COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO
TRIBUNAL DE JUSTIÇA DA COMUNIDADE,
CEDEAO

No. 10 DAR ES SALAAM CRESCENT,
OFF AMINU KANO CRESCENT,
WUSE II, ABUJA-NIGERIA.
PMB 567 GARKI, AB
TEL: 09-6708210/5240781 Fax 09-5240780/5239425
Website: www. courtecowas.org

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES HOLDEN AT ABUJA, NIGERIA.

SUIT NO: ECW/CCJ/APP/36/15.

JUDGMENT NO: ECW/CCJ/JUD/04/18.

BETWEEN:

(1) Federation of African Journalists
(2) Fatou Camara
(3) Fatou Jaw Manneh
(4) Alhagie Jobe
5. Lamin Fatty

Plaintiffs

And

The Republic of The Gambia Defendant

i. Before their Lordships.

Hon. Justice Friday Chijioke Nwoke -- Presiding

Hon. Justice Maria De Ceu Silva Monteiro -- Member

Hon. Justice Alioune Sall --Member

Assisted by: Athanase Attanon Deputy Chief Registrar

ii. REPRESENTATION OF THE PARTIES

For the Plaintiffs:

A. Noah Ajare

i. Angela Uwandu

ii. Hadiza Sule

For the Defendants:

B. Mohammed B. Abubbakar

i. E.R Dougan

For the Amiscus Curae:

C. M.O. Ogulana – Nkanya

i. Deji Ajare

ii. Nanpon Wuyel

1. SUMMARY OF FACTS AND PROCEDURE

The first Plaintiff who described herself as a leading representative body for Journalists in Africa founded in Abuja Nigeria in 2007, an affiliate of the International Federation of Journalists having about six hundred thousand (600,000) Members including the territory of the Defendant, brought this Application in conjunction with the 2nd, 3rd and 4th Plaintiffs.

The 2nd, 3rd and 4th Applicants are the Nationals of the Defendant and Economic Community of West African States (ECOWAS) citizens who now live in exile. They averred that they fled The Gambia (the Defendants) "for fear of persecution and other forms of persecution including, the fear of physical and mental harm, as a consequence of their work as Journalists.

The 2nd Plaintiff further avers that following false accusation of authoring an article against the President of the Defendant, she was arrested and detained on the 15th of September 2013 by officers of the Security Agency of the Defendant; consequent upon which on the 10th of October, 2013, she was charged under the false news provisions of S.59 of the criminal code 2009 and S. 173A of the information and Communications (Amendment) Act 2013. She was required to provide bail of Gambian Dalasi (GMD) of 5, 000,000 (five million Gambian Dalasi).

She avers out of fear that her trial was politically motivated, she fled through Senegal to the United States where she remained in exile till date. (See the 2nd Applicants witness Statement).

On her part, the Third Applicant avers that following series of Articles and public statements made by her between September 2003 and October 2005 criticizing the Government and President of the Defendant, she was detained on the 28th of March 2007, interrogated charged and subsequently tried (according to the 3rd Defendant) under the sedition and publication of false news. She was convicted on all counts on August 18th 2008 and fined GMD 250, 000 (Two hundred and fifty thousand

Gambian Dalasi) payable within two hours, in default of which she will serve a four year Prison term.

The 3rd Plantiff was able to pay the fine as a result of substantial contributions from The Gambia Press Union, family and supporters. She subsequently fled The Gambia and is now resident in the United States of America.

On his Part, the 4th Applicant alleges that he was arrested on the 7th of February 2013 on account of his article on the stand taken by one Major Lamin Touray against the execution of nine condemned Prisoners. He further alleges that while in custody he was locked in a completely dark room for three days. He was also beaten with fists and sticks to the point of unconsciousness, subjected for aggregate burns by NIA officials. On the orders of a Superior officer, he was taken to a medical facility where he was treated. On discharge from hospital, he was charged interlia with production and possession of publications with seditious intention under S.52 of the Criminal Code. He was refused bail and held in custody for seventeen (17) months until the end of the trial in which he was acquitted. Following an information that the State appealed the acquittal and for reasonably fear of further persecution, the 4th Applicant fled to Dakar Senegal where he lives till date.

It is on account of these facts that the Applicants sought the following reliefs from the Court:

i. A Declaration, that the actions of The Republic of Gambia (the Defendant in this case) in enforcing the statutory provisions that are subject of this application more particularly Sections 51, 52, 52A, 59,178, 180, 181 and 181 A of the Criminal Code Cap 10'01 of 2009 and S. 173A of the Information and Communications (Amendment) Act of 2013, by means of detaining, arresting , charging, trying and /or convicting the 2nd , 3rd and 4th Applicants and causing them physical, psychological, emotional and reputational injury and thus forcing them to live in exile outside the Gambia, is in violation of the Applicants 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 expression under Article 19(2) of the ICPRC, the right of journalists under Article 66(2) of the Revised ECOWAS Treaty, the right to liberty and security under Article 6 of the African Charter and Article 9(1) of the ICCPR and the right of Gambian Citizens to return to Gambia under Article 12 (2) of the African Charter and Article 12(4) of the ICCPR.

ii. A Declaration that in subjecting the fourth Applicant to torture or other cruel, inhuman or degrading treatment or punishment, and causing him physical harm, psychological and emotional injury, The Gambia acted

in violation of 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 ICPRC.

iii. A Declaration that in maintaining the statutory provisions mentioned in (ii) above, the Republic of The Gambia have continued to act in gross violation of the Applicants rights and in breach of their obligations under the Revised Ecowas Treaty, African Charter and the ICCPR.

iv. An Order of 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 including under the African Charter, the ICCPR and customary international law.

v. An Order mandating and compelling the Republic of The Gambia to effectively enact and implement laws, regulations, and safeguard in order to meet its obligations under international law prohibiting torture and other cruel, inhuman or degrading treatment or punishment including under the Charter, the ICCPR and Customary international law.

vi. An order for reparations, including physical, psychological, social and economic rehabilitation in respect of the violations of the second, third and fourth Applicant's human rights.

vii. SUCH FURTHER other remedy/or relief as the Honourable Court. Curiously, with regard to reparation the Applicants did not ask for any specific sum.

However, the Applicants Counsel filed in what he called "Applicants' speaking notes on the Merits" in which he urged the Court to award 20 million Gambian Dalasi each in damages to 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 Gambian Dalasi each to the 2nd and 3rd in damages for the violation of their human rights under international law.

