

## Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

Application 026/2020, *Emil Touray, Saikou Jammeh, Haji Suwareh, and Isatou Susso v Republic of The Gambia*

Ruling, 24 March 2022. Done in English and French, the English text being authoritative.

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

The Applicants are all citizens of the Respondent State. Two of the Applicants who had unsuccessfully applied for permits to hold protests within the Respondent State were arrested and detained on account of holding a protest without a permit as required by the Public Order Act of the Respondent State. The Applicants brought this Application, challenging the validity of the Public Order Act and alleging that the arrest and detention of two of the Applicants violated some of their Charter protected rights. Following the failure of the Respondent State to file its Response, at the close of pleadings, the Court proceeded to render its judgment in default. The Court held that the Application was inadmissible on the ground that it had previously been settled in accordance with the principles of the African Charter.

**Procedure** (conditions for default decision, 13)

**Admissibility** (exhaustion of local remedies, 31-35; filing within a reasonable time, 37-38; previous settlement in accordance with the principles of the Charter, 40-45)

Joint Dissenting Opinion: BEN ACHOUR and TCHIKAYA

**Admissibility** (*res judicata*, 5-8; identity of parties, 9-10; jurisdictional settlement, 13-15)

### I. The Parties

1. Emil Touray, Saikou Jammeh, Haji Suwareh, Isatou Susso (hereinafter referred to as the “First Applicant”, “Second Applicant”, “Third Applicant” and “Fourth Applicant” respectively, or “the Applicants” jointly) are nationals of the Republic of The Gambia. The First and Second Applicants are journalists while the Third and Fourth Applicants are entrepreneurs. The Applicants challenge the validity of Section 5 of the Respondent State’s Public Order Act No 7 of 1961 as revised in 1963 and 2009 (hereinafter referred to as “Public Order Act”).
2. The Application is filed against the Republic of The Gambia (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 on 25 January 2004. On 3 February 2020, it deposited with the African Union Commission, the Declaration provided for under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

## II. Subject of the Application

### A. Facts of the matter

3. It emerges from the record that, on 9 May 2019, the Third and Fourth Applicants, members of a group named "3 years jotna"<sup>1</sup> submitted an application to the Inspector General of Banjul for authorisation for a licence under Section 5 of the Respondent State's Public Order Act.<sup>2</sup>
4. Having not received a response, on 10 May 2019, the group assembled at the Senegambia area with the intention of holding the protest. However, they were arrested by the police and later charged with the offences of "unlawful assembly", "conduct likely to cause breach of peace" and "conspiracy to commit offences". The group subsequently re-applied for a licence to hold the

1 "3 years *Jotna*" literally means "3 years have arrived" in Wolof.

2 (1) The Inspector-General of Police in the city of Banjul or the Kanifing Municipality or; in any of the regions, the Governor or other person authorized by the president may direct the conduct of all public processions and prescribe the route by which and the times at which any procession may pass. (2) A person who is desirous of forming any public procession shall first make application for a license to the Inspector-General of Police or the Governor of the region, or other person authorized by the President, as the case may be, and if the Inspector-General of Police or the Governor of the region or other person authorized by the President is satisfied that the procession is not likely to cause a breach of the peace, he or she shall issue a license specifying the name of the license and defining the conditions on which the procession is permitted to take place. (3) A condition restricting the display of flags, banners, or emblems section shall not be imposed under subsection (2) of this section except such as are reasonably necessary to prevent risk of a breach of the peace. (4) A magistrate or police officer not below the rank of Sub-inspector may stop any public procession for which a license has not been issued or which violates any of the conditions of a license issued under subsection (2) of this section, and may order it to disperse. (5) A public procession which – (b) Takes place without a license under subsection (2) of this section, or (c) Neglects to obey any order given under subsection (4) of this section, is deemed to be an unlawful assembly, and all persons taking part in the procession, and in the case of a public procession for which no license has been issued, all persons taking part in the convening, collecting or directing of the procession commit a cognizable offence and on summary conviction before a Magistrate, are liable to imprisonment for a term of three years. Quoted from the ECOWAS CCJ judgment.

protest but never received a response. On 9 July 2019, the group was informed by the police that the charges levelled against them had been dropped.

