Boateng & 351 ors v Ghana (jurisdiction) (2020) 4 AfCLR 805

Application 059/2016, *Akwasi Boateng & 351 ors v Republic of Ghana*

Ruling (jurisdiction), 27 November 2020. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicants, who claimed to be indigenous peoples, brought this action alleging that their lands were wrongfully confiscated and appropriated in violation of their rights under the Charter. The Court declared that it lacked temporal jurisdiction.

Jurisdiction (personal jurisdiction, 32-34; material jurisdiction, 43; temporal jurisdiction, 49, 53-56; continuing violation, 55-56)

Dissenting opinion: BENSAOULA

Jurisdiction (personal jurisdiction, 21-24; continuous violations, 25, 26, 35)

I. The Parties

1. Akwasi Boateng and Three Hundred and Fifty One (351) others (hereinafter referred to as "the Applicants") claim to be an indigenous people and members of the Twifo Hemang Community, living in the Central Region of Ghana comprising seven (7) villages with forty-eight (48) Chiefs. Their names are appended in support of this application.

2. The Application is filed against the Republic of Ghana (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 March 1989; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 16 August 2005; and deposited on 10 March 2011, the Declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non- Governmental Organisations.

3. As filed in Court, the Application also listed J.E. Ellis and Emmanuel Wood, two (2) wealthy foreign merchants purportedly as the 2nd Respondents and the Chief of Morkwa, Ackwasie Symm alias Kenni of Morkwa (hereinafter referred to as "the Morkwa Chief"),

a former chief of another community in the Central Region of Ghana, as the 3rd Respondent.

II. Subject of the Application

A. Facts of the matter

4. The Applicants identify themselves as the indigenous people of the Twifo area in the Central Region of Ghana. According to them, in 1884, boundary disputes arose between two (2) communities in the Central Region of Ghana, that is, the Applicants headed by Chief Kwabena Otoo and the Morkwa Community headed by Chief Ackwaise Symm also known as Akasi Kenni I. They state that the disputes were settled by the Gold Coast Colonial Division Court in 1894, resulting in the Applicant's Chief being ordered to pay an award or compensation of two hundred and fifty thousand (250,000) pounds to the Court. The Applicants aver that there are no records from either party illustrating how the award was obtained. However, since their Chief was unable to pay the award, the land was sold through a public auction on 8 May 1894, and this resulted in a violation of their right to property, as they and their descendants were unable to utilise their land.

5. The Applicants allege that the land was fraudulently purchased by the Chief of Morkwa at one hundred thousand (100,000) pounds. On 5 March 1896, the Morkwa Chief sold the Applicant's Lands to the J. E. Ellis and Emmanuel Wood families. After the sale, disputes over its ownership continued, necessitating the intervention of the Respondent State. The Applicants allege that this sale in 1894, was orchestrated by J. E. Ellis then a Clerk at the Gold Coast Colonial Divisional Court.

6. The Applicants claim that they still live on the land which is owned by their ancestors. It is where the community derives its livelihood and it was vested in the chiefs of the village as custodians and not as owners. They contend that the Gold Coast Colonial Court did not have the right to sell the lands, rather that these lands required special protection.

7. Furthermore, the Applicants claim that, at the instigation of the Respondent State and the J. E. Ellis and Emmanuel Wood families, their land has attracted the interest of national development planners and private investors contrary to the Community's interest. They allege that no services and infrastructure have been provided to the Community, yet lumber companies have received large concessions on their land for timber exploitation,

with some leases issued since the 1930's to date, lasting up to ninety-nine (99) years.

8. The Applicants allege that in 1961, the new Twifo Community Chief, Nana Kyei Baffour II realised the futility of the Community's efforts to seek remedies in the courts of law and decided to seek redress from the Executive Arm of the Respondent State's Government. In 1964, Chief Nana Kyei Baffour II petitioned the Respondent State for redress but did not receive a response. In 1972, he petitioned the Respondent State for the restoration of the Community land. In 1972, The Respondent State initiated two (2) steps to address the matter: first, it referred the matter for consideration to the civilian arm of the military regime because of reports of harassment of the Twifo Community by the J. E. Ellis and Emmanuel Wood families in collaboration with top police and military personnel and second, the Respondent State directed the Attorney General to investigate the purported sale of all the "Twifo Hemang Stool Lands".

9. In the Report that was submitted by the Applicants, they aver that in 1974, the Attorney General, following his investigation, made recommendations in his report which resulted in the confiscation of the Twifo Hemang Community land by the Respondent State. In the report, the Attorney General also established that the families of J. E. Ellis and Emmanuel Wood are legitimate members of the Aburadzi clan, which is part of the Twifo Hemang Community. Accordingly, it follows that their rights and duties on the Hemang Stool Lands are no different from those of the Twifo Community as they owe allegiance to, and are subjects of the Twifo Community Chief. As such even if the J. E. Ellis and Emmanuel Wood families had bought the land, it would still belong to the Twifo Hemang Community as per the tradition.

