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## **ECOWAS Community Court of Justice**

Application No. ECW/CCJ/APP/08/08

Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008

Hadijatou Mani Koraou

v

The Republic of Niger

### **JUDGMENT**

1. The applicant, Mrs. Hadijatou Mani Koraou, of Nigerien nationality, is a citizen of the ECOWAS Community.
2. The applicant is jobless and lives in the village of Louhoudou, in the Konni district. Her counsel is Mr. Abdourahaman Chaïbou, from the professional law firm Chaïbou-Nanzir, lawyers accredited to argue before Niamey Court of Appeal (Rep. of Niger), assisted by Mrs. Helen Duffy and Mr. Ibrahim Kane from Inter Rights (London).
3. The defendant, the Republic of Niger, is a Member State of the ECOWAS Community.
4. The defendant is represented by Mr. Mossi Boubacar and associates, lawyers accredited to argue before Niamey Court of Appeal (Rep. of Niger).
5. The applicant claims that the defendant has violated her fundamental human rights. She asks the Court to acknowledge this violation and to condemn the defendant.
6. The defendant presented preliminary objections to admissibility.
7. The Court decided to merge the objections with the merits, in accordance with Article 87.al.5 of its Rules of Procedure.

### **PRESENTATION OF THE FACTS AND THE PROCEDURE**

8. In 1996, while she was only twelve (12) years old, the applicant, Mrs. Hadijatou Mani Koraou, of the Bouzou custom was sold to the tribe chief, Mr. El Hadj Souleymane

Naroua, of the Haoussa custom, aged 46 years old, for two hundred and forty thousand (240.000) CFA francs.

9. This transaction occurred in the name of the “*Wahiya*”, a current practice in Niger consisting of acquiring a young girl, generally a slave, to work as a servant as well as a concubine. The slave woman who is bought under these conditions is called “*Sadaka*” or fifth wife, i.e. a wife who is not one of the legally married wives, the number of which cannot exceed four (4), according to Islam’s Recommendations.

10. In general the “*Sadaka*” does housework and is at the “*master’s*” service. He can, at any time, day or night, have sexual relations with her.

11. One day, as she was working in her master’s field, he came and surprised her and then abused her. This first forced sexual act was imposed in these conditions while she was less than 13 years old. Thus the applicant was often the victim of acts of violence on the part of her master, as a result of genuine or supposed rebelliousness.

12. For about nine (9) years, Hadijatou Mani Koraou was a servant in El Hadj Souleymane Naroua’s household, doing all sorts of housework and serving as a concubine.

Four (4) children were born out of relations with her master, two (2) of whom survived.

13. On the 18 August 2005, El Hadj Souleymane Naroua gave Hadijatou Mani Koraou a liberation certificate from slavery. This certificate was signed by the beneficiary, the master and countersigned by the chief of the village who stamped it.

14. Following this liberation act, the applicant decided to leave the house of her former master. He refused, on the ground that she was and remained his wife. Nevertheless, under the pretext of a visit to her mother who was ill, Hadijatou Mani Koraou left El Hadj Souleymane Naroua’s house never to go back.

15. On 14 February 2006, Hadijatou Mani Koraou brought a complaint before the civil and customary tribunal of Konni, to have her desire to be totally free and live her life elsewhere recognised.

16. The civil and customary tribunal of Konni, in judgment No. 06 of 20 March 2006, found “that the applicant and El Hadj Souleymane Naroua were never properly married, since the dowry was never paid for, there was no religious ceremony and Hadijatou Mani Koraou remains free to live her own life with the person of her choice.”

17. El Hadj Souleymane Naroua lodged an appeal of this judgment before the Court of First Instance of Konni, which by decision No. 30 of 16 June 2006 quashed the first judgment.

18. The applicant took her case to the final court of appeal before the Judicial Chamber of the Supreme Court of Niamey, to request “application of the law against slavery and slavery-like practices.”

