

Noudehouenou v Benin & Ors (provisional measures) (2022) 6 AfCLR 1047

Application 010/2021, *Houngue Éric Noudehouenou v Republic of Benin, Burkina Faso, Republic of Côte d'Ivoire, Republic of the Gambia, Republic of Ghana, Republic of Malawi, Republic of Mali and Republic of Tunisia*

Ruling, 21 December 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, BENSAOULA, ANUKAM, NTSEBEZA

Recused under Article 22: BEN ACHOUR, MUKAMULISA, CHIZUMILA and SACKO

The Applicant, a politician and citizen of the first Respondent State, claimed that the first Respondent State was responsible for continuous human rights violations against him despite decisions of the Court in his favour. He brought this Application alleging *inter alia*, that all the Respondent States had violated his rights by failing in their responsibilities to enforce the decisions of this Court in his favour. Along with the Application, the Applicant filed a request for provisional measures to avoid irreparable harm arising from the Presidential elections in the first Respondent State. The Court considered and dismissed all the provisional measures sought by the Applicant.

Jurisdiction (*prima facie* jurisdiction, 19, 23-26)

Provisional measures (urgency, 36, 38; irreparable harm, 37; cumulative conditions, 38; mootness, 42-43; non-parties, 45-46)

I. The Parties

1. Mr. Éric Noudehouenou (hereinafter referred to as “the Applicant”) is a politician and Benin national. He avers that the Republic of Benin is responsible for continuous human rights violations, despite the decisions of this Court. He adds that the Respondent States should be held responsible for the non-enforcement of the said decisions since they are members of the Executive Council of the African Union (hereinafter referred to as “Executive Council”) which has oversight responsibility for the enforcement of the Court’s decisions.
2. The Application is filed against:
 - i. The Republic of Benin, 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. On 8 February 2016 it

deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organizations. On 25 March 2020, the Republic of Benin deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no bearing on pending cases or on new cases filed before the withdrawal takes effect one year after its filing, that is, on 26 March 2021.¹

- ii. Burkina Faso became a Party to the Charter on 21 October 1986 and to the Protocol on 25 January 2004. Burkina Faso also deposited the Declaration on 28 July 1998. The Declaration took effect on the date of entry into force of the Protocol, that is, 25 January 2004.
 - iii. The Republic of Côte d'Ivoire became Party to the Charter on 31 March 1992 and to the Protocol on 25 January 2004. It also deposited the Declaration on 23 July 2013. On 29 April 2020, the Republic of Côte d'Ivoire deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed before the withdrawal takes effect one year after its deposit, that is, on 30 April 2021.²
 - iv. The Republic of the Gambia became a Party to the Charter on 21 October 1986 and to the Protocol on 25 January 2004. It also deposited the Declaration on 3 February 2020.
 - v. The Republic of Ghana became a Party to the Charter on 1 March 1989 and to the Protocol on 16 August 2005. It further deposited the Declaration on 10 March 2011.
 - vi. The Republic of Malawi became a Party to the Charter on 23 February. It became a Party to the Protocol and deposited the Declaration on 9 October 2008.
 - vii. The Republic of Mali became a Party to the Charter on 21 October 1986 and to the Protocol 20 June 2000. It deposited the Declaration on 19 February 2010.
 - viii. The Republic of Tunisia became a Party to the Charter on 21 October 1986 and to the Protocol on 5 October 2007. It also deposited the Declaration on 2 June 2017.
3. These States are referred to individually by their respective official names and collectively as “Respondent States”.

1 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Ruling ((5 May 2020) (Provisional Measures), § 4-5 and Corrigendum of 29 July 2020.

2 *Suy Bi Gohoré Émile and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), §67;

II. Subject of the Application

4. In his Application, the Applicant states that, following multiple violations suffered, Beninese citizens, including himself, decided to bring before the Court several Applications against the Republic of Benin, which has been found responsible for the said violations in previous judgments delivered by this Court.³
5. He maintains that the Respondent States, which are members of the Executive Council, failed to ensure the enforcement of the said judgments by the Republic of Benin and, by their failure to do so, “endorsed the dispossession of the Beninese people of their sovereignty and their right to self-determination, by having given effect to the systematic and continuous violations of fundamental rights and of the decisions of this Court by the Republic of Benin”.
6. The Applicant contends that on 5 March 2021, Ms Reckya MADOUGOU, was arrested while protesting against the holding of the 2021 presidential election in violation of the decisions of this Court. He further avers that he was given power of attorney by Ms. MADOUGOU to represent her in this matter. The Applicant further submits that the detention of Reckya MADOUGOU is arbitrary, especially since there was no plausible suspicion against her warranting her arrest.