10. The Attorney General's Report also indicated that there was no evidence that any court issued a decree auctioning the Applicants Community Lands at a public auction and there was no court record about a settlement. Furthermore, that the Community Lands covering an area of two hundred (200) square miles are rich in natural resources such as timber, cocoa and minerals yielding over one thousand (1000) Cedis annually through dues, tributes and royalties which went to the coffers of the J. E. Ellis and Emmanuel Wood families. As a result, neither the central government nor the local council was able to develop any projects in the area.

11. The Attorney General concluded that a *prima facie* case had been established by the Petitioner (the Applicant's Chief) and made the following recommendations:

i. The J. E. Ellis and Emmanuel Wood families be asked to produce their documents in connection with the Applicants' Community Lands for study;

ii. An interim injunction be placed on all Lands in question, whereby all persons in occupation and paying rents, dues, royalties and tributes should do so to the Administrator of Stool Lands until the disputes are resolved;

iii. That a Lands Commission be appointed to inquire into the alleged sale of the land to the J. E. Ellis and Emmanuel Wood families with the aim of finding a permanent solution to the disputes.

12. The Applicants allege that in early 1974, the Attorney General's Office advised the Respondent State to "compulsorily confiscate the Twifo Hemang Ethnic Community Land" by invoking "its powers under Act 125 of 1962 to vest all the Twifo Hemang Ethnic Community Lands in the State to settle the matter once and for all." They further allege that the Act was itself 'fraudulent' because it did not comply with the principles of public interest and did not take into consideration publicity and education of the community on compulsory acquisition, prompt compensation at market value or replacement value of the land or the cost of disturbances or any other damage suffered by the victims. They also allege that, there was no improvement of the land by the Respondent State within two (2) years from the date of publication of the instrument or decree.

13. The Applicants aver that following the Attorney General's recommendation, and without prior notification or consultation with the Twifo Community, the Respondent State enacted five (5) laws concerning the Applicants Lands, namely:

i. The State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) issued on 21 June 1974;[1]

ii. The Hemang Acquisition- Instrument, 1974 (E.I 133);[2]

iii. The Hemang Lands (Acquisition) Decree 1975 (NRCD 332);[3]

iv. The Hemang Land (Acquisition) (Amendment) Law, 1982 (PNDC Law 29); and[4]

1 This law published on 12 June 1974, allegedly vested 190,784 Acres of Twifo Hemang Lands to the Respondent State.

2 This law "published soon afterword's" allegedly revoked the original instrument, Executive Instrument 61 and backdated the acquisition to 21 February 1973 in a bid to address the loop holes created by Executive Instrument 61.

3 This law allegedly strengthened the legal basis of the acquisition and maintained the date of acquisition as 2 May 1975.

4 This law published "Seven years later" allegedly amended the NRCD 332, decreasing the size of the land compulsorily acquired by the State from 190,784 Acres to 35,707.77 Acres. According to the Applicants the original 1982 PNDC

v. The PNDC Law 294 - Hemang Lands (Acquisition and Compensation Act) 1992.[5]

14. The Applicants state that as a result of the above laws, particularly Section 3 of the PNDC Law 294 - Hemang Lands (Acquisition and Compensation Act) 1992, prevented them from accessing judicial remedies during this period. They further allege that the effects of the above laws created massive and irreversible problems for their Community which persist to date. The Regional Lands Commission of the Cape Coast Region became the owner of the Twifo Community Land and started collecting rent, tolls and royalties from the Community. This action created a shortage of land, threatening the existence and future generations of their Community and culminating in increased alienation of the community, manifesting in their abject poverty and their continued under-development. They aver that their land has been used as a subject of political campaigns by politicians to the detriment of the Community.

B. Alleged violations

15. The Applicants allege that the Respondent State has conspired to deprive them of their community land in contravention of their rights under the Charter, specifically:

i. The right to property under Article 14 of the Charter; and

ii. The right to economic, social and cultural development under Article 22 of the Charter.

III. Summary of the Procedure before the Court

16. The Application was filed on 28 November 2016.

17. On 25 April 2017, the Court requested the Applicants to submit evidence of proof of exhaustion of local remedies and relevant documents to substantiate their claims. They submitted the said information on 21 June 2017. The Application was then served on the Respondent State on 18 January 2018.

Law 29 transferred back to the Twifo Community all land that was compulsorily acquired by the Respondent State, however, this law was never enacted until another "PNDC Law 294 came in 1992 to repeal Law 29, vesting again all Twifo Hemang Lands into the State".

5 This law allegedly barred the Twifo from accessing a judicial remedy for their claims. Section 3 of the Act states that "a court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act."

