

COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNATE,
CEDEAO
TRIBUNAL DE JUSTICA DA COMUNIDADE,
CEDEAO



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

In the Matter of

**1. REPUBLIC OF NIGER & SEVEN OTHERS
(APPLICANTS)**

v

**1. THE AUTHORITY OF HEADS OF STATE AND
GOVERNMENT, ECOWAS
2. THE MEDIATION AND SECURITY COUNCIL, ECOWAS
3. THE ECOWAS COMMISSION
(RESPONDENTS)**

Application No. ECW/CCJ/APP/34/23; Ruling No. ECW/CCJ/RUL/05/23

RULING

ABUJA

7 DECEMBER 2023

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

Application No. ECW/CCJ/APP/34/23; Ruling No. ECW/CCJ/RUL/05/23

1. REPUBLIC OF NIGER & SEVEN OTHERS
(APPLICANTS)

v

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ECOWAS
2. THE MEDIATION AND SECURITY COUNCIL, ECOWAS
3. THE ECOWAS COMMISSION
(RESPONDENTS)

COMPOSITION OF THE COURT:

Hon. Justice Edward Amoako ASANTE	- Presiding/ Judge Rapporteur
Hon. Justice Gberi-Be OUATTARA	- Member
Hon. Justice Dupe ATOKI	- Member

ASSISTED BY:

Dr. Yaouza OURO-SAMA	- Chief Registrar
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REPRESENTATION OF PARTIES:

Maitre Mounkaila Yaye;

Maitre Ismaril Tambo Moussa;

Maitre Yankori Souleymane;

Maitre Ahmed Mamane;

Maitre Kadri Oumarou Sonda; and

Brown Iyobosa Osarenkhoe Esq

-Counsel for the APPLICANTS

Maitre Francois Konga

-Counsel for RESPONDENTS

I. RULING

1. This is a ruling 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. The first to eighth Applicants respectively are: (i) Republic of Niger, an ECOWAS Member state; (ii) Dr Fatimata Moussa, a national of the Republic of Niger resident in Niamey; (iii) la Societe Nigeriene d'Electricite, a semi-public limited company which has its registered office in Niamey, Republic of Niger; (iv) la Chambre de Commerce et d'Industrie du Niger (Niger Chamber of Commerce and Industry) a professional body which has its registered office in Niamey, Republic of Niger; (v) Le Conseil des Users des Transport Publics (Nigerien Council of Public Transport Users) an industrial and commercial body with its head office in Niamey, Republic of Niger; (vi) Le Conseil National de l'Ordre des Pharmacisens du Niger (National Council of the Association of Pharmacists of Niger) with its head office in Niamey, Republic of Niger; (vii) La Chambre d'Agriculture du Niger (Niger Chamber of Agriculture) which has its head office in Niamey, Republic of Niger; and (viii) Le Syndicat des Commerçants Importateurs du Niger (Importers and Traders Union of Niger) which has its head office in Niamey, Republic of Niger.
3. First Respondent is the Authority of Heads of State and Government of the Economic Community of West African States ('the ECOWAS Authority').

4. Second Respondent is the Mediation and Security Council of the Economic Community of West African States ('the ECOWAS Mediation and Security Council').
5. Third Respondent is the ECOWAS Commission.

III. INTRODUCTION

Subject Matter of the Proceedings

6. The present application for provisional measures seeks an order of the Court to suspend the execution of Decisions MSC.A/DEC.05/07/23 (30 July 2023) and MSC.A/DEC.05/08/23 (10 August 2023) adopted by the ECOWAS Authority to impose certain sanctions aimed at restoring constitutional order in the Republic of Niger.

IV. PROCEDURE BEFORE THE COURT

7. Applicants commenced this case by an Initiating Application dated 28 August 2023 which they filed at the Registry of the Court on 31 August 2023. On the same day, Applicants filed in a separate document an application for provisional measures. Both the initiating Application and the Application for provisional measures were served on the Respondents on 4 September 2023.
8. At the sitting of the Court on 21 November 2023, the Court heard submissions of the Parties on the provisional measures application and adjourned to deliberate for a reasoned ruling on the application.

