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

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.

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]

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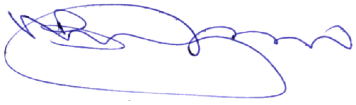
14. This Court ought to have considered whether these findings are in harmony with each other and more significantly whether having underlined the need for that requirement to be reviewed, but not making any orders to that effect in the operative part of its judgment, has any implications in determining 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 24th 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".