IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA

CORAM: ATUGUBA, J.S.C. (PRESIDING)
AKUFFO, J.S.C.
ANSAH, J.S.C.
ADINYIRA (MS), J.S.C.
BAMFO, J.S.C.

CRIMINAL APPEAL.
NO.J3/3/2010

19TH JANUARY, 2011

TSATSU TSIKATA - - - RESPONDENT/APPELLANT

VRS

THE REPUBLIC - - - APELLANT/RESPODENT

JUDGEMENT

ATUGUBA, J.S.C:

This judgment should have, but for a motion for its arrest by the appellant and subsequent events , been delivered on 25/6/2008.

A question has arisen whether in view of the delivery of judgment by the High Court and the pendency of the appellant's appeal therefrom, this appeal is now moot. This question of mootness has been dealt with by this court on some occasions. The whole matter has been extensively dealt with by Dr. Bimpong-Buta in his celebrated book The Role of the Supreme Court In the Development of Constitutional Law in Ghana at 168-176. From

his treatment of it I do not regard this matter as moot especially as a constitutional issue is involved. In any case the appellant cannot raise this question of the immunity before the Court of Appeal again since it has been decided by it already. This means that in all probability that issue will come up before this court again unless decided now. It is therefore still a live and not a moot issue.

The appellant stood trial before the High Court, Fast Track Division, Accra, on charges of causing financial loss to the state and misapplication of public funds. In the course of the trial the appellant sought and obtained a subpoena by order of the trial judge, Mrs. Henrietta Abban, J.A. in these words:

> "Let the Registrar of the Court issue a ***Subpoena Duces Ad Tecum*** directed at the Country Director, I.F.C to appear before this Court on the 15th of December 2005 instant, in respect of documents of the Valley Farms Project promoted by the African Project Development Facility for the period from 1987 to about 1990."

Pursuant to the issue of this subpoena but before its service, the International Finance Corporation (I.F.C) per their counsel, Mr. Kizito appeared before the trial court and objected to the issuance of the subpoena on the following grounds:-

> "Statutory Immunity from the courts processes. I understand that your order has not been served on them; that notwithstanding when it came to the attention through the dailies that the order had been made they asked us to inform the court that they do not on this occasion intend to waive their immunity. The immunity is derived under LN9 of 1958 Section 5 grants immunity to the archives of the IFC and section 8 grants immunity to the Governors, Executive Directors and officers of the IFC. My Lord, my clients do not intend to waive their immunity."

The Attorney-General (Mr. Ayikoi Otoo) associated himself with the objection and further relied on articles 73 and 57(5) of the 1992 Constitution.

The trial judge upheld the objection. The appellant's counsel thereupon shifted his application for the same purpose but this time directed to the International Finance Corporation itself, but the same was refused. The appellant appealed against these rulings to the Court of Appeal without success, hence this ultimate appeal to this court.

The grounds of appeal and the arguments thereon were profuse but do not defy a summation. I will therefore with respect to both deal only with the essence.

The trust of the appellant's contention is that the trial judge assumed, without the necessary factual basis that the claims to immunity were established and that no such factual basis could have, at any rate, been established in the circumstances of this case.

This appeal, I have urged, in my ruling on the appellant's application for the IFC's counsel to be invited to address this court on the question of this immunity, could be regarded as moot consequent upon an admission by the Republic in its "written Submissions by Counsel for the Respondent" dated 26/11/2007. At page 6 thereof the learned Acting Director of Public Prosecutions, Gertrude Aikins submitted as follows:-

> "It is my humble submission that there is no dispute between the respondent and the appellant over the viability of the project. The prosecution's own witness PW1 under cross-examination gave evidence for the accused that the project was a good one, Agence Francaise de Development also gave evidence to the same effect"

She reiterated this submission at page 9 as follows:-

> "My submission is that, the viability of the Valley Farms Project has never been in issue. That has never been the case of the prosecution. The crux of the matter is that the appellant invested outside the core functions of GNPC as prescribed by Law PNDCL 64 of 1983 and sustained a loss as a result. After all the evidence quoted above, what was the IFC coming to say?"

The admission was stated in extenso but these excerpts capture its essence. The conspicuous purpose of the appellant in relation to the subpoena is stated by his counsel at pages 82-83 of the Record thus:

> "The order is for the IFC to testify and provide information regarding its role in a transaction in respect of which criminal charges have been brought against the accused. It is part of the case of the accused that having regard to the role played by a number of banking institutions including IFC in undertaking technical and economic studies of the project and given a positive evaluation of the project to potential investors, it was an appropriate exercise of good business judgment for the accused to authorize asset managers, holding assets on behalf of the Corporation which accused was Chairman and Chief Executive of, to make investment in the project on an agreed basis. The best evidence about the role of the IFC can only come from the IFC itself and the defence has to be afforded facilities for obtaining the attendance of the IFC to provide evidence."

