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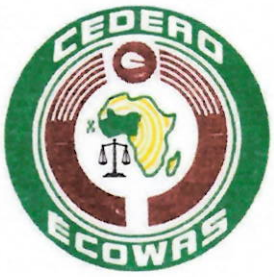

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THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the Matter of

ISAAC MENSAH AND OTHERS

(APPLICANTS)

v

REPUBLIC OF GHANA

(RESPONDENT)

Application No. **ECW/CCJ/APP/47/20;** *Judg't No.* **ECW/CCJ/JUD/30/24**

JUDGMENT

ABUJA

12 JULY 2024

THE COMMUNITY COURT OF JUSTICE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)
HOLDEN AT ABUJA, NIGERIA

Application No: **ECW/CCJ/APP/47/20;** *Judg't No*. **ECW/CCJ/JUD/30/24**

BETWEEN

ISAAC MENSAH AND OTHERS --APPLICANTS

AND

REPUBLIC OF GHANA --RESPONDENT

COMPOSITION OF THE COURT:

Hon. Justice Edward Amoako **ASANTE** - Presiding/ Judge Rapporteur

Hon. Justice Gberi-Be **OUATTARA** - Member

Hon. Justice Ricardo C.M. **GONÇALVES** - Member

ASSISTED BY:

Dr. Yaouza **OURO-SAMA** - Chief Registrar

REPRESENTATION OF PARTIES:

Ms. Anta Guissé - Counsel for APPLICANT

Mrs. Helen Akpene Awo Ziwu (*Solicitor General*)

Mrs. Leona Johnson-Abassah (*Principal State Attorney*)

-Counsel for RESPONDENT

Ms. Charlotte Mancini - Counsel for AMICUS CURIAE

I. JUDGMENT

1. This is a judgment of the Court read virtually in open court pursuant to Article 8(1) of the Practice Directions on Electronic Case Management and Virtual Court Sessions, 2020.

II. DESCRIPTION OF THE PARTIES

2. First Applicant, Mr. Isaac Mensah, sues as the surviving son of Mr Peter Mensah, a Ghanaian national and Community citizen who was allegedly disappeared after his arrest by state agents in The Gambia in July 2005. Applicant sues for himself and on behalf of 23 other individuals claiming to be family members of Mr Peter Mensah.

3. Second Applicant is Registered Trustees of African Network Against Extrajudicial Killings and Enforced Disappearances (ANKED), a human rights NGO based in The Gambia.

4. Respondent, the Republic of Ghana, is an ECOWAS Member State and a party to the African Charter on Human and Peoples' Rights 1981 (African Charter) and the International Covenant on Civil and Political Rights 1966 (ICCPR) on which Applicants rely in this case.

III. INTRODUCTION

Subject Matter of the Proceedings

5. The Application alleges that Mr. Peter Mensah, a Ghanaian national, was one of several West African migrants traveling to Europe through The Gambia in July 2005; they were arrested by state security agents

and have since been killed or disappeared. Applicants claim that by failing to investigate the enforced disappearance of Mr. Peter Mensah in The Gambia, provide an effective remedy to his family, and grant the family access to information on the truth concerning his unlawful arrest, detention, and disappearance, the Respondent has violated its human rights obligations under the African Charter and the ICCPR.

IV. PROCEDURE BEFORE THE COURT

6. Applicants initiated this proceeding by an application dated 18 November 2020 which was filed with the Registry of the Court and served on the Respondent on 19 November 2020.

7. On 16 April 2021, the Respondent filed an application for extension of time within which to file its defence and also lodged its prepared Statement of Defence dated 16 April 2021. Both documents were electronically served on the Applicants the same day.

8. On 9 November 2022, Applicants filed a Reply dated 8 November 2022 to the Respondent's Defence. It was electronically served on the Respondent on 9 November 2022.

9. At a hearing of the case on 11 May 2023, both parties were represented by Counsel. Respondent's new counsel who had taken over the case from the earlier counsel of record, indicated that Respondent did not have Applicant's Reply. In any event, given the need for translation of some documents in the case, the Court adjourned the matter to 5 October 2023 for hearing.

10. On 1 September 2023, The World Organisation Against Torture, (known by its French acronym "OMCT") filed an Application to intervene in the case as amicus curiae together with its prepared Amicus Brief dated 30 August 2023. Both documents were electronically served on the parties on 4 September 2023.

11. On 9 October 2023, Applicants lodged with the Registry of the Court additional annexes to the Application which were electronically served on the Respondent on the same day.

12. At a virtual session of the Court on 12 October 2023 at which both parties were represented by counsel, the Court noted the filing of the amicus curiae application. Respondent indicated that it had filed a motion for extension of time to file a Rejoinder to Applicant's Reply, but the Registry confirmed that it had not received the said process. In light of this, as well as the absence of OMCT, the amicus applicant, the Court adjourned the matter to 23 November 2023 and directed the Respondent to liaise with the Registry to regularise its filing.

13. On 12 October 2023, Applicants filed an application for extension of time within which to file a Reply. The process was electronically served on Respondent the same day.

14. Following an email of 17 May 2024 sent by Respondent's counsel to regularize Respondent's application for extension of time to file a rejoinder, Respondent filed its Rejoinder on 21 May 2024 which was electronically served on the Applicant the same day.

15. At a virtual session of the Court on 30 May 2024, at which both parties were represented, the Court admitted all outstanding processes filed including the amicus application and proceeded to the merits of the case. The Court heard the submissions of the Applicants, the Respondent and OMCT, the amicus curiae, and adjourned for deliberations and judgment.

V. APPLICANT'S CASE

A. Summary of Facts

16. According to the Applicants, Mr Peter Mensah, the father of the First Applicant was a citizen of Ghana, who lived in Akomadan (in the Ashanti Region) and worked as a cocoa farmer. In March 2005, when the First Applicant was only 12 years old, Mr Peter Mensah embarked on a journey to Europe through Senegal. However, his wife, the First Applicant's mother who had been communicating with the elder Mensah, eventually lost contact with him.