## **B. Alleged violations**

5. The Applicants allege the following:
  - i. Violation of the rights to freedom of assembly under Article 11 of the Charter and Article 21 of the International Covenant on Civil and Political Rights (hereinafter referred to as “the ICCPR”), and freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR;
  - ii. Violation of Article 1 of the Charter and Article 2(2) of ICCPR.

## **III. Summary of the procedure before the Court**

6. The Application was filed on 16 September 2020 and served on the Respondent State on 23 September 2020. The Applicants filed their submissions on reparations on 13 October 2020 and these were transmitted to the Respondent State on 16 October 2020.
7. On 26 October 2020, the Respondent State filed its list of representatives. On 10 December 2020, the Respondent State was reminded to file its response but it failed to file a response.
8. On 15 April 2021, the Applicants filed a request for a judgment in default and this was transmitted to the Respondent State on 23 April 2021. On 17 June 2021, the Respondent State was further reminded to file its Response and that if it failed to file a Response within the stipulated time, the Court would proceed to deliver a judgment in default. The Respondent State has failed to file a Response.
9. Pleadings were closed on 22 September 2021 and the Parties were notified thereof.

## **IV. Prayers of the Parties**

10. The Applicants pray the Court for the following:
  - a. Declaration that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of assembly under Article 11 of the Charter and Article 21 of ICCPR;
  - b. Declaration that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR;
  - c. a Declaration that the rights of the Third and Fourth Applicants under

Article 11 of the Charter and Article 21 on one hand, and further under Article 9(2) of the Charter and 19(2) of the ICCPR on the other hand, were violated by the disbandment of the 10 May 2019 protest and their subsequent arrest.

- d. a Declaration that the Republic of the Gambia has violated Articles 1 of the Charter and 2(2) of the ICCPR.
  - e. Order the Republic of the Gambia to immediately repeal or amend Section 5 of the Public Order Act to align with provisions of the Article 9(2) and 11 of the Charter and Articles 19(2) and 21 of the ICCPR.
  - f. An order for costs;
  - g. Any other order that the Court deems fit in the circumstances.
11. The Respondent State did not participate in these proceedings and, therefore, did not make any prayers.

## **V. On the default of the Respondent State**

12. Rule 63(1) of the Rules of the African Court on Human and Peoples' Rights (hereinafter referred to as "Rules") provides:
- Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
13. The Court notes that Rule 63(1) sets out three conditions for a decision in default: i) the notification to the Respondent State of all the documents on file ii) the default of the Respondent State; iii) application by the other party for a decision in default or the Court on its own motion decides to enter a decision in default.
14. On the first condition, the Court notes that, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. With respect to the second condition, the Respondent State, was granted sixty (60) days to file its Response. However, it failed to do so. The Court also sent two reminders to the Respondent State on 10 December 2020 and 17 June 2021 granting it thirty (30) days respectively to file its Response but it failed to do so. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.
15. With respect to the last condition, on 15 April 2021, the Applicants requested the Court for a decision in default thereby fulfilling this condition.

16. The required conditions having thus been fulfilled, the Court enters this decision in default.<sup>3</sup>

## VI. Jurisdiction

17. The Court observes that Article 3 of the Protocol provides as follows:
  1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
  2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
18. Pursuant to Rule 49(1) of the Rules “[t]he Court shall conduct preliminarily examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules”.
19. From the record, the Court finds that it has personal jurisdiction, as the Respondent State is a party to the Protocol and has deposited the Declaration provided for under Article 34(6) of the Protocol with the African Union Commission.
20. The Court has material jurisdiction because the Applicants allege the violation of the Charter and the ICCPR<sup>4</sup> to which the Respondent State is a party.
21. The Court has territorial jurisdiction as the facts of the case occurred in the Respondent State’s territory.
22. As regards temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the impugned law remains in the laws of the Respondent State.<sup>5</sup>
23. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

3 *African Commission on Human and Peoples’ Rights v Libya* (merits) (3 June 2016) 1 AfCLR 153 §§ 38-42; *Robert Richard v United Republic of Tanzania*, ACTHPR, Application No 035/2016, Judgment of 2 December 2021 (merits and reparations) § 16.

