IN THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY

OF WEST AFRICAN STATES

(ECOWAS)

In the Case

MADO FIDEGNON FREDERIC v. REPUBLIC OF TOGO

Application No. ECW/CCJ/APP/04/17 - Judgment No. ECW/CCJ/JUD/21/2022

JUDGMENT

ACCRA

On 30TH MARCH FEBRUARY, 2022

APPLICATION No. ECW/CCJ/APP/04/17

JUDGMENT No. ECW/CCJ/JUD/21/2022

BETWEEN:

MADO FIDEGNON FREDERIC, represented by the Collective of Associations Against Impunity in Togo (CACIT)… **APPLICANT**

AND

STATE OF TOGO…….. RESPONDENT

COMPOSITION OF THE COURT PANEL

Hon. Justice Edward Amoako **ASANTE** ……Presiding

Hon. Justice Gberi-Be **OUATTARA**……Member

Hon. Justice Januária T. S. M. **COSTA**…… Member/Rapporteur Judge

ASSISTED BY:

Aboubacar DIAKITE…….Registrar

I. REPRESENTATION OF PARTIES

Me Claude Kokou AMEGAN

Me Ferdinand Ekouévi AMAZOHOUN …….Counsel for the Applicant

Monsieur Le Garde des Sceaux, Minister de la Justice, Charge des Relations …. Counsel for the Respondent

II. COURT'S JUDGMENT

1. This is the Court's Judgment read virtually in a public hearing, in accordance with Article 8 (1) of the 2020 Practical Instructions on Electronic Case Management and Virtual Sessions of the Court.

III. DESCRIPTION OF THE PARTIES

2. The Applicant, MADO Fidégnon Fréderic, represented by the Collective of Associations Against Impunity in Togo (CACIT), is an officer of the Togolese Armed Forces, retired, residing in Lomé.
3. The Respondent is the Republic of Togo, an ECOWAS Member State and signatory to the African Charter on Human and Peoples' Rights.

IV. INTRODUCTION

4. In the instant case, the Applicant came to plead the violation of his human rights, alleging, inter alia, that in April 1993, the Defendant's agents arrested, beat and handcuffed him to obtain information about his involvement in the attempted Coup d'état of March 1993. That he was detained and tortured between April 1993 and December 1994 and that in March 1996 he was notified of a decision of his retirement from the Army, as a disciplinary measure, issued in March 1993.

V. PROCEDURE BEFORE THE COURT

5. The application initiating proceedings (Doc.1), accompanied by 3 Exhibits, was lodged at the Registry of this Court on January 11, 2017 and served on the Respondent on January 16, 2017.
6. With the original application, the Applicant also filed an application for Expedited Procedures (Doc. 2), which, was served on the Respondent on the same date.
7. On March 20, 2017, the Respondent filed a preliminary objection application (Doc. 3) as well as its defense (Doc. 4), which were served on the Applicant on March 23, 2017 to which he made no pronouncement.
8. October 13th, 2021 was appointed for the hearing of the parties, who, through their representatives, attended the hearing at which they were heard, formulating their oral observations.
9. The judgment of the case was adjourned to 30th March, 2022.

VI. APPLICANT'S CASE

a. Summary of Facts:

10. The Applicant, since 1990, was a member of the Togolese Armed Forces (TAF) and head of a military radio station;
11. In this capacity, the Applicant was the reporter for the Airborne Troop Training Center (CETAP), under the command of Captain ATCHA Titikpina;
12. On the night of March 24-25, 1993, there was an attempted coup d'état in Togo (Lomé);
13. The RI field, the Inter-Arms Regiment, was attacked;
14. The TAF Chief of Staff was killed and the Head of State's house was attacked;
15. That night, the Applicant was on duty at the Airborne Troop Training Center (CETAP) located at the end of the runway at Lomé Airport, Tokoin;
16. The Applicant was the head of operational availability (OD);
17. On the week following the attack on the RIT field, there was a bloody purge in the army with the systematic elimination of suspects;
18. On April 4, 1993, during a mission, the Applicant was the victim of a traffic accident caused by an unidentified car;
19. Which caused him fracture of his left leg;
20. He was transferred to the University Hospital Center of Lomé, Tokoin (CHU);
21. A week later, Captain TITIKPINA ordered the doctor, Captain DJATO, to transfer the Applicant to his garrison's infirmary;
22. The Applicant was brought back to CETAP and thrown into a cell without receiving any meals for 48 hours;
23. Two days after his arrest, a search was carried out at his home, in his presence;