2. On receipt of the Plaintiff's claim, the Defendant filed a notice of preliminary Objection pursuant to Article 87 (1) & (2) and 88 of the Rules of this Court. The Defendant urged the Court to strike out the suit on grounds of lack of jurisdiction.

When the matter came up for hearing on the 9th of April, 2017, the Applicant's Counsel brought an application seeking the following reliefs;

a. An order granting leave to the Applicants to join Lami Fatty as the 5th Applicant.

b. An order granting leave to the Applicants to file and introduce additional evidence on behalf of the 4th Defendant and the expected 5th Defendant, and thus an order amending Paragraphs 4 of the Originating Applications to reflect the amendments, if granted. The Court allowed the Applicants to move their application, which was opposed by the Defendant's on the grounds that the accompanying affidavit did not comply with the Evidence Act of Nigeria. In its ruling, the Court granted application to join Lamin Fatty as the 5th Applicants as the Defendant could not satisfy the Court that it will suffer any prejudice on the account of the Application being granted. The Applicants also sought to withdraw their application for accelerated hearing which was accordingly struck out.

Similarly, Amnesty International, the Canadian Journalist for Freedom of Expression, Committee to protect Journalists, Freedom House, Pen International, Reporters without Borders and Right to know campaign South Africa, brought an application pursuant to inherent jurisdiction of the Court and 89 of the Rules of this Court, seeking to join the suit as interveners/ Amici Curiae. The Defendant did not oppose the application. The Court granted the amicus Curae thirty days to file a consolidated brief instead of the forty five days they had asked for.

The issues having been joined the Court proceeded to hear Defendants Preliminary Objection.

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, arrest and violation of Human Rights of Journalists across The Gambia.

The 1st Plaintiff/Applicant 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 2nd, 3rd and 4th and 5th Plaintiffs/ Applicants are Gambian Nationals and Citizens of the Economic Community of West African States. (ECOWAS).

The 1st Plaintiff avers, that the Gambian government has relied upon its sedition laws (section 51, 52 and 52a of the Criminal Code), criminal libel law (section 178, 179, 180 and 181a of the communication Act) to detain, arrest, and convict journalist across The Gambia on multiple occasions over the past 15 years.

The 2nd Plaintiff avers, that she was unlawfully arrested and detained on 15th September 2013 by the officers of The Gambian National Intelligence Agency (NIA). Sometime in October 2013, she was charged and convicted falsely of being a source of an article published, relating to the Gambian President and was required to provide bail of GMD 5,000,000.

In fear of further prosecution, the 2nd plaintiff fled via Senegal to the United States, where she remains in exile till date.

The 3rd 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 Gambian President and government between September 2003 and October 2005, and was subsequently charged of sedition and publication of false news under the law. On 18th August 2008, she was convicted on all counts and subject to bail of GMD 250,000 fine, payable within 2 hours, or in default of payment, four years imprisonment.

The 3rd Plaintiff further avers that she made the payments within the stipulated time with the aid of concerned citizens and relatives and subsequently fled The Gambia and is now resident in United States, where she remains in exile.

The 4th Plaintiff avers, that on the 7th of February 2013, he was arrested and unlawfully detained on the grounds of researching and preparing an article relating to the actions taken by Major Lamin Touray against the execution of nine condemned prisoners. He was detained in an isolated room and physically tortured with brutality by the NIA 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 refused bail pending trial, he was transferred to an overcrowded cell and was held in state custody for 17 months until the end of his trial at which he was acquitted.

The fear of further prosecution and injustice being afflicted on the 4th Plaintiff, forced him to go into exile, and he now resides in Dakar, Senegal.

The Application was later amended to include the 5th Applicant as a party.

The Applicants aggrieved by the alleged acts of the Defendants have filed this suit for 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 Defendant upon receipt of the claims so filed against it, filed a preliminary objection dated 4th January 2016 raising the following issues:-

a. There is no paragraph in the narration filed in support of the substantive application which shows that the 1st Plaintiff is a juristic person duly registered and only consists of member countries of ECOWAS.

b. The 1st Plaintiff lacks the *locus standi* to institute this action.

c. The 2nd and 4th Plaintiffs' claim is premature and cannot be maintained for it does not disclose any cause of action.

d. The 3rd Plaintiffs' claim is statute barred

e. The Plaintiffs/Respondents suit before this court is an affront to the internal sovereignty of the Defendant/Applicant.

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

In response to the objection raised by the Defendant, the Applicants contends that the 1st Applicant is a legal person recognized and registered under Senegalese law. A proof of official registration was therefore attached and marked **"Annex 1".** The Applicants further pointed out that this Court has already granted standing to the 1st Applicant in a previous proceeding; the 1st Applicant under its alternative name ' International Federation of Journalists Africa'- was the 3rd Applicant in the recent case of Hydara V. The Gambia, ECW/CCJ/APP/30/11.

The Applicants further contends that the Respondent's second point is irrelevant and does not advance its case as there is no restriction in this court's rule on locus standi for human rights cases which requires that, in the case of membership organizations, only entities with membership exclusively from ECOWAS member states are entitled to bring applications before the court. The Applicants submits that, insofar as the nationality of a non-governmental organization is relevant, it must be that the location of the country in which it is registered, and whether it is properly recognized that matters.

The applicants submits that the 3rd applicant continues living in exile even till date, to suffer a violation of her rights as a journalist, her rights of freedom of expression and liberty by virtue of her being forced to remain in exile.

In addition, they continued that the Gambia's persistent and continuous omission in failing to repeal the domestic criminal laws under which the 3rd Applicant's rights

were breached means that The Gambia's violation ought to be viewed as continuing until this day, since those provisions remain in force.

In conclusion, the Applicants submits that, even if the 3rd Applicant were to be held technically out of time to bring her claim (which is denied), then this Court ought to exercise its discretion to extend, in the interest of justice.

The Applicants filed an Application for an expedited hearing dated 17th February, 2016, Amici Curiae application dated 18th day of March 2016 and application granting leave to the Amici Curiae to intervene as an intervener dated 30th March, 2016.

As earlier noted, the application for accelerated hearing was struck out on the request of the Applicants, while the Court granted the amicus Curiae permission to file a consolidated brief.

A critical perusal of the application and the corresponding defence raises issues of law and fact both at the preliminary level and the substantive suit. Accordingly, 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.