17. In July 2005, the family heard news of the arrest and killing of some West African migrants (mainly Ghanaian nationals) in The Gambia, with the only survivor being one Martin Keyere, a Ghanaian, who managed to escape.

18. Applicants say that later in 2005 when Mr Martin Keyere returned to Ghana, he worked with the Commonwealth Human Rights Initiative, an NGO, to locate the families of the Ghanaian migrants who had

presumably been killed. Mr Martin Kyere confirmed, that Mr Peter Mensah was among the West African migrants who were arrested in The Gambia when they were trying to get on a ship to Europe. However, he had no knowledge of his fate as the detained migrants were subsequently separated into two groups, with Peter Mensah falling into a different group from his.

19. After an unsuccessful fact-finding mission by Ghanaian authorities to The Gambia in August 2005, The Gambia later allowed an investigative team from Ghana into The Gambia in March 2006. However, the findings of the investigations are still unknown as neither Ghana, nor The Gambia furnished the First Applicant with any information about the said investigation.

20. Subsequently in August 2008, a joint UN/ECOWAS Fact Finding Team was established in collaboration with Ghana and The Gambia to investigate the incident. According to Applicants, the Report of the investigation was not shared with the public. However, the investigations established that a group of migrants had indeed left Senegal on 22 July 2005 for Europe but were dropped off the coast of The Gambia and had since not been seen or heard from. The Report also indicated that rogue elements of The Gambian security forces were responsible for the death of some of the migrants and the disappearance of others but found no evidence of direct government involvement.

21. Based on these findings, Ghana and The Gambia, without any consultations with families of the victims, signed a Memorandum of

Understanding (MOU) on 2 July 2009. Under the MOU, the Government of The Gambia without acknowledging responsibility, agreed to make a financial payment to the families of six Ghanaian found dead in The Gambia in accordance with African traditional values. Both parties also agreed to investigate, arrest and prosecute the perpetrators.

22. In September 2009, it was reported that the remains of about six to eight of the Ghanaians who were killed in The Gambia were returned to Ghana. No DNA samples were collected from the First Applicant, Mr Isaac Mensah, or any of his family members to enable identification of the possible remains of Mr Peter Mensah among those returned. Instead, the Government of Ghana proceeded to do a mass burial.

23. In December 2010, the Government paid 10,000 cedis (approximately 6,800 US dollars at 2009 exchange rates) to 27 families including the Mensah family out of the 500,000 US dollars paid by the Government of The Gambia pursuant to the MOU signed by the two countries. Applicants say that the rest of the 500,000 dollars was spent on questionable items such as payments to grave diggers and the rental of red carpets and plants. That after the mass burial and the payments, the First Applicant and his family have not heard from the Government of Ghana again.

24. Applicants claim that contrary to the findings of the Joint UN/ECOWAS Fact-Finding Team, which stated that the migrants

were killed by rogue security agents, new evidence from investigative journalists, a Human Rights Watch report, and a confession by a former Gambian soldier reveals that the killings were ordered by then-President of The Gambia, Yahya Jammeh. Additionally, in July 2019, two former operatives of "The Junglers," an armed group controlled by Yahya Jammeh, testified before The Gambia's Truth, Reconciliation, and Reparations Commission (TRRC) that the West African migrants were suspected to be mercenaries and were killed by the Junglers on Jammeh's orders.

25. According to Applicants, Ghana has failed to follow up on any of the new information uncovered about the 2005 killing or disappearance of the Ghanaian migrants in The Gambia despite its pledge to do so under the 2009 MOU with The Gambia. In October 2019, the First Applicant wrote through the Commonwealth Human Rights Initiative to request from the Government of Ghana the following documents: (i) a copy of the UN/ECOWAS Investigation Report; (ii) the coroner or pathologist's report on the bodies returned to Ghana in 2009; (iii) a copy of the videotape of the burial ceremony of the six bodies returned to Ghana; (iv) report on the disbursement of the money paid by the Government of The Gambia; and (v) a copy of the picture taken when the payment was made to the Mensah family.

26. Applicants contend that the Government of Ghana has failed to provide the information requested and has not communicated to the family the steps it has taken to investigate the disappearance of Mr Peter Mensah since July 2005. That these failures violate the rights of

the First Applicant and his family to know the truth about the circumstances surrounding the disappearance of Mr Peter Mensah, the father of the First Applicant.

B. Pleas in Law

27. For their case, the Applicants make the following pleas in law:

(i) That the Court has jurisdiction over the case in accordance with Article 9(4) of the Protocol of the Court.

(ii) That the failure of the Respondent to investigate the detention and enforced disappearance of Mr Peter Mensah since it became aware of it in July 2005 is a serious violation of a peremptory norm of international law, namely, the prohibition against enforce disappearance.

(iii) That the Respondent has and continues to violate the rights of the First Applicant to an effective remedy contrary to Articles 1, 4, 5, 6 and 7 of the African Charter and Articles 6(1), 7, 9 and 16 of the ICCPR.

(iv) That the failure of the Respondent to grant the First Applicant access to information requested concerning the disappearance of his father violate his rights to information under Article 2(1) of the 1992 Constitution of Ghana, Section 1 of the Right to Information Act of Ghana, Article 19(2) of the ICCPR, and Article 9 of the African Charter.

C. Reliefs Sought

28. Applicants requests the Court for the following reliefs:

(i) A declaration that Ghana is in breach of its duty to investigate [a violation] of a peremptory norm of international law.

(ii) A declaration that as a result of the failure of Ghana to provide an effective remedy, Ghana has violated the right of Isaac Mensah to an effective remedy under Articles 1, 4, 5, 6 and 7 of the African Charter and Articles 2(3), 6(1), 7, 9 and 16 of the ICCPR.

(iii) A declaration that Ghana is in violation of Isaac Mensah's right to information, guaranteed by Article 21(1)(f) of the 1992 Constitution of Ghana, Section 1 of the Right to Information Act of Ghana, Article 19(2) of the ICCPR and Article 9 of the African Charter.

