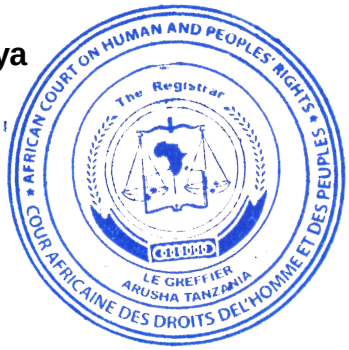
CASE OF EMIL TOURAY AND OTHERS v. REPUBLIC OF THE GAMBIA

Application No. 026/2020

Joint Dissenting Opinion of Judges

Rafaâ Ben Achour and Blaise Tchikaya



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Rafaâ Ben Achour

Judge Blaise Tchikaya

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