2.1. PRELIMINARY OBJECTION.

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

i. Whether the 1st Plaintiff is a legal person and whether it has the locus standi to institute this action.

ii. Whether from the totality of facts before this Court, the 3rd Plaintiff's claim is statute barred.

iii. Whether the facts of this application discloses a cause of action against the Defendant.

We shall now consider the issues seriatim;

1. **Whether the 1st Plaintiff is a legal person and whether it has the locus standi to institute this action**

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

The term legal personality is defined in the **Black's Law Dictionary 9th Edition** as *"the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacity".* A legal person therefore is any person (human or non- human) that is clothed 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 artificial or juridical.

In the second instance, it is a creation of law. In all nascent system of law, legal personality whether natural or juridical is a requirement for bringing an action before a Court or tribunal. It is a pre-requisite for legal capacity.

Legal personality can be conferred either by statute or acquired by registration and it is a prerequisite for non-natural persons to institute action either for themselves or on behalf of others.

The fulcrum of the Defendant's preliminary objection is that the 1st Applicant not being a juristic person duly registered under any law of any ECOWAS member state cannot bring the present application.

The 1st Applicant in response to the Defendant's contention, attached a proof of official registration under the Senegalese law and marked "Annexure1".

The production of its certificate of registration without more, 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 **SERAP V THE PRESIDENT OF THE FRN & 8 ORS 2010 CCJELR Pg. 247 para 54** this Court held that:

"With respect to the existence of the Plaintiff itself and the regularity of its constitution under Nigerian Law, what emerged from the evidence produced before the Court, is that the Plaintiff is an entity duly and legally registered under the Company and Allied Matters Decree of the 1999 of the Federal Republic of Nigeria with certificate of incorporation as confirmed by Annexure A. In the absence of any compelling evidence to the contrary, the Plaintiff is a legal entity duly registered."

See also National Coordination of Departmental Delegates of the Cocoa Coffee Sector (CNDD) V. Republic of Cote d'Ivoire (2004-2009) CCJELR pg. 317.

Thus, having produced the certificate of incorporation in prove of its status, the Court will presume in the absence of any contrary evidence that the certificate is regular and that the 1st Applicant is a legal entity with capacity to sue and be sued. Consequently, the objection of the Defendant in this regard cannot be sustained.

The Defendant further contends that the 1st Applicant has no locus standi to institute this action.

The term "Locus Standi" denotes the 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 a standing to litigate same.

There is however need to stress here that the position in law globally has moved beyond insistence on the strict rule of standing in human rights violation cases. This Court 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 of behalf of the actual victim. See **SERAP V FEDERAL REPUBLIC OF NIGERIAN & 4 ORS 2014 ECW/CCJ/JUD/16/14 Unreported.**

In **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 popularis, which is wisely allowed under African Charter".

In the case **SERAP V Federal Republic of Nigeria & Anor 2010 CCJELR p 195-197,** the Court noted that the doctrine of 'actio popularis' was developed under the Roman law in order to allow any citizen to challenge a breach of a public right in court as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court.

The Court was persuaded by the authorities relied upon by the Plaintiff in Fertilizer Corporation Kamager Union V Union of India (1981) A.IR (sc) 344; and Abraham Adesanya V President Federal Republic of Niger (1981) 1 ALL N.L.R 1 @ 20 and held that;

"Public international law in general, which is by and large in favor of promoting human rights and limiting the impediment against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. The plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable."

Having found that the 1st Applicant is a duly registered non-governmental organization, it is a juristic person with a right to sue and be sued. A fortiori, the 1st Applicant on the strength of the above decisions has standing to bring the present action for and on behalf of its members. Indeed some violations can as in this case be considered as done against the corporation of journalists, and not against one person, thus "the victim" is the whole

profession because the injury can be regarded as affecting all the members of that profession. In accordance with our jurisprudence which admits only "the victims" federation of journalists can be regarded as a victim.

2. Whether from the totality of facts before this Court, 3rd Plaintiff's claim is statute barred.

The defendant contends that the 3rd Plaintiff's action is statute barred not having been brought within the limitation period provided by Article 9(3) of the Supplementary Protocol 2005.

The 3rd Applicant's claim is that she was arrested after landing in Banjul International Airport for her father's funeral on the 28th of March 2007. She was taken to the National Intelligence Agency (NIA) Headquarters by two plain-cloth officers where she was detained for six days and interrogated. On the 4th of April 2007, she was charged with intention to commit sedition, publication of seditious words, publication of false news and uttering seditious words. On the 18th of August 2008, the 3rd applicant was convicted on all counts and sentenced to a GMD 250, 000 fine to be paid within two hours or four years' imprisonment with hard labour on default of payment. Upon satisfying the conditions, she fled the Gambia for fear of being re-arrested as this has been the case with other journalists.

Statute of limitations are laws promulgated by legislative bodies, local, national or international which sets the maximum time within which legal proceedings may be initiated or commenced. Where the period stipulated in a limitation statute lapses, a

claim for reparation for the wrong suffered may not be filed and where filed is liable to be struck out as having become statute barred. In that case, a litigant is said to have lost his right of action despite the existence of a course of action, thus depriving a Court the jurisdiction to entertain the claim. Article 9(3) of the Supplementary Protocol of this Court provides that:

"Any action by or against a community institution or any member of the Community shall be statute barred after three (3) years from the date when the right of action arose."

Article 9(3) 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 or against the Community or any of its institutions or officials. However, the French version have not placed the same time limits on actions against member States.

The French version provides as follows:

"L'action en responsibilité contre la Communauté ou celle de la Communauté contre des tiers ou ses agents se prescrivent par trois (3) ans à compter de la réalisation des dommages"

A literal interpretation of this sub Article reads;

"Action in responsibility against the Community or action by the Community against third parties or its agents shall be considered as statute barred three years from the date the cause of action occurred".

"It is deducible from the above that actions against Member State being statute barred after three (3) years is absent in the French version".

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

Therefore, it follows that in interpreting this provision, the contents of the French version is to be preferred. This position is reinforced by international best practices and the provisions of the fundamental human rights enforcement procedures of most States, that claim for enforcement of human rights cannot be caught by limitation statutes.

Thus the Court holds that the previous decisions of this Court relating to limitation of actions against Member States in human rights cases after three years that the cause of action arose were decided per incuriam including the recent case of Dorothy Njemanze & 3 ors Vs. Federal Republic of Nigeria (2017) 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 limitation does not apply.