(iv) A declaration that consequent upon the breach of the right to an effective remedy, Ghana is in violation of the right to truth under Article 2(3) in conjunction with article 7 of the ICCPR.

(v) An order directing the Republic of Ghana to implement its obligations under the African Charter, ICCPR, and the RTI Act in relation to Peter Mensah's disappearance.

(vi) An order directing the Republic of Ghana to conduct an effective investigation into the circumstances of Peter Mensah's disappearance and his whereabouts/fate including his alleged death.

(vii) An order directing the Republic of Ghana to provide Isaac Mensah with the documents previously requested. These are a copy of the UN/ECOWAS report delivered to Ghana; the coroner's/pathologist's report on the bodies returned to Ghana in 2009; a report on the disbursement of the money paid by The Gambia to the families; a copy of the videotape of the burial ceremony of the six bodies returned to Ghana, and a copy of the picture taken when the money was handed to the Mensah family.

(viii) The sum of 1,500,000 USD as compensation to the First Applicant.

VI. RESPONDENT'S CASE

A. Summary of Facts

29. According to the Respondent, the human rights abuse complained of was committed outside the jurisdiction of Ghana in the Republic of The Gambia at a time when the Ghanaian government had neither knowledge nor access to intervene in the matter. This case must

therefore be treated differently from other cases where the violation takes place within the Respondent State.

30. According to the Respondent, The Gambia is a sovereign state and, therefore, for an effective investigation to be conducted, there must be cooperation between The Gambia and Ghana. The best approach to resolving the matter is the approach adopted by the Respondent, which involves engaging the Republic of The Gambia diplomatically.

31. The Respondent states that it sought the assistance of the domestic investigative machinery of The Gambia as far back as the commencement of this unfortunate event in 2005. Consequently, it initiated an investigative process once the tragic incident was brought to its attention by sending a team of experts, led by the Director of Criminal Investigations, to The Gambia to seek assistance in unravelling the circumstances surrounding the murder of the Ghanaians.

32. The President of the Republic of Ghana and the Foreign Minister of Ghana also held high-level consultations with their Gambian counterparts to support the special investigation mission in establishing the truth.

33. Both governments made efforts to facilitate the resolution of the matter in line with the principles of justice and respect for human rights and dignity. This resulted in the establishment of a fact-finding committee comprising representatives of the UN and ECOWAS. The

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Respondent states that the UN/ECOWAS Fact-Finding Committee, set up at the request of both the Respondent and The Gambia, included experts in criminal investigation from the Ghana Police Service, representatives from the Commonwealth Human Rights Initiative, and a family member of the victims.

34. At the end of its investigations, the Committee concluded that the Government of The Gambia owed the victims a duty to protect their human rights under international law, even if it was unclear who the perpetrators were or whether the Government of The Gambia was directly involved. The Committee stated that since the atrocities were committed within the jurisdiction of The Gambia, the country was liable under international law. Therefore, the Government of The Gambia should provide compensation and other forms of redress.

35. The conclusions of the fact-finding committee led the governments of the two states to pledge to use all means to arrest the perpetrators and bring them to justice, emphasizing the cooperation and willingness of both states to ensure appropriate redress. Therefore, the Respondent acted in utmost good faith when it signed a Memorandum of Understanding (MoU) with The Gambia, pledging that the perpetrators would be dealt with appropriately to ensure justice is delivered to the victims.

36. Regarding access to the UN/ECOWAS Fact-Finding Committee Report, the Respondent states that in June 2020, Ghana's Attorney-General and Minister of Justice wrote to the Gambian authorities

requesting a "waiver of confidentiality in respect of the 2009 UN/ECOWAS Fact-Finding Committee Report" in light of emerging information and consistent with international best practices.

37. The Attorney-General of The Gambia, in a letter dated 24 August 2020, acceded to the waiver and promised to communicate the same to the UN Special Procedures by the end of August 2020. The Respondent formally received the grant of the waiver of confidentiality by a letter dated 9 September 2020.

38. Regarding continued investigations into the killings and disappearances in The Gambia, the Respondent states that the process to arrest and punish the perpetrators is still ongoing. The burial of the victims and the payment of compensation did not bring finality to the matter. The Respondent is mobilizing to undertake the second phase of the investigation.

39. According to the Respondent, it has worked with the Applicants up to this stage, paid compensation to the families of the victims, identified mass graves, evacuated the bodies from The Gambia, and assisted with the mass burial of the eight identified bodies. All these actions are part of an effective remedy. Therefore, the Respondent remains committed to investigating, prosecuting, and punishing the perpetrators since it has lost its citizens.

40. However, Respondent contends that the Court has no jurisdiction over the Application since the events giving rise to the case occurred in The Gambia rather than Ghana.

B. Pleas in Law

41. As to pleas in law, Respondent submits the following:

(i) That the Court has no jurisdiction within the meaning of Article 9(4) of the Protocol of the Court since the events giving rise to the case occurred outside the territory of Ghana.

(ii) That the case is inadmissible within the meaning of Article 10(d) of the Protocol of the Court since Applicants have not proven their indirect victim status in the matter by establishing their close family relationship to the victim.

(iii) That Applicants have failed to establish that the alleged violation of a peremptory norm of international law prohibiting enforced disappearance was committed by the Respondent.

(iv) That Respondent took all necessary steps to investigate the killings and disappearance through diplomatic engagements with The Gambia and is committed to conducting a second phase of investigation in light of new findings.

(v) That the right to information both under Ghanaian law and international human rights law is not absolute, but subject to necessary qualifications and exceptions.

(vi) That Respondent has acted diligently to uncover the truth about the killings and disappearances that took place in the Gambia.

C. Reliefs Sought

42. Respondent requests that the Court dismiss the Application on grounds that the Court has no jurisdiction and that the application is inadmissible.

