within which legal proceedings must be instituted or commenced. When the period is passed in a limitation statute however, a claim for reparation for the wrong suffered may no longer be filed and where filed is liable to be struck out as having been statute barred. In that case, a diligent is said to have had his right of action despite the existence of a reasonable cause thus depriving a Court the jurisdiction to entertain the claim. Article 9(2) of the Supplementary Protocol of the Convention states that:

"Any person may invoke a remedy according to my member of the Community and in accordance with the law of my state the right of action shall not be extinguished.<sup>4</sup>

Article 9(2) of the English Version of the Supplementary Protocol of this Court has on the face of it placed a three year limitation period on all actions brought against a member State of the Community before the Courts of my state to

implications of trials. However, the French version has kept most of the semi-final  
changes and it's against this States.

The French version provides as follows:

"Toute responsabilité civile ou pénale de l'Etat pour les actes de ses agents ou agents de personnes privées ou d'organisations internationales dépendra de la volonté"

A broad interpretation of this sub Article would:

"An action respecting my agents, the Community or an act by the Community against third parties or its agents shall be considered to have been committed if there is no intent to determine the nature of action violated".

"La responsabilité civile ou pénale des agents de l'Etat pour les actes de ces agents ou agents de personnes privées ou d'organisations internationales dépendra de la volonté"

More interestingly, the French version is the original text of the Protocol before its  
translation into English.

Therefore, it follows that interpreting this provision, the content of the French  
version is to be preferred. This position is reinforced by international best practices  
and the decisions of the International Human Rights enforcement panels...> almost  
States that claim for violation of human rights could be exempt by intention  
of the States.

Let it be recalled that the previous decisions of this Court relating to limitation of actions against Member States in human rights cases after three years, that is, the cause of action as to were decided per incuriam including the case of *Egretby Petroleum Plc v. Tans Vs. The Federal Republic of Nigeria* (1917), on this point and are hereby overruled.

Accordingly, in actions for enforcement of fundamental rights against member States, the Court holds that the Statute of Limitations does not apply.

Furthermore, assuming but not conceding that Article 4(3) may serve to limit the existence of a right of action, there is no other plank for the exclusion of the application of statute of limitation. The rule is that where statutory is conflicting, it will give rise to a case of relinquish in dico (say in and out), and postpones the running of time.

The right of action is the right to bring a specific case to a Court or tribunal. It is an individual right. That right is dependent on whether or not the facts the action is brought to court, all the necessary facts are available and any pre requisite legal or factual circumstances have been satisfied. See *Valentine Ayika Vs. Republic of Liberia* 2011 UGELR pg. 236 para 10.

The right of action stands in abeyance until the cause of action. A right of action accrues once an actionable wrong occurs. However, where the wrongful act is continuing, the right of action subsists until the wrongful act terminates.

In SERAP V. FEDERAL REPUBLIC OF NIGERIA (CIVIL SUIT 112), UNREPORTED this Court found that the Plaintiff's action against the state of limitation depends on the character of the act, i.e. as an isolated act or a persistent and continuous wrong. It was held until the date the complainant was released by the Court and that in instances of continuous illegal behaviour, the statute of limitation only begins to run from the time when such unlawful conduct or omission ceases.

In the case of ONUKO V KENYA COMMISION No. 202/1999 (2000) A.H.R.L. 125, the question was whether the political persecution and subsequent flight of the applicant into exile violated the provisions of the African Charter. The African commission held that persecutions suffered by a union leader constituted a breach not only of the rights of expression and freedom of association, but also of the significant violation of political rights by way of torture and beatings amounted to a violation and immediate breach of the right of return to his own country under Article 21(2) of the Charter.

The 3<sup>rd</sup> Applicant's contention is that following his release from prison he is no longer in the power of, or by, the Nigerian state, nor can it still say that he

constitutes a violation of the right to personal liberty, work as a function, and freedom of expression.

In Randolph V. Togo Communication No. 9102000 (2001) 11 ILMR 306 the IJN Human Rights Committee held that where a person has been forced into exile by a violation of his/her human rights, the termination of the violation does not necessarily break off the same rights.

The above findings are quite provocative and in the light of other decisions of the court it appears that the court may hold the view that the cause of action subsists so long as the 1<sup>st</sup> plaintiff remains in forced exile. Thus, like the D. Lauter's argument, the 1<sup>st</sup> Plaintiff's action is one of tortious conduct therefore be sustained as the wrong complained of is a continuous in nature.

The next issue for consideration is whether the facts of this application disclose a cause of action against the Defendant.

The defendant's 1<sup>st</sup> cause of preliminary objection admits that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff's claim is vexatious and cannot be maintained as it does not disclose any cause of action.

Black's Law Dictionary Ninth edition defines "vexatious" as follows:

A form of oppressive force giving rise to one or more bases for suing; a legal situation that enables one person to obtain a remedy in court from another person.

The term "cause of action" was considered in *Lemang v. Cooper* (1960) ALL ER 929 at 931:

*The reason or cause that entitles a plaintiff to sue or bring his action to the court, i.e. a legal wrong done to him or his property, to obtain from the court a remedy against another person.*<sup>1</sup>

In determining whether a cause of action has been disclosed, the court is guided and directed to restrict its self to facts as presented by the plaintiff and nothing else.

The facts contained in the Applicants' initiating application state that they were on 18th December 2010 lawfully arrested and detained and in some cases tortured by the officers of the Nigerian National Intelligence Agency (NNI) for what they published against the Nigerian President. They further alleged that the Cambodian government has relied upon its Criminal and Sedition Laws to detain, arrest and imprison journalists over the past years. The fear of further prosecution has made them remain in exile till date.