19. On 28 December 2006, the Supreme Court, by judgment No. 06/06/cout. quashed and invalidated the Court of First Instance of Konni's decision, on the ground of violation of Article 5(4) of Law 2004 – 50 of 22 July 2004 relating to the Judicial Organisation in Niger, without pronouncing on the issue of Hadijatou Mani Koraou's slave status. The matter was remitted for review to the same court with a different composition.

20. Before the end of the proceedings Hadijatou Mani Koraou, who was back in her father's family, married Mr. Ladan Rabo.

21. Aware of the marriage of the applicant to Mr. Ladan Rabo, El Hadj Souleymane Naroua filed a criminal complaint to the Brigade of Gendarmerie in Konni, who wrote a summary record and transferred it to the public prosecutor at the Court of First Instance of Konni.

22. In judgment No. 107 of 2 May 2007, the criminal division of the Court of First Instance of Konni sentenced Mrs. Hadijatou Mani Koraou, her brother Koraou Mani and Ladan Rabo to six (06) months of imprisonment and a fine of 50.000 CFA francs each, in accordance with Article 290 of the Niger criminal code which criminalises bigamy. Moreover, a warrant of arrest was issued against them.

23. On the same day, Hadijatou Mani Koraou lodged an appeal. Nonetheless, on 9 May 2007, Hadijatou Mani Koraou and her brother Koraou Mani were jailed in the prison of Konni by virtue of the warrant of arrest.

24. On 17 May 2007, while Hadijatou Mani Koraou was still in detention, the professional law firm CHAIBOU-NANZIR, her counsel, filed a complaint against Souleymane Naroua before the public prosecutor at the Court of First Instance of Konni for slavery in accordance with Article 270.2 and 3 of the criminal code as modified by Law No. 2003 – 025 of 13 June 2003. The case is examined by an investigating judge under the number R.P.22, R.I.53.

25. Concurrent to the criminal procedure, the Court of First Instance of Konni, ruling after the transfer to the Supreme Court, "gives right to Hadijatou Mani Koraou's petition for a divorce;... says that she will respect a delay of three (03) months before any new marriage", by its decision No. 15 of 6 April 2007.

26. El Hadj Souleymane Naroua lodged an appeal to the Final Court of Appeal against the latter decision.

27. On 9 July 2007, the Criminal Division of Niamey Court of Appeal, ruling on Hadijatou Mani Koraou's appeal against the Criminal Court's decision, "rules as an interim order the temporary release of the applicant and her brother, decrees the withdrawal of the warrant of arrest issued against Ladan Rabo *sua sponte* and defers a ruling until an absolute decision by the divorce judge".

28. On 14 December 2007, Hadijatou Mani Koraou filed a submission before the ECOWAS Community Court of Justice on the basis of Articles 9.4 and 10.d) of Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991 relating to the Court, seeking to:

- a) Condemn the Republic of Niger for violation of Articles 1, 2, 3, 5, 6 and 18(3) of the African Charter of Human and Peoples' Rights;
- b) Request Niger authorities to adopt legislation that effectively protects women against discriminatory customs relating to marriage and divorce;
- c) Ask Niger authorities to revise the legislation relating to Courts and Tribunals in order to enable justice to fully play its part in order to safeguard victims of slavery;
- d) Urge the Republic of Niger to abolish harmful customs and practices founded on the idea of women's inferiority;
- e) Grant Hadijatou Mani Koraou a fair reparation for the wrong she was victim of during the 9 years of her captivity.

29. The defendant presented preliminary objections on admissibility to say that:

- a) The complaint is not admissible because domestic remedies have not been exhausted;
- b) The complaint is not admissible because the case brought before the present Court is still pending before Nigerien domestic courts.

30. The ECOWAS Court of Justice, in applying Art. 87(5) of its Rules of Procedure merged the preliminary objections to the merits, to render one, and single, judgment.

31. At the hearing planned on 24 January 2008 to hear the parties, the applicant's counsel made submissions in relation to her dire financial situation and the need to hear witnesses living in Niamey, whose travel expenses to go to Abuja were not affordable for the applicant. Her counsel requested the transfer of the Court's session to Niamey or to any other place in Niger.