The substratum of the whole controversy raging over the immunity ***vel non*** of the IFC to legal process having thus been removed by the admission of the Republic one wonders on what this appeal could continue to hang.

Nonetheless my colleagues (then), and counsel on both sides feel strongly that the question of this immunity must still be usefully decided. Very well then.

So far as the immunity of the directors, employees etc of the IFC is concerned, it is, as far as relevant, provided in section 8 of the schedule to The International Bank, Fund and Finance Corporation (Immunities and Exchange Contracts) Order, 1958 L.N.9 as follows: "all governors, directors, alternates, officers and employees of the Corporation shall (1) be immune from legal process *with respect to acts performed by them in their official duty."*

Legal immunity from legal process may take various forms but the common legal thread that runs through them is that the facts upon which it operates are preconditions to its successful invocation. See *Littlewood v George Wimpey & Co. Ltd*. (1953) 1 WLR 426, *Armon v Katz* (1976) 2 GLR 115 C.A. in which a certificate from the Ministry of Foreign Affairs was obtained to establish the diplomatic status of the 2nd defendant; *Kwakye v Attorney-General* (1981) GLR 9 S.C. at 14. I therefore agree that without taking evidence on the factual prerequisites of the immunity claimed by the country director the courts below erred in upholding that claim. To my mind the immunity in section 8 of LN 9 relates to protection for them while carrying out their functions relating to the affairs of the International Finance Corporation. That is the context of that provision. The purpose of the immunity is stated in section 3 of LN 9 as follows:- "*to enable the fund, the bank and the corporation to fulfil the functions with which they are respectively extrusted,* the provisions of the fund agreement, the bank agreement and the finance corporation agreement set out in the schedule to this order shall have the force of law". The immunity therefore is restricted to the extent therein revealed. I do not pretend to know International Law. I have never studied it. But whatever it is I do not think that the mischief or purposive rule of construction can be expelled from it. Humans are rational creatures and therefore the general rule of construction is that, no matter the use of wide words, effect must be given to them to no greater extent than their objective warrants. Thus in *Rex v Dick Ogbulu Opia* (1942) 8 WACA 114 at 116 the court passionately stated thus: "a passage in the 7th Edition of Maxwell on the Interpretation of Statutes at page 198 is pertinent:-

> "Where the language of a statute, in its ordinary meaning and
> "grammatical construction, *leads to a manifest contradiction of the*
> *"apparent purpose of the enactment,* or to some inconvenience or
> "*absurdity, hardship or injustice, presumably not intended,* a
> "construction may be put upon it *which modifies the meaning of*
> *"the words, and even the structure of the sentence*. This may be
> "done by departing from the rules of grammar, by giving an

"unusual meaning to particular words, by altering their collocation,
"by rejecting them altogether, *or by interpolating other words, under*
"the influence, no doubt, of an irresistible conviction that the
"*Legislature could not possibly have intended what its words signify,*
"and that the modifications thus made are mere corrections of careless
"language and really give the true meaning. Where the main
"*object and intention of a statute are clear,* it must not be reduced
"to a nullity by the draftsman's unskillfulness or ignorance of the law,
"except in a case of necessity, or the absolute intractability of the
"language used. *The rules of grammar yield readily in such cases*
"to those of common sense.

The statement of the law set out in this text is fully supported by a long series of authorities commencing with *Warburton v. Loveland* (1828) 1 Hudson & B. Irish Cases 623, a case which is frequently cited in subsequent cases upon the point. Further the first and most material sentence of the text was quoted, obviously with approval, by Lord Alverstone, L.C.J. in the much more recent case of the *King v. Vasey and Lally* (1905) 2 K.B. 748."

Even in respect of international treaties, Clarke J in *Three Rivers District Council & Others v Bank of England (No. 2)* (1996)2 All ER 363 said, as summarised in the headnote as follows:

"Where the court is seeking to construe a statute purposively and consistently with any relevant European legislation, or *the object of the legislation under consideration is to introduce into English law the provisions of an international convention* or European directive *it is of particular importance to ascertain the true purpose of the statute, and in those circumstances the court may adopt a more flexible approach to the admissibility of Parliamentary materials than that established for the construction of a particular provision of purely domestic legislation"*

I do not therefore see how the limited purpose for which the appellant seeks the subpoena in this case is inconsistent with "*the true purpose of the statute*" involved herein, so far as immunity from legal process is concerned. I have no doubt that the subpoena sought here ***non fit injuria*** to the smooth operation of the IFC which is the bedrock of the immunity provision.

I entirely agree with the appellant's contention that a subpoena to the IFC's country director to produce something which is not his act but is in the custody of the IFC does not infringe his immunity from legal process and legal processes can lie in respect of him as to such matters. Equally the trial judge's holding that the documents sought to be produced are in the archives of the IFC without foundation for the same is erroneous.

