

Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 712

Application 004/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Order (provisional measures), 6 May 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action alleging that he was illegally arrested, charged and sent to a detention Centre. Thereafter, he was tried in absentia, convicted and sentenced to ten years imprisonment. He claims that the entire domestic process leading to his conviction in absentia is a violation of his Charter protected rights. Along with the originating process, the Applicant filed this application for provisional measures, including a request to stay execution of the sentence of the domestic court. The Court granted part of the provisional measures sought.

Jurisdiction (*prima facie*, 26)

Admissibility (conditions for admissibility not applicable, 28)

Provisional measures (preventive nature, 36; extreme gravity 37, 48; risk of execution of prison sentence, 47; risk of irreparable harm, 48; direct and accurate information, 55)

I. The Parties

1. Mr Houngue Eric Noudehouenou, (hereinafter referred to as the “Applicant”) is a Beninese citizen, economist and tax specialist by training.
2. The Respondent State is the Republic of Benin (hereinafter referred to as “the Respondent State”). It became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and 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 22 August 2014. Also, on 8 February 2016, the Respondent State filed the Declaration required in Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations.¹

¹ The Respondent State also ratified the International Covenant on Civil and Political Law on 12 March 1992 and the African Charter on Democracy, Elections

3. On 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

II. Effect of the Respondent State's withdrawal of the Declaration required in Article 34(6) of the Protocol

4. The Court recalls that in its judgment in *Ingabire Victoire v Republic of Rwanda*,² it concluded that withdrawal of the declaration filed under Article 34(6) of the Protocol does not have retroactive effect and has no bearing on matters pending at the time of notification of the withdrawal, as is the case for the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the instrument of withdrawal is deposited.
5. Regarding the Respondent State, having deposited the instrument of withdrawal on 25 March 2020, withdrawal of the Declaration made under Article 34(6) will take effect on 25 March 2021.

III. Subject of the Application

6. In his Application on the merits, the Applicant alleges that he was arrested on 20 February 2018 by unidentified individuals who led him to the Cotonou police station, where he was informed of the reasons for his arrest, namely, embezzlement of public funds.
7. By Decision No. 001/CRIET/COM-I/2019 of 20 March 2019, the Investigating Committee of the Court for the Repression of Economic Crimes and Terrorism (CRIET) referred him to the Correctional Chamber of that Court, including with a new charge. He was referred there with a new charge of complicity in the abuse of office, even though he has never been privy to the information on the proceedings.
8. By judgment of 25 July 2019, he was tried *in absentia* by CRIET, convicted and sentenced to ten (10) years' imprisonment for abuse of office and usurpation of title and an arrest warrant was issued against him. In addition, he was ordered to pay the sum

and Governance on 28 June 2012 and Protocol A/SP1/12/01 of the Economic Community of West African States (ECOWAS) on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security on 21 December 2001. The Respondent State is also a party to the African Charter on Democracy, Elections and Governance, ratified by Law No. 2011-18 of 5 September 2011.

2 Application 003/2014. Ruling of 3 June 2016 on the withdrawal of the declaration, *Ingabire Victoire Umuhoza v Republic of Rwanda*, § 67.

of 1,277,995,474 (one billion two hundred and seventy-seven million nine hundred and ninety-five thousand four hundred and seventy-four) CFA francs to CNCB as compensation for the damage suffered.

