THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

THE 2022 INTERNATIONAL HUMANITARIAN LAW MOOT COURT COMPETITION

IN THE MATTER BETWEEN

PROSECUTION

V.

ADUGA BOLO (DEFENDANT)

MEMORIAL FOR THE DEFENCE.

TEAM NUMBER: FIM-2022-15

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2. LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AfCLR	African Court Law Report
AHRLR	African Human Rights Law Report
CCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
IACHR	Inter-American Commission on Human Rights
NWLR	Nigeria Weekly Law Report
SERAP	Socio-Economic Rights and Accountability Project
UN	United Nations

3. LIST OF AUTHORITIES

3.1. STATUTORY AUTHORITY

- African Charter
- Protocol of the Statute of the African Court of Justice and Human Rights
- Protocol on Amendment to the Protocol of the Statute of the African Court of Justice and Human Rights (Malabo Protocol)

3.2. JUDICIAL AUTHORITY

- Agrotexim and Others v Greece (1995) ECHR 42
- Amnesty International v Tunisia [1992] AfCLR 69
- Anyimba v Onovo [2009] 13 NWLR, [2008] 555 SC 1159
- Bob Ngozi Njoku v Egypt [1990] AfCLR 40
- Bakweri Land Claims Committee v Cameroon [2004] AHRLR 43
- Cantos v Argentina [2001] IACHR 15
- Centre of the Independence of Judges and Lawyers v Algeria [1994] AfCLR 104
- Electronic Sicula S.P.A ELSI USA v Italy [1989] ICJ 15
- Former Somadex SA Employees v Republic of Mali [2018] AfCLR 6
- Gombert v Côte d'Ivoire [2018] AfCLR 2
- Jawara v Gambia [1996] AfCLR 147
- Johnson v Ghana [2019] AfCLR 3
- Mariam Kouma and Ousmane Diabaté v Republic of Mali [2018] AfCLR 2
- Mpaka-Nsusu Andre Alphonse v Zaire [1988] AfCLR 15
- O.F v Norway [1983] AfCLR 158
- Prosecutor v Zejnil Delalic and Others [1996] ICTY 364
- Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria [2009] AHRLR 331

4. STATEMENT OF JURISDICTION

The Prosecution has filed the present case of The Prosecutor v. Aduga Bolo before the jurisdiction of this honourable Court of the African Court of Justice and Human Rights pursuant to Article 3 of the Protocol on Amendment to the Protocol of the Statute of the African Court of Justice and Human Rights. The Defendant reserves the right to challenge the admissibility of this instant case before this honourable Court, which shall be argued in the pleadings of this memorial.

5. PLEADINGS

5.1. ISSUE 1: WHETHER THE CASE; THE PROSECUTOR v ADUGA BOLO, IS ADMISSIBLE BEFORE THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS?

5.1.1. In the address of the first issue before this honourable court, the argument of counsel shall be adopting the position that the case of The Prosecutor v Aduga Bolo is inadmissible before the African Court of Justice and Human Rights.

5.1.2. My Lord, for want of clarity of argument, this argument shall be streamlined under two headings: (a) the need to respect the complementary jurisdiction of the National Court; (b) the application of the principle of non bis in idem.

a. <u>THE NEED TO RESPECT THE COMPLEMENTARY JURISDICTION OF THE NATIONAL COURT</u>

5.1.3. My Lord, the crux of this issue – admissibility of case – is as fundamental as the objective, existence, and jurisdiction of this Court. The admissibility of a case goes to the root of the court, and can incapacitate a court if found wanting.

5.1.4. This issue deals with the legal appropriateness of the Court to hear or exercise its jurisdiction on a particular case brought before it. This has formed the premise of the Court in ***Centre of the Independence of Judges and Lawyers v Algeria***[1] in ruling that the necessary requirement must be met before the Court can rule that a case is admissible before it.