In any event upon proper construction of the provisions of LN 9 in the light of the 1992 constitutional provisions particularly article 19(1), the provisions thereof cannot deprive a person of his right to subpoena the country director or other officer or employer of the IFC to produce documents necessary for his defence. That article provides as follows:- "19(1) *A person charged with a criminal offence shall be given a fair hearing within a reasonable time*." In the celebrated case of *Tuffour v. Attorney-General* (1980) GLR 637 C.A. (sitting as the Supreme Court) it was held that a written constitution is a political document that mirrors the aspirations of the people, reflecting their past experiences and that it is an organic law capable of growth.

Article 11(6) mandatorily requires that "*The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution*, or otherwise to give effect to, or enable effect to be given to, any changes effected by this constitution". Clearly at the time LN9 was enacted there was no constitution in Ghana that provided so elaborately for the fundamental human rights as contained in the 1992 Constitution. The construction of

LN9 must now reflect this new situation. This court's decision in *Tsatsu Tsikata v The Republic* (2005-2006) SC GLR 612 states the trite constitutional position that the fundamental rights are "*subject to respect for the rights and freedoms of others and for the public interest*". See article 12(2). However it does not mean that every right and freedom of others or the public interest will in all cases uncritically override the fundamental rights. The nature, extent and quality of that respect depend on a balancing act of the competing rights and freedoms. See *Republic v Tommy Thompson Books Ltd. (No.2)* (1996-97) SC GLR 484.

This is clearly brought to the fore when article 12(2) is read in conjunction with articles 11(6) and 21(4). The latter provides that legislation qualifying the fundamental rights therein referred to shall not "be held to be inconsistent with, or in contravention of, this article ...(e)... except so far as *that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in terms of the spirit of this Constitution."* I have already, supra, referred to the objects to be attained by LN 9 and its parent Act.

In matching them against the right to a fair trial in article 19(2) one is at a loss to understand how the mere testimony relating to and production of documents in the custody of IFC for the purpose for which they were sought in this case, when in the same trial, office copies of the relevant documents were tendered in respect of the records of AFD , is unacceptable. How could such a process impede the performance of IFC's functions to such a degree that it ought to be disallowed? It must be remembered that LN9 was enacted pursuant to the Fund, Bank and corporation agreements of the United Nations Organization which same body now, if not in 1958, at the time of LN 9, is at the forefront of human rights defence. It is clear that in this new international order the fundamental right to a fair trial is ranked even above relationship with other states. In *Algemene Bank Nederland v K. F. and others* (1987) Vo. 96 ILR 344 the facts of the case as per the headnote are as follows:

"The International Tin Council ("the ITC") was an international organization constituted, at the relevant time, under the Sixth International Tin Agreement, 1982 ("the Agreement"). *The members of the ITC were twenty-three States, including the Netherlands, and the European Economic Community*. The object of the ITC was to promote an orderly market in tin. This was achieved by the operation of a buffer stock which entailed buying tin when the market price fell below a certain level and selling from the buffer stock when the market was too high. In September 1984, Algemene Bank Nederland ("ABN") lent the ITC £40,000,000 secured against various stocks of tin in order to finance the buffer stock price stabilization programme. In October 1985, the ITC announced that it was unable to meet its commitments to third parties and ceased trading.

The ITC subsequently held negotiations with its Member States and principal creditors, including ABN, with a view to reaching a settlement. Following the initial collapse of these negotiations in 1986, ABN became concerned that it ran the risk of suffering a substantial loss as the tin lodged as security for its loan had in the meantime fallen in value. *In order to mitigate its losses ABN then considered the possibility of commencing proceedings against the Netherlands on the ground that it had helped bring about the ITC's collapse. Prior to the commencement of proceedings, ABN, acting pursuant to the provisions of the Open Government Act, requested information from the Minister for Economic Affairs concerning meetings of the ITC and its sub-committees, the ITC buffer stock price stabilization programme and reports of the Dutch representative attending the ITC.* This request was refused. ABN appealed against this decision to the Judicial Division of the Council of State and, pending resolution of the case, applied to the President of the Division for provisional relief. In proceedings before the President, *the Minister contended, inter alia, that as Rules 16(2) and 19 (3) of the ITC's Rules of Procedure and Rules 12(5) of the buffer stock operational rules ("the Rules") , which had been issued pursuant to the provisions of the Agreement, restricted the publication of information concerning ITC meetings*

and its buffer stock operations, the disclosure of the information sought would constitute a breach by the Netherlands of its obligations under the Agreement and thus have serious consequences for its relationships with the ITC and other Member States. The Minister further contended that he was not, therefore, required to release the information requested by ABN *as Article 4(d) of the Act (5) allowed the Government to withhold information if this was required in the interests of maintaining the Netherlands' relationship with other States." (e.s)*

Upon these facts, the Supreme Court of the Nederlands held as stated in the head note thus:

"(1) *Article 68 of the Constitution, Article 98-99 (b) of the Criminal Code and Article 4 of the Act did not grant persons who had represented the Netherlands in international consultations with other States exemptions from giving testimony concerning confidential matters arising out of those consultations (pp*. 354-5).