32. The defendant's counsel said "that he did not see any problem for the session to be held outside the Court's seat." However it brought to the Court's attention "a possible negative media effect and politicisation of the trial before concluding on the lack of utility of such a session in Niger."

33. By interim order No. ECW/CCJ/APP/08/08 of 24 January 2008, the Court decreed the holding of the session in Niamey, in accordance with Art. 26 of the 1991 Protocol.

34. At the hearing on 7 April 2008 in Niamey, the parties and their witnesses appeared.

## **EXAMINATION OF THE PARTIES' ARGUMENTS**

### **1. ON THE PRELIMINARY OBJECTIONS**

35. The Republic of Niger argued *in limine litis* inadmissibility on the grounds of non-exhaustion of domestic remedies on the one hand, and of the fact that the matter brought before the ECOWAS Court of Justice was still pending before domestic courts on the other hand.

### **ON NON EXHAUSTION OF DOMESTIC REMEDIES**

36. While acknowledging that exhaustion of domestic remedies is not one of the conditions for admissibility of cases of human rights violations before the ECOWAS Court of Justice, the Republic of Niger considers this absence as a gap which the Court's practice should fill.

37. Besides, the defendant's counsel added that it is the exhaustion of domestic remedies rule that facilitates a court in deciding whether a State sufficiently protects or not human rights on its Territory. He further observed that human rights protection by international mechanisms is a subsidiary protection, which only intervenes if a State fails to carry out its duty to ensure respect of human rights at the national level.

38. Furthermore, by reference to Art. 4(g) of the Revised ECOWAS Treaty, the defendant argued that the ECOWAS Court of Justice should apply Article 56 of the African Charter of Human and Peoples' Rights in order to resolve the silence of documents ruling the Court, notably concerning exhaustion of domestic remedies.

39. While subsidiarity of human rights protection by international mechanisms is longstanding, this principle has evolved over time. As a result, interpretation of the rule of exhaustion of domestic remedies has been very flexible. That is what the European Court of Human Rights said in its judgment *De Wilde, Ooms and Versyp v Belgium* of 18 June 1971 when it ruled that "*there is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies (...)* There exists on this subject a long established international practice".

40. The ECOWAS Community legislature must have answered that call when it decided not to make the rule of exhaustion of domestic remedies a condition of admissibility before the Court. Waiving such a rule applies to all ECOWAS Member States, and the Republic of Niger shall not depart from it.

41. Besides, in stating in Art. 4(g) of the Revised Treaty that ECOWAS Member States declare their adherence to the principles of "recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on

Human and Peoples' Rights”, the Community legislature simply wanted to integrate this instrument into the law applicable before the ECOWAS Court of Justice.

42. Adhesion of the Community to the Charter’s principles means that, even in the absence of other ECOWAS legal instruments relating to human rights, the Court ensures the protection of the rights enshrined in the Charter, without proceeding in the same way as the African Commission of Human and Peoples’ Rights.

43. One cannot deduce from an interpretation of Article 4(g) of the Revised Treaty that the Court’s modalities for the protection and promotion of human rights should be those provided for by the Charter.

44. A distinction must be drawn between the fundamental principles of the Charter (Part I) and the modalities of implementation of these rights (Part II). These modalities encompass creation of the Commission (Art. 30), its composition (Art. 31 to 41), its functioning (Art. 42 to 45) and its procedure (Art. 46 to 59); whereas the ECOWAS Revised Treaty provides, for its part, for other mechanisms aimed to implementing these same fundamental principles through the ECOWAS Court of Justice.

45. It should not be considered that the absence of the exhaustion of domestic remedies principle constitutes a gap that should be filled by the ECOWAS Court of Justice’s practice, since it shall not, without violating individuals’ rights, impose conditions and formalities on them that would be more cumbersome than those enshrined in the Community texts.

46. The defendant recalled all the applications submitted to Nigerien domestic courts and noted that on 14 February 2006 the applicant lodged a petition for divorce with the civil and customary tribunal of Konni; that this tribunal handed down a judgment in her favour; that following the appeal, the judgment was quashed; that the appeal judgment was quashed and invalidated by the Supreme Court; that the decision after the final appeal and the transfer was in favour of the applicant; that a second appeal to the final court was filed by the defendant and that the Supreme Court has not ruled on it yet.