In SERAP V. Fed Rep of NIGERIA & 40cs 2014 Unreported, the Court held the view that the Plaintiff's legal basis which which included the following cause, a remote possibility that the Defendants may have violated their fundamental rights, however established in the proceedings an arguable case exists.

The facts of this case as presented by the applicants constitute arguable infringement of the minimum core provisions of human rights law as follows: which if established constitutes a violation of the obligation of the State under international law in this regard, the Applicants have exhausted an available course of action.

The Defendants' objection here also fails.

### 3. Exhaustion of Local Remedies

The rule on the exhaustion of local remedies before international remedies is one of the basic rules of customary international law. The object of the rule is to make the Respondent享有 the first opportunity to correct or remedy the harm caused to make a reparation. With regard to protection of human rights, the application of the said remedy rule is dependent on the conventional provisions as well as that of the treaty establishing the international tribunal. A person whose right has been violated is required to first make use of domestic remedies to right the wrong before resorting to an international Court or tribunal. In this regard Courts should be the first resort after all other domestic remedies has been exhausted.

However, this rule is not absolute and may, but not limited to:

- a. If no effective remedies are available or there is unacceptable delay on the part of national Courts in granting redress;

b. Where the treaty establishing a Tribunal excludes the application of Article 39, or expressly or by necessary implication

abrogated, the rule of local remedies should not constitute an unquestioned impediment to access to the international remedies. The criteria set by Supreme Court's *Pelletier* (2002) which created the human rights jurisdiction of this Court, provides the parameters to be satisfied by Appellant before accessing this Court, namely:

i. The application must not be anonymous;

ii. The application must not be brought when same is already pending before another international court.

There is no requirement of the exhaustion of local remedies before accessing this Court. The Defendant is guilty that the Appellee is failed to exhaust local remedies as a condition precedent for approaching this court and there is a flagrant violation to articles 26, 50 and 56(5) of the African Charter on Human and Peoples' Rights.

We need to start by making it clear that the procedural relief open by the Defendant is a standing rule applicable by the African Court and this Court is not bound by the procedural provisions of the African Court.

This Court has held – a number of cases the exhaustion of local remedies is not a condition precedent for bringing human rights claims before it and this issue need not be met *de jure*.<sup>11</sup>

In *Sakun Alabs V Fed. Rep of Nigeria* 2012 CCJELR unreported, the Court held that the provisions of article 1(3)d) were it succinctly clear that the access to ‘local’ is not subject to exhaustion of local remedies as envisaged by the customary international law to date point. Thus the Protocol of the Court is an exception to the general rule. While international customary law is the general, the provisions of the protocol as extended by the supplementary protocol is less specific and therefore it applies as an exception to the general.

Similarly, in *Overseaking Nigeria Ltd V. Republic of Senegal* 2011 CCJELR 139 the Court pointed out that the exhaustion of local remedies which is derived from the customary international law is not an inflexible rule.

The best mark case on this issue is the Courts decision in *Must Sayid Khati* (2008) CCJELR p. 175 in which the court had the following observations on this issue:

1. That the provision of a statute cannot be ousted by implication and thus through interpretation of customary international law in support of exhaustion of local

- regardless the rule is not enforceable since it can be legislatively or compromised by parties.
- i. That the Protocol on Democracy and good governance was either informed by the 2003 Supplementary Protocol which granted access to the community individuals without providing for the preservation or enhancement of local customs;
  - ii. That even if the Protocol on Democracy and good governance came into force at the same time as the 2003 Supplementary Protocol, the Supplementary Protocol revisions will take precedence over the provisions of the protocol on democracy and good governance in that it was made specifically for the Court;
  - iii. That Article 59 of the African Charter which mandates that African communities to submit cases only after the exhaustion of local remedies is inapplicable to this court being a directive meant only to the African Commission.

In view of the above the court's position on this legal question are summarized below:

#### d. ON THE SUBSTANCE

The following issues call for consideration

1) Can this court examine the impugned principles of the law of Gambia as used by the Plaintiff.

The jurisdiction of this Court to determine cases of human rights violation is provided in Article 9(1) and 10(d) of the 2003 Supplementary Protocol.

The Plaintiff alleged that the Defendant is enforcing its authority in violation of sections 51, 52, 53A, 58, 178, 179, 180, 181, and 181A of the Criminal Code and Section 12A of the Rehabilitation and Compensation (Amendment) Act of the Gambia which grants rights to journalists. Further, the Plaintiff also said that continued application of those laws violates their right to physical liberty and to a decent life, they are in exile at home.

The Defendant however objected to the competency of this court to examine its national laws.

The question to be resolved at this point is whether this court can examine the national legislation to determine if the legislation is compliant with and infringes on the Plaintiff's 'rights' under the ILOD, African Charter, ICACR and other international provisions to which the Defendant is a party.

<sup>1</sup> Hissien Habre Vs. Senegal [2012] CLJELR; pg.25, this Court has

<sup>2</sup> That is already a major aspect of the jurisdiction of this court if the court makes a finding that the Defendant has violated the Plaintiff's rights to the benefit of the Plaintiff, the court may award the Plaintiff

international or domestic legislation, if the right is violated, they may be subject to criminal prosecution and legal claim, whatever the ultimate outcome may be determined by a court or by the community.<sup>19</sup>

The powers conferred on the Court, in the 2005 Supplementary Protocol should be used and could not be misinterpreted as the jurisdiction to exercise a criminal court, the criminality of acts of member states which is the reserve of domestic constitutional courts.