VII. JURISDICTION OF THE COURT

43. Article 9(4) of the Protocol of the Court grants the Court "jurisdiction to determine cases of violation of human rights that occur in any Member State." In *Registered Trustees of Gan Allah Fulani Development Association of Nigeria v Federal Republic of Nigeria*, ECW/CCJ/JUD/06/23, at para 37, the Court held that an "assessment of jurisdiction is so crucial that the Court may do so on its own motion even if a party has not raised a challenge to jurisdiction."

(a) Respondent's Objection to Jurisdiction

44. In this case, Respondent contends that the Court lacks the competence to hear the Application, because under Article 9(4) of the Protocol of

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the Court, the Court only has jurisdiction over an alleged human rights violation that occurs in the respondent Member State. At the hearing of the Application on 30 May 2024, lead counsel for the Respondent summed up the Respondent's objection to jurisdiction in the following terms:

> [T]he Applicant is asking Ghana to respond to the acts of omissions of another State. My Lords, we basically contend that the Application before this honourable Court cannot be admitted because the alleged enforced disappearances did not occur within the jurisdiction of the Republic of Ghana or the Respondent's jurisdiction.... [T]he Respondents submits that in the Applicants own narration just some few minutes ago, the claim of human rights violation, if any, cannot be shifted to the doorstep of the Respondent when all evidence gathered proves that the said violations occurred in the Gambia and not Ghana." (Community Court of Justice, *Verbatim Record of Proceedings, Isaac Mensah v Republic of Ghana* (ECW/CCJ/APP/47/20), 30 May 2024).

(b) Applicants' Submission on Jurisdiction

45. Applicants submit that "[r]egardless of whether the disappearance of Peter Mensah occurred on the territory of The Gambia, it still falls to the State of Ghana to remedy those violations". (*Applicants' Reply to Respondent's Defence*, para 8). According to Applicants, enforced disappearance is a peremptory norm of international law (*jus cogens*)

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imposing an obligation *erga omnes* on all states of the international community to investigate and remedy it. It is, therefore, no defence for the Respondent to say that the violation occurred outside its territory, particularly when Section 56(4) of Ghana's Courts Act (Act 459) clothes the Respondent with universal jurisdiction over "serious offences provided for in agreements and treaties to which the State is a signatory". (*Applicants' Reply*, para 9). Therefore, Applicants submit that Respondent's objection to the Court's jurisdiction on grounds that the violations occurred in the territory of the Gambia rather than Ghana must fail.

(c) Analysis of the Court

46. The Court begins by noting that "[i]n general terms, jurisdiction is the power or authority of a court to adjudicate on a case which is conferred by law and meant to be exercised within certain parameters." (*Incorporated Trustees of Prince and Princess Charles Offokaja Foundation, Nigeria and Another v Federal Republic of Nigeria* ECW/CCJ/JUD/09/24, para 66). Such "power or authority to adjudicate is typically exercised (i) with respect to a particular subject matter, (ii) over particular entities/persons who may appear as parties (applicants, respondents, or interveners), (iii) within certain territorial limits, and (iv) prospectively from a certain cut-off date." (*Prince and Princess Charles Offokaja* case, para 66). Correspondingly, these parameters give rise to four broad elements or types of jurisdiction described as subject matter or material jurisdiction (*jurisdiction ratione materiae*); personal jurisdiction (*jurisdiction ratione*

personae); territorial jurisdiction (*jurisdiction ratione loci*), and temporal jurisdiction (*jurisdiction ratione temporis*).

47. An examination of the relevant jurisdictional provisions of the 1991 Protocol of the Court (as amended) and some previous decisions of the Court point to the conclusion that the Court's jurisdiction to determine cases comprises these elements, although not every case may implicate all of them. (See Solomon T. Ebobrah, 'Court of Justice of The Economic Community of West African States (ECOWAS)' in *Max Planck Encyclopedias of International Law*, Oxford University Press, 2019, paras 15-24).

48. In this case, the Court is invited to consider whether and to what extent, the Court may adjudicate alleged human rights violations that occur outside the territory of a Respondent State. This invites a closer look at Article 9(4) of the Court's Protocol which provides: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State." From the text of Article 9(4), the Court's human rights jurisdiction clearly comprises a subject matter element ("subject matter jurisdiction") as well as a *spatial* or *territorial* element ("territorial jurisdiction").

49. Subject matter jurisdiction relates to the authority of the court to entertain a specific legal issue or matter and/or to grant the relief sought by a party. Article 9(4) of the Court's Protocol clearly indicates that the Court is competent to address and provide

appropriate relief in "cases of violation of human rights". However, since the provision specifies that such human rights violations must be those that occur "in any Member State", there is a clear territorial aspect to the Court's human rights jurisdiction that should be satisfied, particularly when it is called into question.

50. Accordingly, in *Hassan Habre v Senegal (Interim Ruling)* [2010] CCJELR 43 (paras 58-59) the Court stated as follows:

> 58. When seised on the basis of Article 9(4) of the 2005 Supplementary Protocol on the Court, which provides that ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"***, and the Court has to decide on the Preliminary Objections relating to its jurisdiction, it has to verify the criteria of the jurisdiction that must be in place as a result of the said Article. It is a question of the criteria of *ratione materiae* and *ratione loci.*
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> 59. In the first place, the Court shall examine if the issue submitted before it deals with a right which has been enshrined for the benefit of the human person, whether it arises from the international and Community obligations of the State complained of, as human rights to be promoted, observed, protected and enjoyed, and whether it is the violation of that right which is being alleged. The Court shall verify whether the subject matter of the dispute, as arising from allegations and claims of the parties, falls within the domain of human rights. It shall also ensure that these recognised rights are obligations binding on the State against which the matter is brought. Secondly, the Court shall examine whether the alleged violations were committed in a Member State of the Community.