47. In addition, the defendant declared that on 11 January 2007 a criminal procedure was initiated against the applicant; that an appeal relating to the judgment of the criminal court sentencing the applicant and the other two charged people was lodged with the Court of Appeal of Niamey; and that the Court of Appeal, after having requested that the applicant and her brother be temporarily released, adjourned the trial to wait for the outcome of the civil procedure.

48. In the present case, is Mrs. Hadijatou Mani Koraou, whose case has already been brought before domestic courts, legitimately taking her case before the ECOWAS Court of Justice when domestic courts have not ruled on it yet?

49. According to Article 10 d. ii of the Supplementary Protocol A/SP.1/01/05 relating to the ECOWAS Court :

“Access to the Court is open to the following: (...)

d) individuals on application for relief for violation of their human rights; the submission of application for which shall:

- i) not be anonymous; nor
- ii) be made whilst the same matter has been instituted before another International Court for adjudication;

Thus the rule of exhaustion of domestic remedies is not applicable before the Court.

50. These provisions aim to prevent individuals from abuse of remedies and a matter being reviewed by several bodies at the same time. see COHEN - JONATHAN in “La Convention Européenne de Sauvegarde des Droits de l’Homme et des Libertés Fondamentales”, Economica, Paris, 1989 page 143 where it is said that this condition was provided precisely to “exclude cumulative international procedures.”

51. This condition is provided for in all international investigation or settlement mechanisms (Art. 35.2.b of the European Convention of Human Rights, Art. 56.7 of the African Charter of Human and Peoples’ Rights, Art. 46.c. of the American Convention of Human Rights, Art. 5.2.a) of the first Optional Protocol to the International Covenant on Civil and Political Rights), originating in the idea of avoiding the same case being brought before several international bodies.

52. However, interpretation of this rule revealed, as noted by Stefan TRECHSEL in *Die europäische Menschenrechts-konvention, ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte*, Stämpfli Bern, 1974, pp. 125, that it “*is not limited to the ‘non bis in idem’ principle, but also encompasses concurrent proceedings, since it only requires that the submission has been brought before another international body in substance. Thus it is about avoiding parallelism of different international proceedings on the one hand, and avoiding any conflict between various international bodies on the other hand. As a matter of fact, there is no hierarchy between them and none of them would have authority to review decisions taken by another one.*”

53. Therefore, the ECOWAS Community legislature, when drafting the provision in Article 10 d. ii. of the Supplementary Protocol, meant to remain within the strict limits of what international practice believed had to be respected. Thus it is not for this Court to add to the Supplementary Protocol conditions that are not provided for by the texts.

### **ON THE APPLICANT’S QUALIFICATION**

54. The defendant in its last brief and in its rejoinder of 9 April 2008 argued that the applicant was not qualified. It argued that since Mrs. Hadijatou Mani Koraou was a liberated *wahiya* when she submitted her application, she was not a slave any more. Thus

she could have submitted her application before her liberation but since she had not done so, her application had become ineffective and should be declared inadmissible.

55. This late preliminary objection submitted shall be declared inadmissible. Moreover, according to the provisions of Article 9.4 and 10.d of its Supplementary Protocol, “The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State... Access to the Court is open to ... individuals on application for relief for violation of their human rights.”

56. It should be underlined that since human rights are inherent to the human being, they are “inalienable, inprescriptible and sacred” and do not suffer any limitation.

Consequently the Court declares Mrs. Hadijatou Mani Koraou’s application to be admissible.

### **ON THE MERITS**

57. The applicant presented several grounds of violation of her human rights. First of all, she claimed that the defendant did not take appropriate measures to ensure rights and freedoms proclaimed in the African Charter of Human and Peoples’ Rights, thus violating Article 1 of the Charter. She argued that this violation derives from other violations enshrined in other arguments submitted to this Court, since Article 1 of the African Charter gives Member States the obligation to respect those rights, and that under Article 1, “The Member States ... shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.”