III. Alleged violations

7. With regard to the Republic of Benin, the Applicant alleges violation of the following rights or obligations:
 - i. The right not to be discriminated against, protected by Article 2 of the Charter;
 - ii. The rights to full equality before the law and equal protection of the law, protected by Article 3 of the Charter and Article 7 of the Universal Declaration of Human Rights (UDHR);
 - iii. The right to respect for life and physical and moral integrity, protected by Article 4 of the Charter;
 - iv. The right to respect for the inherent dignity of the human person, protected by Article 5 of the Charter;

3 Application 013/2017, *Sébastien Ajavon v Republic of Benin*, Judgment of 29 March 2019; Application No 059/2020 – *XYZ v Republic of Benin*, Judgment of 27 November 2020; Application No 010/2020 – *XYZ v Republic of Benin*, Judgment of 27 November 2020; Application No 62/2020 – *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, Judgment of 4 December 2020; Application No 003/2020 – *Houngue Eric Noudehouenou v Republic of Benin*, Judgment of 4 December 2020.

- v. The right to a fair trial, in particular, the right to a defence, protected by Article 7(1)(c) of the Charter, the right to be tried within a reasonable time by an impartial court, protected by Article 7(1)(d);
- vi. The right to information, protected by Article 9(1) of the Charter;
- vii. The right to freedom of opinion and expression, protected by Article 9(2) of the Charter and Article 19 of the ICCPR;
- viii. The right to freely associate with others, protected by Article 10 of the Charter, due to arbitrary interference in the affairs of an association;
- ix. The right to participate freely in the conduct of the public affairs of one's country, protected by Article 13 of the Charter;
- x. The right to property, protected by Article 14 of the Charter and Article 17 of the UDHR;
- xi. The right to work, protected by Article 15 of the Charter and Article 23 of the UDHR;
- xii. The right of all peoples to the free disposal of their natural wealth and resources, protected by Article 21 of the Charter;
- xiii. The right of all peoples to peace and security, protected by Article 23(1) of the Charter;
- xiv. The right to liberty and security, protected by Article 9(1) of the ICCPR;
- xv. The right to respect for the principle of legality of criminal law, protected by Article 15 of the International Covenant on Civil and Political Rights (ICCPR);
- xvi. The right to privacy, protected by Article 17 of the ICCPR;
- xvii. The right to an adequate standard of living, protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- xviii. The rights to take part in cultural life, to enjoy the benefits of scientific progress and its applications, as well as the right of every author to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic production, protected by Article 15(1) of the ICESCR
- xix. The right to an effective remedy, guaranteed by Article 8 of the Universal Declaration of Human Rights (UDHR);
- xx. The right to the presumption of innocence, guaranteed by Article 11 of the UDHR;
- xxi. The obligation to adopt legislative or other measures to give effect to and secure the rights, freedoms and duties guaranteed in the Charter, provided for in Article 1 of the Charter;
- xxii. The obligation to take the necessary measures to protect the health of the population and to provide medical assistance in the event of illness, provided for in Article 16(2) of the Charter;
- xxiii. The obligation to guarantee the independence of the courts, provided for in Article 26 of the Charter;

