Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 592

Application 032/2020, *Houngue Éric Noudehouenou v Republic of Benin*

Ruling, 22 November 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant alleged that the procedures of the domestic courts of the Respondent State in a civil matter involving him were in violation of his human rights. In his Application before the Court, he brought this request *inter alia* for provisional measures to stay execution of the judgment of the domestic courts. The Court granted the order for stay of the judgment as requested.

Jurisdiction (*prima facie*, 15-20)

Provisional measures (urgency, 33, 42; irreparable harm, 34; specific nature of measures requested, 37 - 40; urgency in enforceable domestic judgment, 42; vague request, 46)

Dissenting Opinion: KIOKO

Provisional measures (requirements for grant, 26-27)

Dissenting Opinion: BEN ACHOUR

Provisional measures (requirements for grant, 5)

I. The Parties

1. Mr. Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He seeks the stay of execution of the judgment delivered against him in a civil case on 5 June 2018, by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

2. The Application is brought against the Republic of Benin (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 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 (hereinafter referred to as "the Protocol") on 22 August 2014. It further made the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the

jurisdiction of the Court to receive applications from individuals and non-governmental organisations. On 25 March, 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases or on new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

II. Subject of the Application

3. In the main Application, the Applicant alleges that following a civil procedure in which he had voluntarily intervened, , the Cotonou Court of First Instance rendered on 5 June 2018, without his knowledge, a judgment in the case opposing Collectivité Houngue Gandji, Akobande Bernard, Mrs Anne Pogle, née Kouto as plaintiffs and Gabriel Kouto, as defendant.

4. The Applicant submits that the judgment of the Cotonou Court of First Instance, of which was never notified to him, infringed on his right of ownership. Part of its operative section reads as follows:

> For these reasons,
>
> Ruling publicly, adversarially, in civil matters of land and state property law and in the first instance;
>
> Homologates the framework agreement dated 4 October 2016, the amicable settlement dated 4 April 2016 and the minutes dated 4 May 2017 and makes them enforceable;
>
> Acknowledges that Houngue Gandji group has withdrawn its action;
>
> Note that Mrs Anne Pogle née Kouto and Gabriel Kouto are presumed owners of the "S" plots of Lot No. 3037 of Agla estate, plotted under number 1392 and "R" of Lot No. 3037 of Agla estate, plotted under number 1462 F;
>
> Note that the DJA-VAC association represented by Koty Bienvenue acquired landed property of 4ha 62a 58ca from the Houngue Gandji group;
>
> - Confirms the property rights of: Pedro Julie on Plots Numbers 403h and EL 404h at Agla estate;
> - Mrs Anne Pogle, née Kouto on Plot "S" of Lot 3037 of Agla estate, under number 1392 F;
> - Kouto Gabriel on Plot "R" of lot 3037 of Agla estate under number 1462 F;

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Ruling of 3 June 2016) 1 ACtHPR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

- DJA-VAC association on land the size of 4ha 62a 58ca;
- Dismisses the Application by Trinnou D. Valentin, Houenou Eleuthère, Alphonse Adigoun and Houngue Eric and orders them to pay costs;
- Notifies the parties that they have a period of one (1) month to appeal.

5. He submits that he is bringing this Application for the purpose of praying this Court to:

i. Order the Respondent State to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court;

ii. Order the Respondent State to "stay the execution of the judgment of the Cotonou Court of First Instance until the Court delivers its final judgment";

iii. In the alternative, "grant it the benefit of the Court's legal aid fund for all acts and procedures that the Court deems necessary to suspend the judgment of the Cotonou Court of First Instance, in view of the continued violations of the decisions of the Court by the Respondent State.

III. Alleged violations

6. The Applicant alleges violation of the following rights:

i. The right to property, protected by Article 14 of the Charter;

ii. The rights to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter and the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR ");

iii. The right to have one's cause heard, protected by Articles 7 of the Charter, 14(1) of the ICCPR and 8 of the Universal Declaration of Human Rights.

IV. Summary of the Procedure before the Court

7. The Application was filed on 15 October 2020. It was served on the Respondent State on 20 October 2020, giving it ninety (90) days to respond.

8. On 8 June 2021, the Applicant filed the instant Application for provisional measures which was duly notified to the Respondent State, which was given fifteen (15) days from the date of receipt to file its response.

9. As of 6 July 2021, when the time for filing the response to the Application for provisional measures elapsed, the Registry had

not received any response from the Respondent State.

V. *Prima facie* jurisdiction

10. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "the Rules")[2] that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case but merely that it has *prima facie* jurisdiction.

11. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration provided for in Article 34 (6) thereof; and insofar as he alleges violations of rights protected by human rights instruments.

12. He further submits that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal only took effect on 26 March 2021.

13. The Respondent State did not respond to this point.

***

14. Article 3(1) of the Protocol provides:

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

15. Furthermore, Rule 49(1) of the Rules provides that "[t]he Court shall ascertain its jurisdiction …" However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.[3]

16. In the instant case, the rights the Applicant alleged to have been violated are all protected by the Charter and the ICCPR,

2 This Article of the former Rules of 2 June 2020 corresponds to Rule 59 of the new Rules which came into force on 25 September 2020.