24. Marshal TEBIE, who conducted the search, declared that “nothing illegal had been found”;
25. The Applicant was transferred to the gendarmerie for further investigation;
26. And he was detained for two weeks without food rations;
27. After 21 weeks of detention, i.e. at the end of 1993, the Applicant and other soldiers were presented to the Federal Attorney, Mr. ABDOULAYE Yaya;
28. The prosecutor notified them of a state charge against them;
29. The State's charges against him were, among others: acts against State security, destruction of the Republic's buildings, aggression against the head of State, murder of General AMEYI and a soldier of the Presidential Guard, destruction of the Head of State's house;
30. The Applicant was brought back to the national gendarmerie;
31. Following, he was entitled to visits from his parents;
32. The Applicant was detained by the gendarmerie from September 1993 to November 20, 1994;
33. And on the night of November 17, 1994, Colonel LAOKPESSI visited them and told them that they had to get ready to get on a bus, which was parked in front of the cell;
34. The Applicant and his unfortunate companions arrived at the Lomé Transport Base;
35. They were boarded into a plane, handcuffed two by two by the wrist and secured at ankle level;
36. They landed at Niamtougou airport, 460 km from Lomé;
37. The Applicant and his companions were received by Colonel BERENA Gnakoudè and Commander Ernest GNASSIGBE and his elements;
38. They were taken directly to Kara's civilian prison;
39. During the trip they were beaten, intimidated and threatened;

40. All night long, the Applicant and his companions were harassed, beaten and wounded;
41. Water was poured into his cell and he had no coversheet;
42. On December 22, 1994, they received a visit from Colonel AREGBA Wapissou;
43. The Colonel announced the amnesty decreed by the President of the Republic, General GNASSINGBE Eyadema;
44. Colonel AREGBA reported that they were expected the following morning in Lomé for an official ceremony;
45. During the land journey from Kara to Lomé, the Applicant and his companions again suffered severe bodily harm;
46. They were handcuffed, laid down and had no right to get up;
47. Some urinated on their clothes;
48. They arrived at the National Gendarmerie of Lomé on December 23, 1994;
49. An official ceremony was held in the presence of diplomats, administrative and military authorities;
50. Colonel SEYI Memène, then Secretary of State at the Ministry of Interior and Decentralization, in charge of security, declared: "*your release is an expression of the will of the President of the Republic and of the Prime Minister for national reconciliation and forgiveness. So forget forever that you were in jail. You will resume service in your respective units and you will be reinstated back to your rights.*"
51. The Applicant and his companions were released on December 22, 1994, in accordance with the amnesty law, enacted by the Head of State (Exhibit 1);
52. The Applicant's reinstatement was never effective, despite all requests;

53. The Applicant never found his salary slips, sent by the Togolese Bank of Commerce and Industry (BTCI) to his company's office, during his detention;
54. On March 30, 1996, a decision to reform the army as a disciplinary measure, was served on the Applicant by the TAF Chief of Staff (part no. 2);
55. The decision notified to him says that he had been retired on March 30, 1993, the date before the amnesty;
56. The Applicant does not enjoy all his rights inherent to retirement;
57. He asked the competent authorities for his regularization but without any success;
58. Since such events, the Applicant has suffered pain and stiffness in the right knee, pain in the left leg with paresthesia, and left knee failure (part no. 3).

b. Pleas in Law:

59. In support of his claim, the Applicant cited Article 52 of the Togo Code of Criminal Procedure; The amnesty law of December 22, 1994; Article 29 of the Law on the General Status of Military Personnel of the Togolese National Army of 17 July 1963; Articles 11, 19 and 21, paragraphs 1 and 2 of the Togolese Constitution of 14 October 1992; Articles 3 al. 1 and 2, 4th, 5th and 7th al. 1.b and c of the African Charter on Human and Peoples' Rights of 27 June 1981; Articles 5, 10 and 23, paragraph 1 of the Universal Declaration of Human Rights (UDHR) of December 10, 1948; Articles 7, 9/3 and 9/1 and 10/1,14/3Sc of the International Covenant on Civil and Political Rights of December 16, 1966; Article 6.1 of the International Covenant on Economic, Social and Cultural Rights; Article 4 of the Declaration on the Principles of Justice

for Victims of Crime and Abuse of Power; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, December 10, 1984, in spirit and form and Principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 19 December 1988.