Furthermore, assuming but not conceeding that Article 9(3) subsists as to deny the existence of a right of action, there is still another plank for the exclusion of the application of statute of limitation. The rule is that where an injury is continuing, it

will give rise to a cause of action **die in diem** (day 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 enforceable right. That right is dependent on whether as of the date the action is brought to court, all the necessary facts are available and any pre-requisite legal or factual situations have been satisfied. See **Valentine Ayika Vs. Republic of Liberia 2011 CCJELR pg. 236 para 10.**

The right of action finds it basis on the cause of action. A right of action accrues once an actionable wrong occurs. However, where the wrongful act is continuous, the right of action subsists until the wrongful act terminates.

In **SERAP V. FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/18/12, UNREPORTED** this Court found that the Plaintiff's subjection to the statute of limitation depends on the characterization of the act as an isolated act or a persistent and continuous omission that lasted until the date the complaint was filed with the Court and that in situations of continued illicit behavior, the statute of limitation only begins to run from the time when such unlawful conduct or omission ceases.

In the case of **Ouko V Kenya communication No. 232/1999 (2000) AHRLR 135**, 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 persecution suffered by a union leader constituted a breach not only of the

rights of expression and freedom of association, but also that the applicant decision to go into exile for fear of continued persecution amounted to a separate and stand-alone breach of the right of return to his own country under Article 12 (2) of the Charter.

The 3rd Applicant's contention is that following her release she went into exile on fear of further persecution by the defendant and that her continued stay in exile constitutes a violation of her rights to personal liberty, work as a journalist, and freedom of expression.

In **Randolph V Togo Communication No. 910/2000** (2004) 11 IHRR 306 the UN Human rights committee held that where a person has been forced into exile by a violation of his/her human right, the continuation of the exile itself constitutes a continued breach of the same rights.

The above findings are quite persuasive and in the light of earlier decisions of this court as referred to above we are of the view that the cause of action subsists so long as the 3rd plaintiff remains in forced exile. Therefore the Defendant's contention that the 3rd Applicant's action is statute barred cannot therefore be sustained as the acts complained of is a continuous in nature.

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

The defendant in its notice of preliminary objection contends that the 2nd and 4th plaintiffs' claim is premature and cannot be maintained as it does not disclose any cause of action.

Black's Law Dictionary Ninth Edition defines cause of action as:

'A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.'

The term "cause of action" was described in **Letang v. Cooper (1960) ALL ER 929** as:

'The reason or facts that entitled a person to sue or bring his action to the court, or a factual situation that entitles one person to obtain from the court a remedy against another person.'

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 plaintiffs and nothing else.

The facts contained in the Applicants' initiating application is that they were on different occasions unlawfully arrested and detained and in some cases tortured by the officers of the Gambian National Intelligence Agency (NIA) for articles they published against the Gambian President. They further alleged that the Gambian government has relied upon its Criminal and Sedition Laws to detain, arrest and convict Journalist over the past years. The fear of further prosecution, has made them remain in exile till date.

In **SERAP V. Fed Rep of NIGERIA & 4Ors 2014** Unreported, the Court held the view that the Plaintiffs by alleging facts from which can be inferred, at least prima facie, a remote possibility that the Defendant may have violated their human rights, have established in their pleadings an arguable cause of action.

The facts of this case as presented by the applicants constitute arguable ingredients of breaches of the various provisions of human rights law as alleged which if established constitute a violation of their rights under international law.in this regard, the Applicants have established arguable cause of action.

The Defendants' objection here also fails.

3. **Exhaustion of Local Remedies**

The rule on the exhaustion of local remedies before taking to international remedies is one of the basic rules of customary international law. The object of the rule is to enable the Respondent State the first opportunity to correct or remedy the harm and to make a reparation. With regard to protection of human rights, the application of the local 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 expected to first make use of domestic remedies to right the wrong before approaching an international Court or tribunal. Access to such Courts should be the last resort, after the domestic remedies has been exhausted.

However, to this rule there are exceptions namely, but not limited to

a. If no domestic, remedies are available or there is unseasonable delay on the part of national Courts in granting the remedy
b. Where the treaty establishing a tribunal excludes the application of the rule either exprecisly on by necessary implication.

   Indeed, the rule of local remedies should not constitute an unjustified impediment to access to the international remedies. The drafters of the Supplementary Protocol 2005 which created the human rights jurisdiction of this Court provides the conditions to be satisfied by Applicant 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 argued that the Applicants failed to exhaust local remedies as a condition precedent for approaching this court and therefore in 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 provisions relied upon by the Defendant is a procedural rule applicable by the African Court and this Court is not bound by the procedural provisions of the African Court.

This Court has held in a number of cases that exhaustion of local remedies is not a condition precedent for bringing a human rights claims before it and this issue need not be over flogged.

In **Sikiru Alade V Fed. Rep of Nigeria 2012 CCJELR** unreported, the Court held that the provisions of article 10(d) puts it succinctly clear that the access to this court is not subject to exhaustion of local remedies as envisaged by the customary international law on this point. That the Protocol of the Court is an exception to the general rule. While international customary law is lex generale, the provisions of the protocol as amended by the supplementary protocol is lex specialis and therefore it applies as an exception to the general.

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

The land mark case on this issue is the Courts decision in Musa Saidy khan (2010) CCJELR p. 115 in which the court touched on all areas of objections raised by parties on this issue and held:

i. That the provision of a statute cannot be ousted by implication and that though there is a rule of customary international law in support of exhaustion of local remedies, that rule is not inflexible since it can be legislated away or compromised by parties

ii. That the Protocol on Democracy and good governance was earlier in time than the 2005 Supplementary Protocol which granted access to the court to individuals without providing for the pre-condition of exhaustion of local remedies

iii. That even if the Protocol on Democracy and good Governance came into force at the same time as the 2005 Supplementary Protocol , the Supplementary Protocol provisions will take precedence over the provisions of the protocol on democracy and good governance in that it was made specifically for the Court.

iv. That Article 50 of the African charter, which mandates the African commission to admit cases only after the exhaustion of local remedies is inapplicable to this court being a directive meant only for the African Commission.

In view of the above the defendant's contention in this regard goes to no issue and cannot be sustained.