3 *Ghati Mwita v Republic of Tanzania,* ACtHPR, Application No. 012//2019, Ruling of 9 April 2020 (provisional measures), § 13.

instruments to which the Respondent State is a Party.

17. The Court further notes that the Respondent State has ratified the Protocol and it has also deposited the Declaration.

18. The Court observes, as mentioned in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

19. The Court also recalls that it has held that the withdrawal of a Declaration filed in pursuant to Article 34(6) of the Protocol has no retroactive effect and has no bearing on pending cases and new cases filed before the withdrawal comes into effect, [4] as is the case in the instant case. The Court reiterated its position in its Ruling of 5 May 2020 *Houngue Eric Noudehouenou v Republic of Benin,*[5] and held that the Respondent State's withdrawal of the Declaration would take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal has no bearing on its personal jurisdiction in the instant case.

20. From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the instant Application for provisional measures.

VI. Provisional measures requested

21. The Applicant requests the Court to order the Respondent State to "remove the hindrances to the exercise of the right of evidence" and to "ensure the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning him" before this Court.

4 *Ingabire Victoire Umuhoza v Republic of Rwanda (*jurisdiction*)* (Ruling of 3 June 2016) 1 ACtHPR 540 § 67.

5 *Houngue Eric Noudehouenou v Republic of Benin,* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), § 4- 5 and *Corrigendum* of 29 July 2020.

22. Furthermore, that by failing to comply with three Orders for provisional measures[6] and four judgments[7] of this Court, the Respondent State has made it "absolutely impossible for him to obtain documents that are necessary for his human rights".

23. In this regard, he notes that there is an urgent need to preserve his right to a fair trial and that the violation of Article 4[8] and Article

6 These are the following Ruling for provisional measures: Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, Ruling on provisional measures of 5 May, 2020 - Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, in which the Court ordered "the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming communal, municipal, district, town or village elections for the benefit of the Applicant"; Application No. 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin* – Ruling for Provisional measures of 6 May 2020, in which the Court ordered the Respondent State to "to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant (...)"; Application No. 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin* – Ruling for Provisional Measures of 29 March 2021 in which the Court ordered the Respondent State to "stay of execution in respect of Judgments of the Supreme Court of the Respondent State N°209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and N°210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and N°231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020 until the decision of the Court on the merits";

7 These are the following judgments: Application 059/2019 - *XYZ v Republic of Benin*, Judgment of November 27, 2020, the operative part of which reads, inter alia, "Orders the Respondent State to take necessary measures to bring the composition of COS-LEPI into conformity with the provisions of Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy before any election "; Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* - Judgment of December 4, 2020, the operative part of which reads as follows: Orders the Respondent State to take all measures to repeal Law 28 No. 2019-40 of 1 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws related to the election in order to guarantee that its citizens will participate freely and directly, without any political, administrative or judicial obstacles, in the forthcoming presidential election without repetition of the violations found by the Court and under conditions respecting the principle of presumption of innocence; Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; Orders the Respondent State to take all necessary measures to ensure cessation of all effects of the constitutional revision and the violations which the Court has found "; Application 010/2020 - *XYZ v Republic of Benin* - Judgment of November 27, 2020 and Application 062/2019 - *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*. These two judgments have, in part, a similar operative part: "Orders the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, in particular with regard to the process for the renewal of their term of office (...), to take all measures to repeal Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, in particular Law 2019-43 of 15 November 2019 on the Electoral Code, and to comply with the principle of national consensus set forth in Article 10(2) of the ACDEG for all other constitutional revisions".

8 Article 4 ICCPR states: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the

7[9] of the ICCPR is imminent.

24. The Applicant states that it was after a third party initiated a procedure before the Cotonou Court that he obtained, on 1 June 2021, a copy of the certificate of non-appeal and non-opposition of the Cotonou CFI's judgment and a copy of the order authorizing the sale issued on 24 February 2020 (hereinafter referred to as the "authorization of sale"). According to him, the urgency and irreparable harm he suffered "was not brought to his attention until September 2020".

25. The Applicant requests the stay of execution of the judgment of the Cotonou C FI, arguing that urgency arises from the enforceability of the said judgment insofar as he has produced the certificate of non-opposition or appeal thereof. He further submits that it is on this basis that the authorization of sale of the building was delivered. He further submits that he is unable to participate in the proceedings of domestic courts to present his arguments, his evidence and to obtain a fair trial.

26. He argues that staying the execution of the judgment of the Cotonou CFI will put an end to the irreparable harm that he could suffer and guarantee the equality of the parties, their interests and the effectiveness of the Court's final judgment.

27. According to the Applicant, irreparable harm "results from domestic law" which, "by interfering with his rights protected by Articles 1, 2, 5, 7, 8, 14 and 17 of the Charter, Article 27 of the Protocol, Articles 2, 7 and 18 of the ICCPR, and Article 1(h) of the ECOWAS Democracy Protocol, causes him irreparable harm that cannot be reversed even if the final decision on the merits favours him".

present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

9 Article 7 ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

28. He submits that the said provisions of domestic law are, in particular, Articles 30 to 34,[10] 528 and 530[11] of the Land Code as well as Articles 547 and 570 of the Code of Civil Procedure.