c) Reliefs Sought by the Applicant:

60.The Applicant sought from the Court to declare:

i- That the Togolese State, through the actions of its agents, who arrested, beat and handcuffed the Applicant, to obtain information about his involvement in the March 1993 coup attempt, violated the provisions of Article 21, paragraphs 1 and 2 of the Togolese Constitution, the provisions of Articles 4 and 5 of the African Charter on Human and Peoples' Rights, Article 5 of the Universal Declaration of Human Rights, Articles 7 of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, respectively;

ii- That the actions of its agents, who illegally arrested and arbitrarily detained the Applicant in the RIT field, in CETAP, in the national gendarmerie and in Kara's civil prison, for twenty-one (21) months, without legal basis, violated the provisions of Article 52 of the Criminal Procedure Code of Togo, Articles 15 and 19 of the Togolese Constitution, of Articles 3, 6 and 7(d) of the African Charter on Human and Peoples' Rights, the provisions of Article 9/1 10/1 and 14/3c of the International Covenant on Civil and Political Rights and Article 4 of the Declaration on the Fundamental Principles of Justice Relating to Victims of Crime and Abuses

of Power, and of Article 10 of the Universal Declaration of Human Rights of 1948;

iii- That the Applicant's right to work was not respected, in violation of the relevant provisions of the Amnesty Law, of December 22, 1994, of Article 29 of the Law establishing the General Statute of Military Personnel of the Togolese National Army, of 17 of July 1963, of Article 11 of the Togolese Constitution, of Article 6 paragraph 1 of the International Covenant on Social, Economic and Cultural Rights, of Article 23 paragraph 1 of the Universal Declaration of Human Rights (UDHR).

iv- And consequently:

v- Order the Togolese Republic to carry out an investigation to arrest the perpetrators of the offenses, in accordance with the provisions of Article 12 of the Convention Against Torture of December 10, 1984, taking into account their seriousness, under the terms of Article 4 of the same Convention.

vi- Condemn the Republic of Togo to repair the damage suffered, taking into account the relevant provisions of the Convention against Torture, in particular its Article 14, as well as the Fundamental Principles and Directives on the Right to Recourse and Compensation for victims of flagrant violations of international human rights law and serious violations of international humanitarian law, adopted by the General Assembly of the United Nations, on 16 December 2005, in its Resolution 60/147, namely, in the forms of restitution, compensation, rehabilitation, satisfaction and non-repetition guarantees.

vii- Declare illegal the reform decision nº 96-07/MIN-DEF-NAT, of February 24, 1996, which violates the amnesty law nº 94-004/PR of

December 22, 1994, promulgated by the President of the Republic, Supreme Chief in command of the army;

viii- Order the rehabilitation of the Applicant, with all legal effects, in particular the restitution of the Applicant's salaries, which were diverted during his detention;

ix- Order the Togolese Republic to pay the Applicant the sum of one hundred million (100,000,000) CFA francs, as compensation, in accordance with the provisions of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 10, 1984, Article 9/5 of the International Covenant on Civil and Political Rights, of December 16, 1966 and Principle 35 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, December 19, 1988.

VII. DEFENDANT'S CASE

a. Summary of Facts:

61. Mr. Mado Fidégnon Frédéric was incorporated on February 2, 1970, into the Togolese Armed Forces (TAF);
62. Until the last moment, he served in the Parachute Regiment Command and, specifically, at the Airborne Troops Training Center (CETAP) in Lomé, as sergeant-in-chief of the Togolese Armed Forces (TAF);
63. An attempted coup in Togo took place in the night of March 24-25, 1993 and resulted in the death of several military leaders and several other military personnel;
64. Investigations carried out after the attack revealed the involvement of certain elements of the TAF, including the Applicant, Mr. MADO

Fidégnon Frédéric, who was one of the suspects and who, therefore, was presented, with his colleagues, to the Attorney General of the Republic and transferred to Kara civil prison;

65. Mr. MADO Fidégnon Frederic was retired by decision of February 24, 1996 (See Exhibit No. 2 of the Applicant);

66. It was on December 8, 2016, about 23 years after the attempted coup d'etat and 20 years after the decision to retire Mr. MADO Fidégnon Frédéric, that the latter decided to file a lawsuit before the Court of Justice, so that the Togolese Republic is accused on the basis of mere allegations.