4. <u>ON THE SUBSTANCE</u>

The following issues call for consideration

1) <u>Can this court examine the impugned provisions of the laws of Gambia as urged by the Plaintiffs.</u>

The Jurisdiction of this Court to determine cases of Human rights violation is provided in Article 9(4) and 10(d) of the 2005 Supplementary Protocol.

The Applicants alleged that the Defendant in enforcing its statutory provisions particularly sections 51, 52, 52A, 59, 178, 179, 180, 181, and 181A of the Criminal Code and Section 173A of the Information and Communications (Amendment) Act of the Gambia, violates their rights as journalists. Further, the Applicants state that the continued application of these laws violates their rights to personal liberty and as a result of this, they remain in exile till date.

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

The question to be addressed at this point is whether this court can examine the contested legislation to determine if the legislation is incompatible with and infringes on the Plaintiffs rights protected under the UDHR, African Charter, ICCPR and other international provisions to which the Defendant is a party.

In **Hissien Habre Vs. Senegal (2010 CCJELR) pg.65**, this Court held:

"*that to decide whether or not it has jurisdiction to hear a case, it has to examine if the issue submitted deals with the rights enshrined for the benefit of the human person and arising from the international or community obligation of the state as human rights to be observed, promoted, protected and enjoyed and whether the alleged violations was committed by a member state of the community."*

The powers conferred on the Court, in the 2005 Supplementary Protocol should are clear and should not be misconstrued as the jurisdiction to exercise or control over

the constitutionality of laws of member states which is the preserve of domestic constitutional courts.

This Court has thus consistently maintained that it will not examine the laws of member states in abstracto since it is not a constitutional court but, once human rights violation are alleged, it invokes its jurisdiction to examine whether or not there has been a violation.

In **Hadijatou Mani Koraou V. Republic of Niger (2004-2009) CCJELR, pg 232 para. 60.** The court held that it does not have the mandate to examine the laws of member states of the community in abstracto but rather, to ensure the protection of rights of individuals whenever such individuals are victims of the violation of those rights which are recognized as theirs, and the court does so by examining concrete cases brought before it.

In the instant case, the arrest, detention and torture of the Applicants' were predicated upon media publications by the Applicants to which the Defendant argues that the publication constitutes an offence under the Gambian Criminal Laws.

The Applicants' maintained that the impugned provisions has affected their profession as journalists making it practically impossible for them to freely disseminate information for public interest. Furthermore, the fear of being re-arrested, prosecuted and tortured by the Defendant of those laws in future has forced them to remain in exile.

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

Having reiterated the Courts' competence on human rights cases, it therefore implies that this court in exercising its jurisdiction, has the powers to go into the root of the violation i.e. those laws which the Applicants' are contesting to establish whether or not they are contrary to the provisions of international human right laws on freedom of expression.

Consequently, in view of its jurisprudence, 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 rights.

Do the provisions of the laws of the Gambia on sedition, criminal libel and false news publication constitute an infringement on the human rights of the plaintiffs as alleged?

The Plaintiffs urge this Court to declare sections 51, 52, 52A, 59, 173A, 179, 180, 181 and 181A of the Criminal Code, Cap 10:10 of 2009 Laws of The Gambia inconsistent with and a breach of The Gambian obligations as a member of ECOWAS to protect Human rights and comply with its international obligations.

In urging this court to do this they aver that the defendant in applying the laws interfered with their rights as journalists by instilling fear of potential arrest and

prosecution in them thereby having a chilling effect on their freedom of expression as journalists.

Acknowledging the fact that the restriction is contained in the law they contend that that is not enough as the law has to be formulated with sufficient precision. They contend that the definition of seditious intention is based on subjective reactions of the reader while definition of defamatory matter under section 179 does not establish an objective standard as to enable the writer determine ahead of the publication whether the publication will fall within the definition of defamatory matter.

Referring to the provision of sections 59 and 181A on false news, they submit that the possibility of error in journalistic work cannot be avoided and as such the existence of criminal liability for such errors impedes their right to freedom of expression and so cannot be provided by law and that maintaining the provision has not been shown to serve any legitimate purpose.

The plaintiffs further contended that 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 sections under reference satisfy the requirements of a good law within the contemplation of Article 19(3) of ICCPR. They further submit that the interpretation of what is harmful or offensive to the reputation of others are culturally and politically relative and that the stipulations in the provisions being challenged are reflections of the Defendants

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 limitation on the freedom of expression contained in the sections aims at containing advocacy directed at inciting imminent lawless actions within the state. The defendant further contends that the sanctions are liberal and proportionate in so far as they do not impose mandatory custodial sentence but include option of fine

Article 19 of UDHR and Article 19 of ICCPR make provision for freedom of expression and information. However, Article 19(3) of ICCPR goes further to provide for special duties and responsibilities attached to the rights which may thus be subject to certain restrictions provided by law and necessary for the respect of the rights and reputation of others and the protection of national security or public order, public health or morals.

From a reading of Articles 9(2) and 27(2) of the African Charter, the right to express and disseminate opinion is to be exercised within the law, and with due regards to the rights of others, collective security, moral and common interest.

It follows from the above that the right to information is not absolute under any international instrument. However, for the right to be interfered with certain parameters must be in place viz: existence of a legal provision, necessary for the

respect of the rights and reputation of others and the protection of national security or public order, public health or morals.

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

After the Norman conquest of England, William1 set up church court to try the canon law crime of false allegation. The guilty is made to publicly confess and beg the injured for forgiveness. By the 16th century the church courts were replaced by the king's courts which started imposing monetary fines on defamers.

The invention of the printing press led to easy production and circulation of political tracts and this heightened the fear of seditious libel and led to the establishment of the court of the Star Chamber to affirm and protect royal authority. The court of Star Chamber began punishing any criticism that appears to the court capable of bringing the government to disrepute and since such publications tended to undermine the legitimate government, its truth was immaterial. In fact, "the greater the truth the greater the libel" since the exposure of the truth was more likely to lead to government downfall or a breach of peace.