This Court has consistently maintained that it will not examine the laws of member states insofar as since it is not a constitutional court but, once human rights violations are alleged, it invokes its jurisdiction to examine whether or not the laws have been violated.

In *Hadjijatou Mand Kornou v. Republic of Niger* (2004-2009) CJUELR p 232 para. 40, The court held that it can only have the mandate of examining the laws of member states of the community insofar as but rather, to ensure the protection of rights of individuals who, over and above, can claim victims of the violation of these rights which are recognized as rights, and the court does so by considering concrete cases prior to that date ...

In the instant case, the acts, actions and nature of the Applicants' were predicated upon the circumstances by the Applicants in which the O. Tandjouarou, a public official committed acts before the Nigerian Criminal Laws

The Applicant maintains that the unusual provisions have altered the profession as journalists making it practically impossible for them to carry out their professional functions in the public interest. Furthermore, the fear of being re-arrested, re-tried and tortured by the Defendant's forces may in future dissuade them to remain in office.

Freedom of expression is a fundamental human right and full enjoyment of this right is central to achieving individual freedom and to developing democracy. It is not only the cornerstone of democracy, it is indispensable to a thriving civil society.

Having regarded the Court's competence in human rights cases, it therefore follows that this court is exercising its jurisdiction to hear the present case under the relevant law. Those laws which the Appellants are referring to, requesting to establish whether or not they are contrary to the provisions of international human rights laws on freedom of expression.

Consequently, in view of its jurisdiction, this Court has the competence to examine the laws upon which the allegations are based to ascertain whether the laws and punitive measures are regular or in violation of the Applicant's rights.

Do the provisions of the laws of the Cambodian authorities criminal and non-criminal nature constitute or infringe upon the human rights of the plaintiff?

The Plaintiff urge this Court to declare sections 31, 52, 52A, 59, 1714, 172, 180, 181, and 181A of the Criminal Code, Chap 19, C. 17269 Part C, The Cambodian instrument with respect to a breach of their obligations as a member of ECOWAS to protect Human rights and comply with its other internal obligations. It urges this court to do this by way of the defense in applying the laws intended with their rights as journalists by way of law of state and to rule no prosecution in them thereby having a binding effect on their freedom of expression as journalists.

Acknowledging the fact that the defendant is co-accused in the law they argue that that is not enough as the law has to be formulated with sufficient precision. They contend that the definition of sedition intention is based on subjective factors and the reader will determine if it is sedition under article section 179 does not establish an objective standard to enable the wider deterrence threat of the publication. Whether the publication will fall within the definition of sedition or not.

Referring to the provision of sections 59 and 181A as follows, they submit that the publication in question is not within either category - and as such the

existence of criminal liability for such cases impedes the right to freedom of expression and it cannot be provided by any court that maintaining the provision has not been shown to serve any legitimate purpose.

The sensible but farre extended limitations in order to be lawful must be shown to be necessary in a democratic society and proportionate to the aim pursued.

The defendant in response maintained that the provisions of the statutes under reference satisfy the requirements of a just law within the contemplation of Article 10(3) of ICCPR. They further claim that the interpretation of what is intended as offensive in the reputation of others is a culturally sensitive and legal stipulations in the provisions being challenged are reflections of the defendant's cultural and political peculiarities and needs and so within the requirements of Article 19(3) and 27(2) of the ICCPR and the African Charter.

The defendant further refers to the definition of sedition in Black's Law Dictionary and submits that the intention of the legislator is expressed in section 11 of the Act which contains, inter alia, the following provision: "inciting imminent lawless actions against the state... or deliberately and publicly contumelious, blasphemous, seditious, scandalous and profane language... unless they do not appear mandatory or edictal sentence but include option of fine".

Article 10 of UDHR and Article 19 of ICCPR make provision for freedom of expression as follows. However Article 19(3) of ICCPR goes further to

provide for specific rules and responsibilities attached to the rights which may also be subject to certain restrictions provided by law and necessary for the respect of the rights and freedoms of others and the protection of national security, or public order, public health or morals.

Interpretation of Articles 19(2)(a) & 23(2) of the African Charter, the right to express and associate may only be exercised within the law, and without regard to the right of others, collective security, medical interests.

It follows from the above that the right to information is not absolute under any international instrument. However, the right to be informed with certain guarantees must be in place via existence of a legal provision, necessary for the respect of the rights and reputation of others, the promotion of social security or public order, public health or morals.

Permit us to digress a bit into the practice of the practice on freedom of expression.

After the Norman conquest of England, William set up a writ called *scire facias* (show me what you have done) law crime in false allegation. The guilty is made to publicly confess and bear the infamy for his/her/its sins. By the 13<sup>th</sup> century the claim was to be emphasized by the king's courts, which could impose heavy fines on defamers.

The function of the printing press, as to any production and circulation of publications and its heightened the fear of sedition like, and led to the establishment of the court of the Star Chamber in affirming royal authority. The court of Star Chamber began punishing any criticism and opposition to the court and the government's disrepute and gave such publications tended to undermine the legitimate government. *such was the intention.* In that, "the greater the number of the libel," since the exposure of the truth was more likely to lead to government downfall or these opinions.

Historically, criminalizing defamation, the first was born out of the initial purposes of peace & public order and secondly to preserve some security. See the cases of *R v Halsbury*, (1581) 4 (JEL) 42 and *R v Lebeschire*, (1584) 11 (JEL) 200.