(2) The obligation to maintain confidentiality that was incumbent upon the Dutch representatives to the IFC stemmed from their participation as representatives of the Netherlands and not necessarily from the Rules (p 356).

(3) The Court of Appeal *had correctly held that the importance of ascertaining the truth in civil proceedings outweighed the ITC's confidentiality requirements (p. 356)*

(4) However, *the importance of ensuring that the truth came to light in civil proceedings outweighed the need to ensure that the Netherlands was perceived as a reliable partner in relations with other States (p. 357)"*

Surely if the Netherlands Supreme Court so held with regard to civil litigation the position is far stronger in a criminal case. It is not apparent whether the Agreement involved there had direct municipal application or was a municipally ratified one. But I do not think much turns on that in the face of our constitutional situation in Ghana. In any case the thrust of the reasoning therein is amply supported by two authorities filed by the appellant on the 28/10/2010 and to reflect them. I will at this stage amend my old judgment in this case as it stood before the arrestment of its delivery. They in my view, amply support the purposive approach to the construction of the immunity provisions of the IFC I had adopted. In *Salah N. Osseiran, Appellee v International Finance Corporation, Appellant No.07-7122* United States Court of Appeals for the District of Columbia Circuit 552 F.3d 836;384 U.S. App. D.C. 183; 2009 U.S. App. Lexis 395 the facts as per the headnote are as follows:

> "**PROCEDURAL POSTURE**: Plaintiff investor sued *defendant International Finance Corporation* when their investment deal soured. The U.S. District Court for the District of Columbia held that the Corporation had waived its immunity under the International Organizations Immunities Act, 22 U.S.C.S. 288-288f, and it filed an interlocutory appeal."

Randolph, Circuit Judge stated, inter alia, that:

> "The question in *Mendaro* was whether the World Bank had immunity from a former employee's sexual harassment and discrimination suit. Although the waiver provision contained no exceptions for different types of suit, *the court read a qualifier into it*. The court reasoned that an organization would not give up immunity unless it would gain a "corresponding [***7] benefit which would further the organization's goals. "*Mendaro, 717 F.2nd at 617.* A waiver of immunity "with respect to the World Bank's commercial transactions with the outside world" made sense, the court thought, because otherwise *private parties would be hesitant to transact business with the Bank* Id. at 618. *The court thought language in the charter indicated that the waiver of immunity, like immunity itself,*

was meant to aid the Bank in accomplishing its mission Id. The court went on to hold that the World Bank had not waived its immunity from its employee's suit because the potential benefit of attracting qualified staff was offset by the Bank's employee grievance process and outweighed by the disruption to its labour practices."

Again in *Jeorge Vila, Appellee v. Inter-American Investment Corporation, Appellant No. 08-7042* United States Court of Appeals for the District of Columbia circuit *570 F.3d 274; 386 U.S. App. D.C. 364; 2009 U.S. App. Lexis 13279* the facts as in the headnote are as follows:

"**PROCEDURAL POSTURE**: Appellant, an international organization (IO) formed by countries to promote economic development through commercial lending, appealed the United States District Court for the District of Columbia's denial of its motion to dismiss appellee independent banking consultant's unjust enrichment claim, arguing for immunity under the International Organizations Immunities Act, 22 U.S.C.S. 288a(b), and asserting that the statute of limitations had run."

Some of the pertinent holdings as per the headnotes are as follows:

"***International Law>Immunity>Sovereign Immunity>International Organizations***

[HN3] An organization's *immunity should be construed as not waived under the International Organizations immunities Act unless the particular type of suit would further the organization's objectives. If a lawsuit could significantly hamper the organization's functions, then it is inherently less likely to have been intended*. So too, when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization's discretion to select and administer its programs, it is

logically less probable that the organization actually intended to waive its immunity.

x x x

International Law>Immunity>Sovereign Immunity>International Organization

[HN6] Drawing a distinction between external activities and the internal management of international organizations, for purposes of the International Organizations Immunities Act, reflects well-established precedent without creating an artificial category of waived claims. *The court still is required to engage in a weighing of the benefits and costs that a waiver may entail, by focusing on the nature of the parties' relationship rather than the nature of the contested transaction* and inquiring as to the reasons why the international organization would waive immunity for the type of suit involved."

