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3. CASE LAW NOTE: [UNITED DEMOCRATIC PARTY \(UDP\) ET AL. V. THE REPUBLIC OF GAMBIA \(JUDGEMENT No: ECW/CCJ/JUD/01/20\)](#)

1. Introduction

This judgement was brought before the Economic Community of West African States (ECOWAS) Court of Justice by 32 Applicants, including the United Democratic Party (UDP) on the behalf of Ebrima Solo Sandeng, National Organising Secretary of the party, who died in prison on 16th April 2016.

All Applicants are members of the UDP and were arrested during peaceful protests on 14th April 2016, detained and severely tortured by the State. Ebrima Solo Sandeng died while in custody under unknown circumstances, presumably by injuries inflicted by torture (Amnesty International, [Gambia: Death in detention of key political activist](#), 16 April 2016). The Applicants claim that even during the peaceful protest the police used more force than necessary and some of the persons arrested were brought in the maximum security prison without remand warrant, while others were taken to the National Intelligence Agency Headquarters in Banjul.

The Applicants alleged that several detainees were hospitalized as a consequence of the injuries experienced after several forms of tortures and degrading treatments. According to their opinion, Ebrima Solo died because of the tortures inflicted, and his remains were never handed over to his family, whilst a Death Certificate was issued by the prison authorities on 15 April 2016 certifying his death at 4.20 am for shock and respiratory failure.

Some UDP's members undertook a peaceful march towards the prison on the day of Ebrima Solo's death, but they claim to have been intercepted by the Police Intervention Unit, thrown in trucks and detained until the day after, when they were transferred to the maximum security prison. The Applicants claimed that they were sentenced to three years in prison on the 20th July 2016 in a trial which did not respect fairness requirements.

Therefore, the Applicants demanded to the ECOWAS Court of Justice to declare, *inter alia*, the incompatibility of Section 5 of the Gambian Public Order Act with Article 11 of the African Charter on Human and People's Rights (ACHPR); the violation of Articles 4, 7 and 11 of the ACHPR in relation to the arrest, detention, charge, purported trial and imprisonment of the Applicants for offences under the Public Order Act; a violation of Articles 4 and 5 of the ACHPR for torture and/or cruel, inhuman and degrading treatment

of the Applicants perpetrated by the Respondent and torture to death; and that the extra judicial killing of Ebrima Solo Sandeng in circumstances admitted by the Respondent amounted to violation of Article 4 of African Charter on Human and People's Right.

2. *The Defendant response*

In the first section of the Defense, the Respondent (the Republic of Gambia) argued that the arrests were made on a legal basis since the public procession had not been previously authorized and it was, therefore, unlawful. It also dismissed the allegations of torture and inhumane treatments made by the Applicants, while the prosecution followed a fair process. Concerning the death of Ebrima Solo, the Respondent declared that he died from shock and respiratory failure and he was never subjected to torture. Finally, the Respondent argued that Section 5 of the Public Order Act is not incompatible with Article 11 of the ACHPR and the arrests of the Applicants were made on a completely legal basis. In their Response, the Applicants firmly maintained the facts previously alleged. Furthermore, they argued that the Counsel representing them in the trial was compelled to withdraw representation, given the intimidatory atmosphere in which the proceedings were conducted. The Applicants stated that they were arrested and prosecuted because of their association with the UDP, and that they were conducted in prison before the domestic court's trial was held, amounting to two weeks after the arrest, on 4th May 2016 (*Defense*, p. 6).

In addition, the Applicants declared that in the domestic court proceeding that followed the second wave of arrests, on 20th April 2016, the court was already informed of the injuries provoked by the mistreatment of the prisoners. The Applicants implicitly contested the political nature of the arrests, since some of the prisoners were released when it became evident that they were not related to the UDP (*Applicant's Reply*, p. 8) They reiterated that they were denied access to the Counsel, medical treatment and visits from family members. In particular, they re-stated that the Counsel was compelled to withdraw its representation because the domestic court systematically refused applications made on behalf of the prisoners and no opportunity was given to choose another Counsel.

In the second section of the Respondent's Reply, the Republic of Gambia asserted that the arrests were not related to the political orientation of the Applicants, but it was necessary given the illegal nature of the protest and the death of Ebrima Solo could not be considered a legitimate ground. Finally, the Respondent argued that the ECOWAS court could not be considered competent in addressing the case as lacks standing to review the decision of the High Court of Gambia.