The public interest arose from out of the conduct of the defendant to show his conduct for a duel in order to defend his integrity and in doing damage to the public peace. This situation however no longer arises in the modern age where there are established judicial tools for individuals in litigating civil wrongs. As pointed out by Lord Diplock in the case of *Ghervas v. Denkin*, [1950] A.C. 477 (at page 482-185).

"The objects' sought were for the mitigation of the potential lawfulness of defamatory libel in other words against the existence of libelous... The reason for... was the intention to restrain the public from the exercise of deriving the satisfaction of M. before the publication of the libelious statement through general readers in other respects."

are the of creating a series of the past ten years in their country's history in the annual offence of arbitrary killing and torture by torture of other people which provides protection for the systematic exploitation of the society for the benefit of a few individuals and the alleged diversion of public funds or properties."

The Zimbabwe Supreme Court in *Nevanji Madambire v. Attorney General*, C.C.Z. 214 unanimously held that the offence of torture was not lawfully justifiable under article 26(1) of the constitution of 24 March 1980 of the former Zimbabwe Constitution. In its words:

"The Article 26(1) is a sensible provision of the constitution of Zimbabwe, the existing provisions of which, however, do not appear sufficient, as it stands, to prohibit and give adequate protection to an innovative and reasonably effective system which has been adopted to combat the problem of torture. The different objectives of extradition, protection of fugitives and avoidance of double jeopardy, however, obviate the application of the constitutional right and freedom of the person. It may, therefore, be necessary to consider the legalistic aspects."

When criminalization of certain forms of torture by state during the crime is referred to as "extradition laws".

Section 51 is defined in Black's law dictionary as follows: *'An agreement, communication or exchange preliminary to, or intended for, entering into, or carrying out, some, less common, public authority.'*

Section 52 of the Impregnable Law creates the offence of sedition thus:

- (1) A person who –
  - (a) does or attempts to do, or makes any preparation to do, or to expire with any person to do, or with a condition to do;
  - (b) uses any seditious words;
  - (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
  - (d) imports any seditious publication, unless he or she has reasonable cause to believe that it is safe to do;
- commits an offence . . . .

The plain English meaning is not with the establishment of the offence per se but on the definition of seditious intent under Section 51 to include any action likely

- (e) bringing into being or causing or attempting to bring into being, for the purpose of the President, or the Government of The Gambia or of law established;
- (f) to do, or to inflict, or to attempt to inflict, damage, destruction, or alteration, otherwise than by lawful means, of any name or emblem as law established;

- (c) To bring into hatred or contempt or to excite disaffection against the administration of justice in The Gambia;
- (d) To raise disrepute in disrepute among members and of The Council in
- (e) To promote feelings of ill-will and hostility between different classes of the population of The Gambia.

Social 180 defines "defamation in the form of libel" as likely to damage the reputation of a person by exposing him or her to hatred, contempt or ridicule, or likely to damage a person in his or her profession or trade by injury to his or her reputation which is so injury, contemptuous or insulting as to harm.

With respect to the definition of publication for purposes of criminal libel offence, section 180(3) provides that it is not necessary for libel that a statement made or made directly or completely expressed and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the speech libel itself or from an extrinsic circumstance.

Finally with respect to the news publication, section 180 provides as follows:

"a person who publishes or reproduces any statement, written or spoken which is likely to cause fear and alarm to the public at large, knowing or having reason to believe that the statement, if made or repeated is false, commits a misdemeanour and is liable on conviction at a prison term for a period of two years."

According to the above article speakers enjoy several "rights" which are said to need to be capable of diverse subjective interpretations. In general, this is to say, open endedness. The inviolability of freedom of expression suggests that the erosion of freedom of expression by indirect means is the almost pernicious norm to have done suggest that a finding of no alien's obvious. The existence of criminal defamation and court or sedition laws are indeed inexplicable instances of gross violation of the approach and treatment of expression. It restricts the right of access to public information. This appears to be a feature of the law of the Federal Republic.

Discussions on the freedom of speech must be carried on in the narrowest possible terms to ensure speakers appreciate the boundary between legality and illegality in their speechive actions.

The UN Human Rights Committee recently issued its general comment No 34, which advocates the most voluminous interpretation of the minimum standards guaranteed by article 19 of the ICERD. In particular, the committee highlighted the undeniably important habitats of a democratic society. The committee said;

"A free, informed and active democratic society is essential to democracy as a form of government of opinion and conscience and the guarantee of other human rights. It constitutes one of the requirements of a democratic society. The present comment is designed

interventions to keep people from coming to the bars which have been identified as problematic. The pre-implementation of this model and subsequent analysis and evaluation can then identify what is working and what is not. This model can then be replicated in other communities if successful. The model can then be evaluated by independent researchers to determine its validity and replicability across different communities.

Narrowly drawing a line has been treated as rather, largely important in the context of speech because of what is known as "shilling... law" which ensures when a wide range of speech is being proscribed, force or censorship on speakers even with because they do not want to risk being caught on the wrong side of it.<sup>1</sup>

1- New York Times v. Sullivan, 376 U.S.254 (1964) Brennan, J. explained (in part 18, page 25) that "would be order of official conduct may be deferred, provided that, after due enquiry, it is believed to be just and safe enough to do so, in just case, however, of doubt whether it can be proved in court for fear of the expense of proving it so as. Then must be made only a summary which 'gives a brief of the main position.' The rule thus dangers the legal and hence the safety of public debate.

