IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: AKUFFO (MS), CJ PRESIDING
ATUGUBA, JSC
ADINYIRA (MRS), JSC
DOTSE, JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC

WRIT NO.
J1/7/2016

22ND JUNE, 2017

1. MRS. MARGARET BANFUL

2. HENRY NANA BOAKYE ..... PLAINTIFFS

VRS

1. THE ATTORNEY-GENERAL

2. THE MINISTRY OF INTERIOR ..... DEFENDANTS

JUDGMENT

AKUFFO (MS), CJ:-

Background

By a writ filed on 21st of January, 2016, the Plaintiffs, in their capacities as citizens of Ghana, invoked the original jurisdiction of the Supreme Court pursuant to Articles 2(1)(b) and 130(1) of the 1992 Constitution and Rule 45 of the Supreme Court Rules, 1996 (CI 16), seeking against the Defendants the following reliefs:

i. "A declaration that on a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana, by agreeing to the transfer of Mahmud Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby (both profiled terrorist and former detainees of Guantanamo Bay) to the Republic of Ghana, required the ratification by an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.

ii. A declaration that on a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana acted unconstitutionally in his failure to obtain the requisite ratification by an Act of Parliament or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament when he agreed with the Government of the United States of America to transfer Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana.

iii. A declaration that the reception of the said detainees into the Republic of Ghana by the President of Ghana is in excess of his powers under the constitution and hence unconstitutional.

iv. A declaration that on a true and proper interpretation of Article 58(2) of the 1992 Constitution of Ghana, the President of the Republic of Ghana is under obligation to execute and maintain the Anti-Terrorism Act of 2008 (Act 762) and the Immigration Act of 2000 (Act 573), both being laws passed under the 1992 Constitution of Ghana.

v. A declaration that the President of Ghana breached Article 58(2) of the 1992 Constitution of Ghana by agreeing with the Government of the United States of America to have Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby transferred to the Republic of Ghana.

vi. A declaration that on a true and proper interpretation of the 2nd Schedule of the 1992 Constitution of Ghana, the President of the Republic, by agreeing to the transfer of Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana has broken the Presidential Oath.

vii. A declaration that the reception of Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby and their continuous stay in the Republic of Ghana is unlawful.

viii. An order directed at the President and his Assigns, for the immediate removal and return of Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby from the Republic of Ghana to Guantanamo Bay.

ix. Such further or other orders as the Honourable Supreme Court will deem fit.

PLAINTIFFS' CASE

The Plaintiffs' case is that by an agreement made sometime in or about 2016, between the Government of the United States of America (the USA) and the President of the Republic of Ghana, two Yemeni citizens, namely, Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby (hereinafter referred to as 'the said persons' or the 'said two persons'), formerly held in detention by the USA at its facilities at Guantanamo Bay, were transferred to Ghana for settlement. The Plaintiffs aver that the President of Ghana, in agreeing to the said transfer to and the settlement of the said persons in Ghana, supposedly 'on humanitarian grounds and also in the name of reaching out to the USA in their time of need', acted without parliamentary ratification as dictated by Article 75 of the Constitution. Therefore, according to the Plaintiffs, the agreement and the action taken pursuant thereto are unconstitutional. Furthermore, the Plaintiffs averred that the said two persons were suspected terrorists and their settlement in Ghana, pursuant to the said agreement, apart from its unconstitutionality, was in breach of Article 58(2), as the action of the President was in violation of sections 12 and 35 of the Anti-Terrorism Act, 2008 (Act 762) and section 8(1)(h) of the Immigration Act, 2000 (Act 573), which effectively prohibit the migration into Ghana or the harbouring of any person suspected of terrorism.

Accordingly, the Plaintiffs submitted that the executive powers of the President under Article 58 are not absolute but are to be exercised in accordance with the provisions of the Constitution and consequently, by the aforesaid failures to comply with the Constitution the President was in violation of the same.

The Plaintiffs annexed to their Statement of Case, as Exhibits GB1 and GB2, copies of the documents which they claimed are USA Department of Defence profiles on the said persons, respectively, to support their averment that they were terrorists, having been assessed in these documents to be such, and held in detention by the USA, at

Guantanamo Bay, for approximately 14 years. Furthermore, the Plaintiffs also averred that, following a decision of the Federal Government of the USA to close down its detention centre on Guantanamo Bay and release detainees thereat, both Houses of the USA Congress voted against a Bill proposing to relocate and settle former detainees in the USA, for the reasons that the national interest of the USA would not be served by such action as such persons posed a threat to the country's national security. They averred that it was after this rejection by the USA legislature that the President of Ghana entered into the agreement and took the action that has given rise to this matter. The Defendant did not deny this particular averment and since the same is of public notoriety, we take judicial notice of the fact.