V. APPLICANTS' CASE

a. Summary of Facts

9. On Wednesday 26 July 2023, the armed forces of the Republic of Niger overthrew the government of President Mohammed Bazoum, the democratically elected President of the country, and installed la Conseil National pour la Sauvegarde de Patrie (*National Council for the Safeguard of the Homeland*) ('the CNSP'). The CNSP which is headed by the former commander of the Presidential Guard, General Abdourahamane Tiani, now exercises the powers of government in the country.

10. In response, the ECOWAS Authority during an extraordinary meeting held on 30 July 2023 in Abuja, Nigeria, decided to impose the following measures on Niger with immediate effect:
 - i. The closure of land and air borders between ECOWAS countries and Niger.
 - ii. The establishment of an ECOWAS exclusion zone for all commercial flights to or from Niger.
 - iii. The suspension of commercial and financial transactions between ECOWAS member states and Niger.
 - iv. The freezing of all service transactions including utilities.
 - v. The freezing of the assets of the Republic of Niger in the ECOWAS central banks.

- vi. The freezing of the assets of the Republic of Niger and those of its parastatal companies held in commercial banks.
- vii. The suspension of Niger from all forms of financial assistance and transactions with all ECOWAS financial institutions, especially EBID and BOAD.
- viii. A travel ban and asset freeze on military officers involved in the coup attempt. These measures also apply to the members of their families and to civilians who agree to be part of any institution or government to be set up by these military officers.

11. Applicants say that the ECOWAS Authority also called on the West African Monetary Union (UEMOA) and all other regional bodies to implement its decision. Further to this, the ECOWAS Authority in another extraordinary session on 10 August 2023 decided:

- i. To reaffirm all measures and principles agreed during the Extraordinary Summit on Niger held on 30 July 2023.
- ii. To enforce measures, including those relating to the closure of borders, travel bans and the freezing of assets of persons or any groups of persons whose actions have the effect of impeding peaceful efforts to ensure the speedy and full restoration of constitutional order.

- iii. To instruct the Committee of Chiefs of Defence Staff to activate without delay the ECOWAS Standby Force with all its elements.
- iv. To order the deployment of the ECOWAS Standby Force to re-establish constitutional order in the Republic of Niger.

12. According to Applicants, these decisions of a political, diplomatic, economic, and social nature, not only contravene Community legal instruments and binding norms of international law, both for Member States and the organisation itself, but also inflict economic, financial, social, and human suffering on the people of the Republic of Niger, a landlocked country.

b. *Reliefs Sought*

13. Applicants say that the present application for provisional measures, is to prevent excessive, irreparable consequences and damage for the civilian population of Niger. Accordingly, they request that, pending the determination of the main Application, the Court order the following provisional measures:

- i. the suspension of all politically and economically binding sanctions against the Republic of Niger and its population resulting from the decision MSC.A/DEC/5/07/23 of 30 July 2023 until the merits of the case are decided;

- ii. the suspension of decision MSC.A/DEC.6/08/23 dated 10 August 2023 ordering, especially, the activation and deployment of the ECOWAS Standby Force against Niger until the merits of the case are decided; and
- iii. that all ECOWAS Member States and ECOWAS Institutions comply with the provisions of Article 23(2) of the Protocol of the Court 1991 (as amended).

c. Legal Submissions of the Applicants

14. On jurisdiction, Applicants submit that the Court has competence to rule on the application pursuant to Article 9 (1)(c) and (2) of the Protocol of the Court as well as Articles 1, 2, 10, and 23 of the Protocol of the Court.
15. Regarding admissibility, Applicants state that Article 21 of the Protocol of the Court indicates that the Court may order any provisional measure it deems necessary or appropriate whenever it is seized of a dispute. The application for provisional measures must be made in a separate document and in accordance with Articles 32 and 33 of the Rules of the Court. Applicants contend that the application is admissible since it complies with the Rules of the Court, having been submitted as a separate document after the Initiating Application was filed.
16. Regarding the merits of the application, Applicants submit that by Article 79 of the Rules of the Court, applications for provisional

measures under Article 21 of the Protocol of the Court, must specify the subject matter of the dispute, circumstances demonstrating the urgency of the measures sought, and the pleas in law and fact which justify, prima facie, the granting of the provisional measures sought.