5.1.5. Thus, in each application, the Court must make a preliminary examination of its jurisdiction and admissibility, and rule on objections to its jurisdiction, if any. This position has been given judicial recognition by this honourable court in the recent case of ***Former Somadex SA Employees v Republic of Mali***.[2]

[1] [1994] AfCLR 104, [6]
[2] [2018] AfCLR 6, [24]

5.1.6. Without doubt, the admissibility of a case before this honourable court has a direct consequence on the jurisdiction of this court. Notably, my Lord, jurisdiction is the very foundation upon which the entirety of a court process or proceeding is built, and without which, the process or proceeding collapses.[3] It is the bedrock upon which a process is placed and takes its form until completion.[4]

5.1.7. Accordingly, my Lord, it is very imperative for the Court to carefully peruse the issue of the admissibility of a case, in relation to its relevant and existing laws. The ECOWAS Court of Justice, in the case of ***Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria***[5], first dealt with admissibility of a case brought against the Federal Republic of Nigeria.

5.1.8. My Lord, with recourse to the statutory foundation of the court by the Protocol on Amendment to the Protocol of the Statute of the African Court of Justice and Human Rights (hereinafter referred to as the 'Malabo Protocol'), it is worthy of note that the jurisdiction of the Court, and conditions for the admissibility of cases, have been clearly spelt out.

5.1.9. Admittedly, one of the conditions for the exercise of jurisdiction by the Court in this case has been met, as provided for in Article 46F of the Malabo Protocol. However, my Lord, this is one of many conditions to be met before the Court can assume jurisdiction or declare that a case is admissible before it. This honourable Court has rightly ruled in the case of ***Mariam Kouma and Ousmane Diabaté v Republic of Mali***[6] that "*these requirements are cumulative such that, if one of them is not met, an application cannot be admissible*".

5.1.10. My Lord, in the determination of the admissibility of this instant case, it is indispensable that the mind of the Court be adverted to the provision of Article 46H of the Malabo

[3] *Anyimba v Onovo* [2009] 13 NWLR, [2008] 555 SC 1159
[4] Ibid.
[5] [2009] AHRLR 331
[6] [2018] AfCLR 2, [237]

protocol which deals with the complementary jurisdiction of the Court. **Article 46H(1) of the Malabo Protocol** provides thus:

> ***The jurisdiction of the Court shall be complementary to that of the National Courts****, and to the Court of the Regional Economic Communities where specifically provided for by the Communities.* (Emphasis added)

5.1.11. The literal and explicit interpretation of the above provision postulates that the National Courts of different member States and this honourable Court are Courts of coordinate jurisdictions. In other words, the power of both Courts are equal; a matter cannot be tried in both Courts, either at the same time or different periods.

5.1.12. My Lord, **Article 46H(2)(c) of the Malabo Protocol** further provides that the Court shall declare that a case is inadmissible where:

> *(c) The person concerned has already been tried for conduct which is the subject of the complaint*

5.1.13. Significantly, paragraph 2 of the Clarification Answers of the Moot Fact establishes that the respondent, Aduga Bolo, has been tried by the Criminal Court of Chatu – a National Magistrate Court – on the same grounds of prosecution before this honourable court.

5.1.14. My Lord, with the combined effect of the provision of Article 46F and Article 46F(2)(c) of the Malabo Protocol, it has become unmistakable that, where a person has been tried by a National Court in a State, this honourable Court cannot hear such case; in the respect of the doctrine of coordinate jurisdiction between the Courts.

5.1.15. Your Lordship, in the case of ***Johnson v Ghana***[7], your learned brothers respected the doctrine of coordinate jurisdiction between courts and held the case inadmissible following the fact that it had already been settled by a fellow court of coordinate

[7] [2019] AfCLR 3, [99]

jurisdiction and as laid down in the existing rule. This rule has equally been abided by in numerous cases.[8]

5.1.16. Flowing from the afore-established judicial authorities and statutory provisions, it has become crystal clear that, following the complementary jurisdiction of this Court with National Courts, this instant case is inadmissible.

b. <u>THE APPLICATION OF THE PRINCIPLE OF NON BIS IN IDEM</u>

5.1.17. My Lord, the principle of 'non bis in idem', a widely practiced legal doctrine against a person prosecuted twice for the same crime, is graciously incorporated into the Malabo Protocol. This is also known as 'Double Jeopardy'. In Common Law legal system, double jeopardy means the fact of being prosecuted twice for substantially the same offense.[9]

5.1.18. Essentially, non bis in idem is a Latin maxim that literally means not doing the same thing twice. The maxim expresses the legal principle that a person cannot be tried for the same offence twice.