4 The Respondent State became a Party to the ICCPR on 22 March 1979.

5 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

## VII. Admissibility

24. In terms of Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.” Pursuant to Rule 50(1) of the Rules, “[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
25. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:  
Applications filed before the Court shall comply with all the following conditions:
  - a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
  - b. comply with the Constitutive Act of the Union and the Charter;
  - c. not contain any disparaging or insulting language;
  - f. not be based exclusively on news disseminated through the mass media;
  - e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
  - f. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
  - g. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.
26. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the parties. However, pursuant to Rule 50(1) of the Rules, the Court is required to determine if the Application fulfils all the admissibility requirements.
27. From the record, the Court notes that the Applicants have been identified by name, in fulfilment of Rule 50(2)(a) of the Rules.
28. The Court notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union stated in Article 3(h) is the promotion and protection of human and peoples' rights. The Court therefore considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and holds that it meets the requirement of Rule 50(2) (b) of the Rules.

29. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
30. The Application is not based exclusively on news disseminated through mass media but on legal documents in fulfilment of Rule 50(2)(d) of the Rules.
31. With regard to the requirement of exhaustion of local remedies, the Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are unavailable, ineffective, insufficient or the procedure to pursue them is unduly prolonged.<sup>6</sup>
32. In the instant case, the Court notes that the Applicants have made two claims. The first claim is related to the application of Section 5 of the Respondent State's Public Order Act, while the second claim is related to the alleged violations of the rights of the Third and Fourth Applicants.
33. For the first claim, the Applicants were required to seize the Supreme Court of the Respondent State to challenge the constitutionality of the Public Order Act. However, the Applicants adduced evidence showing that the Supreme Court of the Respondent State had already considered a case by other Applicants, that is Ousainou Darboe and others, challenging the constitutionality of Section 5 of the Public Order Act and it held that the impugned law was consistent with the Respondent State's constitution.<sup>7</sup>
34. In this regard, the Court holds that the Applicants could not have been expected to also seize the Supreme Court, the highest Court of the Respondent State, as there would have been no prospect of success, making the remedy ineffective.<sup>8</sup>
35. With regard to the claim that the rights of the Third and Fourth Applicant were violated in relation to the disbandment of the protest and their subsequent arrest in 2019, the Court notes that the Applicants were required to file their claims at the High Court of the Respondent State and exhaust other local remedies before seizing this Court. However, they did not make any submissions or adduce evidence on exhaustion of local remedies. The Court therefore holds that this claim will not be considered further for lack of exhaustion of local remedies.

6 *Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

7 See SC/03/2016 *Ousainou Darboe and 19 others v Inspector General of Police and 2 others*

8 *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations) §§ 37-38.

36. With respect to filing an Application within a reasonable time, the Court recalls that Article 56(6) of the Charter, requires that an Application be filed within: “a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter.”
37. In the present Application, the Court notes that the local remedies were ineffective as regards the challenge of the Public Order Act. However, the Court notes that Article 56(6) of the Charter empowers the Court to set a date as the commencement of the time limit. In this regard, the Court notes that the Respondent State deposited its Declaration under Article 34(6) of the Protocol on 3 February 2020 and therefore, the Applicants could only seize the Court after that date. The Applicants filed their Application on 16 September 2020, that is seven (7) months and thirteen (13) days after the Respondent State filed its Declaration.
38. The Court notes that the Applicants filing of their Application within seven (7) months and thirteen (13) days after the Respondent State deposited its Declaration under Article 34(6) of the Protocol is reasonable, given that it was filed within the same year as the Declaration was deposited.
39. Lastly, according to Article 56(7) of the Charter and Rule 50(2)(g) of the Rules of Court, an application will only be considered if it has not been “settled” “in accordance with the principles” of the Charter of the United Nation or the Constitutive Act of the African Union or the provisions of the Charter.<sup>9</sup>
40. The Court notes that the notion of “settlement” implies the convergence of three major conditions: (i) the existence of a first decision on the merits (ii) the identity of the parties; (iii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case.<sup>10</sup>
41. With regard to a first decision on the merits, the Court recalls that on 20 January 2020, the Economic Community of West African States, Court of Justice (hereinafter referred to as “ECOWAS CCJ”) rendered judgment on the merits in *Ousainou Darboe and*

9 *Jean-Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 44. *Dexter Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99 § 45.

10 See *Gombert v Côte d'Ivoire* (jurisdiction and admissibility) § 45; *Dexter Johnson v Ghana* (jurisdiction and admissibility) § 48; See *Suy Bi Gohoré v Côte d'Ivoire*, ACtHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations) § 104.