- xxiv. The obligation to comply with the decisions of the African Court under Article 30 of the Protocol;
 - xxv. The obligation to provide an effective remedy to any person whose rights and freedoms have been violated, as provided for in Article 2(3) of the ICCPR;
 - xxvi. The obligation to ensure that any remedy that has been granted and justified is properly pursued by the competent authorities, as provided for in Article 2(3)(c) of the ICCPR;
 - xxvii. The obligation to comply with the principle of non-regression, provided for in Article 5 of the ICCPR;
8. The Applicant further alleges violation of Article 1 of the UN Charter, Article 3(b)(e) and Article 4(g)(m) of the Constitutive Act of the African Union (Constitutive Act).
9. With respect to the other Respondent States, the Applicant alleges violation of the following rights and obligations:
- i. The right to respect for the inherent dignity of the human person, protected by Article 5 of the Charter;
 - ii. The right of every people to exist, protected by Article 20(1) of the Charter;
 - iii. The obligation to adopt legislative or other measures to give effect to the rights protected by the Charter, provided for by Article 1 of the Charter;
 - iv. The obligation to ensure the holding of regular, transparent, free and fair elections in order to institutionalise legitimate authority and government as well as democratic change of government, protected by Article 2(3) of the ACDEG;
 - v. The obligation to prohibit, reject and condemn any unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development, protected by Article 2(4) of the ACDEG;
 - vi. The obligation to promote democratic rule, the principle of the rule of law and human rights, as provided for in Article 4(1) of the African Charter on Democracy, Elections and Governance (ACDEG);
 - vii. The obligation not to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the UDHR, provided for in Article 30 of the UDHR;
10. The Applicant further alleges violation of Articles 1 of the UN Charter,⁴ 3(b)(e)(h) and 4(g) of the Constitutive Act.

4 The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of

IV. Summary of the Procedure before the Court

11. The Application and a request for provisional measures were filed with the Registry on 25 March 2021.
12. On 16 August 2022, the Registry notified these various requests to the Respondent States, requesting them to submit the list of their representatives within thirty (30) days and to file their response to the request for provisional measures and the main Application within forty-five (45) and ninety (90) days of receipt, respectively, that is, on 22 August 2022 for the request for provisional measures in the case of Burkina Faso, the Republic of Benin, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Malawi and the Republic of Mali, and on 23 August 2022 in the case of the Republic of the Gambia and the Republic of Tunisia.
13. On 19 September and 5 October 2022, Burkina Faso and the Republic of Ghana submitted the list of their representatives, respectively. At the end of the forty-five (45) day period, none of the Respondent States had filed its submissions on the request for provisional measures.

V. *Prima facie* jurisdiction

14. The Applicant asserts, based on Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter “the Rules”),⁵ that in matters of provisional measures the Court need not be satisfied that it has jurisdiction over the merits of the case, but merely that it has *prima facie* jurisdiction.
15. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as he alleges violations of human rights protected by human rights instruments, and insofar as some of the provisional measures sought relate to the Republic of Benin, which deposited the Declaration on 8 February 2016. He further submits that the withdrawal of the said

justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

5 Rule 59 of the Rules of 25 September 2020.

Declaration, which took effect on 25 March 2020, has no bearing on pending cases, or on cases filed before it took effect.

16. He further contends that the Court has *prima facie* jurisdiction as regards all the five (5) provisional measures requested against the Republic of Benin, even if two of the measures seek to secure the intervention of the Executive Council in order to obtain from it the execution of the Court's decisions, in order to avoid irreparable damage.
17. None of the Respondent States submitted on *prima facie* jurisdiction.

18. 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, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
19. Furthermore, Rule 49(1) of the Rules provides: "The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules". However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits, but merely that it has *prima facie* jurisdiction.⁶
20. In the present case, the rights whose violation the Applicant alleges are protected by the Charter, the ICCPR and the ICESCR, instruments to which the Respondent State is a party.
21. The Court further notes, as mentioned in paragraph 2 of this Ruling, that the Respondent States have ratified the Protocol and also deposited the Declaration.
22. The Court observes, as mentioned in paragraph 2(i) of this Ruling, that on 25 March 2020 the Republic of Benin deposited the instrument of withdrawal of its Declaration deposited under Article 34(6) of the Protocol.
23. The Court recalls that it has held that the withdrawal of the Declaration has no bearing on pending cases at the time of its deposition, or on cases instituted before the withdrawal took

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

effect,⁷ as in the instant case. The Court reiterates its position in its Ruling of 5 May 2020 *Houngue Éric Noudehouenou v Republic of Benin*⁸ that the withdrawal of the Declaration by the Respondent State takes effect on 26 March 2021. Consequently, the said withdrawal has no bearing on the jurisdiction of the Court insofar as the initial Application was filed before the withdrawal took effect.