51. The Court reiterated this jurisdictional analysis in *Registered Trustees of Jama'a Foundation v Federal Republic of Nigeria* [2012] CCJELR 317 (paras 37-40) where it stated as follows:

> 37. By referring to Article 9(4) of the [Court's Protocol], the Community Court of Justice, ECOWAS lays emphasis on the criteria which enables it to determine its jurisdiction. In fact, these are *ratione materiae* and *ratione loci* criteria.

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> 38. On the one hand, the Court views that it is examining whether the issue brought for determination relates to a right as guaranteed for the human person, which falls within the international and community obligations of the accused State as human rights to be promoted, to be respected, to be protected and satisfied, whose violation is alleged.
>
> ....
>
> 40. On the other hand, the Court examines whether the alleged violations have taken place on the territory of a Member State of the Community.

52. In the more recent case of *Incorporated Trustees of Prince and Princess Charles Offokaja Foundation, Nigeria and Another v Federal Republic of Nigeria* (ECW/CCJ/JUD/09/24), the Court affirmed the above understanding of Article 9(4) of the Protocol of the Court when it held at paragraphs 75 and 76 of the judgment as follows:

> 75. Based on the text of Article 9(4) and the relevant precedents, the Court must not only satisfy itself that it has subject matter jurisdiction, namely, that the case alleges human rights violations, but it must also ensure that the alleged violations occurred within the territory of a Member State, especially in cases where that is in doubt.
>
> 76. Thus in determining the jurisdiction of the Court as provided by Article 9(4) referred supra, it is pertinent that two conditions must be met before the court can exercise jurisdiction over an application brought before it for consideration: (a) there must be an allegation of human rights violation and (b) such violation must have occurred within the territorial jurisdiction of the Member State against which the application was brought.

53. The Court observes that, primarily, each state exercises its sovereign powers within the limits of its territory. Therefore, without a compelling basis, a state cannot be held responsible for matters that occur outside of its territory. Accordingly, the appropriate reading of Article 9(4) of the Court's Protocol, as confirmed by the above

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precedents, is that, as a general rule, the Court's territorial jurisdiction is limited to cases the underlying events of which occur in the territory of the particular Member State that has been sued. This reading of Article 9(4) of the Court's Protocol aligns with how the African Court also approaches its territorial jurisdiction. See *Actions pour la protection des droits de l'homme (APDH) v Côte d'Ivoire* (merits) 1 (2016) AfCLR 668, para 67. See also *Mohammed Abdullah Saleh Al-Asad v Djibouti*, (African Commission, Comm No.383/10), para 134.

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54. That said, the arguments presented by the Applicants warrant a consideration of whether there are instances where a State may have extraterritorial human rights obligations, thereby providing a basis for the Court's jurisdiction to be extended to human rights violations that occur outside the territory of a Member State.

55. On this issue, the Court notes that States often act and exercise various powers over things, places, or entities outside their land territory. For this reason, it is recognized that while a state's human rights obligations apply primarily within its territory, they potentially also extend to any other place subject to its jurisdiction or effective control. Thus, the Human Rights Committee has, for instance, indicated that state parties to the ICCPR are required to "respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State

Party, even if not situated within the territory of the State Party." (*General Comment No 31: The Nature of the General Legal Obligation imposed on States Parties to the Covenant*, para 10).

56. By this approach, a state may be potentially liable for human rights violations that occur in a place outside its territory, but which is, nevertheless, subject to its jurisdiction or effective control. These may include incidents occurring aboard a ship or aircraft subject to the state's jurisdiction, or on such objects like an artificial island or a maritime installation over which the State exercises jurisdiction or effective extraterritorial control. See *Mohammed Abdullah Saleh Al-Asad v Djibouti* (African Commission, Comm No.383/10) para 134. The determination that a state's human rights obligations apply to extraterritorial places over which it exercises jurisdiction or effective control would typically extend the competence of a relevant human rights body to alleged violations occurring in such places. Conversely, if the state is found to lack jurisdiction or effective control over a place outside its territory, thereby ruling out the extraterritorial application of its human rights obligations, a human rights body would likely lack territorial jurisdiction to determine alleged violations occurring in that place. This is because "it cannot be assumed that the jurisdiction of a treaty body would be more expansive than the application *ratione loci* of the underlying treaty." (Philipp Janig, 'Extraterritorial Application of Human Rights' in Christina Binder et al (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing, 2022) 180, para 3.)

57. Beyond the extraterritorial application of a state's human rights obligations in places outside its territory that are subject to its jurisdiction or effective control, the Court considers that such extraterritorial liability may also arise in other limited circumstances. This may include instances where the state, through its security forces or other agents, exercises effective control or authority over specific individuals, such as through the arrest or abduction of a person outside its territory. (See *Olan v Turkey*, ECtHR (*Grand Chamber*) App No. 46221/99, para 91; and Philipp Janig, 'Extraterritorial Application of Human Rights' in Christina Binder et al (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing, 2022) 180, paras 26- 33.)

58. From the above discussions, the Court considers the following to be the essential points regarding its territorial (or *ratione loci*) jurisdiction within the meaning of Article 9(4) of the Court's Protocol:

    i. Article 9(4) of the Court's Protocol requires the Court to satisfy itself that it has both subject matter and territorial (or *ratione loci*) jurisdiction.

    ii. The Court's territorial jurisdiction is primarily limited to events occurring within the territory of the Respondent state. In determining occurrence of such events in the State, the Court may consider several factors, including an individual's connection to the State through nationality, residence, or presence within the state's

territory, as well as whether the specific acts or omissions constituting the human rights violations took place there.

iii. By way of an exception, the Court's jurisdiction may extend to events occurring outside a Member State's territory if it is determined that such places are under its jurisdiction or effective control, thereby making its human rights obligations applicable there. This exception may also apply in cases where the state, through its officers or agents, exercises authority or control over specific individuals outside its borders in a manner that implicates the extraterritorial application of its human rights obligations.