5.1.19. In ***Bakweri Land Claims Committee v Cameroon***[10], the Court provided an unblemished and satisfactory definition of the principle of nos bis in idem thus:

> *The principle behind the requirement under this provision of the African Charter is to desist from faulting member states twice for the same alleged violations of human rights. This is called the ne bis in idem rule (also known as the principle or prohibition of double jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned for the same alleged violation of human rights.*

5.1.20. My Lord, **Article 46I(2) of the Malabo Protocol** establishes as follow:

[8] *Mpaka-Nsusu Andre Alphonse v Zaire* [1988] AfCLR 15, [2]; *Amnesty International v Tunisia* [1992] AfCLR 69; *Bob Ngozi Njoku v Egypt* [1990] AfCLR 40, [56].
[9] *Black's Law Dictionary* (8th Ed., 2000), 506.
[10] [2004] AHRLR 43

... [N]o person who has been tried by another Court for conduct proscribed under Article 28A of this statute shall be tried by the Court with respect to the same conduct ...

5.1.21. Having being established in the Moot fact and the antecedent argument head, it goes with saying that the respondent, Aduga Bolo, was tried by the National Magistrate Court on the charges of war crimes which fall under Article 28A. Thus, by the provision of this Article, the respondent cannot be tried by this honourable court.

5.1.22. However, for want of a solidified argument, it is necessary to articulate the inapplicability of the "unless" clause in **Article 46I(2)(a) and (b)** that the proceeding in the other Court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;

(b) *Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*

5.1.23. My Lord, the nature of the office of the respondent in his State vests upon him immunity from court cases; irrespective of its gravity. However, my Lord, in a bid to pave way for the just trial of the respondent, the national authorities of his State lifted his immunity, and arrested him.

5.1.24. Your Lordship, following the average sense of logic and reasoning, this is a clear diversion from the motive to shield the respondent from the criminal responsibility of the charges. Reiterating this, paragraph 5 and 6 of the Moot fact respectively states that "*the national authorities lifted his immunity*" which consequently paved way for the "*all the charges against him (war crimes).*"

5.1.25. In relation to paragraph (b) of the Article 46I(2), it is posited that the manner of proceeding followed the due process in accordance with international law. This means that the

administration of justice is able to guarantee a set of specific rights and that it can ensure that no one will be deprive, in procedural terms, of the right to claim justice.[11]

5.1.26. The rules applicable to the administration of justice are extensive and refer to, *inter alia*, fair trial, presumption of innocence and independence and impartiality of the [Court].[12] Following the fact of the case, my Lord, none of these rules were violated.

5.1.27. In the case of ***Elettronic Sicula S.P.A ELSI USA v Italy***[13], the International Criminal Court of Justice ruled that the requirement of due process was to be measured by the "minimum international standard", and that a sixteen month delay in a municipal judicial proceeding did not violate that standard. Thus, the duration of the trial is inconsequential to this standard.

5.1.28. My Lord, in the case of ***O.F v Norway***[14], this honourable Court respected the principle of non dis in idem and did not try an offence that had already been tried by another Court.

5.1.29. To this end, heavily relying on the arguments canvassed and the authorities supplied, it is the submission of the Defence that the case The Prosecutor v Aduga Bolo is inadmissible before the African Court of Justice and Human Rights.