17. According to applicants, the requirement of urgency for provisional measures is satisfied where the measures are needed to avoid serious and irreparable harm to the party requesting the measures. That such would be the case where, without the intervention of the Court, imminent and irreparable harm will be done to the rights or interest of the party requesting the measures. Applicants say that the requirement of urgency is met in this case given the serious economic, financial, social, and human consequences of the measures taken by the Mediation and Security Council and by the ECOWAS Authority. The sanctions have had far reaching consequences for Niger, its citizens, and its business community, hindering the free movement of capital, goods and services. There are tens of thousands of Nigerien students and interns who have to travel to continue their studies but are blocked due to the sanctions. Also, the sudden cut of electricity supply by Nigeria, as part of the sanctions, has deprived hospitals of electricity and is precariously impacting the living conditions of the population.

18. Further, Applicants say that the closure of land and air borders has deprived the Nigerien citizens of the freedom of movement and trade guaranteed to all Community citizens by ECOWAS legal instruments. That these measures are exacerbated by the geographical disadvantage of Niger, a landlocked country, since it is no longer able to use seaports

of neighbouring Member States for shipment of essential goods into the country. That these measures, together with an embargo on basic necessities such as food, pharmaceutical products and medical equipment are having an extremely damaging impact on ability of the people of Niger to access healthcare.

19. Applicants also state that the freezing of the assets of the Republic of Niger and those of its parastatal agencies or companies in the central and commercial banks of ECOWAS states presents serious consequences for the civilian population. The implementation of these sanctions has led to delays in the payment of salaries to state employees, creating a dire socioeconomic situation for the vulnerable civilian population. Applicants say that given the fact that these assets belong to the State and not the transitional military government, their freeze is unacceptable and unlawful especially given the consequences of the measure for the vulnerable population of the country.

20. In light of these circumstances and having regard to the fact that the country is facing a subregional threat of terrorism, there is an urgent case for the Court to order the suspension of the measures imposed on Niger.

21. On the pleas of law and fact that establish a prima facie case for the provisional measures applied for, Applicants refer to Articles 7(3) and 59 of the ECOWAS Revised Treaty 1993 and Article 45 of the ECOWAS Supplementary Protocol on Democracy and Good Governance (A/SP1/12/01). Applicants state that the closure of land

and air borders do not only violate the freedom of movement of persons and goods under Article 59 of the ECOWAS Revised Treaty, but also Article 45 of the Protocol on Democracy and Good Governance since they are not among the sanctions that may be imposed for unconstitutional changes of government. That also, the drastic and unprecedented sanctions (especially the embargo on essential foodstuffs and pharmaceutical products violate Regulation MSC/REG.1/08 relating to the ECOWAS Conflict Prevention Framework 2008, the objective of which is to eliminate pervasive threats to people's rights, livelihoods, and safety.

22. Applicants further state that, on a proper interpretation of Article 77 of the ECOWAS Revised Treaty, the financial sanctions taken against Niger are only applicable in the event of a breach by a Member State of its obligations towards the Community and do not apply in the event of a breach of democratic order. Accordingly, the freezing of Niger's assets in central banks and those of its parastatal institutions in the commercial banks of members states is arbitrary, unjust, and illegal.

23. That in any event, by Article 9(6) of the ECOWAS Revised Treaty, sanctions imposed on Member States are 'automatically enforceable sixty days (60) after the date of their publication in the Official Journal of the Community'. Yet, the decisions of the ECOWAS Authority to impose sanctions on Niger were declared to be immediately applicable and were immediately implemented.

24. Finally, that the decision of the ECOWAS Authority to authorize a military intervention to restore deposed President, Mohamed Bazoum, through the activation of the ECOWAS Standby Force is illegal as it violates Article 46 of the Protocol on Democracy and Good Governance, Article 1 of the ECOWAS Protocol on Non-Aggression 1978 (as amended), and Article 53 of the Charter of the United Nations which requires that ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council’.

25. On the whole, the decisions of the ECOWAS Authority to impose sanctions on Niger are manifestly irregular, illegal, and unjustified. Therefore, given the serious doubts about the legality of the sanctions, Applicants have satisfied the requirement of establishing a prima facie case for the provisional measures. They call upon the Court to declare that it has prima facie jurisdiction, that the application is prima facie admissible, that there is an urgency for ordering provisional measures, and to order the measures requested in this Application for provisional measures.