In *Ramilla Maidan Trident V. Home Secretary Union of India* (UOJ) 619(2) S 822, L. Swaminathan, J. observed:

It is difficult not to note that the freedom of speech is the fabric of democratic government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first freedom of citizen. It occupies a prominent position in the hierarchy of human rights, giving recognition and protection to all other liberties. It has been well said that it is the mother of all liberties. Freedom of speech plays a crucial role in the formation of public opinion amongst political and economic entities. It has been said that as "basic human right", "natural right" and the like. With the development of time it falls the right to freedom of speech and expression has taken status as one of the right to receive information at last as the right of press.

In *Lingen v. Austria*, Application No. 981582, ECtHR 406, 2 July 1996 before the European Court of Human Right (ECtR), the accused journalist was tried for criminal defamation by the Chancellor of Austria for publishing several critical of his regime. While holding that the institution of an offence of criminal libel violated the freedom of expression, the ECtR also observed (at para 44) that

The penalty imposed on the author – namely imprisonment or a fine which could be liable to encourage him from making statements of that kind again in future – in the event of conviction did not make a sentence would be likely to deter journalists from disseminating a number of important information; the law of the community

On the same token, a section such as this violates, however, the principle of proportionality, as well as the right of information, when it is watching

L., New York Times v. Sullivan 376 U.S. 254 (1964) Brechner, J. observed that:

... freedom of expression is inviolable in free debate, and that it must be, so far as possible, free from governmental interference. ... We hold that the freedoms of expression we have here ... are not violated by this provision.

See also Casells v. Spain, Application No. 11298/85, ECHR decision of 11 April 1991, where the committee ruled that the applicant's right to freedom of expression had been violated, holding that

... the defendant petitioned which the Government considers made it necessary for him to employ certain or recurring legal proceedings, particularly those which remain open only for referring to the designated authority and the time of its application to the court.

In R. v. Smith (supra) Drennan, J. went on to hold that "I am suggesting the critic of official conduct in government has much greater freedom of expression - and to do so, the spirit of strict judgmentalism implicit in section 10(2)(a) is to be rejected completely." Dissemination of the defense of truth will be burden upon the defendant does not mean that only false speech will be different from truth; moreover, it may not be an adequate requirement since recognized the

affidavits claiming several people that the alleged facts were true from his/her own personal... under oath and in consideration of strict confidentiality he deposed that nothing else was true, even though he believed it to be true and a thought of it, in fact, true, because of the nature of the case, known or unknown prior to the signing of the affidavit. They tend to make out, statements which "lend the wings of the police officers."<sup>1</sup>

The Constitutional Court of Zimbabwe in *Nevonji Ncube and Kapusha Mawire v Attorney General* [2015] ZWCC 196, para. 1, noted that:

"The countering effect of the offence of criminal defamation is to stop and prevent the propagation of information in the public domain. This, in turn, may result in the silencing of legitimate and honest voices of public significance and the unauthorised and unchecked circulation of unconscionable malpractices."<sup>2</sup>

While pronouncing the report of the offences of seditious libel, defamation libel, obscene libel and seditious, the UK Secretary of State at the Ministry of Justice, Mr. Claire Warwick quoted in the UK *Teleo Case*,<sup>3</sup> 13<sup>th</sup> January, 2013, as having said that: "Sedition and seditious, and defamatory, libel and obscene offences – from a perspective where freedom of expression rights is one of the right it is about... The existence of these obscenity offences in this country has been used by other countries as justification for the restriction of similar laws which have been adopted and to suppress political dissent and express their position... Analysing those offences

written; the Latin American Commission of Jurists has similar concerns, where they are said to support free speech.<sup>17</sup>

In the case of *Kimel v. Argentina*, judgment of the IACtHR, May 2, 2008 (Case 12-10), the American Court examined whether criminal proceedings of defamation against an Argentinean activist violated Article 12 of the Convention on freedom of thought and expression. It focused on the principles of proportionality to conclude that the violation of the applicant's freedom of thought and expression had been overly disproportionate.

The African Court on Human and Peoples' Rights (*Jissa Konaré v. The Republic of Burkina Faso*, Application No. 00420113) asked Burkina Faso to repeal its provisions on criminal defamation and perjury due:

...to protect the individual's mind from a particular form of defamation, the Court notes that such conduct must be accepted within the context of a democratic society. It also notes that this assessment must ascertain whether the restriction is a proportionate measure in view of the objective sought, the protection of the individual's rights.

...The Court is of the view that freedom of expression is a democratic necessity in the subject of a given degree of importance when it comes to the criminalisation of defamation of public figures. Consequently, as stated by the Committee,

'people who serve highly sensitive roles must necessarily have a higher degree of control than private citizens; otherwise public duties may be slighted altogether'.

In ALTEU TANKER AKCAM V TURKEY application no. 23520/07 25<sup>4</sup> October 2001 where the applicant complained that the existence of Article 301 of the Turkish Criminal Code interfered with his right to freedom of expression, the Court held that in determining whether the criminal legislation is in itself compatible with the Convention's provisions Article 10(1) of the Turkish Criminal Code and the criminal investigation conducted against the applicant do not affect the "quality of law" required by the court's settled case-law, since its unacceptability must be measured in light of the measure's actual effect. The court concluded that the interference in question was not prohibited by law and accordingly there had been a violation under Article 10 of the Convention.