[11] Editorial, 'Procedural Fairness and Due Process of Law' (*International Commission of Jurists (ICJ)*, 1 February 2018) <https://www.icj.org/chapter-5-standards-and-techniques-of-review-in-domestic-adjudication-of-esc-rights-2/5-5-procedural-fairness-and-due-process-of-law/> accessed 24 March 2022; Human Rights Committee, *General Comment* (No. 32, UN Doc. CCPR/C/GC/32, 2007), para. 2.

[12] Editorial, 'The Right to Due Process' (*Icelandic Human Rights Centre*, 15 July 2014), <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process> accessed 24 March 2022.

[13] [1989] ICJ 15

[14] [1983] AfCLR 158

5.2. **ISSUE 2: WHETHER THERE ARE REASONABLE GROUNDS TO BELIEVE THAT, IN THE CONTEXT OF THE SAID ARMED CONFLICT, WAR CRIMES WHICH TOOK THE FORM OF INTENTIONAL ATTACKS AGAINST PLANNED PROTECTED PERSONS AND PROPERTY IN ARTICLE 28D OF THE MALABO PROTOCOL WERE COMMITTED IN THE TERRITORY OF ZENGIN FROM FEBRUARY 2018.**

5.2.1. My Lord, on this issue before this honourable Court, it is the contention of the Defence that there are no reasonable grounds for this Court to believe these war crimes occurred.

5.2.2. My Lord, for every court, there are rules and procedures that must be followed before a Court can hear a case. In this light, it is noteworthy that **Article 27(2) of the Malabo Protocol** provides thus:

> ***In elaborating its Rules, the Court shall bear in mind the complementarity it maintains with the African Commission*** *and the African Committee of Experts.* (Emphasis added)

5.2.3. Flowing from the provision that the rules of the Court must pay respect to the provisions of the African Commission, it is striking to reproduce the provisions of **Article 56 of the African Charter** that spells out the requirements an application must comply with:

> *[A]pplications to the Court shall comply with the following conditions:*
>
> *1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;*
>
> *2. Comply with the Constitutive Act of the Union and the Charter;*
>
> *3. Not contain any disparaging or insulting language;*
>
> ***4. Not based exclusively on news disseminated through the mass media;***
>
> *5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged…* (Emphasis added)

5.2.4. In ***Mariam Kouma and Ousmane Diabaté v Republic of Mali***[15], this honourable Court rightly posited that if one of the requirement is not met, the application cannot be admissible.

5.2.5. My Lord, as lucid as a bright afternoon, it is plain and apparent that the evidence filed before this honourable Court by the Prosecution were based solely on news disseminated through mass media. This has been equally reiterated by the provisions of Paragraph 7 of the Clarification Answers to the Moot Fact:

> *The reports of the non-governmental organizations Human Rights and Msizi as well as the information shared by the Ginika news agency were filed as evidence before the ACJHR.*

5.2.6. In the case of ***Jawara v Gambia***[16], the Court struck out the case following the fact that the evidence of the applicant were based solely on news disseminated through mass media.

5.2.7. Further, my Lord, the substantive foundation in which the Prosecution sues the Defendant is premised on its referral to the Prosecutor by the Peace and Security Council of the African Union.

5.2.8. Notably, my Lord, this referral is named "Resolution 2540 (2020) the situation in Zengin (Mapalo), as of **1 January 2018**". This means that all attacks the resolution documented ended at January. Thus, attacks from February, 2018 are officially unrecognized.

5.2.9. It is thus prayed that, in view of the glaring authorities, the Court rules that there are no reasonable grounds to believe that war crimes indeed occurred in Zengin in February, 2018 following that the application is solely based on news report, and there were no documented attacks from February, 2018 in the official document referred to the Prosecutor.

[15] *Supra* (n 6), [237]
[16] [1996] AfCLR 147

5.3. **ISSUE 3**: **WHETHER THE FACTS PRESENTED ARE CAPABLE OF JUSTIFYING THE INCORPORATION OF RESPONSIBILITY OF ADUGA BOLO AS A COMMANDER ON THE BASIS OF ARTICLE 46B(3) OF THE MALABO PROTOCOL.**

5.3.1. My Lord, this cornerstone of the issue before this honourable court is, whether by the facts presented, its criminal responsibility can be hinged on Aduga Bolo.