VI. RESPONDENTS’ CASE

a. *Summary of Facts*

26. Respondents say that on 26 July 2023, elements of the Armed Forces of the Republic of Niger overthrew the government of President Mohamed Bazoum. La Conseil National pour las Sauvegarde de la

Patrie (CNSP) (*National Council for the Safeguard of the Homeland*) was immediately created, headed by General Abdourahamane Tiani, former commander of the Presidential Guard, who from that point claimed to exercise the executive powers of the state.

27. In response to the armed seizure of power which was strongly condemned by ECOWAS and the international community, the ECOWAS Authority had no choice than to impose measures necessary for the restoration of constitutional order. That these are the measures the Applicants are challenging in this case.

b. Preliminary Objection

28. Respondents contend that since 26 July 2023, the date of the coup d'état which overthrew the government of President Mohamed Bazoum, all bodies appointed or established by the CNSP, or acting on its behalf are illegitimate.

29. Accordingly, the present action initiated by the Legal Agent of the State on behalf of the CNSP, an entity not recognised by ECOWAS, cannot be admitted by the Court. Similarly, Respondents submit that since the main application submitted by Niger is inadmissible, the Court cannot admit an application for provisional measures that is connected to it.

30. Respondents further submit that under Article 9 of the Court's Protocol, persons with interests distinct from those of Niger, presently led by the military junta, can bring their cases before this Court. However, in this case, the interests of the persons and entities suing with the Republic of

Niger are directly linked to those of Niger as currently controlled by the junta. Therefore, since the other Applicants in the case share common interests with the military junta of Niger, admitting the present application based on the standing of the remaining Applicants would indirectly serve the junta's interests and lend credence to the unconstitutional change of government.

31. For these reasons, Respondents contend that the Court must declare the substantive application and the request for provisional measures by the Republic of Niger and its co-applicants inadmissible.

VII. ANALYSIS OF THE COURT ON THE REQUIREMENTS FOR PROVISIONAL MEASURES

32. Applications for provisional or interim measures are governed by Article 21 of the Protocol of the Court which states: "The Court, each time a case is brought before it, may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable."

33. This provision is supplemented by Article 79 of the Rules of the Court which states: "(1) An application under [Article 21] of the Protocol shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. (2) The application shall

be made by a separate document in accordance with the provisions of Articles 32 and 33 of these Rules.’’

34. In *Godswill Mrakpor & 5 Others v Authority of Heads of State and Government, ECOWAS & Another* [2011] CCJELR 75, the Court considered Article 21 of the Protocol together with the relevant provisions of the Rules of the Court with the view to clarifying the requirements that should be met for the grant of provisional measures. The Court deduced from “the combined reading of these provisions that the Court would not be in a position to order the interim (or provisional) measures asked for except upon the fulfilment of three conditions:

- a) If it is competent *prima facie* to adjudicate on the substantive case or if it is not manifestly incompetent to adjudicate on the substantive applications filed;
- b) If the substantive application is *prima facie* admissible or if it is not manifestly inadmissible; and
- c) If there is urgency in regard to the circumstances of fact and law invoked in support of the application for interim measures.’’ (*Godswill Mrakpor v Authority of Heads of State and Government* [2011] CCJELR 75, para 17).

35. This statement of the law was subsequently affirmed in *Hissein Habre v Republic of Senegal* [2013] CCJELR 287, 300 (paras 34-35). Guided by these precedents, the Court must in this case decide (a) whether, *prima facie*, it has jurisdiction over the substantive application or it is not manifestly incompetent to entertain it; and (b) whether the substantive application is, *prima facie*, admissible or at least not

manifestly inadmissible. It is only after these two requirements are cumulatively satisfied that the Court may consider the merits of the request for provisional measures, guided by whether ‘there is urgency in regard to the circumstances of fact and law invoked in support of the application for interim measures.’

36. Accordingly, the Court will now proceed to consider each of these legal requirements in turn, beginning with the question of *prima facie* jurisdiction.

VIII. PRIMA FACIE JURISDICTION OF THE COURT

37. The Court begins by noting that for provisional measures, the jurisdictional standard is for the Court to ascertain “if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.” (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) (Provisional Measures)* [2018] ICJ Reports 406, para 14).

38. With regards to jurisdiction, Applicants approach this Court on the basis of Article 9(1)(c) and (2) of the Protocol of the Court which respectively provide: ‘The Court has competence to adjudicate on any dispute relating to the following:

9(1)(c) the legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS.