18. The Parties filed their submissions on merits and reparations within the time stipulated by the Court and the pleadings were duly exchanged.

19. On 13 May 2019, written pleadings were closed and the Parties were duly notified.

20. On 5 March 2020, the Court solicited the Parties' views on amicable settlement under the auspices of the Court pursuant to Article 9 of the Protocol and Rule 57 of the Rules. There was no response from the Parties and the Court decided to continue with consideration of the Application and issue the present Ruling.

21. On 15 July 2020, the Applicants requested for leave to file new evidence in support of the Application, which they claim emerged after the close of pleadings**,** without indicating the nature of the evidence.

22. On 17 July 2020, the Respondent State was requested to submit observations on the request, if any, within seven (7) days of receipt of notification but did not do so.

23. On 14 August 2020, the Court considered the request from the Applicants to file new evidence and denied the request because the nature of the new evidence was not specified in the request and the Parties had already been notified that the judgment had been reserved for delivery. The Parties were notified of the Court's decision on the same day.

IV. Prayers of the Parties

24. The Applicants pray the Court to:

i. Find that the Court has jurisdiction by virtue of the ratification of the Protocol by the Ghana Government (Article 56 of the African Charter) and by virtue of Articles 6, 34(6) and 5(3) of the Protocol;

ii. Find that the Application is admissible and must be upheld by the African Court due to the human rights violations alleged on the poor indigenous community of Twifo Hemang;

iii. Order the Respondent to produce their documents in connection with the Twifo Hemang Stool lands for study by the Court;

iv. Order the Respondents to release the Twifo Hemang community land to the legally rightful ancestral owners;

v. Order the abrogation of all instruments including the PNDC Law 294, that vests the Twifo Hemang community land on the Respondent;

vi. Order that all royalties accrued from the time of the Respondent's compulsory acquisition of the Twifo Hemang Community land be paid/returned to the poor community dwellers to enable them develop the community and live a decent life; and

vii. Ban the 2nd and 3rd Respondents from contesting the community land.

25. The Respondent State makes the following prayers:

i. That the Court dismiss the Application for lack of jurisdiction as the alleged violation predates the ratification of the Protocol in 2004.

ii. That the Court declares the Application inadmissible as it does not meet the admissibility requirements of Articles 56 (5) and (6) of the Charter on the exhaustion of local remedies and filing the Application within a reasonable time after exhausting local remedies.

iii. That the Court should dismiss this Application as the Applicants have failed to inform the Court of a specific right that has been infringed, and that the Court cannot proceed with the hearing of the Application since it cannot invent or conjure one for them.

V. Jurisdiction

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

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

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

27. In accordance with Rule 49(1) of the Rules,[6] "[T]he Court shall ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules".

28. On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

29. In the instant Application, the Respondent State raises objections to the material and temporal jurisdiction of the Court. However, before dealing with the Respondent State's objections, the Court will determine its personal jurisdiction so as to clarify the question of the Respondent before this Court.

A. Personal Jurisdiction of the Court

30. As noted in paragraph**s** 2 and 3 of this Ruling, the Application is filed against the Republic of Ghana, J. E. Ellis and Emmanuel Wood families and the Morkwa Chief. Accordingly, it is necessary

6 Formerly Rule 39(1) of the Rules of 2 June 2010.

for the Court to rule on whether these individuals are all properly before this Court.

31. Of the three (3) entities against whom the Application is filed, only the 1st Respondent is a State Party to the Protocol, the other two, that is, J. E. Ellis and Emmanuel Wood families and the Morkwa Chief are individuals and not parties to the Protocol. The question for the Court to determine is whether an entity, other than a State Party to the Protocol, could be a Respondent before this Court.

32. The jurisdiction of the Court is premised on the principle that, States bear the primary responsibility for respect for human rights and as such are the principal duty bearers to ensure the implementation of their obligations. The said principle is, *in casu*, derived from Articles 5 and 34(6) of the Protocol.

33. The Court settled the issue of the Respondent against whom an Application can be filed before this Court in its various decisions. The Court held in the matter of *Femi Falana v The African Union*, that "it is important to emphasise that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol...The present case in which the Application has been filed against an entity other than a State having ratified the Protocol… falls outside the jurisdiction of the Court." In the same matter, the Court emphasized that "… what is specifically envisaged by the Protocol … is precisely the situation where Applications from individuals and NGOs are brought against State Parties*…" .*[7]

34. The Court reiterated this position in *Atabong Denis Atemnkeng v The African Union* where it held that "it should be understood that the Court was established by the Protocol and that its jurisdiction is clearly enshrined in the Protocol. When an Application is brought before the Court, the jurisdiction rationale personae of the Court is set out in Articles [5] and 34(6), read jointly. In the present case where the Application is brought against a body which is not a State which has ratified the Protocol and/or made the Declaration, it falls outside the jurisdiction of the Court…"[8]

35. Thus, in the instant case, where the 2nd and 3rd Respondents, J. E. Ellis and Emmanuel Wood and the Morkwa Chief, respectively, are not States Parties to the Protocol, but individuals, no suit can be entertained against them before this Court.