Similarly In Gregi Mondragon V Spain no. 10340/07, 15<sup>5</sup> March 2011 the Court of Human Rights while upholding the penalty imposed on the applicant observed that the nature and severity of the penalties imposed were further to be taken into consideration in assessing the "proportional part" of the sentence. The court held that there had been an interference with the exercise of the applicant's right to freedom of expression under Article 10 of the Convention.

Upholding the Criminal laws of The Gambia, one can certainly infer that they do not guarantee a free press within the spirit of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (ICCPR). The restrictiveness and vagueness with which these laws have been framed and the ambiguity of the maximum (illicit) intention, makes it difficult to discern with any certainty what constitutes a libelous offence.

The law does impose criminal sanctions on section, defamation, libel and false news publication has a chilling effect that may easily restrict the exercise of freedom of expression of journalists. The application of these laws will immediately give rise to violations of the internationally guaranteed rights of the journalists.

Holding critically examined the criminal laws of The Gambia, the Committee sees that the criminal sentences imposed on the offenders are draconian and not necessary in a democratic society where freedom of speech is a guaranteed right under the international instruments.

It is our view that, the impugned provisions are excessive for the purpose of application in particular and those who would exercise their right of free speech and violate the arbitrary rights to freedom of speech and expression under Article 9 of the African Charter, Article 19 of the ICCPR and Article 19 of ECHR.

Consequently, the Court directs that the legal status as author, criminal libel, defamation and false news publication of the Comité be reviewed and disallowed, or in accordance with the "most lenient" revisions on freedom of expression and in accordance with the Defendant's obligation under Article 1 of the Charter.

Whether in the circumstances of this case, the Defendant has violated the rights of the Plaintiffs as alleged.

The 2<sup>nd</sup> 5<sup>th</sup> Applicants alleged that they were arrested and unlawfully detained with the 4<sup>th</sup> and 5<sup>th</sup> Applicants being subjected to torture by agents of the Defendant while in detention. This arrest and detention was predicated on the written, libel and false news items of the Comité. The Applicants further argued that these acts are in violation of their rights as journalists, right to liberty and freedom of expression as they are etc. in order for law and order to prevail in the sense of exercising their rights as journalists.

The requirement of lawfulness is breached mainly by consistency with the relevant domestic law; the application of domestic laws in a case of arrest and detention must itself be in accordance with the international provisions.

An arrest does not conform with the law if it cannot be justified until such laws are repeated. In the present case, though the action of the Applicants was carried out in

and/or with the colony's laws or The Crown; the continued existence of the system constitutes a violation.

In A and Others v. The United Kingdom (Application no. 3455/05) judgment

13<sup>th</sup> February 2009 the Grand Chamber of the European Court of Justice held that:

"The application of discriminatory rules is illegal. Where the "compatibility" of taxation is in issue, including the question whether "a particular practice is...not discriminatory, the Convention requires national law and practice to be obliged to conform to the substantive and procedural rules of national law, Constitution and national law is not discriminatory" (Article 5 (1)). It appears to us from that any application of discriminatory rules should be in keeping with the principles protecting the individual from discrimination. It is a fundamental principle that no discrimination of arbitrary nature may occur, under Article 5 (1), 1 and the notion of "fairness". If Article 5 (1) extends beyond that of compatibility with national law, so that a discriminatory rule may be legal in terms of domestic, domestic territory and thus contrary to the Convention."

Similarly, in MEDVEDEV AND OTHERS v. FRANCE Application no. 277793, JUDGMENT STRASBOURG 29 March 2010, the Court reiterated that where the "compatibility" of taxation is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention requires application

referred to in the law, where appropriate, to other applicable legal standards relating thereto which have been so determined. In all cases a state has an obligation to conform to its domestic and international rules of the law concerned, but it also requires that any legislation it may be compelled to make pursuant to Article 5(1)(c), to protect the individual from arbitrariness. The Court further stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty is respected. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law must be foreseeable to the individual so that it meets the standard of "certainty".

The UN General Assembly provides in Article 3 and 9 of the TUDR that:

3. "Everyone has the 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 subjected to arbitrary arrest, detention or exile."

Similarly, Article 6 the African Charter on Human and Peoples' Rights provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and according to law and justice by due process of law, and no one may be arbitrarily arrested or detained.

Section 19 of the Constitution of the Gambia on Protection of the right to personal liberty provides:

- (1) Every person shall have the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his or her liberty except in such circumstances as are consistent with such procedures as are established by law.
- (2) Any person who is arrested or detained shall be informed at speed as is reasonably practicable and in any language within his or her understanding, of the reason for his or her arrest or detention and of his or her right to consult a legal practitioner.
- (3) Any person who is arrested or detained  
  - (a) shall be allowed to bring him or herself present in exercise of the exercise of his or her right;

<sup>1</sup> Upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under the laws of The Gambia, and who is not released,

shall be brought without undue delay before a magistrate, in my case, within seventy-two hours.

The Parliament regulated the arrest, detention and prosecution of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants who on reasonable suspicion of the Applicant having committed an offence, in pursuance of s. 6(1) in accordance with the law and legal procedures of the Republic of the Gambia.

In order to meet the requirements of lawfulness, detention must be "in accordance with a procedure prescribed by law", i.e. in accordance with law or conform to the substantive and procedural law of nations' law or international law where appropriate.

The concept of lawfulness, arbitrary arrest and due process dates back to the Magna Carta, Section 6 of the Berlin 6/1 (1210) where Article 3<sup>rd</sup> of the guarantee:

"No Freeman shall be taken or imprisoned, or be dispossessed of his自由 or Liberties, or be outlawed, or exiled, or in any way destroyed, nor shall he be subject to cruel and unusual Punishments, except by the Lawes of the Land."