.....

9(2) The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparations for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions’.

39. Following the unconstitutional change of government in Niger, the ECOWAS Authority met twice in extraordinary session and adopted Decision MSC.A/DEC.05/07/23 (30 July 2023) and Decision MSC.A/DEC.05/08/23 (10 August 2023) to impose certain measures of sanction aimed at restoring constitutional order in Niger. It is the legality of these measures that Applicants challenge in their substantive application.

40. Article 9(1)(c) and (2) of the Protocol of the Court vests the Court with the power to determine the legality of ECOWAS decisions or directives and non-contractual liabilities arising from any official acts or omissions of ECOWAS Institutions or their officials. Taking account of these provisions and the fact that the measures imposed on Niger, which the Applicants challenge in this case, are official decisions of ECOWAS taken by its highest organ, the Authority of Heads of State

and Government, the Court concludes that it has *prima facie* jurisdiction over the substantive application filed by the Applicants.

IX. PRIMA FACIE ADMISSIBILITY OF THE CASE

41. The Court recalls that one of the grounds on which it has traditionally assessed admissibility including for applications brought under Article 9(1) of the Protocol of the Court, is the capacity of the Applicant to bring the claim. (*See Aristides Gomes v Republic of Senegal and 3 Others* ECW/CCJ/JUD/08/23, paras 67-81).
42. In this case, Respondents have raised a challenge to admissibility on the grounds that the First Applicant, the Republic Niger, and the other persons and entities suing as applicants with Niger lack the capacity to file the substantive application.
43. In relation to the Republic of Niger, Respondents contend that it is currently controlled by a military junta which seized power unconstitutionally in violation of ECOWAS legal instruments and which ECOWAS does not recognise. That since such an unconstitutional government which has been denounced by ECOWAS and the international community cannot be legally deemed to represent the country, the Republic of Niger as currently controlled by the junta lacks capacity in the ECOWAS Court, making the application inadmissible.

44. Concerning the other persons and entities joining as co-applicants with Niger, Respondents argue that ordinarily, both individuals and legal entities may invoke Article 9(2) of the Protocol of the Court for the determination of acts or omissions by Community officials that violate their rights. However, in this case, the individuals and entities suing alongside the Republic of Niger do not possess distinct interests of their own. Instead, they are pursuing the same legal outcome that the Republic of Niger, which is currently under the control of a military junta, does not have the capacity to claim. Consequently, the application is equally inadmissible with respect to those co-applicants.

**(a) *The Court's Analysis on Capacity of the First Applicant,
Republic of Niger***

45. The Court recalls its observation in *Aristides Gomes v Republic of Senegal and 3 Others* ECW/CCJ/JUD/08/23, 'that as an artificial entity, a state cannot act by itself on the international plane; therefore, it is the government of the state that may act on its behalf in judicial or arbitral proceedings.' (para 68).

46. In the context of this request for provisional measures, the Court notes again that the relevant standard is whether the substantive application is, *prima facie*, admissible or at least not manifestly inadmissible. (See *Godswill Mrakpor v Authority of Heads of State and Government* [2011] CCJELR 75, para 17 and *Hissein Habre v Republic of Senegal* [2013] CCJELR 287, paras 34-35). The ground of admissibility implicated here is capacity. Therefore, the only question the Court must

decide here, is whether, *prima facie*, the entity committing the Republic of Niger to these proceedings is the government of Niger within the meaning of relevant international law including ECOWAS legal texts, and therefore has standing, *prima facie*, to launch these proceedings.

47. In the *Aristides Gomes* case, the Court noted that ‘an entity may be considered the government of a state, if it is a stable political organisation that objectively has effective administrative control over the territory and generally enjoys obedience from the population.’ (*Aristides Gomes v Senegal and 3 Others* ECW/CCJ/JUD/08/23, para 69). The Court further observed that under rules of general international law, an entity that meets the aforementioned criteria is regarded as ‘the government of the state regardless of whether it ascended to power through unconstitutional or illegitimate means and irrespective of whether other state recognise its legitimacy.’ (*Aristides Gomes*, para 70).