Preliminary Objection:

67. The Respondent claimed that the complaint filed before this Court must be declared inadmissible for the following reasons:

A- The Court's Lack of jurisdiction over the matter of legality of administrative acts

68. Mr. MADO Fidégnon Frederic, is a former sergeant of the Togolese Armed Forces (TAF), therefore, a former State employee.

69. By application dated December 8, 2016, he filed a lawsuit before the ECOWAS Court of Justice for violation of his rights.

70. Decision No. 96-097/MIN.DEF.NAT on retirement for disciplinary reasons, of February 24, 1996, proves that the Applicant is retired.

71. It is a decision from the Minister of Defense, therefore, an administrative act.

72. Law No. 81-10, of 23 June 1981 which establishes the procedure before the Administrative Chamber of the Court of Appeal of Togo, provides for an appeal against any administrative decision. Only this Chamber entertains jurisdiction to decide on the legality or not of an administrative act.

73. Without having appealed to the Administrative Chamber, the Applicant appealed directly to the Court of Justice, 20 years later, for violation of his right to work.
74. Only the decision of the Administrative Chamber of the Court of Appeal could confirm or not the legality of the decision taken by the minister before the Applicant could bring an action before the Court of Justice, for violation of his right.
75. As of the present date, the time limit for filing an appeal has expired, so, the Applicant cannot appeal to the Administrative Chamber of the Court of Appeal.
76. Since the Applicant's notification of retirement, according to his own statements, on March 30, 1996 (see the statement of facts), nearly 20 years have elapsed, without him having appealed to the Administrative Chamber of the Court of Appeal, to challenge the legality of the said act, the validity of which can no longer be called into question before the domestic judge, much less before the ECOWAS Court.
77. The Court of Justice cannot rule on the violation alleged by the Applicant, who due to his silence, during the appeal period, accepted the reform decision;
78. Therefore, Mr. MADO Fidégnon Frederic's application, dated December 8, 2016, must be declared inadmissible, in accordance with the following:

B - On the inadmissibility of the alleged crime of torture, which was not legally sanctioned, at the time of the facts.

79. The Applicant claims to have been tortured in 1993.
80. At the time of the alleged acts of torture, according to Law No. 80-1 of August 13, 1980, which establishes the penal code, torture was not yet constituted as a crime. It was only on 15 November 2015 that the

Togolese Republic adopted a new penal code, this time making torture a crime under Article 198.

81. Torture is henceforth a crime and according to Article 7 of Law No. 83, establishing the code of criminal procedure, of 2 March 1983, being it a prescriptive crime.

82. This Article provides that "*the action of the Public Prosecutor's Office is time-barred when the offense has not been granted before the court of law, by summons or remittance order, within the period running from the day on which it was committed:*

- *Ten years for crimes,*

- *One year for offenses;*

- *One year for misdemeanors"*

83. The alleged facts supposedly took place in the year 1993, therefore, the Applicant can no longer appeal to the Court to hear alleged violations attributed to the Togolese Republic.

84. With regards to the issue of statute-barring, it should be noted that the new Criminal Code of 15 November 2015, in Article 198, was amended as follows: "*the crime of torture is not statute barred*", but no transitional provision was adopted by the National Assembly, and the new Criminal Code of 15 November 2015, does not give retroactive effect to any of its provisions, the criminal law, being established only for future offenses.

85. Statute-barred allegations of torture cannot take effect.

86. Under such circumstances, the application of Mr. Frédéric MADO Fidégnon, dated December 8, 2016, must be declared inadmissible.

C - On the inadmissibility of the application with respect to the alleged arbitrary detention