With commitment to the rule of the Rule of Law everyone is to be free from Arbitrary Arrest, Detention, and Unlawful Imprisonment. The act of taking a person to custody without authority which may be implied or "presumed" and include

he period lies the moment he is placed under custody up to the time he is brought before an authority competent to exercise his case and to deny or to release him and defines themselves as the set of conditions prior to a certain place or other circumstances of arrest and makes no claim which prevent him from being with his family or carry out his normal occupational or social activities.

The 7<sup>th</sup> Applicant alleges he have been detained for 5 days, the 8<sup>th</sup> Applicant was also detained for about a month while the 9<sup>th</sup> Applicant was detained for 65 days because being charged a crime. The Defendant failed to give a justification for the continued detention.

The Defendant did not send any evidence to refute the allegation, rather, contends that the arrest and detention was mere reasonable suspicion and in accordance with the Laws of the Republic.

Section 19(1)(g) of the Constitution of the Namibia above provides that persons detained upon reasonable suspicion shall be brought to court within 72 hours. Similarly, the ACHPR, ICCPR and the UDHR provides that for an arrest to be justified, it must be done in accordance with the law.

In Tundju V Republic of Niger (2010 CCJELR) pg 130, the Court held that detention in any criminal case must comply with the norms enshrined in the human rights instruments and must be done within the scope of judicial procedure.

A criminal trial on a criminal charge will require trial within a reasonable time or to be released pending trial.

In the case of Huri Jaws V Nigeria, communication no. 225/93 (2002) para 45, the Commission concluded that Nigeria violated both articles 7(1) (d) and 28 of the African Charter by failing to bring the accused犯人 into court before a judge or other judicial officer for trial; the victim had been detained for weeks and months respectively without any charges being brought against him.

Similarly, in Castillo Pino V Peru 1987 pg 263 paras 56-58 the Inter-American Court of Human Rights concluded "that article 7 of the American Convention on Human Rights had been violated since the victim had not been brought before a competent court within 24 hours or otherwise..."

The Constitution of the United Kingdom, for the right to liberty and justice stipulates that persons涉嫌犯人 shall be brought before a judge before a court trial, even if, within 24 hours from his/her arrest.

The Applicants' in the cause of their own poem and art, Nos. 6, 16 and 87 respectively. The prolonged detention of the Applicants which the D. Court did not determine upon contrary detection within the period fixed by African Charter and other international instruments.

Viewing the above, the Court holds that the just life detention of the Applicants which is not in conformity with the democratic institutions, arbitrary and falls short of the requirements under the ACHPR and the ICCPR and therefore violates the 3<sup>rd</sup> & 5<sup>th</sup> Applicants' rights.

#### O. the effect of the cruel, inhuman and degrading treatment

Article 5 of the African Charter on Human and Peoples' Rights provides:

*Every individual shall have the right in the respect of his dignity inherent in a human being and to the recognition of his legal status. In times of war, torture and degradation of man particularly causes grave injury, inhuman, inhumane or degrading punishment and torture shall be prohibited.*

Section 21 of the Constitution of the Gambia provides:

*No one shall be subjected to torture or inhuman or degrading punishment or treatment.*

Article 7 of the International Covenant on Civil and Political Rights provide:

“We must learn to evaluate our own personal interests as well as those of others, and to recognize... we must be objective either for your greater or smaller self-interest.”

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CtC), provides the most precise and widely-cited definition of torture under international law. It defines torture as:

“*They are the most important in agriculture, because they are the most numerous and most widely distributed.*”  
An agricultural census of 1900 reported that about 10 million people in the United States were engaged in agriculture,  
and nearly all of them knew their work well enough to be considered “farmers” or “ranchers.”  
In addition to the big cities and the towns, there were thousands of smaller towns,  
and small towns just as big, scattered by the prairie, in all directions. The result was  
a mixture of a rural life and other communities in the great city. It was, in effect,  
a city of villages, stretching over three thousand square miles, with no central point.

In the case of *Torres Lamego V. Peru* judgment of September 17, 1947, Series C No. 51, para 57, in Inter-American Case, vol. 10:

The outcome of the right to personal and individual property is private ownership of land and other immovable property, and the protection of the right to the inheritance of land and other immovable property.

“and/or border patrol agents and/or military personnel do not have authority, nor do they have the power to arrest. The ongoing abuse is characterized by the abuse/and/abuse of power of controlling and negotiating with the (or) holding the typical case/case.”

With regards to the 4<sup>th</sup> and 5<sup>th</sup> April, “on 4<sup>th</sup> (and) 5<sup>th</sup> April” Applicant stated that he was locked up in a dark cell which now has a small accessible hole. While in detention, he was severely tortured and逼害 (forced) (i.e. Procedural In-military prison and pre-military security term). This will basically has him exposed to the public during interrogations on two consecutive nights. They attempted to break his fingers, used plastic tape to suffocate him and, extinguished their cigarettes on his body.

The 5<sup>th</sup> Applicant asserts the following: “On 5<sup>th</sup> April he was forced to sleep on a bare floor of a tiny cell which measured approximately 1 meter by 2.2 meters with a small amount of ventilation. The cell was lit 24 hours daily with a very bright light making it difficult for him to sleep. The cell had a small air covered with a wooden board, which was never used or built. He was given limited water, food, say and never had the opportunity to shower or change clothes.