9. By letter of 26 July 2019, he lodged an appeal in cassation against the judgment, since Article 19 of Law No. 2018–13 of 2 July 2018 establishing CRIET prohibited him from lodging an appeal, in violation of Article 14 of the Charter.
10. The Applicant alleges violation by the Respondent State of the following rights:
 - i. His right to be tried by a competent court, equality of all before the law, to be tried by an impartial tribunal, a reasoned judgment guided by the adversarial principle, protection from arbitrariness and judicial security, all protected by the Charter and Articles 10 of the Universal Declaration of Human Rights (hereinafter referred to as “UDHR”) and 14(1) of the Covenant;
 - ii. His rights to defence, the equality of arms, to be defended by Counsel, to the facilities necessary to organize his defence, to be notified of the indictment and charges, to be present at his trial, the adversarial principle, to adduce evidence and present his arguments, to question the prosecution witnesses, to be protected by Articles 14(3) of the Covenant and 7(1)(c) of the Charter;
 - iii. His right to appeal the judgments protected under Articles 10 of the UDHR, 7(1)(a) of the Charter and 2(3) of the Covenant;
 - iv. His right to have his conviction and sentence reviewed under Article 14(5) of the Covenant;
 - v. His right to the presumption of innocence protected under Article 7(1) of the Charter;
 - vi. His rights to paid work, property and an adequate standard of living, protected by Articles 6 of the ICESCR, 15 and 14 of the Charter and 23 of the UDHR;
 - vii. His right to reputation and dignity, not to be subjected to inhuman and degrading treatment protected under Articles 7 of the Covenant and 5 of the Charter and his right to freedom of movement, protected under Articles 12, 14(5) and 17 of the Covenant”.
11. The Applicant sought from the Court the following reliefs on the merits:
 - i. A decision stating that the violations of the Applicant’s human rights are well-founded and that the Respondent State has violated each of the Applicant’s human rights in question;
 - ii. A decision condemning the Respondent State on each violation of the Applicant’s human rights invoked in this Application;
 - iii. A decision that the unrealistic facts referred to in the 20 March 2019 CRIET judgment against the Applicant leading to his 10-year prison

sentence constitutes a serious breach on his honour, his dignity, reputation, health and right to protection from arbitrariness;

- iv. A decision that the Applicant has been subject to arbitrary judicial practices and persecution for having ensured the exercise of the tax defence right in Benin in his capacity as manager of the company Fisc Consult Sarl;
- v. A decision that the Applicant is being persecuted for having ensured the exercise of tax defence rights for the benefit of political opponent Sébastien Germain Ajavon and companies in which he has interests;
- vi. A decision that as long as the CRIET judgments was not appealed, the arrest warrant issued by the Respondent State against the Applicant is a violation of the right to freedom of movement guaranteed under Article 12 of the Covenant, the right to stay execution of the sentence imposed by Article 15(5) of the Covenant and Chapter N, 10(a) point (2) of the Guidelines and Principles on the Right to a Fair Trial and Legal Aid in Africa;
- vii. A decision ordering the Respondent State to take all necessary measures to quash the judgment of 25 July 2019 and Judgment No. 001/CRIET/COM-I/2019 of 20 March 2019 issued by CRTET against the Applicant, and in order to erase all the effects of these two judgments within one month of the judgment of this High Court in accordance with the requirements of Chapter IX of United Nations Resolution 60/147 of 16 December 2005 and the jurisprudence of this High Court and the Permanent Court of International Justice which recalls that “the State responsible for the violation must endeavour to erase all the consequences of the unlawful act and restore the state that would likely have existed had that act not been committed”;
- viii. A decision ordering the Respondent state to take all measures to restore the reputation of the Applicant tainted by the CRIET judgments, proceedings conducted in violation of human rights, as well as charges brought against him in the absence of evidence of personal guilt, and to stop any prejudice against the Applicant;
- ix. Order the Respondent State to pay the Applicant the pecuniary damages of 20,701,312,046 CFA francs for losses incurred and loss in income not including that relating to all other companies in which he is a shareholder and has shares that have suffered losses in value, and which can be presented as follows:
 - 21,016,320 CFA francs for wage losses and wage benefits from 2018 to 2022 taking into account the likely date of the Court’s judgment;
 - 366,784,794 CFA francs for the Applicant’s real losses in dividend;
 - 20,088,510,933 CFA francs for the loss in income suffered by the Applicant in COMON, JLR SAU, SCI L’ELITE, MAERSK BENIN, CMA-CGM BENIN, MSC BENIN, EREVAN, ECOBANK;
 - 150,000,000 CFA francs for losses in fiscal studies and tax