58. Additionally, the applicant argued that according to Nigerien legislation, “the Republic of Niger respects the rule of law; it assures equality before the law, without any distinction on the grounds of gender, social, racial, ethnic or religious origin to all” (1996 Constitution, Article 11). “No one shall be submitted to torture or other cruel, inhuman or degrading treatment or punishment (1996 Constitution, Article 12). “Any person ... who would be responsible for acts of torture, ... or cruel, inhuman or degrading treatment... will be punished in accordance with the law” (Constitutions of 1989 and 1992, Art. 14).

59. The applicant claims that despite this legislation, she was victim of discrimination on gender and social origin grounds since she was held in slavery for nearly 9 years; that after her liberation she could not enjoy her freedom despite her lawsuits; that she was detained and that all these actions contributed to the deprivation of her fundamental rights. Therefore she requests condemnation of the defendant for violating the aforementioned articles of the African Charter of Human and Peoples’ Rights and urges adoption of new laws that better protect women’s rights against discriminatory customs.

60. On this first ground, the Court affirms that its role is not to examine Community Member States’ laws *in abstracto*, but rather to ensure protection of people’s rights when



they are victims of violations of those rights and that it must do so by examining concrete cases brought before it.

More precisely, the Court asserts that such a review is done by other mechanisms, as it is with country situation monitoring, and periodic reports as provided for by some international instruments such as Article 62 of the African Charter of Human and Peoples' Rights, according to which: "Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."

61. In that respect, the Court notes that such reviews have already taken place with regard to the Republic of Niger, notably before the United Nations Human Rights Committee and the Committee for the Rights of the Child, which contained recommendations.

Therefore, the Court declares that it will not go beyond its jurisdiction, which mostly consists of reviewing concrete cases of human rights violations and sanctioning them.

### **ON THE DISCRIMINATION**

62. The applicant claimed that she was a victim of discrimination on gender and social origin grounds, in violation of Articles 2 and 18(3) of the African Charter of Human and Peoples' Rights. She further argued that she did not enjoy *equal protection of the law and equality before the law* as provided for by Article 3 of the Charter. More precisely, she said that the *Sadaka* or the sale of a woman to a man to serve as a *concubine* is a practice that affects women only and therefore constitutes discrimination based on gender. Moreover, the fact that she could not consent freely to marriage or divorce represents discrimination based on her social origin.

63. According to the sociologist Mr. Djouldé Laya's testimony, quoted by the defendant during the hearing held on Tuesday, 8 April 2008 in Niamey, "as far as the *wahiya* is concerned, it is not said that she is liberated since she is a slave. Thus she is someone's property... The *wahiya* or 5<sup>th</sup> wife system was set up by the slave owners... I consider that the woman cannot leave her *wahiya* state... It is a system that allows women to go from one status to another, which means that slavery continues elsewhere, since women have still to be caught, war had to be done, one must buy..."

64. Having examined the applicant's arguments on discrimination, equality before the law and of the law, the Court says, as underlined by Frédéric Sudre in his book: *le droit international et européen des droits de l'homme*, éd. 2005, page 259, "the non-discrimination principle derives from the general statement that "all human beings are born free and equal in dignity and in rights" (Article 1 of the Universal Declaration of Human Rights). It is this principle that allows for a definition in the field of equality.

65. According to the texts invoked by the applicant, any discrimination based on race, ethnicity, gender, religion, or social origin, is prohibited and constitutes a violation of

human rights, recognised by Niger's different Constitutions (1989, 1992 and 1996), as well as provisions of the Nigerien criminal code.

In this particular case, to determine whether the applicant was a victim of discrimination, the *wahiya* or *sadaka* practice must be analysed as it was described by witnesses, to find out if all women are equal in rights regarding marriage on the one hand, and if the man and the woman can equally enjoy rights and freedoms that are proclaimed in international instruments ratified by the defendant.

66. The Court notes that in Niger, the marriage celebration is established by the payment of the dowry, the woman's consent and a religious ceremony. In the present case, the Court observes that Mr. El Hadj Souleymane Naroua, former master of the applicant, refused to comply with the marriage obligations or conditions.