Historically, criminalizing defamation therefore was born out of the need to prevent breaches of peace / public order and secondly to preserve state security. See the cases of R v Holbrock, (1878) 4 QBD 42 and R v Labouchare, (1884) 12 QBD 320

The public order issue arose out of the tendency of the defamed to draw his sword for a duel in order to defend his integrity and in so doing disrupt public peace. This

situation however no longer arises in the modern era where there are established judicial fora for individuals to litigate civil wrongs. As pointed out by Lord Diplock in the case of **Gleaves v. Deakin, [1980] AC 477 (at page 482-483).**

> *"The original justification for the emergence of the common law offence of defamatory libel in a more primitive age was the prevention of disorder… The reason for creating the offence was to provide the victim with the means of securing the punishment of his defamer by peaceful process of the law instead of resorting to personal violence to obtain revenge. But risk of providing breaches of the peace has ceased to be an essential element in the criminal offence of defamatory libel; and the civil action for damages for libel and on injunction provides protection for the reputation of the private citizen without the necessity for any interference by public authority with the alleged defamer's right to freedom of expression*."

The Zimbabwe Supreme Court in **Nevanji Madanhire V. Attorney General, CCZ 2/14** unanimously held that the offence of defamation was not reasonably justifiable in a democratic society within the contemplation of s 20(2) of the former Zimbabwe Constitution. In its words:

> "*The harmful and undesirable consequences of criminalizing defamation, viz, the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, right and freedoms of other persons. In short, it is not necessary to criminalize defamatory statement."*

When criminalization of defamation aims at preservation of state security the crime is referred to as "seditious libel".

Sedition is defined in black's law dictionary 9th edition as an agreement, communication or other preliminary activity aimed at inciting treason or some lesser commotion against public authority

Section 52 of the impugned law creates the offence of sedition thus:

(1) A person who –

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;

(b) utters 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 no reason to believe that it is seditious,

'commits an offence……'

The plaintiffs grouse is not with the establishment of the offence per se but on the definition of seditious intent under Section 51 to mean any action likely:

a) To bring into hatred or contempt or to excite disaffection against the person of the President, or the Government of The Gambia as by law established

(b) To excite the inhabitants of The Gambia to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Gambia as by law established;

(c) To bring into hatred or contempt or to excite disaffection against the administration of justice in The Gambia;

(d) To raise discontent or disaffection amongst the inhabitants of The Gambia; or

(e) To promote feelings of ill-will and hostility between different classes of the population of The Gambia…'

Section 179 defines "defamatory matter" as matters likely to injure 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 or which is derogatory, contemptuous or insulting to a person.

With respect to the definition of publication for purposes of criminal libel offence, section 180(2) provides that it is not necessary for libel that a defamatory meaning should be 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 alleged libel itself or from an extrinsic circumstance…

Finally with respect to false news publication, section 59 provides as follows:

" a person who publishes or reproduces any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that the statement, rumour or report is false, commits a misdemeanor and is liable on conviction to imprisonment for a term of two years".

A reading of the above article espouses expressions of inexactitude which are also so broad as to be capable of diverse subjective interpretations. It indeed amounts to censorship on publication. The jurisprudence of freedom of expression suggests that the erosion of freedom of expression by indirect means as the above provisions seem to have done suggests that a finding of violation is obvious. The existence of criminal defamation and insult or sedition laws are indeed inacceptable instances of gross violation of free speech and freedom of expression. It restricts the right of access to public information. This appears to be the intent of the laws of the Defendant on sedition.

Restrictions on the freedom of speech must be couched in the narrowest possible terms to enable speakers appreciate the boundary between legality and illegality in their speeches/ actions.

The UN Human Rights Committee recently issued its general comments No 34, which constitutes the most authoritative interpretation of the minimum standards guaranteed by article 19 of the ICCPPR. In particular, the committee highlighted a free and uncensored media as bedrock of a democratic society. The committee said;

> *"A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The covenant embraces a right whereby the media may receive information on the basis which it can carry out its functions. The free communication of information and*

ideas about public and political issues between citizen's candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censor or restraint and to inform public opinion. The Public also has a corresponding right to receive media output".

Narrowly drawing offences has been treated as particularly important in the case of free speech because of what is known as "chilling effect" which occurs when a wide or vague speech-restricting provision forces self-censorship on speakers even with, because they do not wish to risk being caught on the wrong side of it.

In **New York Times v. Sullivan, 376 U.S.254 (1964)** Brennan, J. explained (at para18, page 725) that "*would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court for fear of the expense of having to do so. They tend to make only statements which "steer for wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate*.

In **Ramilla Maidan Incident V. Home Secretary Union of India (**UOI)(2012) S SCC I, Swatanter Kumar, J. observed:

It is significant to note that the freedom of speech is the bulwark 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 condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succor

and protection to all other liberties. It has been truly said that it is the mother of all liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press.

In **Lingens v. Austria, Application No. 9815/82, 8ECHR 407**, 8 July 1986 before the European Court of Human Rights (ECHR), the applicant journalist was fined for criminal defamation by the Chancellor of Austria for publishing an article criticising his regime. While holding that the institution of an action of criminal libel violated the freedom of expression, the ECHR also observed (at para 44) that:

The penalty imposed on the author ... amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future. In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.

In **New York Times v Sullivan 376 U.S 254 (1964)** Brennan, J. observed that:

….erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they need .... to survive

See also **Castells v. Spain, Application No, 11798/85, ECHR** decision of 24 April 1992, where the court while ruling that the applicant's right to free speech had been violated, held that:

…the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.

In Sullivans case (supra) Brennan, J. went on to hold that: "*A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars ... under such a rule would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."*

The Constitutional Court of Zimbabwe in Nevanji Madanhire and Nquaba Matzhizi v Attorney General 2015 ZWCC 02, Patel, J. observed that

"The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices."

While announcing the repeal of the offences of seditious libel, defamatory libel, obscene libel and sedition, the UK secretary of State at the Ministry of Justice, Ms. Claire Ward was quoted in the UK Press Gazette, 13th January, 2010, as having said that: "*Sedition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today… The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom… Abolishing these offences will allow the UK to take a lead in challenging similar laws in other countries, where they are used to suppress free speech*."

In the case of Kimel v. Argentina, judgement of the IACHR of May 2, 2008 the Inter American Court examined whether criminal proceedings of defamation against an Argentinian accused violated Article 13 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 overtly disproportionate.

The African Court on Human and Peoples' Rights in **Issa Konate v. The Republic of Burkina Faso, Application No. 004/2013** ordered Burkina Faso to repeal its provisions on criminal defamation, and pointed out that:

In order to consider the need for a restriction on freedom of expression, the Court notes that such a need must be assessed within the context of a democratic society; it also notes that this assessment must ascertain whether that restriction is a proportionate measure to achieve the set objective, namely, the protection of the rights of others.