- training contracts with the World Bank and the European Union;
 - 75,000,000 CFA francs for legal fees, assistance and legal advice due to the violations which led to this Application;
 - x. Order the Respondent State to pay the Applicant moral damages of two billion CFA francs (2,000,000,000) and for any other moral damages to which he has been subjected;
 - xi. Order the Respondent State to pay for the property and moral damages amounting to 1,000,000 CFA francs, including 400,000,000 CFA francs for his wife and 300,000 000 FCFA for each of his three children for the inhuman and degrading treatment and other moral harm to the Applicant's family as a result of CRIET's judgments and the legal proceedings that violated his human rights;
 - xii. Order the Respondent State to bear the cost of this action;
 - xiii. Order the Respondent State to bear the full costs.
- 12.** In a separate Application, the Applicant also seeks the following provisional measures:
- "i. Order the Respondent State to stay execution of the sentence of 25 July 2019 rendered by CRIET until the final judgment of this Court is rendered;
 - ii. Order the Respondent State to take all appropriate measures to ensure that his life, physical and moral integrity and health are not harmed;
 - iii. Order the Respondent State to take all appropriate measures so as not to subject him to any inhuman, degrading or demeaning treatment;
 - iv. Order the Respondent State to take all appropriate measures to ensure that the freedom, security and physical and moral integrity of his family members are not infringed upon;
 - v. Under his arguments and additional evidence, the Applicant further seeks, as a provisional measure, that the Court order, seek or obtain from any Member State of the African Union asylum and the legal protection of his wife and children, on the one hand, pursuant to the right to protection of victims and their families, and on the other, in accordance with Articles 12(3) of the Charter and 23 of the Covenant in order to protect them from the judicial, economic and moral persecution they face ”.

IV. Summary of Procedure before the Court

- 13.** The Application on the merits and request for provisional measures dated 14 January 2020 were filed with the Registry of the Court on 21 January 2020.
- 14.** Pursuant to Article 34(1) of the Protocol on the Establishment of the Court, on 18 February 2020 the Registry communicated to the Applicant, acknowledgment of receipt of said Applications

and in accordance with Rule 36 of the Rules of Court, served the Applications on the Respondent State with a request to submit its Response on the provisional measures within fifteen (15) days and that on the merits within sixty (6) days.

15. On 28 February 2020, the Registry received additional evidence and arguments from the Applicant concerning the provisional measures and this was notified to the Respondent State on 5 March 2020, with a request for the latter to submit its Response within eight (8) days of receipt.
16. On 4 March 2020, the Registry also received a letter from the Republic of Benin requesting for an extension of time by fifteen (15) days from 3 March 2020 for it to file its Response to the request for provisional measures. This was transmitted to the Applicant on 5 March 2020 for his comments within three (3) days of receipt.
17. On 10 March 2020, the Registry acknowledged receipt of the Respondent State's request for extension and asked it to submit its Response on the provisional measures within eight (8) days from the date of receipt.
18. On 18 March 2020, the Registry received the Response from the Respondent State and notified the Applicant for his comments.

V. Jurisdiction of the Court

19. In support of jurisdiction, the Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules, that to make determination on requests for provisional measures, the Court does not have to satisfy itself that it has jurisdiction over the merits of the case but simply that it has *prima facie* jurisdiction.
20. Referring further to Article 3(1) of the Protocol, the Applicant argues that the Court has jurisdiction insofar as, on the one hand, the Republic of Benin has ratified the African Charter and the Protocol, and made the Declaration provided for in Article 34(6). He alleges that the Respondent State has violated rights protected by other human rights instruments.