*31 others v the Republic of the Gambia*.<sup>11</sup> The ECOWAS CCJ held:

In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review.<sup>12</sup>

42. With respect to the identity of the parties, the Court notes that the Respondent State is the same in both cases, it is therefore only necessary to establish the identity of the Applicants. The Applicants before this court are Emil Touray, Saikou Jammeh, Haji Suwareh and Isatou Susso while the Applicants in the ECOWAS case were Ousainou Darboe and 31 others. None of the thirty-two Applicants in the ECOWAS case appear before this Court in the Emil Touray Application. However, in relation to this requirement, the Court recalls its previous judgment where it held that:

...nowhere in the file before the Court is there a connection between APDH and the Applicants suggested, let alone established. However since the current Application and *APDH v Côte d'Ivoire* (merits) can be qualified as public interest cases, the “identity of parties” can be considered as being similar, to the extent that they both aim to protect the interest of the public at large rather than only specific private interests.<sup>13</sup>

43. Consequently, given that the Applicants in the Emil Touray application challenge the validity of the law, which had been challenged at the ECOWAS CCJ, then both parties can be said to have filed public interest cases and thus both sets of Applicants are closely associated with the claim and can be deemed identical.
44. With regard to the identity of the claims, the Court must decide whether the legal and factual basis of the claims are the same. The Court notes that both cases challenge the validity of Section 5 of the Respondent State’s Public Order Act in relation to international instruments ratified by the Respondent State and the facts in both cases arise from the protests and the subsequent arrests and detention of the protesters. Furthermore, the prayers

11 ECOWAS, Suit No ECW/CCJ/APP/27/1 – *Ousainou Darboe and 31 others v the Republic of the Gambia*.

12 *Ibid* at p 34.

13 *Suy Bi Gohoré v Côte d'Ivoire* (merits and reparations) § 105.

in both cases are similar in that they request that the Section 5 of the Public Order Act be declared inconsistent with the provisions of the Charter. In light of the foregoing, the Court finds that the claims in both the ECOWAS CCJ and this Court arise from the same legal and factual basis and are therefore identical.

45. In light of the foregoing, the Court finds that the claim against Section 5 of the Public Order Act has been settled in accordance with the principles of the Charter and therefore, the Application fails to meet the requirement set out under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules and is declared inadmissible.

### VIII. Costs

46. The Applicant prays the Court, for the Respondent State to pay for the costs of the Application. The Respondent State did not file a Response.

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47. The Court notes that Rule 32(2) of its Rules<sup>14</sup> provides that “unless otherwise decided by the Court, each party shall bear its own costs.”
48. Therefore, the Court decides that each Party shall bear its own costs.

### IX. Operative part

49. For these reasons,

The Court

*Unanimously,*

*On jurisdiction*

- i. *Declares* that it has jurisdiction;

*By a majority of Nine (9) for, and Two (2) against, Justice Blaise TCHIKAYA, the Vice President and Justice Rafaâ BEN ACHOUR Dissenting*

*On admissibility*

- ii. *Declares* the Application inadmissible;

14 Rule 30(2) of the Rules of Court, 2 June 2010.

*On costs*

- iii. Orders each Party to bear its own costs.

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**Joint Dissenting Opinion: BEN ACHOUR and TCHIKAYA**

1. We deeply regret that we were unable to vote in favour of the Court's decision to declare Application No 026/2020 *Emil Touray et al. v The Republic of The Gambia* inadmissible pursuant to Article 56(7) of the African Charter on Human and Peoples' Rights (hereinafter "the Charter") and Rule 50(2)(g) of the Rules of Court (hereinafter "the Rules").
2. Indeed, in paragraph 41 of the judgment, the Court "[r]ecalls that on 20 January 2020, the Economic Community of West African States, Court of Justice (hereinafter referred to as "ECOWAS CCJ") rendered judgment on the merits in *Ousainou Darboe and 31 others v the Republic of the Gambia*.<sup>1</sup> The ECOWAS CCJ held as follows:

In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review.<sup>2</sup>

3. The Court draws a conclusion in § 43 unrelated to the foregoing, that: "Consequently, given that the Applicants in the Emil Touray application challenge the validity of the law, which had been challenged at the ECOWAS CCJ, then both parties can be said to have filed public interest cases and thus both sets of Applicants are closely associated with the claim and can be deemed identical". In other words, the Court considers that the case was

1 ECOWAS, Application No ECW/CCJ/APP/27/1 – *Ousainou Darboe and 31 others v the Republic of The Gambia*.

2 *Ibid.*, § 34.

not settled by the ECOWAS Court notwithstanding the fact that the parties are not identical.