29. In the alternative, the Applicant requests the Court to "grant him the benefit of the Court's legal aid fund for any acts and proceedings that the Court may deem necessary for the stay of execution, in view of the continued violations of the Court's decisions by the Respondent State.

30. The Applicant asserts that in the absence of a ruling staying the execution of the Cotonou CFI judgment, he will suffer irreparable harm.

31. He underlines, to this effect, that the current illegal occupants of the building in question will counter-argue that failure to diligently comply with Court's directives is synonymous with acquiescence to the execution of the judgment of the TPI of Cotonou.

***

10 Article 30 provides: "Within the meaning of this code, extinctive prescription is the annulment of a pre-existing presumptive right of ownership by peaceful, notorious, uninterrupted and unequivocal possession of ten (10) years"; Article 31: "Prescription is acquired when the last day of the term is over. The period referred to in the preceding article is counted from date to date"; Article 32: "The statute of limitations does not run against the person who is unable to act as a result of an impediment resulting from the law, an agreement or a case of force majeure. The occupation of a building supported by acts of violence cannot be the basis for prescription. Nor can exploitation or occupation as a result of authorization or simple tolerance be the basis for prescription. Those who possess by others cannot prescribe. In any case, the farmer, custodian, guardian, lessee, bailee, usufructuary and all other operators or occupants who precariously hold the owner's property cannot prescribe it. Ascendants, descendants and collaterals of operators or occupants on a precarious basis cannot prescribe either. Between spouses, prescription does not run"; Article 33: "The plea of prescription is of public order. It may be invoked in any case and even ex officio by the judge"; Article 34: "When prescription has expired, the action to claim the property of the presumed pre-existing owner is inadmissible".

11 These articles provide: "Article 528: "The execution of a court decision, judgments, or rulings ordering forced eviction shall be preceded by a stage of amicable negotiation with a view to the purchase, by the party taking part in the proceedings, of the occupied property (...)"; Article 530: "In all cases, the property pre-empted or expropriated in application of the preceding articles shall be the subject of a lease purchase, as a matter of priority, in favour of the parties taking part. The modalities for the implementation of the provisions of this article are fixed by a Cabinet.

32. The Court notes that Article 27(2) of the Protocol provides that:

> [i]n cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

33. The Court recalls that urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent risk that irreparable harm will be caused before it renders its final judgment".[12] The risk in question must be real, which excludes a purely hypothetical risk and which explains the need to cure it immediately.[13]

34. With respect to irreparable harm, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.[14]

35. The Court notes that the two conditions that must be satisfied under the above-mentioned Article, is that of extreme gravity or urgency and irreparable harm which are cumulative, to the extent that where one of them is absent, the measure requested cannot be ordered.

36. In light of the foregoing, the Court will examine the measures requested to determine whether they meet the required conditions.

A. On the measure to "remove obstacles to the exercise of the right to evidence" and to "the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning the Applicant" before this Court

37. The Court emphasises that an application for provisional measures is necessarily made in the context of a specific procedure on the merits to which it is attached, and therefore cannot be general in nature and extend to other procedures on the merits.

38. The Court notes that the provisional measure requested by the Applicant extends to all the procedures that he has initiated and that are pending before the Court. The measure is, in fact, intended to enable him to exercise certain rights "in the procedures

12 *Sébastien Ajavon v Republic of Benin,* ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61.

13 *Ibid*, § 62.

14 *Ibid*, § 63.

concerning him before the Court ".

39. The Court notes that, in addition to the instant procedure, the Applicant has filed three Applications before the Court, which are pending.[15]

40. In view of the general nature of the measure requested, which the Applicant intends to extend to all the pending procedures to which he is a party before the Court, the Court cannot grant it.

41. In any event, the Applicant has not demonstrated, even for the instant procedure, that the requirements of Article 27(2) of the Protocol have been met. Accordingly, the Court dismisses the prayer for the measure requested.

B. Stay of execution of the Cotonou CFI judgment

42. The Court notes that in the instant case, it is true that the certificate of non-opposition and non-appeal produced by the Applicant attests that the judgment of the Cotonou Court of First Instance is enforceable. As such, it is synonymous with urgency, consubstantial with extreme gravity in the sense that objectively, there is no longer any obstacle to the execution of the said judgment. This execution can, so to speak, take place at any time before the Court renders its judgment. Therefore, the existence of a real and imminent risk is established.[16] This risk is exacerbated by the order authorizing the sale dated 24 February 2020, issued in execution of the judgment of the Cotonou Court of First Instance and on which the Applicant relies.

43. Regarding the requirement on irreparable harm, the Court considers that it is also met.

44. In view of the foregoing, the Court orders the Respondent State to stay the execution of the Cotonou CFI judgment.

C. The measure relating to the benefit of the legal aid fund

45. The Court emphasises that the conditions for granting legal aid are governed by the Legal Aid Policy of the Court.

46. The Court notes that the Applicant's request is vague and that in any case, the measure cannot be granted by way of an order on

15 Applications Nos. 004/2020, 020/2020, 028/2020;

16 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No.002/2021, Ruling (Provisional measures) du 29 mars 2021, § 39-40;

provisional measures.