From the foregoing it is quite clear that the US courts can disentitle or require reliance on almost identical provisions on immunity as are involved herein according as the reliance advances or damages the interests of the donee. Quite clearly then when the credibility of the IFC report on the Valley Farms Project is involved in this case I do not see how a claim of immunity by them can advance their interests in any way. That being so the appellant's appeal ought clearly to succeed.

In the English case of *R v. Lord Chancellor, Ex parte Witham* (1997))3 LRC 347 the court nullified subsidiary legislation by which the Lord Chancellor removed exemption of indigents from paying filing fees in certain cases as derogating from the right to fair trial. At page 358 Laws J forcefully said: "…I cannot think that the right of access to justice is in some way a lesser right than that of free expression; *the circumstances in which free speech might unjustifiably be curtailed in my view run wider than in which the citizen might properly be prevented by the state from seeking redress from the Queen's Courts.* Indeed *the right to a fair trial*, which of necessity imports the right of access to

the courts, *is as near to an absolute right as any which I can envisage".* Similarly in *Norwich Pharmacal v Customs and Excise Commissioners* (1974) A.C. 133 H.L the applicant sought discovery of confidential information concerning third parties obtained under statutory powers by Customs and Excise Commissioners. The House of Lords unanimously rejected the plea of crown privilege against production for the relevant documents. At page 182 Lord Morris of-Borthy-Gest forcefully said:

> "If there was some statutory prohibition (such as that contained in section 17(2) of the Agricultural Marketing Act 1931: see *Rowel v. Pratt* [1938] A.C. 101) then that, of course, would be conclusive. *In the absence of any such prohibition* it seems to me that in the special circumstances of this case, and with some support from authority, *the interests of justice warrant the court in making the desired order unless there are some features of the public interest which are of such weight as to out-balance the public interest of advancing the cause of justice*. I can well appreciate *the importance of the considerations which were advanced* and *which undoubtedly carry some weight,* but having *considered them in relation to the very limited order now sought* I am firmly of the view that *the balance of the public interest warrants the making of the order as now requested." (e.s)*

I have no doubt that but for the English constitutional principle that ***Parliamentum omnia potest***, the House of Lords would have reached the same conclusion were they to operate under a constitution such as ours.

It is clear that if Ghanaians are to be free from the effects of decisions such as the infamous case of *Re Akoto* (1961) 1 GLR 523 S.C. when an opportunity of upholding fundamental human rights was allowed to slip away from the Supreme Court, the courts of today should strive to uphold these rights whenever a construction in that regard is possible.

The attitude of the 1992 Constitution towards international law and its proper application is clearly stated in article 40 of the constitution in Chapter 6, The Directive Principles of State Policy. It is as follows:-

"40.International relations

In its dealings with other nations, the Government shall

(a) promote and protect the interests of Ghana

(b) seek the establishment of a just and equitable international economic and social order,

(c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means,

(d) adhere to the principles enshrined in or as the case may be, the aims and ideals of,

(i) the Charter of the United Nations,

(ii) the Charter of the Organisation of African Unity,

(iii) the Commonwealth,

(iv) the Treaty of the Economic community of West African States, and

(v) any other international organisation of which Ghana is a member."

But the core principle is in article 73, as follows

"The Government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy *in a manner consistent with the national interest of Ghana*"

To ensure that the national interest is paramount, ***salus populi suprema lex***, article 75 incorporates the dualist principle as follows:-

"(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.

(2) A treaty, agreement or convention executed by or under the authority of the President *shall be subject to ratification* by –

(a) Act of Parliament or

(b) A resolution of Parliament supported by the votes of more than one-half of all the members of Parliament."

All these reflect our national history and aspirations as enunciated in *Tuffuor v Attorney-General*, supra. Clearly these provisions are designed to prevent the effects of the over concentration of the President on foreign or international policy perceived to have occurred under an otherwise very outstanding President Nkrumah of the First Republic of Ghana. The Netherlands Supreme Court has pre-empted such a situation in the *Algemene Bank Nederland v K.F. and others*, case, supra and the Ghanaian experience reflected in the above quoted constitutional provisions of our Constitution is thereby vindicated and strengthened.

The welfare of the people of Ghana in the democratic and modern sense is the grundnorm of Ghanaian law as stated in article 1(1) as follows:

> *The Sovereignty of Ghana resides in the people* of Ghana *in whose name and for whose welfare the powers of government are to be exercised* in the manner and within the limits laid down in this Constitution."

These are the considerations which have pulled my mind to the construction I have arrived at.

Section 3 of article VI of LN 9 of 1958 provides with regard to the IFC itself as follows:

> "*Actions may be brought against the Corporation* only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No action shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the corporation shall wheresoever located and by whomsoever held, be immune from all seizure, attachment or execution before the delivery of final judgment against the Corporation."