59. Applying the above jurisdictional requirements, the Court concludes that it lacks jurisdiction over the Applicants' claims related to: (i) the alleged violation by the Respondent of the prohibition against enforced disappearance due to its failure to investigate the detention and enforced disappearance of Mr. Peter Mensah; (ii) the alleged violation of the Applicants' right to an effective remedy, contrary to Articles 1, 4, 5, 6, and 7 of the African Charter and Articles 6(1), 7, 9, and 16 of the ICCPR; and (iii) the alleged violation by the Respondent of the right to truth, contrary to Articles 2(3) and 7 of the ICCPR.

60. The Court notes that all these claims are directly linked to the alleged arrest, detention, and subsequent disappearance of Mr. Peter Mensah in The Gambia in July 2005 by security operatives linked to Yahya

Jammeh, then President of The Gambia. According to the Applicants' account of events, Mr. Peter Mensah was traveling from Senegal to Europe through The Gambia when he was arrested, detained, and ultimately disappeared. These key events forming the basis of the Applicants' claims occurred in The Gambia and were allegedly carried out by agents of the Gambian government, a sovereign state separate from the Respondent's territory.

61. Furthermore, it has not been demonstrated or argued that the specific location(s) in The Gambia where these events occurred were under the jurisdiction or effective control of the Respondent at the relevant time. Nor do Applicants claim that the Respondent was complicit in Mr. Peter Mensah's alleged arrest, detention, and disappearance. Therefore, given that these events forming the basis of the Applicants' claims (in para 59 above), did not occur within the territory of the Respondent, the Court is precluded from assuming jurisdiction under Article 9(4) of the Court's Protocol.

62. Similarly, the Court concludes that the requirements for triggering the Respondent's extraterritorial human rights obligations have not been met in respect of the claims outlined above in paragraph 59. Consequently, the Court cannot assume jurisdiction based on the exception to its territorial jurisdiction discussed above.

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63. In support of their claim that the Respondent has an extraterritorial human rights obligation in this case, the Applicants asserted that the

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prohibition of enforced disappearance is a peremptory norm of international law (*jus cogens*), imposing an *erga omnes* obligation on all states, including the Respondent, to investigate its violation wherever it occurs. While the Court does not doubt the *erga omnes* character of peremptory norms of international law, the Court does not consider that the peremptory character of the prohibition of enforced disappearance, as alleged in this case, has been demonstrated by the Applicants. (See International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, 2022, Draft Conclusions 7, 8, 9 and 17). The Court acknowledges that enforced disappearances of a widespread or systematic nature may constitute crimes against humanity and thereby possess a peremptory character under international law. However, when the allegation concerns an isolated incident involving an individual, as in this case, labelling the enforced disappearance as a *jus cogens* violation under the prevailing legal test would appear to be far-fetched. This is particularly so when one considers that, as a separate and distinct concept, enforced disappearance has yet to attain universal recognition as a peremptory norm of general international law. (*Ibid,* Draft Conclusions 7, 8, 9, and 23; Annex to the Draft Conclusions).

64. For these reasons, the Court concludes that it lacks jurisdiction, within the meaning of Article 9(4) of the Court's Protocol, over the Applicants' claims that the Respondent has violated the prohibition of enforced disappearance, the right to a remedy, and the right to the truth.

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65. On the other hand, the Court considers that it has jurisdiction over the Applicants' claim relating to Respondent's violation of the right to information under Article 9(4) of the Court's Protocol. The Court reaches this conclusion in light of the fact that most, if not all, of the acts or omissions underlying the Applicants' claim concerning the right to information occurred within the territory of the Respondent and involved officials of the Respondent.

66. According to the Application, the First Applicant requested the following from the Respondent: a copy of the UN/ECOWAS report delivered to Ghana, the coroner's/pathologist's report on the bodies returned to Ghana in 2009, a report on the disbursement of the money paid by The Gambia to the families, a copy of the videotape of the burial ceremony of the six bodies returned to Ghana, and a copy of the picture taken when the money was handed to the Mensah family. All these pieces of information were either generated in the Respondent State or with the involvement of the Respondent and are in the custody of the Respondent.

67. For these reasons, the Court concludes that it has jurisdiction over the Applicants' claim relating to Respondent's alleged violation of their right to information.

VIII. ADMISSIBILITY

(Alleged Violation of the Right to Information)

68. Article 10(d) of the Court's Protocol establishes three main admissibility criteria for human rights cases which are (a) the applicant's victim status or standing, (b) the non-anonymity of the application; and (c) the non-pendency of the matter before another international court or tribunal. See *Aziagbede Kokou & Others v Republic of Togo* [2013] CCJELR 167 (para 18).

69. Respondent raised an objection to admissibility on the grounds that Applicants have failed to show their close relation to the primary victim to establish their own indirect victim status within the meaning of Article 10(d) of the Protocol of the Court.

70. On this issue, the Court recalls that for an applicant to prove their indirect victim status for purposes of admissibility under Article 10(d), it is sufficient if the applicant presents evidence establishing his or her familial or other close relationship to the primary victim. Such evidence may include a birth certificate, a marriage certificate, or even a statutory declaration or affidavit in which the applicant swears to the existence of a close or familial relationship to the primary victim under the law of a Member State. (See *Kehinde Enagameh v Republic of The Gambia*, ECW/CCJ/JUD/34/20, para 32).

71. In this case, the First Applicant, Mr. Isaac Mensah, annexed to the Application an affidavit sworn by him under the penalty of perjury under the laws of the Respondent, in which he provides information

relating to his birth and his father-son relationship with Mr. Peter Mensah. The Court also notes that the First Applicant attached a copy of the biodata page of his passport to the Application. The information on the passport indicates that he bears the same surname as Mr. Peter Mensah. Additionally, Akomadan, the place of birth indicated on the First Applicant's passport, is the hometown of Mr. Peter Mensah, as stated in the Application. These pieces of information lend credence to the Applicant's claim that Mr. Peter Mensah was his father.