47. Accordingly, the Court dismisses the request.

48. For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and in no way prejudges the Court's decision on its jurisdiction, on admissibility and on the merits of the case.

VII. Operative part

49. For these reasons,

The Court

By a majority of Seven (7) in favour and Four (4) against, Judge Ben Kioko, Judge Rafaâ Ben Achour, Judge Tujilane R. Chizumila and Judge Chafika Bensaoula Dissenting,

i. *Dismisses* the measure seeking to "remove the hindrances to the exercise of the right of evidence" and to "ensure the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning the Applicant" before this Court;

ii. *Dismisses* the request for legal aid;

Unanimously,

iii. *Orders* the stay of execution of the Cotonou Court of First Instance Judgment of 5 June 2018.

iv. *Orders* the Respondent State to report to the Court on the implementation of the measure ordered in point (iii) of this operative part, within fifteen (15) days of notification of this Ruling.

***

Dissenting Opinion: KIOKO

1. I agree with the Majority Ruling, on the most part, in the findings and conclusions reached in the matter of Mr. Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") against the Republic of Benin, in which he seeks provisional measures for stay of execution of a judgment delivered on 5 June 2018 against him in a civil case by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

2. The Applicant alleges that following a civil proceeding in which he had voluntarily intervened, the Cotonou CFI delivered the

judgment without his knowledge on 5 June 2018. According to him, this judgment, which was never served on him, deprived him of his right to property.

3. The Applicant prays the Court to:

i. Order the Respondent State to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court;

ii. Order the Respondent State to "stay the execution of the judgment of the Cotonou Court of First Instance until the Court delivers its final judgment";

iii. In the alternative, "grant it the benefit of the Court's legal aid fund for all acts and procedures that the Court deems necessary to suspend the judgment of the Cotonou Court of First Instance, in view of the continued violations of the decisions of the Court by the Respondent State.

4. I am in agreement with the reasons advanced by the majority for granting prayer no: (ii) for a stay of execution of the order of the Cotonou Court of First Instance (CFI) of 24 February 2020 authorizing the sale of the Applicants property pursuant to the judgment of the CFI of 5 June 2018 and for the Respondent to report to the Court within 15 days. Similarly, I agree with the Court's decision not to issue an order granting the request for legal aid as this is a matter falling within the administrative jurisdiction of the Court, which cannot be dealt with through a Court order.

5. However, I have a divergence of opinion with the majority with respect to prayer (i) in which the Court has rejected the request for an order to exercise the right to evidence.

6. Having carefully perused the detailed Request submitted by the Applicant, I find that the reasoning in the majority Ruling with respect to prayer (i) problematic. As indicated in Paragraph 22 of the Ruling, the Applicant has submitted that by failing to comply with three

Orders for provisional measures[1] and four judgments[2] of this Court, the Respondent State has made it "*absolutely impossible for him to obtain documents*" that he requires to prosecute his case before this Court in order to overturn the decision that deprived him of his property.

7. Basically, what the Applicant is seeking is what in common law is referred to as discovery of documents. The discovery of documents is intended to provide the parties with the relevant documentary

1 These are the following Ruling for provisional measures: Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, Ruling on provisional measures of 5 May, 2020 - Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, in which the Court ordered "the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming communal, municipal, district, town or village elections for the benefit of the Applicant"; Application No. 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin* – Ruling for Provisional measures of 6 May 2020, in which the Court ordered the Respondent State to "to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant (...)"; Application No. 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin* – Ruling for Provisional Measures of 29 March 2021 in which the Court ordered the Respondent State to "stay of execution in respect of Judgments of the Supreme Court of the Respondent State N°209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and N°210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and N°231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020 until the decision of the Court on the merits";

2 These are the following judgments: Application 059/2019 - *XYZ v Republic of Benin*, Judgment of November 27, 2020, the operative part of which reads, inter alia, "Orders the Respondent State to take necessary measures to bring the composition of COS-LEPI into conformity with the provisions of Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy before any election "; Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* - Judgment of December 4, 2020, the operative part of which reads as follows: Orders the Respondent State to take all measures to repeal Law 28 No. 2019-40 of 1 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws related to the election in order to guarantee that its citizens will participate freely and directly, without any political, administrative or judicial obstacles, in the forthcoming presidential election without repetition of the violations found by the Court and under conditions respecting the principle of presumption of innocence;; Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; Orders the Respondent State to take all necessary measures to ensure cessation of all effects of the constitutional revision and the violations which the Court has found "; Application 010/2020 - *XYZ v Republic of Benin* - Judgment of November 27, 2020 and Application 062/2019 - *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*. These two judgments have, in part, a similar operative part: "Orders the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, in particular with regard to the process for the renewal of their term of office (...), to take all measures to repeal Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, in particular Law 2019-43 of 15 November 2019 on the Electoral Code, and to comply with the principle of national consensus set forth in Article 10(2) of the ACDEG for all other constitutional revisions".

material before the trial so as to assist them in appraising the strength or weaknesses of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at trial. It is also in the interest of justice since discovery ultimately allows the Court to establish the truth of the allegations before it.