It is clear from this provision that the IFC can be sued in the situation therein sated. The parties do not dispute that this situation obtains in Ghana in respect of the IFC. There is no other legal barrier with regard to legal process as to the IFC. Clearly then legal process like a ***subpoena duces tecum*** can issue to the IFC itself and the courts below erred in holding otherwise.See

Lutcher SA.Celulose e Papel and F. Lutcher Brown, Appellants, v.

Inter-American Development Bank, Appellee

No. 20166

United States Court Of Appealls For The District Of Columbia

127 U.S. App. D.C. 238, 382 F.2d 454, 1967 U.S App. Lexis 5639

For all the foregoing reasons I would allow the appeal.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

AKOTO - BAMFO, J.S.C.

I had the opportunity of reading before hand the opinion of my brother Atuguba JSC and I agree with his conclusion that the appeal be allowed in it entirety and I therefore have nothing useful to add.

(SGD) V. AKOTO-BAMFO

JUSTICE OF THE SUPREME COURT

SOPHIA ADINYIRA (MRS.) JSC:

This appeal against the ruling of the Court of Appeal dated 19 December 2006 was fixed for judgment on 11 June 2008 by this Court. On the said date the Appellant took the Court by surprise by praying that we arrest judgment due to some applications he has filed in respect of some other aspect of the substantive case that was pending before another panel. We obliged but unfortunately the judgment could not be delivered as one panel member later declined jurisdiction in the matter for reasons I need not discuss here. When the case was relisted the panel had to be reconstituted as a member of the original panel has since retired and so the appeal had to be heard de novo.

Meanwhile this appeal was overtaken by events. The appellant was convicted and sentenced by the High Court and he was granted full presidential pardon in December 2008. There is also an appeal pending in the Court of Appeal against the conviction and sentence and consequently we might perhaps over-reach the decision of the Court of Appeal by our ruling.

However my brother Atuguba is of the view that the matter is not moot so long as it involves a constitutional issue. Be it as it may, I have decided to express my opinion as I depart from my brother on one issue in his opinion.

The issue is whether a claim for diplomatic immunity from legal proceedings over-rides the constitutional right of an accused person to fair trial under Article 19 (2) (g) of the 1992 Constitution.

The facts of the case relevant to this appeal are that the Appellant, Mr. Tsatsu Tsikata one time the Chief Executive of Ghana National Petroleum Corporation (GNPC) was standing trial on 3 counts for willfully causing financial loss to the state contrary to section 179A (3) (a) of the Criminal Code of 1960, Act 29; and on one count for intentionally misapplying Public property contrary to section 1(2) of the Public Property Protection Decree 1977, SMCD 140.

On 9 December 2005, the Fast Track High Court Accra presided over by Henrietta Abban J.A. (sitting as an additional High Court Judge), issued at the instance of the appellant, a subpoena directed at the country director of the International Finance Corporation (IFC) to produce to the Court documents on Valley Farms Project promoted by the Africa Project Development Facility from 1987-1990. Counsel for the IFC appeared in Court to raise an objection on the grounds that the said country director enjoyed diplomatic immunity from legal proceedings which he does not intend to waive. The trial judge upheld the claim of diplomatic immunity and rescinded the subpoena in respect of the country director of the IFC.

Counsel for the appellant then applied to the Court to issue a fresh subpoena directed at the IFC as an institution to come to produce those documents. Counsel raised the same objection that the IFC was also claiming immunity from legal proceedings, and it was upheld. The Court of Appeal affirmed the ruling by the High Court.

The grounds of appeal and additional grounds of appeal were quite copious and I would refer to the salient issues that call for consideration in this opinion.

One of the main grounds of appeal urged on this Court was that:

"the failure of the trial court to order the Country Director of the IFC to appear for the defence erred in failing to recognize and enforce the fundamental human right of the accused as expressed in clear and mandatory language in Article 19 (2) (g) of the 1992 Constitution to obtain in attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution."

It was counsel's submission that, even if there was a right of the IFC country director "to immunity from the judicial process in Ghana conferred by statute, this would be subordinate to the fundamental human rights in the Constitution which cannot be derogated from by statute."

It is worthwhile to mention that this Court is committed to promote respect for and enforcement of fundamental human rights and freedoms. This Court has therefore in a significant number of cases declared as unconstitutional statutes and statutory provisions that are in conflict with the fundamental human rights and freedoms as enshrined in our 1992 Constitution. Counsel referred to some of these cases namely, the cases of

NPP V. IGP [1993-4] 2GLR 495, *Osei v. The Republic (No.2) and Maikankan v. The Republic.* However the considerations that informed those decisions were different from what is presently before this court.