72. To succeed in its challenge to the First Applicant's relationship with the primary victim (Mr. Peter Mensah), the Respondent must present evidence that disproves his claim. However, the Respondent has not presented any contrary evidence to refute the facts sworn to by the First Applicant in his affidavit. The Court therefore concludes that the First Applicant has sufficiently proven that he is related to Mr. Peter Mensah and has thus established his indirect victim status for purposes of admissibility under Article 10(d) of the Protocol of the Court.

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73. The Court now turns to the capacity of the First Applicant to represent the twenty-three other individuals for whom he has also sued, and the standing of the Second Applicant, the Registered Trustees of the African Network Against Extrajudicial Killings and Enforced Disappearances (ANKED).

74. In cases where an individual sues in a representative capacity on behalf of other identifiable individuals, the Court has held that the applicant must present evidence of his authorization to sue on behalf of the group. In *Eli Haggar and 166 former Employees of Societe Nigerienne des Produits Petroliers(SONIDEP) v Niger* [2015] CCJELR 227, the Applicants (two individuals) claimed that they were suing on behalf of some former employees of SONIDEP for violation of their employment rights, but without any evidence of authorisation to act on behalf of the group. The Court held that the Applicants '**failed to justify, before the [Court] that they hold any title that authorises them to represent Applicants; it therefore follows that they lack *locus standi*, to act on behalf of Applicants.**' (Ibid, para iv.15)

75. Because there is no evidence on record that the 23 other individuals on whose behalf the First Applicant is suing have authorized him to do so, the Court holds that he lacks the capacity to represent them. Therefore, those individuals are struck off from the suit, and the First Applicant is deemed to be suing for himself only.

76. Regarding Second Applicant, Registered Trustees of the African Network Against Extrajudicial Killings and Enforced Disappearances (ANKED), the Court observes that the Application does not state anything about its interest in the suit or the capacity in which it sues. Ordinarily, NGOs may bring human rights actions on behalf of specific, identifiable individuals with their authorization, or they may bring a public interest action on behalf of the general public, in which

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case they require no specific authorization. In this case, the First Applicant is already suing on his own behalf. Therefore, the issue of the Second Applicant representing the First Applicant does not arise, nor has it been argued. Secondly, a public interest action (*actio popularis*) is generally characterised by the following:

a) The applicant (an individual or NGO) presents a claim for the protection or enforcement of a collective or public right, or in some cases, an individual right the alleged breach of which has injured a large and indeterminate section of the public.
b) The applicant may, but need not, be personally affected by the alleged violation.
c) The remedies or reliefs sought, including any pecuniary relief, is intended for the benefit of the public generally, not the applicant or a small identifiable group or section of the public.
d) The applicant does not need authorisation as it would be impossible or impractical to obtain the consent of the whole public, or a large, indeterminate section of the public.

See *Patrick Eholor v Federal Republic of Nigeria* (ECW/CC/JUD/51/23), paras 51-52 and *Incorporated Trustees of Media Rights Agenda v Federal Republic of Nigeria* (ECW/CCJ/JUD/07/24), paras 88-96.

77. In this case, the Application has not been brought for the protection or enforcement of a collective or public right, or an individual right the alleged breach of which has injured a large and indeterminate section of the public. It is also clear that the remedies sought are intended for the benefit of the Applicant rather than the public at large. Accordingly, because the case does not have the hallmarks of a public interest suit and Applicant is already suing for himself, the Court does not deem the Second Applicant to be a necessary party. The Second Applicant is therefore struck off the suit.

78. The net effect of the above conclusions is that only Mr. Isaac Mensah remains as the Applicant in the case. Regarding the other admissibility requirements of Article 10(d) outlined in paragraph 59 above, the Court notes that the case has not been presented anonymously, nor is there evidence that the claims are pending before another international court or tribunal, contrary to the admissibility requirements of Article 10(d) of the Protocol of the Court. For these reasons, the Court concludes that the case submitted by the Applicant is admissible as it relates to the alleged violation by the Respondent of the Applicant's right to information.

IX. MERITS

(*Alleged Violation of the Right to Information*)

79. Given the Court's decision on jurisdiction, the only remaining issue for determination is the alleged violation of the Applicant's right to information which the Court now considers.

(i) Submissions of the Applicant

80. On this issue, Applicant submits that in October 2019, he wrote through the Commonwealth Human Rights Initiative to request from Ghana's Minister of Foreign Affairs and Regional Integration the following: (i) a copy of the UN/ECOWAS Investigation Report; (ii) the coroner or pathologist's report on the bodies returned to Ghana in 2009; (iii) a copy of the videotape of the burial ceremony of the six bodies returned to Ghana; (iv) report on the disbursement of the money paid by the Government of The Gambia; and (v) a copy of the picture taken when the payment was made to the Mensah family. However, neither the Foreign Minister nor any official of the Ghanaian government has provided the information requested.

81. Applicant contends that the refusal to provide the information requested violates his rights to information under Article 21(1)(f) of the 1992 Constitution of Ghana, Section 1 of the Right to Information Act of Ghana, Article 19(2) of the ICCPR, and Article 9 of the African Charter.

(ii) *Submissions of the Respondent*

82. In response to the Applicant's arguments, the Respondent submits that the right to information is indeed a fundamental human right enshrined in its Constitution, as well as in the African Charter and the ICCPR, which it has ratified. However, the right is not absolute but is

subject to various restrictions and qualifications. The Respondent states that information whose disclosure may be restricted includes information that could prejudice international relations, endanger public safety, hinder criminal investigations, or reveal the identities of confidential sources, among others. Without explicitly stating so, the Respondent appears to rely on these grounds as the basis for refusing to release the documents requested by the Applicant.

(iii) *Analysis of the Court*

83. On this issue, the Court begins by noting that its human rights jurisdiction is limited to determining whether a Member State's conduct violates its international human rights obligations. While domestic laws of the state may sometimes provide context for this exercise, the Court's mandate is not to interpret and enforce domestic legislation of Member States. Accordingly, the Court will limit its analysis to the relevant international human rights obligations of the Respondent on this issue.