8. What I find troubling is that the majority have not appreciated that it is in the interest of justice that a party should have access to documents, which the party needs to prepare for his case unless there is a valid reason to withhold them. In the instant case, no valid reason has been adduced by the Respondent state, which in fact did not respond to the request.

9. In its brief consideration of this prayer, the Court has in five paragraphs dismissed this prayer by noting that the measure requested by the Applicant applies to all the procedures that he has initiated and that are pending before this Court; the measure requested is to enable the Applicant exercise certain rights "in the procedures concerning him before this Court, where he has three Applications, which are pending'.[3] Furthermore, the Court concludes that it cannot grant the measure requested for two reasons, in view of their generality, whose application, the Applicant intends to extend to all the pending procedures to which he is a party before this Court; and that, in any event, the Applicant has not demonstrated, even for the instant Application, that the requirements of Article 27(2) of the Protocol are met. Accordingly, the Court dismisses the prayer for the measure requested.

10. Having carefully gone through the Application, I find that the reasoning of the Court ignores the detailed submission made by the applicant with respect to the evidence he seeks to collect, why he requires such evidence, the jurisprudence he relies upon with respect to the right to evidence as well submissions on the requirements of Article 27 of the Protocol.

A. Evidence that the Applicant wishes to search for, obtain and produce before this Court

11. According to the Applicant, the respondent is withholding evidence that would allow this court to assess the truthfulness of the allegations made. In this regard, he seeks a Court order to access the following pieces of evidence:

3 Applications Nos. 004/2020, 020/2020, 028/2020.

i. Obtaining and producing any document issued by the bodies of the respondent before the Court of Cassation, for example, the applicant could not and cannot obtain from the Court of Cotonou the certificate of non-appeal[4]

i. The expert commission order in Exhibit 6, the expert report as carried out by ASSOSSOU Pedro d'Assomption and its use by CRIET which was used to condemn the applicant to 10 years in prison with a fine of the billion to be paid to the CNCB.[5]

ii. "due to lack of financial means and accessibility to the Court of Cotonou, due to the non-execution of the decisions of the Court by the defendant, it is impossible for the applicant to identify the current occupants of his domain who are availing themselves of the ongoing execution of judgment no 006 / 2DPF / -18 of 05 June 2018 of the TPI of Cotonou referred to the Court of Cassation, in order to submit the list of these persons and the numbers of the plots in the applicant's domain which they occupy in violation of his fundamental rights", from the Court;[6]

iii. Indeed, the applicant cannot make the list of occupants because to do so, he must first obtain an order authorizing entry of the domain from the Court of Cotonou because without this order, he will be arrested for violation of the home. arbitrarily deprived the applicant by the contested judgment referred to the Court, then on the basis of this order, the applicant must request the services of a bailiff and the police to carry out the service of the said order and identification of the names and surnames of the occupants of their domain.

iv. the certificate of life and charge on the filiation of his three children[7]

v. to produce the documents of filiation of the other members of his family who are affected, including his three brothers and four sisters. as well as his adoptive mother and his wife who were illegally placed in detention by the defendant on the count of this case and who on this count alone deserves comfortable reparation;[8]

vi. The correspondence exchanged between FISC Consult Sari Company and CNCB and which formed part of the allegations made against him in the CRIET judgment.[9] The letters of the Fisc Consult Sari company that the applicant signed in his capacity as manager

4 The Request para 28.

5 *Ibid* para 76.

6 *Ibid* para 51.

7 *Ibid* para 87.

8 *Ibid* para 87.1.

9 *Ibid* para 57 and 57.1.

of Fisc Consult, the Court will easily observe that the company had done everything to avoid undue expenses at the CNCB;[10]

vii. "The signed sale agreements followed by the affixing on it of the fingerprints of the legal representatives of the HOUNGUE GANDJI Collectivity (exhibit no 2) and the bailiff's exploits attesting to the sale of the 2.5 hectares located in Agla to the applicant by the HOUNGUE GANDJI Collectivity (exhibits no 3 and 5) produced at the Court to prove his right of ownership, the applicant wants to produce".[11]

12. The applicant also seeks evidence, in the possession of the Respondent State, which was never notified to him and yet served to convict him to a sentence to ten years in prison, in violation of his presumption of innocence because "by virtue of the principle of the presumption of innocence, the right to have 'the necessary facilities' for the preparation of the defence should be understood as ensuring that individuals cannot be sentenced on the basis of evidence to which they or their lawyers do not have full access":[12] This evidence which he requests the Court to order the Respondent to produce is itemised as follows:

i. In the judgment of July 25, 2019 rendered by CRIET, the Respondent cited an extract from the judgment of July 25, 2019 in his brief of April 30, 2020. This extract is unknown to the applicant;[13]

ii. The audit report carried out by the Ministry of Public Transport since the defendant cited it in his judgment of March 20, 2019 as confirming offenses against the applicant;[14]

iii. The minutes of the interrogations of the Applicant during the police investigation and the investigation as well as the evidence which he submitted there since the Respondent affirmed on page 18 of his judgment of March 20, 2019, that the facts against the Applicant were established during these interrogations and he was sentenced to 10 years in prison;[15]

iv. The forensic expert report carried out by Sieur ASSOSSOU Pedro d'Assomption which would have evoked the pecuniary responsibilities

10 *Ibid* para 57.