7 *Femi Falana v African Union* (jurisdiction) (26 June 2012) 1 AfCLR 118, §§ 63, 70 and 71.

8 *Atabong Denis Atemnkeng v African Union (*jurisdiction) (15 March 2013) 1 AfCLR 182, § 40.

36. As indicated in paragraph 2 of this Ruling, the 1st Respondent is a State which became a Party to the Protocol on 16 August 2005 and as such qualifies to be brought before this Court by virtue of Articles 5 and 34(6) of the Protocol, as read together.

37. From the above analysis, the only Respondent that is properly before this Court is the Republic of Ghana.

38. Having determined that the Republic of Ghana is the only Respondent and that as such, it is properly before this Court in this matter, the Court will now consider its objections to the jurisdiction of this Court to entertain the matter.

B. Objections raised by the Respondent State

39. As indicated earlier, the Respondent State raises objections to the material and temporal jurisdiction of the Court on the basis that the Applicants have not specified the rights under the Charter allegedly violated and that the alleged violation "predates the ratification of the Protocol in 2004".

i. Objection to the material jurisdiction of the Court

40. The Respondent State contends that this Application cannot be entertained by this Court, because, according to it, the Applicants simply narrated a story without specifically alluding to the violation of any of the rights guaranteed by the Charter.

41. The Applicants on the other hand argue that their allegations are specific. They submit that, by compulsorily confiscating their ancestral land without consultation and compensation, the Respondent State violated their rights to property and to development, guaranteed under Articles 14 and 22 of the Charter, respectively.

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42. The Court notes that as provided in Article 3 (1) of the Protocol, the material jurisdiction of the Court extends to all cases and disputes concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned.

43. The Court has consistently held that "as long as the rights allegedly violated are protected by the Charter or any other human rights

instrument ratified by the State concerned, the Court will have jurisdiction over the matter."[9] In any case, the Court retains the discretion to qualify the claims of the Parties accordingly.

44. The Court notes that in the present Application, the Applicants clearly indicate that they are alleging the violation of Articles 14 and 22 of the Charter, relating to the rights to property and socio-economic and cultural development, respectively.

45. The Court therefore, holds that it has material jurisdiction to consider the Application and accordingly dismisses the Respondent State's objection to the material jurisdiction of the Court in this regard.

ii. Objection to the temporal jurisdiction of the Court

46. The Respondent State submits that the Court lacks temporal jurisdiction to entertain this matter. According to the Respondent State, the alleged violations predate its signing and ratification of the Protocol and that the compulsory acquisition of the Applicants Community lands was in 1974 and later, in 1982. It avers that other dealings that it undertook with regard to the Twifo Community lands also happened before it became Party to the Protocol.

47. The Respondent State contends that the Charter and relevant regulations governing the jurisdiction of the Court cannot be applied retrospectively to situations that occurred before their entry into force. It argues that it signed the Protocol on 9 June 1998 and subsequently ratified it on 25 August 2004 and the instrument of ratification was deposited on 16 August 2005. Furthermore, that it is from 16 August 2005 that it became subject to the jurisdiction of the Court. The Respondent State argues that the Applicants' cause of action, if any, relates to acts that occurred prior to ratification of the Protocol by the Respondent State, therefore the Court has no jurisdiction to adjudicate on those issues.

48. The Applicants on their part, submit that the Court has jurisdiction to consider their Application since the Respondent State has ratified the Charter and the Protocol and deposited the Declaration envisaged under Article 34(6) of the Protocol. They add that "where a violation preceded the treaty, but still has an on-going effect, claimants may argue for an exception on the basis of an 'on-going' or continuing violation on the national level." The Applicants also

9 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014)1 AfCLR 398, § 114.

argue that the Respondent State cannot be allowed to continue its violations against the Applicants in perpetuity.

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49. The Court holds that, with regard to temporal jurisdiction, the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and of the Protocol as well as the date of depositing the Declaration required under Article 34(6) of the Protocol.[10]

50. As stated in paragraph 2 of this Ruling, the Respondent State became a party to the Charter on 1 March 1989 and to the Protocol on 16 August 2005 having deposited the Declaration under Article 34(6) on 10 March 2011.

51. The Court observes that the alleged fraudulent sale of the Applicants' Community land in 1884; the subsequent compulsory acquisition of the land in dispute by the Respondent State through the successive enactment of the five (5) legislations[11] between

10 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 74 and 77; See also *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34 *Mtikila v Tanzania* (merits) (2013) §, 84; *Jebra Kambole v United-Republic of Tanzania*, AfCHPR, Application 018/2018, Judgment of 15 July 2020 (merits and reparations) §§ 22-25.