21. When seized of an application, the Court conducts a preliminary examination of its jurisdiction, under Articles 3 and 5(3) of the Protocol and Rule 39 of the Rules of Court (hereinafter “the

- Rules”).
22. Article 3(1) of the Protocol provides that “*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*”.
 23. Under Article 5(3) of the Protocol, “*the Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol*”.
 24. The Court notes that the Respondent State has ratified the Charter and the Protocol. It has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations in accordance with Articles 34(6) and 5(3) of the Protocol jointly read.
 25. The rights alleged by the Applicant to have been violated are all protected by the ICCPR, the ECOWAS Protocol and the UDHR, all of which are instruments that the Court is entitled to interpret and apply under Article 3(1) of the Protocol.³
 26. In the light of the above, the Court recalls its established jurisprudence that in determining requests for provisional measures, it does not have to ensure that it has jurisdiction over the merits of the case, but that it has *prima facie* jurisdiction.⁴

VI. Admissibility

27. In its Response dated 18 March 2020, the Respondent State raised an objection to the admissibility based on the absence of urgency or extreme gravity and irreparable harm on the basis of the provisions of Article 27(2) of the Protocol.

3 ACHPR, Judgment on the merits, *Action for the Protection of Human Rights v Republic of Côte d'Ivoire*, 18 November 2016.

4 See Application 058/20L9 XYZ *v Republic of Benin* (Order on provisional measures of 2 December 2019); Application No.020/2019 *Komi Koutche v Republic of Benin* (Order on provisional measures of 2 December 2019); Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for provisional measures dated 15 March 2013); Application 006/2072 *African Commission on Human and Peoples' Rights v Kenya* (Order for provisional measures of 15 March 2013) and Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for provisional measures of 25 March 2011).

28. The Court notes that in matters of provisional measures, neither the Charter nor the Protocol provided for conditions of admissibility, the examination of those measures being subject only to *prima facie* jurisdiction.
29. Accordingly, the Court dismisses the objection to the admissibility of the Application.

VII. Provisional measures requested

30. The Applicant considers that the judgments of 25 July 2019 and 20 March 2019 of CRIET put him in a precarious situation of unbearable extreme gravity. They have unpredictable and irreparable consequences due to impunity for the human rights violations in question.
31. Pursuant to Article 27 of the Protocol and Rule 51 of the Rules, the Applicant prays the Court to order the Respondent State to take the provisional measures set out in paragraph 9 of this Order.
32. The Respondent State argues on the contrary in its Response that urgency means “*the character of a state of affairs that, if not repaired at short notice, could cause irreparable harm*”, while extreme gravity is a situation of increased violence and of an exceptional nature justifying that the Court put an end to it. The Respondent State therefore concludes that the provisional measures sought do not result from any finding of urgency or a situation of extreme gravity.
33. With regard to irreparable harm, the Respondent State notes that it differs from the harm that is difficult to repair and refers to the action whose consequences cannot be erased, repaired or compensated, even by compensation.
34. According to the Respondent State, provisional measures are only possible in exceptional circumstances, when an applicant is exposed to a real risk of irreparable harm. This is not the case in the present case because these measures hinge on consideration of the case on the merits.

35. The Court notes that Article 27(2) of the Protocol states that: “*In cases of extreme gravity or urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such*

provisional measures as it deems relevant”.

36. In the light of the foregoing, the Court takes into account the law applicable in matters of provisional measures which are of a preventive nature and in no way prejudice the merits of the Application. It can only order for provisional measures *pendente lite* and if the basic conditions are met, namely, extreme gravity or urgency and the prevention of irreparable harm to persons.
37. The Court notes that urgency, consubstantial with extreme gravity, means a “*real and imminent risk that irreparable harm will be caused before it renders its final judgement*”.⁵
38. There is urgency whenever acts likely to cause irreparable harm can “*occur at any time*” before the Court renders a final judgment in the case.⁶
39. The Applicant’s various requests for provisional measures will be considered in the light of the above.