87. The Applicant maintains that he was arbitrarily detained by the Togolese Republic and relies on various instruments to this end.
88. He claims to have been detained for a period of twenty-one (21) months, sometimes twenty-one (21) weeks, without any evidence (see page 8 of the December 8, 2016 application); which seems to be confusing.
89. In principle, detention is arbitrary, only when it is manifestly impossible to claim any legal ground to justify deprivation of liberty.
90. The alleged facts relating to the arbitrary detention, after 23 years, are grossly statute-barred.
91. Indeed, the code of criminal procedure, in its Article 7, provides that the action of the Public Prosecutor's Office is statute-barred when the offense has not been granted by the court of law, by summons or remittance order, within a period of ten years in criminal matters and five years in the case of offense, counting from the day it was committed.
92. We found that after 23 years, the facts are statute-barred, considering, further, that Mr. MADO claimed the amnesty of the facts attributed to him, thus recognizing their veracity and therefore the need for his detention at that time.
93. That Applicant's detention is on legal grounds and cannot be described as arbitrary as it was necessary for the purposes of investigation.
94. Furthermore, his detention was decided by the competent judicial authority of the Togolese Republic.
95. It is also worth recalling the established case-law of the Court of Justice, that in case No. ECW/CCJ/APP/01/06- EL HAJI Hammami against the Republic of Nigeria and four others: "*since the Applicant has been arrested, detained and prosecuted before the competent courts of a Member State, in accordance with the laws and regulations in force, the Court cannot hear the appeal, without risk of interfering, without just reason, in the domain within the jurisdiction of national courts*".

96. In fact, the decision to detain Mr. Mado was taken by a Togo judicial authority.

97. It follows from the foregoing that the application must be declared inadmissible, because the facts are statute-barred or not in accordance with the case law of the Court of Justice.

b. Pleas in Law:

98. The Respondent based its claim on Articles 11, 15, 19, 21, paragraphs 1 and 2 of the Togolese Constitution; 29 of the Law on the General Status of Military Personnel of the National Army, of December 17, 1963; 3, 4, 5, 6 and 7 (1) (d) of the African Charter on Human and Peoples' Rights; 5, 10, 23 (1) of the Universal Declaration of Human Rights of December 10, 1948, 7, 9 (1), 10 (1), 14 (3) (c) of the International Covenant on Civil and Political Rights of 16 December 1966; 4 of the Declaration on Fundamental Principles of Justice for Victims of Crime and Abuse of Powers; the Amnesty Act of December 22, 1994 and 6 (1) of the International Covenant on Social, Economic and Cultural Rights.

c. Reliefs Sought:

99. The Respondent submitted that the Court should:

With regards to the form:

i. Grant the reliefs sought by the Togolese Republic;

ii. On the other hand, declare the application dated 8 December 2016 inadmissible, based on the grounds relied on by the Togolese Republic;

On the merit:

iii- If in an extraordinary case, the Court considers that the application initiating proceedings is admissible, it should declare:

iv- That the Applicant did not present any proof to establish his claims;

v- Consequently, the Court should reject all his claims, pleas and submissions and reject the sought reliefs;

vi- Order the Applicant to pay all the expenses;

VIII. PROCEDURE BEFORE THE COURT

a) Expedited procedure

100. The Applicant prayed that the instant case be submitted to an expedited procedure, claiming that in view of the facts he has presented there is an urgent need, as the silence observed by the Togolese authorities, despite all his efforts, aggravates his already precarious situation and that of his family, so it is necessary to put an end to this situation.

101. The Respondent was duly served but made no pronouncement on this regard.

102. The Court, by order No. ECW/CCJ/ORD/02/17, rejected the aforementioned application for expedited procedure.

IX. JURISDICTION

103. **The Defendant questioned the jurisdiction of this Court to hear the instant case, claiming, in summary, that the matter refers to the legality of administrative acts and that the** Decision No. 96-097/MIN.DEF.NAT on retirement for disciplinary reasons, of February 24, 1996, proves that the Applicant is retired. And that the decision of the Minister of Defense is therefore an administrative act which, according

to Law No. 81-10, of 23 June 1981, the procedure before the Administrative Chamber of the Court of Appeal of Togo, provides for a appeal against any administrative decision. And that only that Chamber entertains jurisdiction to decide on the legality or not of an administrative act. Since the Applicant has not appealed to the Administrative Chamber which could confirm or not the legality of the decision taken by the minister, with the period of time for this having expired, 20 years later, the Applicant cannot appeal directly to the Court of Justice for violation of his right.

104. With this argument, the Respondent seems to intend to invoke the principle of the need to exhaust domestic remedies, as a condition of access to the Court which, which if applicable to this Court - which is not the case - could determine the inadmissibility of the case, but not the lack of jurisdiction of the Court - See Judgments Nos. ECW/CCJ/JUD/07/11 in the case *OCEAN KING LTD. V. REPUBLIC OF SENEGAL*; ECW/CCJ/JUD/25/2015, in the case, *HANS CAPEHART WILLIAMS SR. AND OTHERS V. REPUBLIC Of LIBERIA AND OTHERS* (page 11, Case No. ECW/CCJ/APP/06/14.) – so this Respondent's argument is unfounded.