11 i. The State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) issued on 21 June 1974 - This law allegedly published on 12 June 1974, vested 190,784 Acres of Twifo Hemang Lands to the Respondent State.

ii. The Hemang Acquisition- Instrument, 1974 (E.I 133) - This law "published soon afterword's" allegedly revoked the original instrument, Executive Instrument 61 and backdated the acquisition to 21 February 1973 in a bid to address the loop holes created by Executive Instrument 61.

iii. The Hemang Lands (Acquisition) Decree 1975 (NRCD 332)- This law allegedly strengthened the legal basis of the acquisition and maintained the date of acquisition as at 2 May 1975.

iv The Hemang Land (Acquisition) (Amendment) Law, 1982 (PNDC Law 29)- This law allegedly published "Seven years later" amended the NRCD 332, decreasing the size of the land compulsorily acquired by the State from 190,784 Acres to 35,707.77 Acres. According to the Applicants the original 1982 PNDC Law 29 transferred back to the Twifo Community all land that was compulsorily acquired by the Respondent State, however, this law was never enacted until another "PNDC Law 294 came in 1992 to repeal Law 29, vesting again all Twifo Hemang Lands into the State".

The PNDC Law 294 - Hemang Lands (Acquisition and Compensation Act) 1992- This law allegedly barred the Twifo from accessing a judicial remedy for their

1974 and 1992, occurred before the Respondent State became a Party to the Charter and to the Protocol and before it deposited the Declaration.

52. The question that arises therefore, is whether, the jurisdiction of the Court can extend to acts of human rights violations that occurred before the Respondent State ratified the Protocol and deposited the Declaration.

53. According to the Protocol, the Court does not have jurisdiction to hear acts of violations occurring before the State concerned became party to the Protocol and filed the Declaration, except in cases where the violations alleged are continuous in character.[12]

54. The Court notes, therefore, that a distinction has to be made between continuous and instantaneous acts of human rights violations. It previously determined that where the acts that form the basis of the allegations of the violations are instantaneous, it will lack temporal jurisdiction and where such acts result in continuing violations, the Court will establish temporal jurisdiction.[13]

55. In the matter of *Beneficiaries of Late Norbert Zongo v Burkina Faso,*[14] the Court held that instantaneous acts are those which are occasioned by an identifiable incident that occurred and is completed at an identifiable point in time. It was on the basis of this definition that the Court determined that the alleged violation of the right to life fell outside its temporal jurisdiction because "this instantaneous and completed incident" occurred before the entry into force of the instrument, that is, the Protocol, which gives the Court jurisdiction to hear *inter alia* , the alleged violations of the Charter'.[15]

56. In the same matter, the Court also held that continuing acts or violations as being "the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in

claims. Section 3 of the Act states that "a court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act."

12 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 76-77.

13 *Ibid*, §§ 76-77.

14 *Ibid*, § 70.

15 *Ibid*, § 69.

conformity with the international obligation".[16]

57. In the present case, the Court notes that, the Respondent State promulgated five (5) legislations on the compulsory acquisition of the disputed land, at specific points in time, albeit in a successive manner between 1974 and 1992. The promulgation of these laws which resulted in the compulsory acquisition of the Applicants' disputed land had immediate effect with regard to ownership in that, the beneficiaries became the new *bona fide* owners thereof.

58. Furthermore, the Court notes that these laws were neither abstract in nature, nor of general application, rather their target was very specific in scope, that is the resolution of the land disputes of the Twifo Hemang Community as raised by some members of that community. The said laws, indeed, put an end to the specific land disputes of the Twifo Hemang Community. This position is also supported by that of the European Court of Human Rights in the case of *Blečić v Croatia*,[17] where that Court determined that "the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of deprivation …therefore did not create a continuing situation."

59. The instant case can be distinguished from the Court's reasoning in other cases[18] where the subject matter of the application relates to the Constitution of the Respondent State. In other words, the law of the Respondent State is abstract in nature and of general application in that it is binding on all subjects under the jurisdiction of that State, and is in force until it is repealed.

60. In the present context, the subject matter of the Application revolves around laws that are neither general nor abstract in their nature. Instead they are concrete as they target a well identified group of people belonging to the Twifo Hemang Community, and are also specific in scope as they aim at resolving a land dispute. Their life span comes to an end with their implementation to that concrete and specific subject matter, hence are instantaneous in nature.

61. The Court therefore, considers that the Respondent State's promulgation of the laws on the compulsory acquisition of the

16 *Ibid*, § 73.

17 *Blečić v Croatia* (Application 59532/00) Judgment of 8 March 2006.