48. That said, the Court was careful to explain the exception to this general rule of international law, as reflected in the right of states, whether individually or collectively, to decide whether and on what grounds to recognize or deal with governments that ascend to power illegitimately. Accordingly, the Court stated:

However, international law also permits states to decide whether they recognise a particular entity as the government of another state and to determine the extent to which they wish to have economic, political, or diplomatic relations with such a

government. Individual states may, therefore, make ascension to power by democratic or constitutional means a condition for recognising and dealing with the government of another state. Similarly, within the context of international organisations, members may collectively establish rules requiring that governments of member states must come to power through democratic or constitutional means for them to be recognised as such. **An example of the latter is the common prohibition of unconstitutional changes of governments within ECOWAS and the African Union, and the requirement that the government of member states must obtain or maintain power through constitutional and democratic means. (See *The ECOWAS Protocol on Democracy and Good Governance 2001* and *the African Charter on Democracy, Elections and Governance 2007*). (Aristides Gomes case, para 71).**

49. Based on the general position that obtains under public international law, the military junta currently controlling Niger may be considered as the government of the state. However, the rules of collective recognition of governments at ECOWAS and, at the level of the African Union, to which Niger has subscribed qualify that general position. In fact, these rules abhor the attainment or maintenance of power through unconstitutional means. Accordingly, the Court takes the view that an entity that is the product of an unconstitutional change of government and which is not recognised by ECOWAS as a government of a member state, lacks the capacity, *prima facie*, to bring a case before the Court, in which it seeks to derive benefit or reprieve. Therefore, to the extent

that the present action and request for provisional measures standing in the name of Niger has been brought by an unconstitutional and unrecognised governmental authority, it is *prima facie* inadmissible.

50. The Court recognizes that under certain exceptional circumstances, it is conceivable to acknowledge the capacity of a Member State whose government did not constitutionally obtain power to appear in proceedings before the Court. When there is an unconstitutional change of government in a Member State, ECOWAS and the African Union invariably imposes sanctions. However, these sanctions do not completely sever the suspended state from its international obligations, including those owed to ECOWAS or the AU, particularly if they relate to the protection of human rights.

51. Accordingly, Article 25(2) of the African Charter on Democracy, Elections and Governance 2007 (to which Niger is a party), provides that despite the suspension of a member state for an unconstitutional change of government, ‘the suspended State Party shall continue to fulfil its obligations to the Union, in particular with regard to those relating to respect of human rights.’ The Charter further requires, under Article 25(3), that the AU ‘shall maintain diplomatic contacts and take any initiatives to restore democracy in that State Party.’

52. Similarly, the ECOWAS Protocol on Democracy and Good Governance states that during the period a Member State is suspended for unconstitutional change of government, ‘ECOWAS *shall continue*

to monitor, encourage and support the efforts being made by the suspended Member State to return to normalcy and constitutional order.’ (Protocol on Democracy and Good Governance, Article 45(3)).

53. Given the continuing obligation of the suspended state to fulfil its international commitments, particularly those related to human rights, and the responsibility of ECOWAS and the AU to maintain a continuous relationship and take measures to support the return to constitutional rule, the Court believes that its doors cannot be entirely closed to a member state suspended for an unconstitutional change of government. However, the Court would note that instances in which the capacity of the suspended state will be recognized in proceedings before it would necessarily be limited to the state’s ongoing obligation to respect human rights or matters related to the restoration of constitutional order within the state.

54. Thus, for instance, to ensure the protection of human rights, the suspended state may be admitted before the Court as a Respondent in cases brought against it. Once sued as a Respondent, it is entirely plausible for the state to avail itself of all procedures, including post-judgment processes such as requests for the interpretation, rectification, or supplementation of judgment on legal issues that the Court may have omitted to address.

55. While it may be rare, the Court also considers it plausible that the suspended state, in fulfilling its ongoing obligation to protect the human rights of its population, may have limited capacity to initiate

proceedings before the Court. This would conceivably occur in contexts where, out of necessity, the suspended state may need to act as *parens patriae* to secure appropriate reparations on behalf of its nationals for mass or gross violations of human rights attributable to the wrongful acts of another member state or other entities subject to the Court's jurisdiction.