He was interrogated by a group of 10-15 masked officials who used threats and many times beat his whole body with sticks to the point that he lost

conscious. His testicles and back were hit by bayonets and beaten. The officer took a cigarette stick into his mouth, moving it back and forth, and poured oil over all over his body. At that point, he heard one of the soldiers taking snuff. He had finished digging the grave.

In another round of torture, the 5<sup>th</sup> Applicant was stripped naked by the NVA officer, who administered electric shocks on his back, testicles and scrotum. He received 150 volts, amounting after being tortured on other occasions. These acts forced the 5<sup>th</sup> Applicant in an excretory and unable to do any physical work.

The Defendant on the other hand denied subjecting the 4<sup>th</sup> and 5<sup>th</sup> Applicant to any form of torture and put them to the strictest guard.

It is true that the burden of proof rests on he who asserts the affirmative and it must be well denied. In the words of Mr. Vaughan in the case of Constantine Jint V. Imperial Smelting Corporation 1942 A.C.154 at p.174, the onus of proof remains on the proponent of a proposition which should not be separated from a prima facie case.

The burden of evidence lies on the Applicant to establish their allegations. The 4<sup>th</sup> and 5<sup>th</sup> Applicants in order to support their claim, contacted a medical expert from an independent friend, in their group. At the result, the expert stated that the 5<sup>th</sup> App-

or applicants suffered from chronic physical issues as well as history symptoms of post-traumatic stress disorder. The physical and psychological findings were considered especially and together are highly consistent with the fact of torture and ill-treatment that they allege. This claim has not been substantiated by the O. Court and in the absence of any admit this amounts to an admission.

In *Djusn Snydylina v. Republic of the Gambia* 2010 UGIELR pg 178 para. 41 the Court observes that the evidence of the Plaintiff as the witness was direct and credible enough for this court to rely on. The Court therefore found as a fact that the Plaintiff suffered physical injuries as he testified to. The Court also found that he underwent medical treatment in Dakar.

Additionally, the Defendant escaped into exile and could not have been expected to exercise the higher burden of proof than the one allowed by the circumstances. Burden of proof is not a static concept and must be amorphous by the circumstances of each case.

Also in *Lel and others v. Turkey* 23145/93 15<sup>th</sup> November 2003 the European Court of Human Rights noted the consistency of the allegations made by the Applicants that they were results assaulted, stripped naked and forced down with freezing cold water and found that the Applicants had suffered places of no mortal violence at the hands of the guards while during their detention. Furthermore, the

Court found that such all treatment caused them severe pain and suffering and was particularly cruel in violation of Article 3 of the convention which must be regarded as the following, D.R.C. 19:

"The Court having examined all the circumstances which arose in the physical initiation of plaintiff in the camp,<sup>54</sup> applied by the NVA officials which includes but not limited to the use of electric shocks on the thighs, and the like; extinguishing cigarette on their bodies, and/or beatings, to see the extent the degree of intensity of physical and mental pain suffered by them.

In view of the foregoing, the court therefore holds that, the acts of the officials of the Defendant during its tenancy amounted to both inhuman and degrading treatment. Consequently, the Court finds that the Defendant violated Article 5 and 7 of the African charter and the ILCPR respectively.

From the quality of evidence before the Court, it appears the applicants are incapable of committing or giving up their rights in freedom of expression and torture as the case may be and the Court so held.

#### DECISION:

The Court adjourned the trial sitting after hearing the parties in the last resort and after despatching all evidence with an

- AS TO THE PRELIMINARY OBJECTION:

Decides that it has jurisdiction to examine this case and therefore dismisses the preliminary objection of the defendant.

AS TO MERITS:

DECISIONS:

1. That the action of the Defendant in enforcing the provisions of its law on torture is the subject matter of this Application according to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Applicants' initial claims because it violates the rights of the Applicants under Article 6, § 12 (2) of the African Charter on Human and Peoples' Rights, Articles 5, 12(1) and 19(5) of the International Covenant on Civil and Political Rights (ICCPR), and Article 6(2) of the Revised ECOWAS Treaty.
2. That the action of the 4<sup>th</sup> and 5<sup>th</sup> Applicants to terminate, interrupt and degrade their treatment violates Article 7 of the African Charter on Human and Peoples' Rights and Article 7 of the ICCPR.
3. Directs the Defendant to immediately release and/or amand its base (the subject matter of this application) in line with its obligations under

international law, especially Article 1 of the African Charter on Human and Peoples Rights, the ICCPR and the ECOWAS Revised Treaty.

4. ORDERS - Defendant to pay the 4<sup>th</sup> and 5<sup>th</sup> Applicants the sum of 2 million CFA francs each for the violation of their human rights including the right to freedom of expression and the right to hear and be heard.
5. ORDERS - Defendant to pay the sum of 1 million CFA francs each to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants as damages for the violation of their rights by the Defendant.

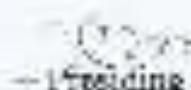
#### AS TO COSTS

Cost is awarded against the Defendants, which is to be assessed by the Registry of the Court. The Court thanks the Amicus Curiae for the insightful submission that have assisted this Court in taking an informed decision.

This judgment is given and pronounced in a public hearing on 17<sup>th</sup> day of February 2014.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT:

Hon. Justice Friday Chijioke Nwoko

  
- Presiding

Hon. Justice Maria De Ces Salva Monteiro

  
- Member

Hon. Justice Alkali Biyu

  
Member

Assisted by: 

Deputy Clerk Registrar 