105. However, the Court assumes *ex officio* its own jurisdiction.

106. The jurisdiction of the Court results, above all, from the legal texts governing it and from the nature of the question that is put before it by the Applicant, based on the facts, as alleged by the Applicant.

107. In this regard, this Court ruled in the case *BAKARY SARRE AND 28 ORS VS. REPUBLIC OF MALI, Judgment No. ECW/CCJ/JUD/03/11 of March 17, 2011, in CCJLR, 2011, p. 67, §25* that; *"The competence of the Court to adjudicate in a given case depends not only on its texts but also on the substance of the initiating application. (...)"*

108. With the same understanding, the Court ruled in the case *MR. CHUD MBA VS. REPUBLIC OF GHANA, Judgment No ECW/CCJ/JUD/10/13* of 6th November 2013, in CCJLR, 2013, pag. 349, §51 that "*As a general rule, jurisdiction is inferred from the Plaintiffs claim and in deciding whether or not this Court has jurisdiction to entertain the present action, reliance has to be placed on the facts as presented by the Plaintiff."*

109. In the instant case, the Applicant relied on the provisions of the law that grants the Court jurisdiction in matters of human rights to substantiate his case, citing Articles 9 (4) and 10 (d) of Additional Protocol A/SP.1/ 05 of 2005 that amended Protocol A/P1/7/91, on the Court, relying, to establish his cause of action, on facts, alleged to have occurred between April 1993 to 22 December 1994 and in March 1996, which he considers to be in violation of his human rights, as contrary to the relevant provisions of the African Charter on Human and Peoples' Rights and other international human rights protection instruments.

110. Thus, there is no doubt that the question posed by the Applicant to the court falls *in abstracto* within the scope of its material competence.

111. Although, as understood by this Court, "*A cause of action is a fact or combination of facts which establishes or gives a right of action." See* GABRIEL INYANG & ANOR V. THE FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/20/18 @ pg 9.

112. Or further, as defined by this Court, the *Cause of action "as a matter for which an action can be brought, a legal right predicated on facts upon which an action may be sustained. It is a right to bring a suit based on factual situations* ***disclosing the existence of a legal right.(…)"*** *See INCORPORATED TRUSTEES OF FISCAL & CIVIL RIGHTS ENLIGHTENMENT FOUNDATION V. FED REP OF NIGERIA & 2 ORS, ECW/CCJ/JUD/18/16 page 19.*

113. Therefore, the cause of action, substantiated in an alleged violation of human rights, must be in a necessary relationship with the right of action as established by law.

114. Article 9 (4) of the Additional Protocol of 2005 established that the *"The Court has jurisdiction to determine the cases of human rights violations that occur in any Member State*."

115. In terms of access to the Court, the Article 10 (d) of the same Protocol establishes that "*Can access the Court (...) d) Anyone who is a victim of human rights violations.*

116. In the instant case, as we have seen, the facts relied on by the Applicant and which constitute the cause of action, allegedly occurred between April 1993 to December 22, 1994 and March 1996, a period well long before the legal attribution of human rights jurisdiction to this Court.

117. This means that it is up to the Court to find out if its *jurisdiction* may rule on facts that occurred before the date of entry into force of the aforementioned Additional Protocol of 2005.

118. It is recalled that jurisdiction in matters of human rights violations was conferred on this Court by Article 9 of Additional Protocol A/SP.1/05 of 2005, which amended Protocol A/P1/7/91 on the Court, which entered into force provisionally on January 19, 2005 with the signature of the Signatory Heads of Member States (including the signature of the Head of State of the Togolese Republic) and definitively into force after its ratification by at least nine (9) of the signatory States.

119. And as it results from article 28 of the *VIENNA CONVENTION ON THE LAW OF TREATIES "Unless a different intention is evident from the treaty, or is otherwise established, its provisions do not bind a party in relation to a previous act or fact or to a situation that has ceased to exist before the entry into force of the treaty, in relation to that part*."