11 *Ibid* para 55.

12 *Human Rights Committee. Onoufriou v Cyprus*. doc. UN CCPR / C / 100 / D / 1636/2007. 20W. §6.11; Concluding Observations, Canada, doc. UN CCPR / C / CAN / CO / 5. 2006. § 13. See ***CP! Prosecutor v Katanga and Ngudjolo*** (ICC-01 / 04- 01 / 06-2681-Red2), Trial Chamber i. Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to lift a Rule 81 (4) Redaction and the Application of Protective Measures pursuant to Regulation 42, March 14, 2011. §27. Johannesburg Principles, Principle 20.

13 The Request para 32.1.

14 *Ibid* para 32.2.

15 *Ibid* para 32.3.

advanced on pages 21 and 22 of the judgment of March 20, 2019 of the CRIET;[16]

v. The Appointment letter by which the public authority appointed the applicant "fiscal advisor of the CNCB" and of the act of taking up his post at the CNCB;[17]

vi. Proof that all of the evidence listed above was served on the applicant at least during the period of his unlawful detention from 20 February 2018 to 31 October 2018.[18]

vii. Other documents in its physical archives in relation to the said fields, including the surveys and work of the IGN (National Geographic Institute), the list of persons previously identified by the IGN in relation to the areas of the collectivity HOUNGUE GANDJI, the QIP numbers (district, block, plot) of the plots making up the applicant's domain, photos and with GPS location from IGN.[19]

13. In conclusion, the applicant requests that "by virtue of the obligation of loyalty in search of the truth, of the applicant's human rights referred to in the case, of Articles 26 of the Protocol, 39 (2), 41 and 45 of the Rules, please the Court to order the defendant to produce before it, and without delay, the entire judgment of July 25, 2019 of CRIET, the audit report carried out by the Ministry of Transport, the minutes of interrogation of the applicant during the police investigation and the investigation as well as the evidence that he submitted, of the forensic expert report carried out by the Sieur ASSOSSOU Pedro d'Assomption, evidence of the quality of tax adviser of the CNCB attributed to the Applicant, the advice he provided and the irregular nature of the payments resulting therefrom, and notification of the evidence of such evidence to the applicant before his sentence to 10 years in prison".[20]

ii. Why is it necessary to search & obtain this evidence?

14. Citing the jurisprudence of the Court, the Applicant asserts that "it should be remembered that the Court has always held that "fair trial requires that the conviction of a person to a criminal sanction and in particular to a heavy prison sentence, be based on solid

16 *Ibid* para 32.4.

17 *Ibid* para 32.5.

18 *Ibid* para 32.7.

19 *Ibid* para 55.4.

20 The Request para 36.

and credible evidence".[21] Based on this, he contends he has a right to see the evidence that was used to convict him.

15. He also contends that the execution of the Court's order, in disregard of the Court order suspending execution, "constitutes a means of asphyxiating the applicant and preventing him from properly defending himself before this Court. …. because the Respondent does not want the plaintiff to defend himself and does not want the truth to be revealed".[22]

16. The Applicant contends that "since the case-law of the Court has imposed the burden of proof on the applicant, it must also be taken into account that it is in principle that the right to evidence is a prerequisite to the burden of proof and that consequently, if, prior to imposing the burden of proof on the Applicant, the Court does not order the Respondent to remove the obstacles which it has arbitrarily imposed on the Applicant's right to evidence, in violation of the decisions of the Court, the burden of proof imposed on the applicant by the case-law of the Court subjects him to risks."[23]

17. Thus, in the view of the Applicant the Court cannot deny him an order for access to evidence and subsequently decide that he failed to prove his allegations. Indeed the applicant cautions with respect to "the future decisions of the Court looming on the horizon, the Applicant having seized it, there is an urgent need for the Court to order the Respondent to remove all obstacles which it has arbitrarily imposed on the Applicant's right to evidence, and this in order to prevent the applicant from being subjected to the risk of inhuman and degrading treatment within the meaning of Articles 4 (2) and 7 of the ICCPR, otherwise, in the light of the Court's case-law, his future decisions will be unfairly prejudicial to the applicant for lack of proof of his claims because of the constraints arbitrarily imposed on his right to evidence and on his rights protected by Articles 4(2) and 7 of the ICCPR stem only from violations of the Court's decisions of 06 May 2020, application no 004/2020, 25 September 2020 and 04 December 2020, application no 003/2020."[24]

21 *Mohamed Abubakari v United Republic of Tanzania (merits), § 174; Armand Gue hie United Republic of Tanzania (merits and reparations), § 105. See also Kijiji Isiaga v United Republic of Tanzania* § 66 and 67.

22 The request para 85.

23 *Ibid* para 74.