24. The Court further notes, as mentioned in paragraph 2(iii), that on 29 April 2020, the Republic of Côte d'Ivoire deposited the instrument of withdrawal of its Declaration under Article 34(6).
25. The Court recalls that it has held that the withdrawal of the Declaration has no effect on pending cases at the time of its deposition, or on cases instituted before the withdrawal takes effect,⁹ as is the case in the present instance. The Court reiterated this position in its judgment of 15 July 2020 in *Suy Bi Gohoré and Others v Republic of Côte d'Ivoire*¹⁰ that the withdrawal of the Respondent State's Declaration takes effect on 30 April 2021. Accordingly, the said withdrawal has no bearing on the jurisdiction of the Court insofar as the initial Application was filed before the withdrawal took effect.
26. Accordingly, the Court finds that it has *prima facie* jurisdiction to hear the present request for provisional measures.

VI. Provisional measures requested

27. The Applicant requests provisional measures, which, he avers, seek to avoid irreparable harm emanating from the holding of the 2021 presidential election in violation of the right to the enforcement of decisions rendered by this Court. He also requests the suspension of the detention warrant issued against Reckya MADOUGOU as well as measures relating to the exercise of the right to an effective remedy.
28. With regard to measures to avoid irreparable harm as a result of the holding of the 2021 Presidential election in violation of

7 *Ingabire Victoire Umuhoza v Republic of Rwanda*, ACTHPR (Judgment of 3 June 2016) (Jurisdiction) 1AfCLR 540 § 67.

8 *Houngue Éric Noudehouenou v Republic of Benin*, ACTHPR, Application No 003/2020, Order (Provisional Measures) (5 May 2020), § 4-5 and Corrigendum of 29 July 2020.

9 *Ingabire Victoire Umuhoza v Republic of Rwanda*, ACTHPR (Judgment of 3 June 2016) (Jurisdiction) 1AfCLR 540 § 67.

10 *Suy Bi Gohoré Émile and Others v Republic of Côte d'Ivoire*, ACTHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 67.

the right to the enforcement of the decisions of this Court, the Applicant prays the Court to order the Republic of Benin to take all necessary measures to ensure the enforcement of its judgments of 27 November 2020 in Application No 059/2019 and Application No 010/2020, and on 4 December 2020, in Application No 003/2020 and Application No 062/2019.

29. In the same vein, the Applicant prays the Court to order the Executive Council to take all appropriate measures, within the meaning of Articles 29(2) and 30 of the Protocol, first, to ensure the enforcement of the said judgments, secondly, to erase all the effects of the holding of the 2021 Presidential election in violation of the aforementioned judgments, until full enforcement of the decisions of this Court and, thirdly, to notify the measures taken to this Court, and to the Government and people of Benin.
30. The Applicant submits, in this regard, that there is urgency simply because the Court's decisions are enforceable. He further contends that the current leadership of the Republic of Benin persisted in holding the 2021 presidential election. Furthermore, he emphasises that the situations that gave rise to the unenforced decisions could cause irreparable harm.
31. As regards the measure relating to the suspension of the detention warrant against Reckya MADOUGOU for acts of terrorism, while protesting against the holding of the presidential election of 2021, the Applicant insists that the said detention warrant is prejudicial to the rights protected by Articles 2, 19 and 25 of the ICCPR "in respect of the presidential elections of 2021". He further contends that she is held under appalling detention conditions and does not have the right to see her children, who are still minors, not to mention the fact that she cannot communicate with her lawyers in private.
32. With regard to the measures relating to the exercise of the right to an effective remedy, the Applicant submits that since, in line with the jurisprudence of this Court, cases cannot be instituted before it against the organs of the African Union, he can only bring a case against all the Member States of the Executive Council.
33. In this regard, the Applicant maintains that there is an urgent need to pursue all the remedies legally available to him in order to avoid a situation of systematic violations of the decisions of this Court. The Applicant underscores, in relation to the irreparable harm, that there is "imminent arbitrary deprivation of the effectiveness and the satisfactory nature of the right to a remedy". He maintains, to this effect, that if the other Member States of the Executive Council were to be excluded from the case, his right to a remedy

would be rendered unsatisfactory.

34. The Applicant thus prays the Court to “rule on the composition of the organ provided for in Article 29(2) of the Protocol by indicating the African States that compose it” and to authorize it to “modify and/or re-state the identities of the Respondent States, other than the Republic of Benin, upon notification of the composition of the organ provided for in Article 29(2) of the Protocol by the Court”.