Indeed, the applicant's witness Halidou Danda, farmer and breeder, declared at the hearing on Monday 7 April 2008: "we were convened by the Prefect in its cabinet to be told that he had received a paper from Niamey saying that we had to hand his wife over to El Hadj Souleymane Naroua. The Prefect asked him: do you want to remarry her since you have liberated her? If so, bring the cola and we will marry you again. El Hadj Souleymane Naroua said: no! I don't want to marry her since God has already married us."

67. Besides, the applicant's witness Almou Wangara, farmer, declared: "when Hadijatou's former master was asked to bring the dowry, he said that it was God who had given him the woman and he was being asked money for the dowry! The Prefect told the former master: "since you have already liberated her, what you have to do is to give the dowry, we will beg her to accept the marriage. The former master stood up and said: no, how! I am going to buy that woman and I am going to be asked the dowry?... After this reaction the Prefect said: listen, *I cannot do anything, you must leave.*"

68. The Court notes that, convened by the administrative authority, the Prefect, the applicant's former master refused not only to abide by the marriage formalities, but also to free her, despite the liberation certificate.

69. In Niger, the marriage celebration is established by the dowry payment and the mandatory holding of a religious ceremony. However, in the present case, El Hadj Souleymane Naroua did not accomplish any of the customary or civil requirements with regard to the applicant.

70. Moreover, the Court observes that in her former master's family, the applicant was subject to a different treatment than the other wives.

71. The Court notes that, while the argument based on discrimination, which was exposed by the applicant for the first time before this Court is founded, this violation is not attributable to the Republic of Niger since it is due to El Hadj Souleymane Naroua, who is not party to the present procedure.

Therefore the Court concludes that this ground is ineffective.

### **WAS THE APPLICANT HELD IN SLAVERY?**

72. The applicant claims that she was held in slavery in violation of Article 5 of the African Charter of Human and Peoples' Rights as well as other international human rights instruments that provide for the absolute prohibition of slavery.

She declared that her parents were slaves themselves and she was always treated as such in her former master El Hadj Souleymane Naroua's household.

73. The defendant for its part rebutted the slavery argument and argues that the applicant, despite her slave status, was El Hadj Souleymane Naroua's wife, with whom she lived with more or less in happiness as any couple.

74. According to Article 1 of Geneva Slavery Convention of 1926, "*Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*"

*"The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."*

75. Slavery is considered as a serious violation of human dignity and is formally prohibited by all international human rights instruments. Other instruments, such as the European Convention of Human Rights (Art.1 para. 1), the American Convention of Human Rights (Art. 6), and the International Covenant on Civil and Political Rights (Art. Para. 1.2 ratified by the Republic of Niger) make prohibition of slavery an inviolable right, that is to say an absolute and non-derogable right.

Similarly, the Nigerien criminal code, as revised by Law No 2003-05 of 13 June 2003, provides for a definition and punishment of the crime of slavery in its former Article 270.1 to 5.

76. According to the above, it is well established that Mrs. Hadijatou Mani Koraou was transferred in exchange for money at the age of twelve (12) by El hadji Ghousmane Abdourahmane for the sum of two hundred forty thousands (240.000) CFA francs to El Hadj Souleymane Naroua. She was brought to her purchaser. She was subject for nearly a decade to psychological pressure characterised by submission, sexual exploitation, hard labour in the house and the fields, physical violence, insults, humiliation and the permanent control of her movements by her purchaser who issued, on 18 August 2005, a document entitled "*liberation certificate (of slave)*", mentioning that from the date of signature of the act "*she (the applicant) was free and was nobody's slave.*"

77. These elements characterise the applicant's slave situation and show all the indicators of the slavery definition contained in Article 1 of the 1926 Geneva Convention, as interpreted by the International Criminal Tribunal for ex-Yugoslavia (ICTY) Appeals Chamber in Prosecutor v Dragoljub Kunarac, Radomir Kovac and Vukovic Zoran Case, Judgment of 12 June 2000, paragraph 119.