24 *Ibid* para 75.

iii. Jurisprudence relied upon by the applicant

18. According to the Applicant,[25] "the 'right to evidence' includes the right to seek evidence, the right to obtain evidence and the right to adduce evidence. In this regard, the Applicant relies on the judgment G. Goubeaux, according to which, "it is a right to obtain evidence, which is exercised against the adversary or third parties; it is a right to produce evidence, which is addressed, this time to the judge."[26]

19. Relying on Articles 2 and 17 of the ICCPR, 26 (1) and 28 (2) of the Protocol and the case law of the Court, the applicant further argues that in the present case, he "continues to suffer irreparable damage from violations of his fundamental rights on account of the fact that the respondent has made it impossible for him to enjoy his right to evidence in violation of the decisions of the Court".[27]

20. The Applicant recalls the decision of the court in Application no 062/2019, in which it stated as follows: "The Court considers that the non-execution of the judgment of March 29, 2019 generates prejudice against the Applicant to the extent that, without a clean criminal record, it is impossible for him to submit his candidacy on the list of his party".[28] He adds that "it is indisputable that the non-execution of the decisions of 6 May, Application no 004/2020, 25 September and 4 December 2020, request no 003/2020 rendered in favour of the applicant, is generating prejudices to the applicant's right to evidence subject to this provisional measure".

21. The Applicant asserts that "Evidence is necessary for the success" of the claims before the judge. Distinct from the "right of evidence", the "right to evidence" is protected by the right to a fair trial, by the interests of justice and by the particular nature of the international trial before the Court, which is intended to protect people. The right to evidence therefore appears to be a

25 *Ibid* paragraphs 22 to 26.

26 In C. Perelman and P. Foriers - The proof ..., ***op. cit.***, p. 281. See also Fred Deshayes, contribution to a theory of proof before the European Court of Human Rights, § 105; ECHR, ***Ruiz Mateos v Spain***, 23 June 1993, series A no.262, § 67.

27 *Ibid* paragraph 27.3 and 27.4.

28 Order of April 17, 2020, Application No. 062/2019, ***Sebastien G. Ajavon v Benin***, § 67.

complementary or corollary right to the right to a fair trial".[29]

22. He also contends that according to pro-victim international case law on the right to evidence, the right to a fair trial before the Court requires that the applicant actually enjoy "a reasonable opportunity to present his case - including his evidence in conditions which do not place him. in a situation of clear disadvantage compared to its adversary".[30] He also notes that in *Komi Koutche v Republic of Benin* the Court ruled "that it is also empowered to order an interim measure which it considers to be in the interest of justice or of the parties".[31]

23. According to the Applicant, the interest of justice is the manifestation of the truth, and in the matter of human rights, the interest of justice is to ensure the effective protection of all human rights including the right to the truth to deliver justice effectively; as such, the international doctrine of human rights recognizes that "the right to evidence is an indispensable condition for the achievement of international justice"[32]

24. The Applicant has also made an assertion, which I fully agree with, that "the violation of Article 30 of the Protocol by the Respondent cannot allow the Court to allow the Respondent to continue to deprive the Applicant of his right to Evidence, nor to impose the burden of evidence to the applicant if the Respondent does not remove the obstacles to the applicant's right to evidence".

iv. Have the requirements of article 27 of the Protocol been met?

25. As indicated above, the Ruling of the Court merely says that "the Applicant has not demonstrated, that the requirements of Article 27(2) of the Protocol are met". I do not think it is proper for a Court to make a general finding that cannot be easily understood by the parties or by a reader.

26. Article 27(2) of the Protocol provides that in cases of extreme gravity and urgency and when necessary to avoid irreparable

29 Fred Deshayes, contribution to a theory of proof before the European Court of Human Rights, § 105; ECHR, *Ruiz Mateos v Spain*, 23 June 1993, series A no.262, § 67.

30 ECHR, October 27, 1993, *Bombo Beheer BV v Netherlands*, serie A, no 274, § 33; CEDH, May 13, 2008, *NN and TA v Belgium*, no 65097/01, §42), or, in other words that the applicant can effectively enjoy the "right to evidence" (ECHR, October 10, 2006, *LL v France*, no 7508/02, § 40).

31 Decision of November 02, 2019, request no 020/2019, case of *Komi Koutche v Republic of Benin.*

32 JC WITENBERG - The theory of evidence before international courts, RCADI, 1936-II, p. 22.

harm to persons, the Court shall adopt such provisional measures as it deems necessary. The question that arises is which aspect of Article 27 has not been met.? Is the Court saying that all three aspects of extreme gravity, urgency and irreparable harm have not been met?

27. I am of the view that this finding is not borne by the submissions made by the Applicant, which have devoted extensive parts of the Request to show why there is extreme gravity, urgency and irreparable harm, by way of facts, arguments and even jurisprudence. Indeed, Paragraphs 59 to 182.11 of the Request is devoted to an expose of these three aspects. Nothing can be further from the truth than the finding that the Request is general in nature. Furthermore, from the. brief summary hereinabove, it is clear to me that these three aspects have been proved beyond a reasonable doubt leave lone on a balance of probability.