35. The Court notes that Article 27(2) of the Protocol provides:
In 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.
36. The Court recalls that urgency, which is consubstantial with extreme gravity, means that there is an “irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision”.¹¹ The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately.¹²
37. With regard to irreparable harm, the Court considers that there must be a “reasonable likelihood of occurrence” having regard to the context and personal circumstances of the applicant.¹³
38. The Court emphasises that the two conditions required by the above-mentioned article, namely, urgency or extreme gravity and irreparable harm, are cumulative, so that if one of them is not met, the measure sought cannot be ordered.
39. The Court notes, however, that before determining if the said requirements are met, it must satisfy itself, if necessary, that the measures sought are meritorious or that a Respondent State is liable to enforce them.
40. The Court recalls that the Applicant requests measures in respect of (i) irreparable harm resulting from the holding of the 2021 presidential election (ii) the detention order issued against Reckya Madougou and (iii) the right to an effective remedy.

11 Sébastien *Ajavan v Republic of Benin*, ACTHPR, Application No 062/2019, Order 17 April 2020 (Provisional Measures) § 61.

12 *Ibid*, § 62.

13 *Ibid*, § 63.

A. On the measures relating to the 2021 presidential election

41. The Court recalls that as regards the 2021 presidential election, the Applicant requested four (4) measures, one against the Republic of Benin and three against the Executive Council.

B. Measures against the Republic of Benin

42. The Court emphasises that the measures sought relate to the enforcement of the Court's decisions by the Republic of Benin before the presidential election of 2021. The Court notes that the said election took place on 11 April 2021. It follows that the measures sought have become moot.
43. Accordingly, without the need to examine the requirements of Article 27(2) of the Protocol, the Court declares this request moot.

C. On the measures against the Executive Council

44. The Court recalls that the Applicant prays the Court to order the Executive Council to take appropriate measures under Articles 29(2) and 30 of the Protocol to ensure the enforcement of four (4) judgments against the Republic of Benin, to erase and hold in abeyance all the effects of the holding of the 2021 Presidential election in violation of the said judgments and to inform the Court of all measures taken in this regard.
45. The Court emphasises that it can only order provisional measures against the parties to a proceeding. In the present case, however, the Executive Council is neither a Party to the proceedings nor a State Party to the Protocol.
46. Accordingly, without the need to examine the requirements of Article 27(2) of the Protocol, the Court rejects this request.

D. On the provisional measure relating to the suspension of the detention warrant issued against Reckya Madougou

47. The Court recalls that the Applicant requests the "suspension" of the detention warrant issued against Reckya Madougou by the CRIET Investigating Committee.
48. The Court notes that it emerges from the record that on 11 December 2021, Reckya Madougou was tried and sentenced by the Court of Repression of Economic Offences and Terrorism to twenty (20) years' imprisonment. The Court underscores that,

consequently, the detention of Reckya Madougou is based on this conviction and no longer on the detention warrant issued by the CRIET Investigation Commission, whose effects have thus come to an end.

49. The Court considers that the request for suspension of the detention warrant, cannot be justified.
50. Accordingly, this request is rejected.

E. On provisional measures relating to the right to the exercise of an effective remedy

51. The Court recalls that the Applicant requests the Court to “decide on the composition of the organ provided for in Article 29(2) of the Protocol by indicating the African States which compose it” and to authorize it to “modify and/or re-specify the identities of the Respondents, other than the Republic of Benin, upon notification of the composition of the organ provided for in Article 29(2) of the Protocol by the Court”.
52. The Court notes that it is not for it to pronounce on the composition of the Executive Council, whose composition and powers are laid down in the Constitutive Act of the African Union.
53. Furthermore, it is not for the Court, under provisional measures, to rule on the procedural position of the parties by amending or clarifying the identity of the Respondent States.
54. Accordingly, the Court dismisses these prayers.
55. For the avoidance of doubt, the Court recalls that this Ruling is provisional and in no way prejudices the Court’s findings on its jurisdiction, on the admissibility of the application and on the merits thereof.

VII. Operative part

56. For these reasons,

The Court

Unanimously,

- i. *Finds* that the requests relating to the 2021 presidential elections are moot;
- ii. *Dismisses* all other requests for provisional measures.