18 *Jebra Kambole* (merits and reparations), § 23 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (14 June 2013) 1 AfCLR 34, §§ 107-111 and 114-115, *Nyamwasa & ors v Rwanda* (interim measures) (24 March 2017) 2 AfCLR §§ 34-36. *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9 , §§ 143-144 and 216-217.

lands in dispute were instantaneous acts.

62. From the foregoing, the Court finds that the five (5) laws which form the basis of the Applicants' allegations of violations of the Charter were not only enacted before the Respondent State became a Party to the Charter and the Protocol, but that their operation also ceased thereof.

63. The Court therefore upholds the Respondent State's objection that it lacks temporal jurisdiction in the present matter.

64. Having determined that it lacks temporal jurisdiction to hear the case, the Court does not deem it necessary to examine other aspects of jurisdiction or the question of admissibility.[19]

VI. Costs

65. Neither Party has made submissions on costs.

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66. According to Rule 32(2) of the Rules of Court**,** "Unless otherwise decided by the Court, each party shall bear its own costs".

67. The Court, decides that each Party shall bear its own costs.

VII. Operative part

68. For these reasons,

The Court,

On jurisdiction

By a majority of Ten (10) for, and One (1) against, Justice Chafika BENSAOULA Dissenting,

i. *Upholds* the Respondent State's objection to the temporal jurisdiction of the Court;

ii. *Declares* that it lacks jurisdiction.

On costs

Unanimously,

iii. *Decides* that each Party shall bear its own costs.

19 *Michelot Yogogombaye v Senegal* (jurisdiction) (15 December 2009) 1 AfCLR, § 40.

In accordance with Article 28 (7) of the Protocol and Rule 70(2) of the Rules, the Dissenting Opinion of Justice Chafika BENSAOULA is appended to this Ruling.

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Dissenting opinion: BENSAOULA

1. I disagree with the majority decision for two basic reasons:

a. The first one relates to the statement of facts, which has many grey areas.

b. The second relates to the treatment of temporal jurisdiction in which the specific characteristics of the victims and the subject of the dispute were overlooked.

a. On the facts

2. I am of the view that the contradictions observed in the statement of the facts as submitted by the Applicants deserved the Court's attention in terms of further information, interlocutory judgment or simply by granting the Applicants' request for leave to file additional evidence instead of dismissing it on the ground that they did not specify the nature of the new evidence.[1]

3. Indeed, it emerges from facts, not refuted by the Respondent State by the way, that the Applicants, residents of 7 villages led by 48 chiefs, are an indigenous population of the Twifo area in the Central Region of Ghana. In 1884, that is, during colonial times, a dispute broke out between the Applicants, led by Chief Kwabena Otoo, and the Morkwa community, led by Chief Acwaise Symm. These disputes, according to the Applicants, were settled in 1894 by the Colonial Regional Court of the Gold Coast which ordered the Applicants' Chief to pay compensation or indemnity of two hundred fifty (250,00) pounds to the Court.[2]

1 § 21-23 of the Judgment.

2 § 4 of the Judgment.

4. However, the records do not show "the manner in which this decision was obtained"[3] or what was the effect of such a conviction on the property being claimed. However, the Applicants state that owing to the inability of their Chief to pay the amount imposed, the lands were sold at a public auction on 8 May 1994, which resulted in the violation of their right to property, since neither they nor their descendants can enjoy their lands any longer.[4]

5. A question arises on this point: How, after Ghana's independence in 1957, can a decision taken during colonial times be enforced through an auction in 1894? This date warranted investigation.

6. It further emerges from the facts that on 5 May 1894, these lands were fraudulently acquired by another clan led by Chief Morkwa (Respondent in the Application) who sold them to Respondents J.E. Ellis and Emmanuel Wood (paragraph 5), who are businessmen that the Court has exonerated by not considering them as Respondents.

7. However, statements from these persons would have been useful to the Court in ascertaining the veracity of the situation of the disputed lands. It is important to note, as the Applicants submitted without being refuted by the Respondent State, that they are still on the land and that they are the custodians thereof.

8. In 1964, their new Chief asked for reparations from the Respondent State but nothing was done about it. As a result, they asked for restitution in 1972 but no action was taken. As a result of all these attempts, the Respondent State delegated the civilian branch of the military regime to investigate the allegations of harassment made by the Applicants. The Attorney General was also tasked to investigate the alleged sale of the land.[5]

9. In his report, the Attorney General recommended to the Respondent State to confiscate the land on the ground that he found no evidence of a court judgment ordering an auction of the lands.[6]

This is another contradiction in relation to some facts stated above, on which the Court could have lingered and requested the parties to file more information.

10. A public hearing was necessary or, failing that, additional information or a judgment for more fairness and justice, especially

3 § 4 of the Judgment.

4 § 4 of the Judgment.