According to this jurisprudence, apart from exercising the powers attached to the right of ownership typical of the notion of slavery, it also depends "*on the operation of the factors or indicia of enslavement ... These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."*

78. The defendant, while acknowledging that slavery survives, observed that this practice has become more discreet and confined to very restricted social circles. It argued that the applicant was El Hadj Souleymane Naroua's wife, with whom she lived with more or less in happiness as any couple until 2005, and that children were born from this union.

79. The Court does not admit such an argument since it is now well-established that: "*Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.*" cf. judgment of 3 November 1947, in Trials of Major War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. 5, 1997, page 958 quoted by the ICTY in the United States v Oswald and Others.

80. The Court notes that in the present case, apart from the material acts well established, the moral element of enslavement lies in El Hadj Souleymane Naroua's intention to exercise the powers attached to the right of ownership over the applicant, even after the liberation act.

Consequently, there is no doubt that the applicant, Hadijatou Mani Koraou, was held in slavery for nearly nine (09) years in violation of the legal prohibition of this practice.

81. Under Nigerien criminal law, as in international instruments, the prohibition and repression of slavery are absolute and of public order. As stated by the International Court of Justice in the Barcelona Traction judgment (5 February 1970), "the outlawing of slavery is an obligation *erga omnes* imposed on all State's organs."

82. Therefore, the national judge, when having to rule on a matter relating to the state of persons, as in the case of Mrs. Hadijatou Mani Koraou before the Court of First Instance of Konni, should deal with this slavery case of its own volition and initiate the punishment procedure.

83. In conclusion, on this point, the Court observes that the national judge, having to rule on Mrs. Hadijatou Mani Koraou's application against Mr. El Hadj Souleymane Naroua, instead of denouncing the applicant's slave status with its own motion as being a violation of Article 270.1 to 5 of the Nigerien criminal code as modified by Law No. 2003-025 of 13 June 2003, stated that "the marriage of a free man with a slave woman is lawful, as long as he cannot afford to marry a free woman and if he fears to fall into fornication..."

84. The Court considers that recognising the slave status of Mrs. Hadijatou Mani Koraou without denouncing this situation is a form of acceptance, or at least, tolerance of this crime or offence. The national judge had the obligation to bring a criminal prosecution or punish this crime or offence as need be.

85. Furthermore, the Court considers that the slavery situation of the applicant, although it was due to a particular individual acting in a so-called customary or individual context, gave her the right to be protected by the Nigerien authorities, be they administrative or judicial.

Consequently, the defendant becomes responsible under international as well as national law for any form of human rights violations of the applicant founded on slavery because of its tolerance, passivity, inaction and abstention with regard to this practice.

86. When failing to deal with a prohibited offence of its own volition and failing to take adequate measures to ensure punishment, the national judge did not assume its duty of protecting Hadijatou Mani Koraou's human rights and therefore, engaged the defendant's responsibility as the administrative authority's one when it declared: "listen, I cannot do anything, you must leave."

87. Besides, the applicant argues, on the basis of international texts, notably paragraph 1(c) and (g) of Article 7 of the International Criminal Court Statute, that her slave status is a crime against humanity.

88. While it is true that slavery is among the constitutive elements of crimes against humanity, it should be noted that in order to constitute a crime against humanity, slavery must be committed "as part of a widespread or systematic attack", as provided for by Article 7 of the Rome Statute of the International Criminal Court.

89. The jurisdiction to conduct such assessment is the one of other international mechanisms and more precisely of International Criminal Courts.

The present Court does not have jurisdiction to assess this argument's merits.

#### **WERE THE APPLICANT'S ARREST AND DETENTION ARBITRARY?**

90. The applicant argued that her arrest on 9 May 2007, as well as her detention in

Konni's prison are arbitrary and constitute a violation of Article 6 of the African Charter of Human and Peoples' Rights. According to her the offence of bigamy is not constituted since she was not married to El Hadj Souleymane Naroua. It is established that this detention is subsequent to his complaint; her arrest and detention were decided following this criminal complaint by her former master before the criminal court in Konni.