4. In our view, the case before the Court was not “settled” by the ECOWAS Court of Justice. First, the identity of the parties before the ECOWAS Court on the one hand, and before this Court on the other, is not established (A). Secondly, and assuming that the identity of the parties is certain, we consider that the case was not settled by ECOWAS and that its referral to the Court was in order (B).

# **I. The identity of the parties is not established in the instant case**

5. Article 56(7) of the Charter, which restates *in extenso* the provisions of Article 50(2)(g) of the Rules of Procedure, sets out the admissibility requirements of communications to the African Commission on Human Rights (hereinafter “the Commission”) and Applications brought before the Court, namely that they “do not raise any matter or issues previously settled<sup>3</sup> by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. As recognised by the doctrine, “[this condition is a factor of legal certainty. It refers to the concept of ‘*res judicata*’ and suggests that rules made on the basis of the African Charter have the force of *res judicata*]”.<sup>4</sup>
6. According to the jurisprudence of the African Commission,<sup>5</sup> the purpose of such a provision is to avoid accusing member states twice for the same alleged violations of human rights. Indeed, this principle is linked to the recognition of the force of *res judicata* of decisions rendered by international and regional courts and/or institutions such as the African Commission.
7. However, as is clear from the concordant jurisprudence of the Commission and the Court, applying this condition requires that the parties, the case and the subject of the communication

3 “Settled” in English.

4 Fatsah Ouguergouz, “Article 56”, in Maurice Kamto (direction), *La Charte africaine des droits de l’homme et des peuples et le Protocole portant création de la Cour africaine des droits de l’homme et des peuples, commentaire article par articles*, Brussels. Éditions Bruylant and Éditions de l’Université de Bruxelles, 2011, pp. 1024-1050.

5 ACTHPR, Communication 260/02: *Bakweri Land Claims Committee v Cameroon*, 36th Ordinary Session of 23 November to 7 December 2004, § 49.

submitted to the Commission or the Application brought before the Court be the same as in the case already settled in accordance with the Charter.<sup>6</sup>

8. The African Court thus agrees with the position of the European Court that the Application must not be essentially the same as another Application, that is, the facts, parties and claims must not be the same.
9. In the instant case, the Court explicitly admits that the Applicants before the ECOWAS Court and those before the ACtHPR are not the same. Indeed, in § 43 of the judgment, this Court explicitly notes that “The Applicants before this court are Emil Touray, Saikou Jammeh, Haji Suwareh and Isatou Susso while the Applicants in the ECOWAS case were Ousainou Darboe and 31 others.”<sup>7</sup> The Court elaborates on this finding in no uncertain terms by stating that “None of the thirty-two Applicants in the ECOWAS case *appear before this Court* in the Emil Touray Application”.
10. Curiously, the Court disregards this first fundamental requirement and draws a conclusion which could not be more astonishing, by ending § 43 with an erroneous reference to its own judgment in *Suy Bi Gohoré v Côte d’Ivoire*.<sup>8</sup> In the said judgment, the Court considered if the parties were the same in the applications, namely, *Suy Bi Gohoré* and *APDH*, both of which were before it. It should be noted that, contrary to what this judgment suggests, the Court did not find that the *Suy Bi Gohoré* Application was inadmissible, but did deal with it on the merits, despite the fact that the parties were the same.

## II. The case has not been settled by the ECOWAS Court of Justice

11. In paragraph 45 of its judgment, the Court “[c]onsiders the claim against Section 5 of the Public Order Act has been settled in

6 In this sense, see the judgments of the Court of Appeal: *Gombert v Côte d’Ivoire*, Judgment of 22 March 2018; *Dexter Johnson v Ghana*, Judgment of 28 March 2019; *Suy Bi Gohoré v Côte d’Ivoire*, Judgment of 15 July 2020.

