TABLE OF CONTENTS

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

In the Matter of

Emil TOURAY and OTHERS

Represented by:

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

Versus

REPUBLIC OF THE GAMBIA
represented by:

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

after deliberation,

renders the following Ruling:

I. THE PARTIES

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

2. The Application is filed against the Republic of The Gambia (hereinafter referred to as "the Respondent State") which became a Party to the African Charter on Human and Peoples' Rights ("the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on 25 January 2005. On 23 February 2020, it deposited with the African Union Commission, the Declaration provided for under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

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

[1] "3 Jotna" literally means "Wolofy ears have arrived" in

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

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

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

B. Alleged violations

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

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

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

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

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

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

IV. PRAYERS OF THE PARTIES

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

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

V. ON THE DEFAULT OF THE RESPONDENT STATE

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

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

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

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

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

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

VI. JURISDICTION

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

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

[3] *African Commission on Human* (merits) (3 June 2016) 1 AfCLR 553 § 38-42; *Robert Richard v. United Republic of Tanzania,* ACtHPR, Application No. 035/2016, Judgment of 2 December 2021 (merits and reparations) § 16.

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

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

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

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

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

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

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

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

VII. ADMISSIBILITY

24. In terms of Article 6(2) of the Proto
admissibility of cases taking into account the provisions of article 56 of the
Charter." Pursuant to Rule 50(1) of the
the admissibility of an Application filed before it in accordance with Article
56 of the Charter, Article 6 (2) of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] See *Gombert v C*(jurisdiction and admissibility) § 45; Dexter Johnson v Ghana (jurisdiction and admissibility) § 48; See *Suy Bi Gohore* ,vACtHPR, Application no. 044/2019, Judgment of 15 July 2020 (merits and reparations) § 104.

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

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

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

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

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

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

[12] *Ibid* at page 34.
[13] *Suy Bi Gohore* (merits and reparations) (2015) AfCLR

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

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

VIII. COSTS

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

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

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

IX. OPERATIVE PART

49. For these reasons,

THE COURT,

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