84. The Court recalls Article 9(1) of the African Charter which provides: "Every individual shall have the right to receive information". Similarly, Article 19(2) of the ICCPR provides in relevant part that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information." The Human Rights Committee has stated that the right to information under Article 19 of the ICCPR "embraces a right of access to information held by public bodies. Such information includes records

held by a public body, regardless of the form in which the information is stored, its source and the date of production". (*General Comment No 34 on Article 19 (ICCPR): Freedoms of Opinion and Expression*, para 18).

85. It is also relevant to underscore, as argued by the Respondent, that the right to information is not absolute and may be subject to restrictions including respect for the rights and reputation of others, the protection of national security or public order, or the protection of public health or morals. (ICCPR, article 19(3)).

86. Regarding the UN/ECOWAS Committee Report, the Court observes that the apparent reason for the Respondent's refusal to release a copy to the Applicant was that it was deemed a confidential document, and its release unilaterally could prejudice Ghana's international relations with The Gambia. Therefore, the Respondent needed to secure a waiver of confidentiality from The Gambia before releasing the Report to the Applicant. Respondent states that in June 2020, Ghana's Attorney-General & Minister of Justice wrote to the Gambian authorities requesting a "waiver of confidentiality in respect of the 2009 UN/ECOWAS Fact-Finding Committee Report". In response, the Attorney-General of The Gambia, in a letter dated 24 August 2020, accepted the waiver request, and pledged to inform the UN Special Procedures by the end of August 2020. Subsequently, the Respondent says that it received formal confirmation of the waiver of confidentiality in a letter dated 9 September 2020.

87. It appears that the sole reason why the Respondent did not release the Report to the Applicant was because of its confidential nature. However, since the confidentiality was waived as of 9 September 2020, the Court sees no reason why the Report should not have been made available to the Applicant. Therefore, the Court finds that the Respondent violated the Applicant's right to information by failing or refusing to release the UN/ECOWAS Committee Report to the Applicant.

88. The other documents requested by the Applicant are: (i) the coroner or pathologist's report on the bodies returned to Ghana in 2009; (ii) a copy of the videotape of the burial ceremony of the six bodies returned to Ghana; (iii) a report on the disbursement of the money paid by the Government of The Gambia; and (iv) a copy of the picture taken when the payment was made to the Mensah family. The Court notes that the Respondent provided a generalized submission on the grounds for restricting the right to information without indicating the specific grounds on which it declined to release each of these other requested documents. On its own analysis, the Court does not see how the release of any of these documents could prejudice national security, public order, the rights or reputations of others, or any other valid reason for their non-disclosure. On the contrary, their release could enhance transparency regarding the killing or disappearance of some Ghanaians, including Mr. Peter Mensah, in The Gambia, and shed light on how the Government of Ghana handled the resulting issues, particularly for family members of the victims like the Applicant. Accordingly, the Court finds that the Respondent violated

the Applicant's right to information by failing or refusing to grant access to these other documents.

X. REPARATIONS

89. A violation of international law by a state, including its human rights obligations, entails a responsibility to make full reparations for the injury caused. See *Case Concerning the Factory at Chorzow (Jurisdiction)* (Permanent Court of International Justice) [1927] PCIJ Series A, No. 9, p 21; and *Articles on Responsibility of States for Internationally Wrongful Acts 2001*, art 31.

90. The Court has determined that Respondent violated Applicant's right to information under Article 9(1) of the African Charter and Article 19(2) of the ICCPR. Given the nature and context of the violation in this case, the Court considers that an order directing the Respondent to release the information requested by the Applicant should suffice as reparation.

XI. COSTS

91. Pursuant to Article 66(4) of the Rules of the Court, the Court decides that each party shall bear their own costs.

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XII. OPERATIVE CLAUSE

92. For the foregoing reasons, the Court sitting in public and after hearing the parties:

On jurisdiction

i. Declares that the Court has jurisdiction over the claim relating to violation of the Applicant's right to information, but lacks jurisdiction over claims concerning (i) the alleged violation by the Respondent of the prohibition against enforced disappearance due to its failure to investigate the detention and enforced disappearance of Mr. Peter Mensah; (ii) the alleged violation of the Applicants' right to an effective remedy, contrary to Articles 1, 4, 5, 6, and 7 of the African Charter and Articles 6(1), 7, 9, and 16 of the ICCPR; and (iii) the alleged violation by the Respondent of the right to truth, contrary to Articles 2(3) and 7 of the ICCPR.

On Admissibility

ii. Finds that the First Applicant has no capacity to represent the 23 other individuals indicated in the Application as being represented by the First Applicant.

iii. Finds that the Second Applicant has no standing and therefore strikes out the Second Applicant as a party to the case.

iv. Finds that the Application is admissible as regards the Applicant's claim relating to the violation of the right to information.

On the Merits

v. Declares that the Respondent violated Applicant's right to information contrary to Article 9(1) of the African Charter and Article 19(2) of the ICCPR.

On Reparations

vi. Orders that the Respondent shall take steps to release to the Applicant, not later than four months from the date of service of this judgment, the 2009 UN/ECOWAS Committee Report delivered to Ghana; the coroner's/pathologist's report on the bodies returned to Ghana in 2009; a report on the disbursement of the money paid by The Gambia to the families; a copy of the videotape of the burial ceremony of the six bodies returned to Ghana, and a copy of the picture taken when the money was handed to the Mensah family.

vii. Decides that all other reliefs sought by the parties which have not been herein granted in whole or in part are hereby dismissed.

On Costs

i. Decides that each party shall bear their own costs.

Done at Abuja this 12th day of July 2024 in English and translated into French and Portuguese.

Hon. Justice Edward Amoako **ASANTE**
Presiding/Judge Rapporteur .....

Hon. Justice Gberi-Be **OUATTARA** .....

Hon. Justice Ricardo C.M. **GONÇALVES** .....

ASSISTED BY:
Dr. Yaouza **OURO-SAMA** (Chief Registrar) .....