56. The Court notes, however, that while the Applicants have invoked the alleged human suffering of the civilian population of Niger, the present case does not fall within the limited exceptions discussed above to grant the Republic of Niger, as presently controlled by the junta, *prima facie* capacity. This is because the alleged humanitarian crises are attributable to the junta's own illegal actions, which it is perpetuating. Different considerations might apply if the junta had agreed to a roadmap with ECOWAS for transitioning to constitutional and democratic order, and the reliefs sought in the present Application were in furtherance of restoring such constitutional rule or protecting the civilian population against human rights violations in which it was not complicit. However, that is not the case here. For these reasons, the Court concludes that the Republic of Niger, as currently controlled by the military junta, lacks *prima facie* standing, and accordingly, the substantive Application is *prima facie* inadmissible.

(b) *The Court's Analysis on the Capacity of the Non-State Applicants*

57. Regarding the non-state applicants suing with the Republic of Niger, the Court observes that, in appropriate cases, individuals and corporate

bodies whose rights are harmed by acts or omissions of ECOWAS Institutions, or their officials may institute proceedings before the Court for remedies. In the consolidated case of *Godswill Mrakpor and 5 Others v Authority of Heads of State and Government* [2011] CCJELR 75, the Court held that Mr. Laurent Gbagbo, who had sued alongside, the Republic of Cote d'Ivoire, was entitled to sue under Articles 9(2) and 10(c) of the Court's Protocol because the measures of the ECOWAS Authority impugned in that case implicated his distinct rights as an individual. In that case, Mr. Gbagbo had argued that the decisions taken by the ECOWAS Authority regarding military intervention in Cote d'Ivoire constituted threats against his person and violated "the principles inherent in his liberty and in the freedom of movement of his natural person." For pleading the nature and extent of how the decision of the ECOWAS Authority affected him personally, the Court found "that Mr. Laurent Gbagbo alleges and brings forth a personal complaint, and as a result, the Court adjudges that the Application fulfils the criterion for admissibility" under Article 10(c) of the Protocol of the Court. (*See Godswill Mrakpor and 5 Others v Authority of Heads of State and Government & Another* [2011] CCJELR 75, para 21.)

58. Therefore, the question the Court must answer here is whether, *prima facie*, the substantive Application alleges any distinct legal injuries of the non-state applicants to pass the test of *prima facie* admissibility within the meaning of Articles 9(2) and 10(c).

59. The Court notes that, while the Application makes generalized allegations of the sanctions affecting businesses and individuals in Niger, the non-state Applicants have not pleaded the exact nature and extent of the harm caused to each of them by the measures imposed on Niger, to distinguish their legal interest in this case from that of the Republic of Niger. In particular, the Court observes that, the combined reading of Article 9(2) and 10(c) of the Court's Protocol envisions scenarios in which individuals or corporate entities can sue Community institutions or officials for damages or reparations intended to address the specific losses or injuries they have suffered. However, at first glance, none of the reliefs sought in the Application, aims to redress any specific injuries that have been pleaded by, and are personal to, the individuals and entities suing alongside Niger in this case. In the circumstances, the Court is constrained to hold that the Application is *prima facie* inadmissible in respect of the non-state applicants within the meaning of Articles 9(2) and 10(c) of the Protocol of the Court.

X. CONCLUSION

60. Having concluded that the substantive Application upon which the present request for provisional measures is based is *prima facie* inadmissible, the Court need not proceed to the merits of the request for provisional measures to determine whether "there is urgency in regard to the circumstances of fact and law invoked in support of the application for interim measures." In the circumstances, the application for provisional measures is dismissed.

XI. OPERATIVE CLAUSE

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

On jurisdiction

- i. Declares that the Court has *prima facie* jurisdiction over the substantive Application.

On Admissibility

- ii. Finds that the First Applicant, Republic of Niger as currently controlled by the military junta, lacks *prima facie* capacity before the Court, and accordingly, the substantive Application is *prima facie* inadmissible in relation to the First Applicant.
- iii. Finds that the substantive Application is *prima facie* inadmissible in respect of the Second to the Eighth Applicants within the meaning of Articles 9(2) and 10(c) of the Protocol of the Court.

On the Merits (Provisional Measures)

- iv. Dismisses the Applicants' request for provisional measures.

Done at Abuja this 7th day of December 2023 in English and translated into French and Portuguese.

Hon. Justice Edward Amoako **ASANTE**

Presiding/Judge Rapporteur

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Hon. Justice Gberi-Be **OUATTARA**

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Hon. Justice Dupe **ATOKI**

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ASSISTED BY:

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

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