It appears to me that the issue before us brings to the fore the relationship between municipal (domestic) law and international law and how far the courts can invoke international and regional human rights norms in deciding human rights issues. It also touches on how the Courts are constitutionally required to hold in balance the scales of justice between competing individual fundamental freedoms and human rights on one hand and national or public interests on the other hand.

Article 19 of the 1992 Constitution of Ghana on the fundamental human right to fair trial provides in part that:

"(1) a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.

(2) A person charged with a criminal offence shall -

(g) be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution" (Emphasis mine)

The right to fair trial has been described in international law as *jus cogens*, a peremptory norm of general international law which is defined under Article 53 of the Vienna Convention on the Law of Treaties as:

> "A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"

Some other examples of *jus cogens* norms are genocide, crimes against humanity and slavery.

Similarly, diplomatic immunities and privileges accorded to diplomatic agents and international organizations as provided by Articles 22, 23, 24, and 27 to 40 of the Vienna Convention are also assented to and recognized and adopted by the international Communities of States of which Ghana is no exception. Signing a treaty imposes a moral obligation on the state not to do anything that would deviate from the object and purpose of the

treaty. A state becomes legally bound to a treaty after ratification, accession, acceptance, approval or signature where the treaty so stipulates. See Article 2 (b), 12 (1) (a) of Vienna Convention on the Law of Treaties.

In fulfillment of its international obligations, Ghana has incorporated into its domestic laws the Vienna Conventions on diplomatic immunities and privileges. This domestic statute is the *Diplomatic Relations Act, 1962, Act 148.* These provisions on diplomatic immunities and privileges of the Vienna Conventions as contained in the First Schedule of Act 148, therefore have the full force of law in our courts.

Section 1 of Act 148 provides:

"Articles 22, 23, 24, and 27 to 40 of the Vienna Convention (which regulate the immunities and privileges, including exemption from taxation, freedom of communication, inviolability of premises and immunity from civil and criminal jurisdiction, to be conferred upon diplomatic agents) shall have the force of law and references therein to the receiving State shall, for this purpose, be construed as references to the Republic."

And section 2 provides that:

"Section 2—International Organisations

The President may, by legislative instrument, make Regulations extending any or all of the immunities and privileges conferred on diplomatic agents by virtue of this Act to prescribed organisations and prescribed representatives and officials, subject to such conditions and limitations as may be prescribed." (Emphasis mine)

Previous to that the International Bank, Fund and Finance Corporation Act 1957 was passed followed by a promulgation of the International Bank, Fund and Finance Corporation (Immunities and Exchange Contracts) Order, 1958 LN 9, whereby diplomatic immunity was conferred on the directors and officers of IFC.

For our purpose, Article 31 (2) of the Vienna Conventions on Diplomatic immunity states that:

"A diplomatic agent is not obliged to give evidence as a witness."

Although, LN 9 is a subsidiary legislation it forms part of the laws of Ghana as stated in Article 11 (1) (c) of the 1992 Constitution. It is enforceable so

long as it is consistent with the provisions of the Constitution. Though an opinion has been expressed that LN9 is a subsidiary legislation and therefore cannot override a Constitutional right to fair trial when an accused person is requesting such an officer to appear as his witness, I am of the view that this Court cannot overlook or disregard other considerations such as the rights of others and what has been described as "relevant counterbalancing public interest considerations" per Justice Date-Bah J.S.C. [1] The 1992 Constitution that guarantees these fundamental human rights and freedoms in Chapter 5 at the same time limits its application, by the proviso of Article 12 (2). It is an established principle of interpretation that constitutional provisions just like any statute, should not be interpreted in isolation but must be interpreted in their entirety taking into account other provisions of the same Constitution. Thus the enforcement of the rights conferred under Article 19(2) (g) is subject to Article 12 (2).

Public interest in relation to the rights and freedoms enshrined in Chapter 5 of the Constitution has been discussed extensively in the case of *Awuni v. West African Examination Council [2003-2004] 1 SCGLR 471*. Justice Sophia Akuffo JSC at page 505 said in respect of these rights and freedom that:

> "Thus, the Judiciary is also required to do everything constitutionally and legally possible to assure that in the exercise of its function, these rights and freedoms are upheld and respected; subject of course to a concomitant respect for the rights and freedoms of others and for public interest." [Emphasis mine]

Justice Date-Bah at page 564 also has this to say:

> "Article 12 (2) of the Constitution contains, inter alia, a public interest proviso to the enforcement of the fundamental rights and freedoms of the individual enshrined in Chapter 5 of the Constitution. Article 12 (2) is in the following terms:
>
> *"(2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual*

[1] Lecture delivered at the 41st J.B. Danquah Lectures: ON LAW AND LIBERTY IN CONTEMPORARY GHANA, February 2008

contained in this Chapter *but subject to respect for the rights and freedoms of others and for the public interest."* (The emphasis mine)

My understanding of this provision is that an individual's entitlement to a fundamental human right is to be interpreted in such a way as not to impair public interest."