A. Request for a stay of execution of CRIET’s sentence of 25 July 2019

40. The Applicant seeks a stay of execution of the CRIET’s 25 July 2019 conviction for putting him in a precarious, extreme, serious and unbearable situation with unpredictable consequences and also because of irreparable consequences due to impunity of the human rights violations at stake before this Court.
41. With regard to the unforeseeable consequences, the Applicant alleges that, following the 10-year sentence imposed by the above judgment, he lodged an appeal in cassation against the judgment.
42. According to the Applicant, despite the appeal in cassation, the Respondent State may enforce the judgment at any time because the CRIET law removed the right to appeal and Article 594 of the Criminal Procedure Code requires the execution of the sentence before the exercise of the right protected under the Charter.
43. He asserts that the Respondent State is obliged to automatically stay execution of the CRIET judgment under Articles 14 and 2(1)

5 ICJ, *Implementation of the Convention for the Prevention and Punishment of Genocide Crime (Gambia v Myanmar)*, 23 January 2020, § 65; *Alleged Violations of the 1955 Treaty of Friendship, Trade and Consular Rights (Islamic Republic of Iran v United States of America)*, 3 October 2018; and *Immunity and criminal proceedings (Equatorial Guinea v France)*, 7 December 2016, § 78.

6 *Infra*, note 2.

(2) of the Covenant.

44. In these circumstances, according to the Applicant, the execution of the CRIET judgment prior to the Court's decision on the alleged violations will have unforeseeable consequences for him.
45. With regard to irreparable harm, the Applicant contends that if the CRIET decision of 25 July 2019 is implemented and the Court subsequently established the alleged violations, the execution would therefore be arbitrary and the perpetrators of that execution would never be punished.

46. The Court notes that even though under the terms of Article 19(2) of the law establishing CRIET, the judgments of that Court are subject appeal in cassation,⁷ Article 594 of Benin's Criminal Procedure Code declares appeals of convicts who are not in detention or who have not obtained exemption from serving their sentence are void.⁸
47. In the circumstances of this case where the Applicant is not in detention and has not been granted an exemption from the execution of his ten-year prison sentence, the Court considers that there is still a risk that the sentence of imprisonment will be executed, notwithstanding the appeal, especially since he is the subject of an international arrest warrant.
48. From the foregoing, the Court considers that the circumstances of this case reveal a situation of extreme gravity and present a risk of irreparable harm to the Applicant, should the CRIET judgment of 25 July 2019 be carried out before the Court's decision in the case pending before it.
49. The Court recalls that in a previous case presenting similar circumstances, it had ordered a stay of execution of a CRIET

7 It is noted that "The judgments of the Court for the Repression of Economic Crimes and Terrorism are justified. They are delivered in open court. They are liable to appeal in cassation by the convicted, the Public Prosecutor's Office and the civil parties."

8 "Persons sentenced to a penalty involving deprivation of liberty who are not in detention or who have not obtained a waiver, with or without bail, from the court that pronounced the sentence, shall be declared to have forfeited their appeal."

judgment.⁹ The Court finds that there is no reason in the instant case for it to depart from its jurisprudence.

50. Accordingly, the Court orders a stay of execution of the 25 July 2019 CRIET judgment.

B. Provisional measure not to impair the liberty, security, physical and moral integrity of the Applicant

51. The Applicant recalls that on 31 October 2018, three unidentified armed persons entered his home, without notifying him of any warrant, arrested him and took him *manu militari* to a police station.
52. He further alleges that while he was in his hospital bed following his arrest, he was persecuted and assaulted by a Bailiff acting in the name and on behalf of the Respondent State, to discharge acts addressed to the company Fisc Consult, of which he is no longer the manager.
53. Therefore, in view of these events, he fears, not only to be subjected to inhuman and degrading treatment, but also fears for his life.
54. The Applicant adds to the additional arguments and evidence he adduced as a result of his request for provisional measures, that the threats have persisted. According to him, the threats are aimed at killing him.
55. The Court finds that the Applicant has failed to provide direct and accurate information to demonstrate the extreme gravity or urgency and the risk of serious and irreparable harm to him. The Court cannot rely on mere assertions to grant his request.