5 § 8 of the Judgment.

6 § 10 of the Judgment.

as the Applicants maintain that they still live on the land that belonged to their ancestors, stating that the land is their main means of subsistence and that the village chiefs are the custodians thereof, not the owners. Besides, to this day, they pay rents and fees to the Regional Lands Commission in Cape Coast."

11. Following these developments, the Respondent State has passed a set of laws whose effect is to confiscate the lands.

12. In relation to these laws, the Respondent State enacted the State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) on 12 June 1974, vesting a Hundred and Ninety Thousand, Seven Hundred and Eighty Four acres (190,784) of the Twifo-Hemang land to the Respondent State. The Hemang Acquisition Instrument, 1974, a law that was passed shortly afterwards, repealed the initial instrument 61, cited above, and backdated the land acquisition to February 21, 1973.

13. The Hemang Lands (Acquisition) Decree of 1975 (NRC Decree 332), strengthened the legal basis for the acquisition and maintained the date of acquisition of the land as 2 May, 1975.

14. The Hemang Land (Acquisition) (Amendment) Law,1982 was passed seven years later (1989), after the Respondent State had become party to the Charter, amended NRC Decree 332, reducing the area of the land expropriated by the State from 190,784 acres to 35,707.77 acres. According to the Applicants, it also retroceded all the lands expropriated by the Respondent State, but the law was not enacted until after "the enactment of PNDC Law No. 294 repealing Law No. 29 which once again returned the Twifo Hemang lands to the domain of the State".

15. PNDC Law 294 of 1992, which was passed after the Respondent State became party to the Charter denied the Twifo Community access to any legal recourse to reclaim the land. Indeed, Section 3 of the law provides that "A Court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act".

16. These laws, especially those of 1989 and 1992 passed after the Respondent State had ratified the Charter, were worth careful examination for a good appreciation of the facts and the submissions made.

b. Temporal jurisdiction and the specificity of the dispute

17. The Court holds that the laws enacted by the Respondent State to compulsorily acquire the disputed lands constituted an

instantaneous act and furthermore, came into force before the Respondent State became a party to the Charter and Protocol and therefore, the Court did not have temporal jurisdiction to hear the matter.

18. There is no doubt that the Respondent State became a party to the African Charter on Human and Peoples' Rights on 1 March, 1989, to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 16 August, 2005. There is also no doubt that the Respondent State on 10 March, 2011 deposited the Declaration provided for in Article 34(6) of the Protocol, by which it accepted the Court's jurisdiction to receive applications from individuals and non-governmental organizations.

19. While it is clear that the laws of 1974 and 1975 were passed before the Respondent State became a party to the African Charter on Human and Peoples' Rights, the laws of 1982 (passed 7 years later) and 1992 were passed after the Respondent State became a party to the Charter, contrary to the Court's statement.[7] At the time of the passing the law of 1992, the State was bound by the obligations imposed by the Article 14 of the Charter, including the protection of the rights of peoples, minorities and indigenous populations[8], especially as it does not contest the facts alleged by the Applicants.

20. The Applicants pray the Court to order the repeal of all instruments, including PNDC Law No. 294, which vested the Twifo Hemang Community Lands to the Respondent State.

21. It is clear that any law passed is an instantaneous act in material terms but has lasting effects in time. Having become party to the Charter, the Respondent State was obliged to find a lasting solution to the Twifo community dispute to protect their rights that guarantee them dignity, identity as well a social, cultural and economic wellbeing by ending the spoliation of their land started by the colonial government.

22. By promulgating the laws of 1982 and 1992 (which only reinforced and approved previous laws) after becoming party to the Charter, the Respondent State not only violated the principles of the Charter, and therefore its obligations, but also the fundamental rights to which every citizen is entitled and the right to seek redress before the competent courts (see the content of the

7 § 51 of the Judgment.

8 §§ 2 and 3 of the Judgment.

law that prevented any action against the act of appropriation[9] (paragraph 13 and 14), which, in my opinion, constitutes abusive and unjust harassment.[10]

23. Even if they remain an instantaneous act, the enacted laws are still in force because, to this day, the situation of the Twifo community remains unresolved, their claims having been expeditiously dispatched through confiscation, especially as the laws were passed by an "act of the prince" in relation to a community in search of a solution to a serious identity situation, thereby preventing the victims from seeking appropriate recourse with a view to challenging this arbitrary act that they find unjust.

24. The Court has jurisdiction, even if it begins from the date the Respondent State became party to the Protocol and the Declaration and the Court will have jurisdiction as long as the violation continues in its effects since 1989, when the Respondent State had already violated the rights protected by the Charter. The Court should have made a distinction between the impugned acts and the very special status of the victim.