120. This norm of the aforementioned Convention enshrines the principle of non-retroactivity of the conventions, determining the *ratione temporis jurisdiction.*

121. And the relevant date for the purpose of establishing jurisdiction by reason of time is, in principle, the date of entry into force of the Convention and its Protocols, as regards the respective contracting parties. (*See European Court of Human Rights (THDH) in the case SILIH V. SLOVENIA (GC §164*)

122. In fact, in the same sense, the Inter-American Court decided in the case *GOMES LUND AND OTHERS ("GUERRILLA DO ARAGUAIA") VS. BRAZIL, JUDGMENT* OF NOVEMBER 24, 2010, by establishing that "*In order to determine whether or not it entertains jurisdiction to hear a case or one of its aspects, in accordance with Article 62.1 of the American Convention, the Court must take into consideration the date of recognition of jurisdiction by the State, the terms in which this recognition was granted and the principle of non-retroactivity, provided for in article 28 of the 1969 Vienna Convention on the Law of Treaties."*

123. This Court concluded that *"the Court would have jurisdiction for the acts subsequent to this recognition".* It also pointed out that, *"Based on the foregoing and on the principle of non-retroactive effect, the Court cannot exercise its contentious jurisdiction to apply the Convention and declare a violation of its norms when the alleged facts or the conduct of the State, which could imply its international responsibility, are prior to this recognition of jurisdiction*." (see §16)

124. In the same sense, the European Court (ECHR) concluded in the case *KOPECKY V. SLOVAKIA (GC)* that competence *ratione temporis* covers only the period after ratification of the Convention or its Protocols by the Respondent State, by reaffirming that "*(...) the Convention imposes no*

specific obligation on the Contracting States to provide a redress for wrongs or damage prior to their ratification of the Convention.. (see §38)

125. Likewise, it follows from the jurisprudence of the Inter-American Court contained in the aforementioned Judgment that "*acts of a continuous or permanent nature last for as long as the fact continues, thus maintaining its lack of compliance with the international obligation remains"* and "*the Court may examine and rule on other alleged violations, which are based on facts that occurred or persisted"* from the date of recognition of its jurisdiction by the State. (see §18)

126. In a similar way, the jurisprudence of the European Court understands that "*the Court can even take into account facts prior to ratification, provided that they can be considered as the origin of a continuous situation that lasted beyond that date, or that are relevant to understand facts that occurred after that date*." (See *KURIC AND OTHERS V. SLOVENIA – GC §240 -241*)

127. Also according to the understanding of the European Court, "*the bodies of the Convention admit the extension of the scope of jurisdiction ratione temporis, to situations of continuous violations that began before the entry into force of the Convention, but which continue after that date*". (*SEE ECtHR in the case BECKER V. BELGIUM, Application No. 214/5)*

128. Also with the same understanding, the *African Court on Human and Peoples' Rights* in determining its temporal jurisdiction over cases of alleged human rights violations that occurred prior to the entry into force of the Protocol on the Court or the declaration by which Respondent States accept the jurisdiction of the Court and the admissibility of applications made under Article 34 (6) of the Protocol, in the case of *BENEFICIARIES OF NORBERT ZONGO AND OTHERS V. BURKINA FASO*, (see Application No. 013/2011, Ruling of June 21, 2013 in Law Report, Vol. I, 2006-2016, page 197), noted that: *63 "(...) the relevant*

dates regarding its ratione temporis jurisdiction are those of the entry into force of the Charter (21 October 1986), the Protocol (25 January 2004) as well as that of the deposit at the Secretariat of the Organization of African Unity by Burkina Faso of the declaration accepting the jurisdiction of the Court to receive Applications from individuals, (28 July 1998)." *(See §62)* and it made a clear distinction between "*instantaneous"* and "*continuous*" acts of violation and established that *"the Application of the principle of non-retroactivity of treaties contained in Article 281 of the Vienna Convention on the Law of Treaties of 23 May 1969 is not contested by the parties. The issue here is to know whether the different violations alleged by the Applicants would, if proven, constitute instantaneous or continuous violations of the international obligations of Burkina Faso in the area of human rights." (See §63)*

129. Also in the case law of this Honorable Court, there are decisions that point towards the acceptance of the non-retroactive application of the 2005 Protocol and the assumption of its jurisdiction over facts that generate a situation of continuous and prevailing violation on the date of entry into force of the said Additional Protocol. (See *ALHAJ HAMMANI TIDJANI V. FEDERAL REPUBLIC OF NIGERIA & 4 OTHERS* - ECW/CCJ/APP/01/06, Judgment ECW/CCJ/JUD/04/07 (CCJLR 2004-2009 p…) and SIRIKU ALADE V. FEDERAL REPUBLIC OF NIGERIA - ECW/CCJ/APP/05/11, Judgment No. ECW/CCJ/JUD/10/12; CCJ Law Report, 2012, p. 189).