56. The Court therefore decides to dismiss the request for the provisional measures requested.

9 AfCHPR, *Sébastien Germain Ajoon v Republic of Benin*, Order on interim measures, 7 December 2017.

C. Provisional measure relating to the Applicant's right to defence before this Court

57. The Applicant asserts that without the stay of execution of the CRIET judgment, he will be in a weaker position in regard to his rights to defence before this Court vis-a-a-vis the Respondent State.
58. To this end, the Applicant maintains that in consideration of this judgment, on the one hand, he cannot mobilize the financial resources necessary to cover travel and accommodation costs for even one of his Counsel in the context of the referral to the Court.
59. On the other hand, he cannot appear before this Court to answer all the questions and refute the arguments of the Respondent State which would require comments on his part.

60. The Court notes that the Applicant argues that the CRIET conviction is an obstacle to the exercise of his right to defence before it.
61. The Court notes that the provisional measures sought in connection with his right to defence are, in the present case, moot, to the extent that the Court ordered a stay of execution of the CRIET judgment.

D. Provisional measure for the rights to liberty and security of the Applicant's family

62. The Applicant alleges that following his arrest in February 2019, his wife, carrying their 8-year-old child, and his adoptive mother, who arrived two hours after the incident and wished to see him, were remanded in custody for eight (8) days, on the pretext that he had escaped. He contends that this situation can have psychological consequences on his family members and can even be fatal for some of them.
63. The Applicant therefore considers that his family is being persecuted and this justifies the need to issue provisional

measures for their protection.

64. The Court reiterates that urgency, consubstantial with extreme gravity, means a “*real and imminent risk that irreparable harm will be caused before it makes its final decision*”.¹⁰
65. The Court finds that the deprivation of liberty of the Applicant’s family members took place in February 2019 following his arrest. It further notes that since that time, the Applicant has not made mention of any threat to his family members.
66. The Court notes that the Applicant failed to provide evidence as to the real and imminent threats to the health, liberty and security of his family to justify provisional measures. Nor does he establish the urgency of such measures.
67. The Court therefore considers that it does not see the need to order the provisional measures.

E. Provisional measure to obtain asylum and legal protection from all African Union Member States

68. The Applicant maintains that his entire family is subjected to persecution and ill-treatment that warrants the benefit of asylum and legal protection from African Union Member States.

69. The Court recalls, as the Applicant contends, that Article 12(3) of the Charter states that “every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international

10 International Court of Justice: Implementation of the Convention for the Prevention and Punishment of Genocide Crime (*Gambia v Myanmar*), para 65, 23 January 2020; Alleged Violations of the 1955 Treaty of Friendship, Trade and Consular Rights (*Islamic Republic of Iran v United States of America*), 3 October 2018; Immunity and criminal proceedings (*Equatorial Guinea v France*), 7 December 2016, para 78.

conventions". Nevertheless, the sought provisional measure must meet the conditions of Article 27(2) of the Protocol.

70. The Court notes that the Applicant fails to adduce evidence as to the direct and current existence of persecutions of his family, nor does he show proof of urgency and the need to order the sought provisional measure.
71. The Court therefore finds that this request for provisional measure should not be granted.
72. Lastly, the Court underscores that this order does not prejudice its findings on the jurisdiction, admissibility and merits of the Application.

VIII. Operative part

73. For these reasons

The Court

Unanimously

- i. *Orders* the Respondent State to stay execution of the judgment of 25 July 2019 of the Court for the Repression of Economic Crimes and Terrorism rendered against the Applicant, Hougue Eric Noudehouenou, until the final decision of this Court;
- ii. *Requests* the Respondent State to report on the implementation of this Order within fifteen (15) days of receipt.
- iii. *Dismisses* all other prayers made.