....The Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the Commission, "people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether".

In **ALTUG TANKER AKCAM V TURKEY application no. 27520/07 25th October 2011** 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 contested legislation is in itself compatible with the Convention's provisions, Article 301 of the Turkish Criminal Code and the criminal investigation commenced against the applicant does not meet the "quality of law" required by the court's settled case-law, since its unacceptable

broad terms result in a lack of foreseeability as to it effect. The court concluded that the interference in question was not prescribed by law and accordingly, there has been a violation under Article 10 of the Convention.

Similarly, In **Otegi Mondragon V Spain no. 2034/07, 15th march 2011** the Court in its decision with regard the penalty imposed on the applicant, observed that the nature and severity of the penalties imposed are factors to be taken into consideration in assessing the "proportionality" of the interference. 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.

In analyzing the Criminal laws of the Gambia, one can certainly infer that these laws 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 restrictions and vagueness with which these laws have been framed and the ambiguity of the mensrea (seditious intention), makes it difficult to discern with any certainty what constitutes seditious offence.

The practice of imposing criminal sanctions on sedition, defamation, libel and false news publication has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists. The application of these laws will amount to a continued violation of the internationally guaranteed rights of the Applicants.

Having critically examined the criminal laws of The Gambia, the Court declares that the criminal sanctions imposed on the applicants are disproportionate and not

necessary in a democratic society where freedom of speech is a guaranteed right under the international provisions cited.

It is our view that the impugned provisions cast excessive burden upon the applicants in particular and all those who would exercise their right of free speech and violates the enshrined rights to freedom of speech and expression under Article 9 of the African Charter, Articles 19 of the ICCPR and Article 19 of UDHR.

Consequently, the Court directs that the legislations on sedition, criminal libel, defamation and false news publication of The Gambia be reviewed and decriminalized to be in conformity with the international provisions on freedom of expression and in consonance with the Defendants 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 2nd-5th Applicants alleged that they were arrested and unlawfully detained, with the 4th and 5th Applicants being subjected to torture by the agents of the Defendant while in detention. This arrest and detention was predicated on the seditious, libel and false news laws of the Gambia. The Applicants further argued that these laws are in violation of their rights as journalists, right to liberty and freedom of expression as they are still in exile for fear of being re-arrested in the cause of exercising their rights as journalists.

The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; the application of domestic laws in a case of arrest and detention must itself be in conformity with the international provisions.

An arrest done in conformity with the law is deemed lawful until such laws are repealed. In the instant case, though the arrest of the Applicants were carried out in accordance with the criminal laws of The Gambia, the continued detention of the Applicant constitutes a violation.

In **A and Others V. The United Kingdom *(Application no. 3455/05)*** *judgement 19th February 2009* the Grand Chamber of the European Court of Justice held that:

"The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 (1) 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 (1) 1 and the notion of "arbitrariness" in Article 5 (1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention."

Similarly, in **MEDVEDYEV AND OTHERS v. FRANCE** *(Application no. 3394/03)* JUDGMENT STRASBOURG 29 March 2010, *the Court reiterated that where the "lawfulness" of detention is in issue,* including *the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, 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 be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness"*

The UN General Assembly provides in Article 3 and 9 of the UDHR thus:

3 "*everyone has a 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 deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

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 conditions previously laid down by law. In particular, 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 on such grounds and in accordance with such procedures as established by law.

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable and in any case within three hours, in a language he or she understands, of the reasons 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) for the purpose of bringing him or her before a court in execution of the order of a court; or

(b) 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 court and, in any event, within seventy-two hours.

The Defendant argued that the arrest, detention and prosecution of the 2nd, 3rd and 4th Applicants was on reasonable suspicion of the Applicants having committed an offence, in pursuance of and in accordance with the laws and legal principles of the Republic of the Gambia.

In order to meet the requirement of lawfulness, detention must be "in accordance with a procedure prescribed by law". This means that detention must conform to the substantive and procedural rules of national law or international law where appropriate.

The concept of freedom from arbitrary arrest and detention dates back to the Magna Carta, Statutes of the Realm 6-7 (1810) wherein Article 39 of the provides:

"No freeman shall be taken or imprisoned or be disseized of his freedom, or liberties, or free customs or be outlawed or exiled or any otherwise destroyed, nor will we not pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land"

The UN Committee on the study of the Rights of everyone to be free from Arbitrary Arrest, Detention, and Exile defines Arrest as "The act of taking a person into custody under the authority of the law or by compulsion of another kind and includes

the period from the moment he is placed under restraint up to the time he is brought before an authority competent to order his continued custody or to release him" and defines detention as the act of confining a person to a certain place, whether or not in continuation of arrest and under restraint which prevent him from living with his family or carrying out his normal occupational or social activities.

The 3rd Applicant alleges to have been detained for 6 days, the 4th Applicant was also detained for about a month while the 5th Applicant was detained for 63 days before being charged to Court. The Defendant failed to give a justification for the continued detention.

The Defendant did not lead any evidence to rebut the allegation, rather, contends that the arrest, and detention was upon reasonable suspicion and in conformity with the Laws of the Gambia.

Section 19 (3) (b) of the Constitution of the Gambia above provides that persons detained upon reasonable suspicion should 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 **Tandja V Republic of Niger (2010 CCJELR) pg 130**, the Court held that detention under whatever guise must comply with the respect enlisted in the human rights instruments and must be done within the frame work of judicial procedure.

A person detained on a criminal charge has the right to trial within a reasonable time or to be released pending trial.

In the case of **Huri laws V Nigeria, communication no.225/98 (2000) para 45**, the Commission concluded that Nigeria had violated both articles 7(1) (d) and 26 of the African Charter by failing to bring the two alleged victims promptly before a judge or other judicial officer for trial; the victims had been detained for weeks and months respectively without any charges being brought against them.

Similarly, in **Castillo Paez V Peru 1997 pg 263 paras 56-58** the Inter-American Court of Human Rights concluded that, article 7 (5) 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 Gambia provides for the rights to liberty and further stipulates that persons so arrested shall be brought without undue delay before a court and, in any event, within seventy-two hours.

The Applicants' in the cause of their arrest spent approximately 6, 30 and 63 days respectively. The prolonged detention of the Applicants which the Defendant did not deny amounts to an arbitrary detention within the context of the African Charter and other international instruments.