I fully endorse the views expressed by my learned sister and brother Justices in the *Awuni case* that some degree of balancing between the enforcement of the rights of an individual and that of other individuals and public interest respectively has to be respected. Wood JSC (as she then was) in the case of *The Republic v, Court of Appeal, Accra: Ex parte Tsatsu Tsikata [2005-2006] SCGLR 613*, where in an application for certiorari the same submission has been that the appellant's fundamental rights under Article 19(2)(g) have been violated by the trial court's acceptance of the plea of immunity commented that:

"The right envisaged under Article 19(2) (g) is like all other rights unbridled or unlimited, the court cannot be said to have been in error. Indeed it is trite learning that the right to compel a witness to testify in court is clearly subject to the witness's rights and privileges, which include the right to immunity and such other protection as is provided under the Evidence Act,1975, (NRCD 323)"

From the foregoing, I hold that the appellant's constitutional right to call any witness of his own choice to testify on his behalf is not absolute but limited to the rights and privileges of that witness as required under Article 12 (2). I consider section 8 of LN 9 on diplomatic immunity of IFC officials as one of such restrictions envisaged under Article 12 (2) of the Constitution. The country director of the IFC is not a compellable witness under both our domestic and international laws by virtue of his diplomatic immunity. In that respect it is my considered opinion that once the country director of IFC has declared his intention through counsel that he did not intend to waive his immunity, his claim of right to immunity has to be respected and that should over-ride the corresponding right of the appellant to compel him to be his witness by the issue of a subpoena.

In addition, there is the balance of public interest to be considered as required by Article 12 (2). As said earlier, Ghana as a member of the U.N. is a signatory to major international conventions, treaties, protocols and agreements including the Vienna Conventions under reference and is

therefore obliged to keep to her commitments. The Government of Ghana is also obliged by Article 73 of the 1992 Constitution:

> "[T]o conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana."

It is the opinion of my esteemed brother Justice Atuguba JSC that the fundamental human right to a fair trial is ranked above relationship with other states. With due respect, I regard this statement as too sweeping. My point of departure from his opinion is that the case of *The Algemene Bank Nederland v. K.F. and Others (1987) 96 ILR 344* cited by the appellant in his submissions is clearly distinguishable from the facts of this appeal before us. In the *Algemene* case the minister was not claiming diplomatic immunity but rather claiming that the information sought was privileged by confidentiality.

The Judiciary as the arm of government entrusted under the Constitution with the responsibility to administer justice is obliged to apply international norms in the administration of justice. This Court, by recognizing the claim to immunity by the Country Director of IFC is thereby affirming an internationally acceptable norm of diplomatic relationships among states and international organizations which has been incorporated in our domestic laws, viz. The Diplomatic Relations Act, 1962, Act 148. This Court ought to promote respect for international law, and treaty obligations. It is my considered opinion that such an approach is in the national interest. This is one area where the Court in balancing the interest of an individual as against the national or public interest should allow public interest to prevail.

From the foregoing I hold that the Country Director of IFC enjoys diplomatic immunity under LN9 and therefore having indicated to the court through counsel that he did not intend to waive such immunity, he was not a compellable witness. I accordingly hold that the Court of Appeal did not err in affirming the decision by the trial court in rescinding the subpoena she had earlier issued. The appeal is therefore dismissed on this ground.

The second major issue raised in this appeal is whether IFC as an international financial institution is entitled to the same immunity from any form of judicial process like other international organizations and its directors and officers.

It was a ground of appeal that the Court of Appeal gravely erred when it relied on a statutory provision granting immunity to the International Monetary Fund (IMF) from judicial processes to decide the issue before the Court about immunity of the IFC.

I agree with the conclusion reached by my brother Justice Atuguba that the IFC has no immunity under LN9 and therefore the appeal on this ground be allowed.

From the foregoing the appeal succeeds in part.

(SGD) S. O. A. ADINYIRA

JUSTICE OF THE SUPREME COURT.

AKUFFO, J.S.C.

I have previously read the opinion of my learned sister Justice Adinyira and agree with her reasoning and conclusions.

(SGD) S. A. B. AKUFFO (MS.)

JUSTICE OF THE SUPREME COURT

ANSAH, J.S.C.

I read the judgment by my brother Atuguba JSC as well as what my sister Adinyira JSC is about to read and I agree with her judgment, reasons and conclusions that the appeal be allowed in part.

(SGD) J. A. ANSAH
JUSTICE OF THE SUPREME COURT

COUNSEL:

E. V. O. DANKWA FOR THE APPELLANT

MERLEY WOOD O.S.A (WITH HER MRS. SEFAKOR BATSE AND RICHARD GYAMBIBY A.S.A) FOR RESPONDENT.