3. *The Court's evaluation of the case*

The ECOWAS Court initiated its evaluation of the case first by assessing its competence to hear the claim brought by the Applicants. According to the statutory provisions, the court recognized that the basis of the Applicants' claims are grounded in Article 9(4) of the Supplementary Protocol. Thus, the court held that the Respondent's acts that include act of arrest and prosecution whilst the Applicants were exercising a peaceful protest might constitute a violation of fundamental human rights. Therefore, the ECOWAS court is competent in examining the case, since «a mere allegation of a violation of human rights in the territory of a Member State is sufficient, prima facie, to justify its jurisdiction» (See

cases [SERAP V. FEDERAL REPUBLIC OF NIGERIA & 4 ORS \(2014\) ECW/CCJ/JUD/16/14](#) and [BAKARE SARRE V MALI \(2011\) ECW/CCJ/JUD/03/11](#)) After having established its competence in judging the allegations, the court proceeded with the analysis of the merits.

The first violation analysed concerns the allegation of arbitrary arrest and detention brought forward by the Applicants. Article 6 of the ACHPR establishes that all individuals are entitled to the right of liberty and to security of their person, «except for reasons and conditions previously laid down by law». Thus, the court must determine whether the arrest of the Applicant respectively on 14 and 16 April 2016 constituted a lawful act. According to the Criminal Procedure Code, Cap 11, Vol. 3, Laws of The Gambia, Revised Edition 2009, a police officer without a warrant may arrest any person whom he suspects on reasonable grounds of having committed a cognizable offence, any person who commits a breach of peace in his presence and any person who obstructs a police officer in the execution of his duty.

The Court noted that for the Respondent this provision, to be read jointly with [Section 73 of the Criminal Code](#), act in accordance with permissible exceptions laid down by Article 6 of the ACHPR. Therefore, it needed to be ascertained whether or not the alleged unlawful and violent procession resulted in the disruption of public peace as the Respondent argued. The court noted that

«the Applicants failed to tender evidence to establish proof that the protest was with the approval of the Inspector General of Police of the Gambian Police Force and did not lead evidence either by means of oral or documentary in form of pictures or video to establish that indeed the acts of the Applicants was peaceful. The Applicants therefore failed to show that their act was lawful and peaceful».

It followed that the arrests cannot be considered arbitrary because they were made pursuant to the Gambian Law. However, the modalities in which the detention was held are to be considered illegal as it was in breach of the Gambian Constitution which provides a maximum period of seventy-two (72) hours before being charged to Court. The detention of Applicant 26th- 31st lasted for more than two weeks.

The second allegation analysed by the court concerns whether the Applicants have been subjected to torture, inhuman and degrading treatment while in custody by the agents of the Respondent. This analysis provides for a very interesting approach regarding the issue of the burden of proof necessary to determine a violation of fundamental human rights.

First, the court recalls the provisions contained in the UN Convention against torture in conjunction with Article 5 of the ACHPR. Secondly, it notes that the deposition made on oath by the Applicants contain «consistent allegations of acts of torture, inhuman and degrading treatment meted on them by the officers of the PIU unit, to wit agents of the Respondent». The court noted that the very nature of oaths are «reflective of a true position in a matter» and, in this case, the Applicants presented a prima facie substantiation of violation of their fundamental rights. Therefore, the burden of proof shifts from the Respondent that needs to prove that Applicants have not been victims of ill-treatment, but, on the contrary, were treated with respect and dignity while in custody.

Second, the court extends the notion of torture and human and degrading treatment, arguing for the inclusion of negative psychological effects in the amounting of the violation. Acts such as slapping, blind folding, confinement and inadequate feeding and other treatments the Applicants were subjected amount to a form of psychological torture.

Since the Respondent had not gone beyond the mere denial of allegations, and it failed to adduce any evidence to prove that the Applicants were *not* subjected to any form of inhuman or degrading treatment, the court considered that a violation of Article 5 of the ACHPR took place.

Similarly, the court established that the Respondent did not guarantee family visits to the Applicants while held in custody. In fact, the Respondent failed in submitting documents and records confirming that family members of the Applicants had access to the prison, and this directly affects their «right to the dignity of their family» (Issue 2, p. 19).