In view of the above, the Court holds that the unjustified detention of the Applicants which is not in conformity with the domestic and international laws is arbitrary and

falls short of the requirements under the ACHPR and the ICCPR and therefore violates the 3rd-5th Applicants' rights.

On the allegation of torture and degrading treatment

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

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Section 21 of the Constitution of the Gambia provides:

"No person shall be subject to torture or inhuman or degrading punishment or other treatment."

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

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

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

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,

punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

In the case of **Loayza Tamayo V. Peru judgment of September 17, 1997. Series C No. 33, para 57,** the Inter-American Court held that:

"the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradation and embraces treatment ranging from torture to other types of humiliating or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The European Court of Human right has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical moral resistance".

With regards to the 4th and 5th Applicant's claim, the 4th Applicant stated that he was locked up in a dark cell with no windows called a crocodile hole. While in detention, he was severely tortured and attacked by" Jungulars" i.e. President Jammeh's personal para-military security force. These men brutally beat him repeatedly to the point of being unconscious on two consecutive nights. They attempted to break his

fingers, used a plastic bag to suffocate him and extinguished their cigarettes on his body.

The 5th Applicant averred that while in detention, He was forced to sleep on a bare floor in a tiny cell which measured approximately 1 meter by 2.5 meters with a small amount of ventilation. The cell was lit 24 hours a day with a very bright light making it difficult for him to sleep. The cell had a small pit covered with a wooden plate, which was to be used as a toilet. He was given food only once a day and never had the opportunity to shower or change clothes.

He was interrogated by a group of 10-15 masked soldiers who used sticks and military boots to beat his whole body and genitals to the extent that he lost consciousness. His testicles and back were badly bruised and swollen. The officers forced a cigarette stick into his mouth, moving it back and forth, and poured cold water all over his body. At that point, he heard one of the soldiers asking another if he had finished digging the grave.

In another round of torture, the 5th Applicant was stripped naked by the NIA officers who administered electric shocks to his back, forehead and testicles. He received no medical attention after being tortured on either occasions. These acts have left the 5th Applicant in an unstable state and unable to do any arduous work.

The Defendant on the other hand denied subjecting the 4th and 5th Applicant to any form of torture and put them to the strictest proof.

It is trite that the burden of proof rest on he who asserts the affirmative and not on he who denies. In the words of Lord Maugham in the case of **Constantine line V. Imperial Smelting Corporation 1942 AC.154 at p.174**, *this ancient rule founded on consideration of common sense should not be departed from without strong reasons.*

The burden therefore, lies on the Applicant to establish their allegation. The 4th and 5th Applicants in establishing their claim, attached a medical report from an independent forensic experts group. In the report, the experts stated that the 4th and 5th Applicants suffered from chronic physical issues as well as heavy symptoms of post-traumatic stress disorder. The physical and psychological findings when considered separately and together are highly consistent with the act of torture and ill-treatment that they allege. This report has not been contested by the Defendant and in the absence of any refute, this amounts to an admission.

In **Musa Saidykhan V. Republic of the Gambia 2010 CCJELR pg 178 para. 41** this Court observed that the evidence of the Plaintiff on the wounds was direct and credible enough for this court to accept it. 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.

Above all, the 5th Defendant escaped into exile and could not have been expected to exercise the higher burden of proof than the one allowed by the circumstance.

Burden of proof is not a static concept and must be circumscribed by the circumstances of each case.

Also in **Eci and others V. Turkey 23145/93 13th November 2003** the European Court on Human Rights noted the consistency of the allegations made by the Applicants that they were insulted, assaulted, stripped naked and hosed down with freezing cold water and found that the Applicants had suffered physical and mental violence at the hands of the gendarmerie during their detention. Furthermore, the Court found that such ill-treatment caused them severe pain and suffering and was particularly cruel in violation of Article 3 of the convention which must be regarded as constituting torture.

This Court having examined all the circumstances which arose in the physical infliction of pain meted out on the 4th and 5th Applicants by the NIA officials, which includes but not limited to the use of electric shocks on the forehead and testicle, extinguishing of cigarette on their bodies, and the brutal beatings, takes into account 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 interrogation 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 ICCPR respectively.

From the totality of evidence before this Court, it appears the applicants have established a case of infringement on their rights to freedom of expression and torture as the case may be and the Court so hold.

DECISION:

The Court adjudicating in a public sitting after hearing the Parties in the last resort and after deliberating in accordance with law.

AS TO THE PRELIMINARY OBJECTION:

Declares that it has jurisdiction to entertain this case and therefore dismiss the preliminary objection of the Defendant.

AS TO MERITS:

DECLARES;

1. That the action of the Defendant in enforcing the provisions of its law on sedition (the subject matter of this Application) against the 2nd, 3rd, 4th and 5th Applicants which forced them to exile violates the rights of the Applicants under Articles 6, 9 12 (2) of the African Charter on Human and Peoples' Rights, Articles 9, 12(4) and 19 (2) of the International Covenant on Civil and Political Rights (ICCPR, and Article 66(2) © of the Revised ECOWAS Treaty.

2. That the subjection of the 4th and 5th Applicants to torture , inhuman and degrading treatment violates their rights under Article 5 of the African Charter on Human and Peoples' Rights and Article 7 of the ICCPR.
3. Directs the Defendants to immediately repeal and /or amend its laws (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 the Defendant to pay the 4th and 5th Applicants the sum of 2 million Gambian Dalasi each for the violation of their human rights including the right to freedom of expression and the right to freedom from torture.
5. ORDERS the Defendant to pay the sum of 1 million Gambian Dalasi each to the 2nd and 3rd Applicants as damages for the violation of their rights by the Defendant.

AS TO COSTS

Cost is awarded against the Defendants. Such costs to be assessed by the Registry of the Court. The Court thanks the Amicus Curae for the insightful submission that have assisted this Court in taking an informed Decision.

Thus made adjudges and pronounced in a public hearing this 13th day of February 2018.

THE FOLLOWING JUDGES HAVE SIGNED THE JUDGEMENT;

Hon. Justice Friday Chijioke Nwoke	**-- Presiding**
Hon. Justice Maria De Ceu Silva Monteiro	**-- Member**
Hon. Justice Alioune Sall	**--Member**

Assisted by: Athanase Attanon Deputy Chief Registrar