5.3.2. It is the unflinching contention of the Defence that Aduga Bolo cannot be criminally responsible for the presented facts before this Court.

5.3.3. Your Lordship, the Malabo Protocol has provided, by way of Article 46B, the criminal responsibility of any person who contravenes the Statute. Particularly, **Article 46B(3)** provides for the criminal responsibility for offenders of the offence under Article 28A (Crimes under the jurisdiction of the International Criminal Law Section of the Court) of the Statute:

> *The fact that any of the acts referred to in Article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts* ***or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof****.* (Emphasis added)

5.3.4. My Lord, before the criminal responsibility in Article 46B(3) can be invoked, there are two conditions precedent as laid down in the same provision: (i) if the superior knew the offence was committed or about to be committed; (ii) the superior knew and failed to prevent such acts or punish the perpetrator. A similar approach has been adopted by this Court.[17]

[17] *Gombert v Côte d'Ivoire* [2018] AfCLR 2, [270]

5.3.5. The contention in this argument is premised on the fact that Aduga Bolo is in full fulfilment of condition (ii), thus, he is relieved of all criminal responsibilities that may surface.

5.3.6. Truly, Aduga Bolo is a superior commander in the Chu Liberation Movement (MLC). However, this position is not totally sufficient to pronounce Aduga Bolo criminally responsible for the offences committed.

5.3.7. According to the moot fact which serves as the foundation of this case in Court, it is clear by the provisions of Paragraph 9 that Aduga Bolo took necessary and reasonable measures to prevent such offences, and he punished the perpetrator:

> *It seems, however, that he [Aduga Bolo] sometimes sanctioned those responsible for abuses. For example, Kefile Dineo was disciplined in May 2019 … Aduga Bolo also demanded that the abducted girls be brought back to their villages.*

5.3.8. Flowing from this, it has become obvious that, even though Aduga Bolo is a commander in the MLC, he cannot be criminally responsible because he did not fail to reprimand the perpetuator.

5.3.9. My Lord, a brother Court, the International Criminal Tribunal for the former Yugoslavia[18], carefully considered these conditions before making its decision. This consideration was also observed by your learned brothers at Inter-American Court of Human Rights[19] and the European Court of Human Rights[20]. This depicts the dire perusal of the fulfillment of these conditions before a person can be said to be criminally responsible for a crime as a superior or commander.

5.3.10. It is thus prayed that the Court holds this issue in favour of the Defence.

[18] *Prosecutor v Zejnil Delalic and Others* [1996] ICTY 364
[19] *Cantos v Argentina* [2001] IACHR 15
[20] *Agrotexim and Others v Greece* (1995) ECHR 42

6. **PRAYERS**

Going by the argument so far canvassed, coupled with statutory and judicial authorities, we humbly pray this Court to do justice to this case by granting the following reliefs:

1. **A DECLARATION** that this case is not admissible before the African Court of Justice and Human Rights.
2. **A DECLARATION** that there are no reasonable grounds to believe that, in the context of the said armed conflict, war crimes which took the form of intentional attacks against planned protected persons and property in Article 28D of the Malabo Protocol were committed in the territory of Zengin from February 2018.
3. **A DECLARATION** that the facts presented are not capable of justifying the incorporation of responsibility of Aduga Bolo as a commander on the basis of Article 46B(3) of the Malabo Protocol.
4. **AN ORDER** of dismissal in striking out this case for lack of merit.
5. **AND FOR SUCH FURTHER ORDER(S)** as this honourable Court may deem fit to make in the circumstances.

Dated this 8th Day of April 2022

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TEAM CODE: FIM-2022-15

DEFENDANT COUNSEL

FOR SERVICE ON:

PROSECUTION COUNSEL