On the issue concerning the death of Ebrima Solo, the court needed to establish whether the 32nd Applicant, the UDP party, had the faculty of initiating the application on his behalf. The court noted that «only persons who can justify their claims of being directly affected have the standing to seek reliefs for violations of human rights from the Court» (see also [MUSA SAIDYKHAN V. REPUBLIC OF THE GAMBIA \(2012\) ECW/CCJ/JUD/08/12](#)). Therefore, the argument is to determine whether the UDP can be considered victim within the meaning enshrined in article 10(d) of the Supplementary Protocol (*A/SP.1/01/05 Amending Protocol (A/P1/7/91)*). According to this disposition, applicants seeking relief for violation of their rights must establish the status of a victim who must have suffered a personal loss capable of being determined. According to the court “it is without doubt that the 32nd Applicant is not victim within the meaning [...] of Article 10(d)”. Furthermore, the 32nd Applicant, in acting in a representative capacity, has failed in establishing a documentary evidence to show that has the factual capacity of representing Ebrima Solo as the deceased Personal Representative (Issue 5, p. 37). In absence of this evidence, the court cannot proceed in judging on the circumstances around the death of Ebrima Solo.

Finally, regarding the alleged incompatibility of the provisions enshrined in Section 5 of the Public Order Act with article 11 of the ACHPR, the court established that the act does not violate the right to assemble freely. However, the court held that the requirement established in the Public Order Act section 5 of the Laws of The Gambia might undermine the exercise of such right. Section 5 in fact establishes that the approval of the inspector general or police is required to certify that a procession does not potentially cause a breach of peace. In the court’s views, this requirement needs a review (*Issue 3*, p. 34)

4. *The Decision*

In the Decision, the court determined that the 32nd Applicant lacks the *locus standi* to represent Ebrima Solo Sandeng, and that the arrest and detention of the Applicants was made on lawful basis. However, the detention that followed was arbitrary as the period of detention exceeded what is established by the Law of Gambia. The inhuman and degrading treatment the Applicants were subjected while in prison amounted to a violation of article 5 ACHPR and therefore the court ordered the payment of 100,000 USD equally to the 1st, 3rd, 4th, 5th, 15th, 17th, 26th, 27th, 28th, 30th for the hardships and violations of their Human Rights caused to them by agents of the Respondents.

The court also ordered that the Respondent sets up an independent panel of inquiry to investigate the events of the 14th and 16th of April 2016, and also determine the persons

responsible for the arrest, detention, and torture of the Applicants and therefore prosecute the police officers involved.

5. Conclusion: on human rights violations in Gambia

The circumstances around the death of Ebrima Solo Sandeng remain unclear at present date. A report from Amnesty International affirms that during the 22 years of President Jammeh's rule human rights violations have been committed especially during pre-elections periods. In 2006, members of the UDP had been arrested and subjected to forced disappearance. In 2011, ECOWAS did not commit to monitor the presidential election because of the «intimidation, an unacceptable level of control of the electronic media by the party in power, the lack of neutrality of state and para-state institutions, and an opposition and electorate cowed by repression and intimidation» (Amnesty International, [Opposition in Gambia: the Danger of Dissent, 2016](#)).

After the arrests of 2016, ECOWAS, alongside other international organisations, expressed its concerns on the political situation in Gambia «marked by the arrest, detention and death of some opposition leaders following demonstrations advocating political reforms prior to the presidential election scheduled to hold in December 2016» (UN News Centre, [Ban calls for release of detained protesters after death of opposition members, 2016](#); US Department of State, [United States Condemns The Gambia's Response to Peaceful Protests](#), 2016; European Union, [Statement by the Spokesperson on recent violence in The Gambia](#), 2016; ACHPR, [Press Statement of the African Commission on Human and Peoples' Rights on the events of 14 and 16 April 2016 in the Islamic Republic of The Gambia](#), 2016).

Gambia, as state party to multiple human rights instruments and member of the ECOWAS and African Union, has clear and mandatory obligations to respect international human rights instruments on its territory. The failure to promote, respect and fulfil its obligations has led to the activation of the complementary mechanism provided by the ECOWAS Court of Justice, which provided for a consistent redress of the injustices suffered in detention by some members of the UDP. The existence of such mechanism has ensured the guarantee of reparations to the victims of torture by the agents of the State, and provided the institution of a panel of inquiry which, perhaps, will shed light on the circumstances of Ebrima Solo Sandeng's death.

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