91. Detention is arbitrary if it is not founded on any legal basis. In this particular case, the applicant's arrest and detention intervened to implement a judicial decision rendered by the criminal court. This decision, whether ill-founded or not, constitutes a legal basis, that is not for the Court to assess.

Therefore, the Court considers that this argument cannot prosper.

### **IS THE APPLICANT ENTITLED TO REPARATION?**

92. In her brief of 07 April 2008, the applicant claims the payment by the Republic of Niger of the sum of fifty millions (50.000.000) francs as reparation for the harm she suffered.

93. In response, the defendant says that it is a new argument and invokes Article 37.2 of the Rules of Procedure of the Court and concludes that the reparation claim is inadmissible.

94. The Court recalls that the inadmissibility provided for in Article 37.2 of the Rules of Procedures is about new arguments invoked by a party during the proceedings. In this particular case, the quantification of the requested reparation does not amount to a new argument but rather is a detailed quantification of the reparation request contained in the initial submission.

Therefore, the defendant's argument is rejected.

95. To support her reparation request, the applicant did not provide the Court with any calculation hint that would allow it to decide on a specific sum of money in reparation for the alleged harm. The Court concludes that an all-inclusive sum of money can be granted to her.

96. The analysis of the facts clearly shows that the applicant was subject to physical, psychological and moral harm due to the nine (09) years during which she was held in slavery. This justifies the allocation of compensation as reparation for the harm suffered.

### **CONSEQUENTLY**

1. Where texts do not provide for particular admissibility conditions the Court does not impose more cumbersome ones.

2. The *wahiya* or *sadaka* practice founded on social origin considerations put the applicant in a disadvantageous situation and excluded her from the benefits of the equal dignity recognised to all citizens. Thus she was discriminated because of her social origin. However this discrimination is not attributable to the Republic of Niger.
3. The Court notes that the Republic of Niger did not sufficiently protect the applicant's rights against the practice of slavery.
4. This slavery situation caused the applicant physical, psychological and moral harm.
5. For this reason, the applicant is entitled to an all-inclusive compensation for the harm caused by slavery.

### **ON THESE GROUNDS**

The ECOWAS Community Court of Justice, ruling in public, in the presence of the parties involved, on human rights matters, in the first instance and last resort,

- In view of the ECOWAS Revised Treaty of 24 July 1993,
- In view of the Universal Declaration of Human Rights of 10 December 1948,
- In View of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979,
- In View of the Slavery Convention of 25 September 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956,
- In view of the African Charter of Human and Peoples' Rights of 27 June 1981,
- In view of the Protocol of 06 July 1991 and the Supplementary Protocol of 19 January 2005 relating to the ECOWAS Community Court of Justice,
- In view of the Court's Rules of Procedure of 28 August 2002,
- In view of the interim decision N0. ECW/CCJ/APP/08/08 of 24 January 2008,

### **ON THE FORM**

- Rejects the Republic of Niger's preliminary objections on inadmissibility on all points;
- Declares Mrs. Hadijatou Mani Koraou's application admissible and says she is qualified to submit it;

### **ON THE MERITS**

1. Says that the discrimination to which Mrs. Hadijatou Mani Koraou was subject is not attributable to the Republic of Niger;
2. Says that Mrs. Hadijatou Mani Koraou was victim of slavery and that the Republic of Niger is responsible because of its administrative and judicial authorities' inaction;

3. Accepts Mrs. Hadijatou Mani Koraou's request for reparation for the harmed suffered and grants an all-inclusive compensation of ten millions cfa francs (10.000.000);
4. Rules the payment of this sum to Mrs. Hadijatou Mani Koraou by the Republic of Niger;
5. Rejects all others grounds presented by Mrs. Hadijatou Mani Koraou;
6. Says the Republic of Niger has to pay the expenses, in accordance with Article 66.2 of the Court's Rules of Procedure.

Signatures

- Hon. Justice Aminata Mallé SANOGO, President
- Hon. Justice Awa Daboya NANA, Member
- Hon. Justice El-Mansour TALL, Member
- Assisted by Mr. Athanase ATTANON, Registry