130. More recently, the Court, in the case *EVARISTUS DENNIS EGBEBU V. FEDERAL REPUBLIC Of NIGERIA,* Case ECW/CCJ/APP/32/20, Judgment ECW/JUD/14/21 - Unreported, ruled that *"…its jurisdiction to examine human rights violation cases in ECOWAS Member States from the 2005 Supplementary Protocol A/SP.1/01 /05 of 19th January 2005,*

which came into force on the same date, as well as from its Rules adopted on 3rd June 2002. (see §76)

131. Therefore, the 2005 Additional Protocol, while conferring jurisdiction on the Court of Justice in matters of human rights, did not establish anything as to the possibility of its retroactive application.

132. Thus, following the principle of non-retroactivity of the Treaties, arising from article 28 of the *VIENNA CONVENTION ON THE LAW OF TREATIES* mentioned above, the jurisdiction of this Court in matters of human rights is limited to facts that occurred after January 19, 2005, the date of its provisional entry into force.

133. On the other hand, the notion of "instantaneous" or "continuous" acts of violations is established in Article 14 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts* adopted in 2001, which provides that: *"(1)The violation of an obligation by an act of a State that is not continuous occurs at the time the act is performed, even if its effects persist*. (2). *The violation of an international obligation by an act of a State that is continuous in nature extends for the entire period during which the act continues and remains in violation of the international obligation*. (*3). The violation of an international obligation requiring the state to prevent a certain event will take place at the moment that event begins and extends throughout the period during which the event continues and remains in contravention of that obligation."*

134. As the African Court found, in the case cited above, "*in its commentary on this Article, the Commission stated that an act does not have a continuing character merely because its effects or consequences extend in time. It must be wrongful act as such which continues.*" (See §66).

135. Therefore, in light of these observations, to determine its *ratione temporis* jurisdiction, it is for the Court to examine the alleged violations

of the right not to be tortured and the right not to be arbitrarily detained and the right to work, as claimed by the Applicant.

136. In configuration of his cause of action, the Applicant alleges that he was detained and tortured between April 1993 and December 1994 and that in 1996 he was notified by the Chief of Staff of a decision that determined his retirement from the army as a disciplinary measure, delivered in March 1993.

137. He affirms that he was released on December 22, 1994 and that he was retired from his duties in 1996.

138. These facts, as pleaded by the Applicant, demonstrate with precision in time, the moment in which the alleged interferences in the alleged human rights of the Applicant took place, and from them does not result in any situation of a *"continuous*" violation of alleged human rights. Therefore, "*instantaneous*" acts which were exhausted in their practice, long before this Court was vested with jurisdiction to judge the violation of human rights perpetrated in the Member States.

139. Thus, based on the aforementioned, this Court considers that it does not have *ratione temporis* jurisdiction to hear the instant case, and must, therefore, reject it.

X – Costs

140. The Applicant did not present any claim regarding expenses.

141. The Respondent, in turn, seeks from the Court to order the Applicant to bear the costs of the proceedings.

142. Article 66 (1) of the Court's Rules of Procedure provides that "*The judgment or order that ends the process decides on expenses."*

143. Paragraph 2 of the same Article states that "*The unsuccessful party is ordered to pay the costs if so decided."*

144. Thus, in light of the above provisions and in view of the circumstances of the case, the Court considers that each of the parties must bear their respective expenses.

XII – OPERATIVE CLAUSE

145. For these reasons, the Court held a public hearing and having heard both parties:

With regards to jurisdiction:

i. **declares itself** lacking *ratione temporis* jurisdiction to judge the instant case and consequently rejects it.

On the Costs

146. The Court determines that each party bear their respective expenses.

Signed by:

Hon. Justice Edward Amoako **ASANTE** -Presiding _____

Hon. Justice Gberi-Be **OUATTARA**-Member_____

Hon. Justice Januária T.S.M.**COSTA**-Member/Rapporteur _____

ASSISTED BY:

Aboubacar DIAKITE-Registrar_____

147. Done in Accra, on the 30th of March 2022, in Portuguese and translated into French and English.