28. It is telling that the Applicant also avers that "on account of the constraints arbitrarily imposed on his right to evidence, by way of violation of the previous decisions of the Court, there are irreparable damages under Article 28(2)[33] of the Protocol, owing to the infringements of the applicant's right to evidence, since if the application is dismissed for lack of evidence, "he will no longer be able to raise the same violations before another body such as the African Commission, the ECOWAS Court of Justice and the UN Human Rights Committee so that manifestly, the prejudices at issue are irreparable and justify the Court ordering the requested measure."[34]

v. Does it matter if the Applicant indicates that these measures are applicable to all pending applications?

29. This is one aspect of the Ruling of the Court that is deeply troubling. The Court has neither demonstrated why this is a problem nor has it explained why the orders cannot be examined in relation to the Application in which it was submitted. Indeed, the Court has not examined the formulation of the request where the Applicant has tried to link the pending application.

30. Having gone through the Request, out of 182.11 paragraphs (46 pages), it is only in one paragraph, under 'Conclusion on the interim measures requested from the Court' where the Applicant could be said to have tried to link the provisional measures to the

33 "The judgment of the Court is taken by majority; it is final and cannot be appealed."

34 The Request para 92.

pending applications:

> to order the defendant to remove all obstacles to the applicant's right to evidence and to ensure the applicant the enjoyment of his right to search, obtain and produce all administrative, judicial and legal documents. civil status for the exercise of his right to appeal and his rights of defence in the pending proceedings concerning him, including in particular the present case.

31. This statement is neither here nor there because in his prayers, the Applicant did not link the provisional measures to all the pending applications. Even if the Applicant did so, which in my view he did not, being a human rights court, the Court cannot properly dismiss the prayer on a procedural basis; rather, it should have proceeded to consider the request within the context of the instant Application.

b. Conclusion

32. There is no doubt in my mind that the documents the Applicants wishes to have access to would be relevant for the determination of the matter at the merits stage. The Applicant has asserted that he needs the documents now to prepare for his case before the Court. If it turns out at the merits stage that the documents were necessary, will the Court dismiss the matter for lack of documentary evidence, which it failed to order access to?

33. The court should draw inspiration from the following contention by the Applicant:

> In these circumstances, if the Court does not order the requested measure by requiring the Respondent to remove the obstacles sheltered from the applicant's right to evidence, the applicant's right to a fair trial before the Court will continue to be infringed, all the more so as according to the case-law of the Court, its decisions will continue to conclude that the applicant has not proved his allegations (see for example § 35[35] of the Order of November 27, 2020, Request no 028/2020, §§ "29 and 30,"[36] the order of 29 March 2021, Request no 032/2020) while in the particular circumstances of the applicant, the latter is unable to enjoy his right to seek evidence, his right to

35 "... Moreover, he does not provide proof of the intimidation to which members of his family are the object. It notes that the Complainant is making hypothetical allegations."

36 "On the other hand, the only suspensive appeal which could, in this case, be lodged is the appeal. The absence of this appeal must, in principle, be attested by a certificate of non-appeal, issued by the registry of the court before which it should be filed. However, in the present case, the Applicant has not provided such proof. It follows from the foregoing that the judgment of the CFI of Cotonou is not enforceable, so that the risk of realization of the prejudice invoked is not imminent. It follows that the condition of urgency required by Article 27 (2) is not fulfilled".

obtain the evidence and his right to produce said evidence before the Court because the Respondent continues to violate the decisions of the Court of May 6, 2020, Request no 004/2020, September 27 and December 4, 2020, Request no 003 / 2020 rendered in favour of the applicant.

34. A court of law, and more so a human rights court, cannot shut the door to discovery of evidence, which on the one hand, will lead to the establishment of the truth, and on the other, lead to irreparable damage to a party before it. The Court has previously ruled against the Applicant for lack of evidence. The Applicant has finally appreciated where the problem is, and is now requesting the court to order access to required documentary evidence. I see no valid reason why the majority rejected the request.

***

Dissenting Opinion: BEN ACHOUR

1. Pursuant to Rule 70(3) of the Rules of the Court, I hereby declare that I disagree with the majority ruling of the Court that "Dismisses the request for an order to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court.

2. However, I agree with the dissenting opinion expressed by Judge Ben Kioko concerning the Court's dismissal of the above-mentioned request.

3. In my view, the Court's reasoning for dismissing the request is unpersuasive and fails to take into consideration some of the elements of the case. The Applicant submits that by failing to comply with three Rulings for provisional measures and four judgments of this Court, the Respondent State has made it "absolutely impossible for him to obtain documents" that he requires to prosecute his case before this Court in order to overturn the decision that deprived him of his property". The Respondent State has provided the Court with no valid justification to contradict the Applicant's claims although the documents sought by the

Applicant are readily available with the Respondent State.

4. Moreover, the Court holds that "the Applicant has not demonstrated that the requirements of Article 27(2) of the Protocol are met", which is far from certain.

5. As a matter of fact, the three requirements of Article 27(2) (extreme gravity, urgency and irreparable harm) have been met and were amply highlighted by the Applicant who devoted extensive parts of his request to them. Stating that the request is general in nature does not reflect the facts and jurisprudence provided by the Applicant.

6. As Judge Kioko cites all these facts in his dissenting opinion, it is not necessary for me to go over them again. With this dissenting opinion, I am only expressing my dissent, endorsing and supporting the opinion of my distinguished colleague.