25. In its ruling of 21 June 2013 on preliminary objections in *Norbert Zongo, Abdoulaye Nikiema a.ka. Ablasse*, *Ernest Zongo*, *Blaise Ilboudo and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso* the Court held that under the Protocol, the Court does not have jurisdiction over acts of violations that occurred before the State concerned became a party to the Protocol and deposited the Declaration, except in cases where such violations are of a continuing nature.[11]

26. In the same case, the Court adopted the definition of the notion of a continuous violation in Article 14(2) of the draft articles on the international responsibility of States that commit internationally illegal acts, adopted in 2001 by the International Law Commission: " The breach of an international obligation by an act of a State having a continuous character extends over the entire period during which the act continues and remains inconsistent with the international obligation".[12]

27. However, in the instant case, the Court has distorted this definition since the laws enacted by the Respondent State were specific in

9 §§ 13 and 14 of the Judgment.

10 See 52 of the Judgment.

11 Right-holders of the late *Norbert Zongo, Abdoulaye Nikiema a.k.a. Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkina des droits de l'homme et des peuples v Burkina Faso*, Judgment (Preliminary objections) (21 June 2013) 1 ACLR 204, §§ 61-83.

12 *Ibid*. § 73.

scope because their purpose was to resolve the Twifo Hemang community land disputes.[13] (Paragraph 53 of the Judgment).

28. In support of its ruling, the Court reference a ruling of the European Court of Human Rights issued on 8 March, 2006 in *Blečić v Croatia*,(Application 59534) where the European Court held that "deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuous situation of 'deprivation' ... does not therefore create a permanent situation.»[14] (Paragraph 58 of the Judgment).

29. My criticism of the Court in this comparison is the specificity of the facts of the two litigations compared. While one concerns the rights of an individual, the other concerns the rights of a whole community, a minority people in search of identity and dignity, a minority catered for by the Charter as seen in its very title!

30. It is unjust to use specific laws to resolve an identical situation through an act of confiscation that does not in any way resolve the situation of the Respondents nor that of future generations. Additionally, the law has not only robbed the Respondents of their rights to property without compensation or indemnity, but also their basic right to seek redress in the courts to reclaim the alleged rights.

31. There is abundant case law in this respect. In many of its cases, including *Minority Rights International v Kenya* (Communication 276/03 of 25/11/2009), the Commission held that the Kenyan government had violated the Charter, in particular the right to property, to the free disposal of natural resources and to social and cultural development cited in Article 14 of the Charter, which obliges the Respondent State not only to respect the right to property but also to protect same.

32. There are many cases in which the Court has held that confiscation, plunder of property, expropriation or destruction of land constitute a violation of Article 14 and especially any restriction of property rights, which are continuing acts!

33. The Inter-American Court of Human Rights has also considered the expropriation of the traditional lands of indigenous communities in numerous cases and has required the establishment of national laws and procedures to make their rights effective, and where the only remedy available is the cessation of the acts, these acts are considered continuous.

13 § 53 of the Judgment.

14 § 58 of the Judgment.

34. As the Court has held regarding spoliation of indigenous peoples' lands. The act can only be considered as continuous!

35. Like the Banjul Commission, the African Court has already held that expropriation of land or restricting on the rights to property are continuing acts. It also on this basis asserted its jurisdiction to examine the applications, as was the case in the matter of Ogiek Community (*African Commission on human and Peoples' Rights v Republic of Kenya)*[15] in which it considered that although the alleged violations started when the Respondent State was not a party to the Charter "the violations alleged by the fact of the expulsion"[16] of the Ogiek community continue, as do the failures of the Respondent to honour its international obligations under the Charter".[17]

36. Finally, I will quote the dissenting and individual opinion of Cheng Tien-Hs attached to the Judgment of the International Criminal Court rendered on 14 June 1938 in which he held that "For the monopoly, though instituted by the dahir of 1920, is still existing to-day. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir (royal decree) that first created it remains in force".

37. It is estimated that there are about 50 million indigenous people in Africa and many of them face multiple challenges including the despoilment of their lands, territories and resources. Their identity and history are inseparable from their territory and even if recognition of indigenous peoples in the laws and constitutions of most countries remains a challenge at the regional level, the inclusion of "peoples' rights" in the African Charter on Human and Peoples' Rights is a starting point for the recognition of these peoples.

38. Consideration for these peoples starts by the effective management of their disputes by focusing on facts that often lead us to allegations of violations that go back in time and that undoubtedly deserve to be elucidated.

39. The abundant case law in this context proves to us that continuous violations will remain so as long as the act by which the violation

15 *African Commission on Human and Peoples' Rights v Kenya* (26 May 2017) 2 ACLR 9, §§ 64-66.

16 *Ibid*. § 65.

17 *Ibid*. § 66.

began is still present through its effects and will always lead to claims and litigation, although States will always attempt to use the dates of accession to human rights instruments to escape being held accountable for human rights violations.