7 The Applicants before the ECOWAS Court of Justice are: Oussainou Darboe, Kemmesseng Jammeh, Femi Peters, Lamin Dibba, Lamin Jatta, Yaya Bah, Baboucarr Camara, Fakebba Colley, Ismaila Ceesay, Mamodou Fatty, Dodou Ceesay, Samba Kinteh, Mamudu Manneh, Nfamara Kuyateh, Fanta Darboe-Jawara, Lamin Njie, Juguna Suso, Momodou L. K Sanneh, Yaya JammehMasaneh Lalo Jawlan, Lamin Sonko, Modou Toura, Lansana Beyai, Lamin Marong, Alhagie Fatty, Nогоi Njie, Fatoumata Jawara, Fatou Camara, Kafu Bayo, Ebrima Jadama, Modou Ngum, United Democratic Party (UDP), The Gambia (suing for himself and for the succession of *Ebrima Solo Sandeng (deceased)*).

8 § 105 of the *Suy Bi Gohoré* decision.

accordance with the principles of the Charter and therefore, the Application fails to meet the requirement set out under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules and is declared inadmissible”.

12. The notion of settlement of a case refers, *a priori*, to a cardinal principle of international law, namely, the principle of peaceful settlement of international disputes enshrined in Article 2 § 3 of the Charter of the United Nations and specified in Chapter VI of the same Charter, particularly in Article 33 which sets out the various modes of settling disputes. This principle is also stated in Article 4(e) of the Constitutive Act of the African Union.
13. However, although commonly used, the notion of settlement, which, *a priori*, is simple, is by no means clear. In the context of this case, the settlement referred to is jurisdictional settlement. Jurisdictional settlement is defined as “[the process of ending an international dispute by the decision of a body that is external to the parties, empowered to render a decision that is based on law and is binding on the parties]”<sup>9</sup>
14. The European Court considers that, when it finds that the conditions laid down in Article 35 § 2 (b) have been met owing to the existence of a decision on the merits at the time it examines the case, it must declare inadmissible an application that has already been examined by another international body. According to the European Court, a decision on the merits of a case requires the following characteristics: the decision must be taken after an adversarial procedure;<sup>10</sup> the decision must be reasoned,<sup>11</sup> notified to the parties and published; *the decision must aim to put an end to the violation*; the victims must be able to obtain reparation.
15. To come back to the ruling of the ECOWAS Court of Justice, it should be noted that the decision of the sister court did not put an end to the dispute over the inconsistencies between section 5 of the Public Order Act and Articles 1, 9(2) and 11 of the Charter and Articles 19(2) and 21 of the International Covenant on Civil and Political Rights. The Abuja Court did not stop the violation. It even implicitly admitted that the impugned section 5 of the Public Order Act and the requirement to obtain the approval of the Inspector General of the Gambia Police Force could lead to abuse: “In light

9 Jean Salmon (direction), *Dictionnaire de droit international public*, Brussels – Paris, Bruylant – AUF, 2001, p 962.

10 ECHR, Application No 21449/04, *Celniku v Greece*, Judgment of 5 July 2007, §§ 39-41.

11 ECHR, Application No 2096/05, *Peraldi v France*, Decision on admissibility of 7 April 2009.

of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review”.

16. In view of the foregoing, we believe that the Court could have declared the Application admissible and ordered the amendment of the challenged law in accordance with the Charter and the ICCPR.
17. In this regard, we recall the words of the Human Rights Committee's General Comment No 37 to the effect that a prior authorisation procedure is incompatible with the very principle of freedom: “[Requiring authorisation from the authorities undermines the principle that the right to peaceful assembly is a fundamental right].<sup>12</sup> Notification systems requiring those intending to hold a peaceful assembly to inform the authorities in advance and to provide some important details are permissible to the extent necessary to assist the authorities in facilitating peaceful assembly and protecting the rights of others.<sup>13</sup> However, this requirement must not be misused to discourage peaceful assembly and, as with other interferences with this right, must be justified based on one of the grounds set out in Article 21.<sup>14</sup> The application of a prior notification procedure cannot become an end in itself.<sup>15</sup> Prior notification procedures should be transparent and not unnecessarily burdensome;<sup>16</sup> the conditions they impose on organisers should be proportionate to the impact the meeting is likely to have on the public, and they should be free of charge.”

12 CCPR/C/MAR/CO/6, para. 45; CCPR/C/GMB/CO/2, para. 41; and African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para. 71.

13 *Kivenmaa v Finland*, para. 9.2. See also African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para 72.

14 *Kivenmaa v Finland*, para. 9.2. See also *Sekerko v Belarus*, para. 9.4.

15 *Popova v Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.5.

16 *Poliakov v Belarus*, para. 8.3.