The Plaintiffs also adverted to the fact that the detention of people at the Guantanamo bay detention centre for long stretches of time without trial or any court order had been a matter of concern in terms of international human rights norms and contended that the transfer of the said two persons to Ghana to be held under conditions amounting to restriction of their freedom of movement without due process amounts to breach of Articles 14 and 15 of the Constitution.

DEFENDANT'S CASE

The Defendant was rather tardy in filing its Statement of Case, and upon an application was granted an extension of time within which to file the same. It is noteworthy that, in the affidavit in support of its application for extension of time, there is a deposition that the delay in filing a Statement of Case was because the Defendants had made a request to the Embassy of the USA in Ghana for certain undisclosed relevant information that would facilitate the completion the Defendants' Statement of Case. However, we observe that no such information was ever mentioned in the Statement of Case eventually filed by the Defendant.

The Defendant filed the Statement of Case on 16th March 2016, wherein the Defendant made a number of submissions, the most salient of which may be summarized as follows:

a. The agreement under which the said persons were settled in Ghana is not of the type of agreement contemplated by Article 75. They argued that the said article does not cover every form of agreement that Ghana might enter into with another state or non-state actor as it covers only treaties, agreements and conventions in more solemn form than mere diplomatic notes. Therefore, according to the Defendant there was no need for the agreement in this case to be submitted to Parliament for ratification.

b. The Plaintiffs have failed to show in what manner Article 58(2) has been violated and, in any event, the violation of an ordinary statute such as the Anti-Terrorism Act or the Immigration Act would not justify the invocation of the original jurisdiction of the Supreme Court.

c. The exhibits attached to the Plaintiffs' Writ, which form the factual foundation of their claim (Exhibits GB1 and GB2) are of dubious authenticity (section 136(1) of the Evidence Act 1973 (NRCD 323), since they were obtained from undisclosed or unofficial sources, the authors or signatories of which cannot be verified or cross examined (section 161 of NRCD 323), and also amount to hearsay evidence, which in the circumstances, do not fall within the exceptions permissible pursuant to section165 NRCD 323, and consequently, the foundation of the Plaintiffs' case must collapse and the action dismissed.

d. Under the international law doctrine of sovereign equality of states, one sovereign cannot sit in judgment over the acts of another sovereign. The Defendant cited the dictum of Lord Browne-Wilkinson in the case of Ex Parte Pinochet (No.3) [2000] 1 AC 147 at 201:

> *"It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability"*

The Defendant argued that '…lurking under the subterranean current of the action is an evaluation of the conduct of the officials of the United States Government who did the assessment contained in Exhibits GB1 and GB2.'

The Defendant's Statement of Case canvassed a plethora of other issues, some of which appear to be irrelevant to the resolution of the core issues in this matter. Unfortunately, the parties herein failed to draw up a Memorandum of Agreed Issues although there is no evidence that there was even a mutual or disparate attempt to reach such agreement on the issues, before filing their separate memoranda. Suffice it to say that the Plaintiffs on December 12th 2016 filed what they have headed "Plaintiffs' memorandum of issues pursuant to Order of Court Dated 28th July 2016",(although there is no such order of the Court on record) wherein they set out the following issues: -

1. "Whether or not the Agreement between the government of Ghana and the United States of America transferring Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby required parliamentary approval in accordance with Article 75 of the 1992 Constitution of the Republic?

2. Whether or not the President of the Republic of Ghana's failure and or refusal to obtain the requisite approval from Parliament in respect of the Agreement in issue, prior to the transfer of Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana is unconstitutional?

3. Whether or not the reception of Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby and their continuous stay in Ghana is lawful.

4. Whether or not upon a true and proper interpretation of Article 58(2) … the President … is under an obligation to maintain and execute the Anti Terrorism Act of 2008… and the Immigration Act of 2000, both being laws of Ghana ….?

5. Whether or not the President …breached Article 58(2) …by agreeing with the government of the (USA) to have Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby, suspected terrorists, transferred to the Republic of Ghana?"

On the other hand, the Memorandum of Issues filed by the Defendants on the 5th of January 2017 raised the following issues: -

1. Whether the note verbale(sic) established between the Government of Ghana and the Government of the United States of America in settling Umar Muhammed Bin Atef and Khalid Muhammed Salih Al-Dhuby in Ghana was an agreement that was caught by Article 75 of the Constitution, 1992 and therefore requiring Parliamentary approval.
2. Whether the President of the Republic of Ghana, in allowing the settlement in Ghana of Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby breached the provisions of the Anti-Terrorism Act, 2008 (Act 762) and the Immigration Act, 2000 (Act 573).

3. Whether the documents, Exhibits GB1 and GB2 upon which the Plaintiffs rely on for their entire case are authentic and meet the standard set in section 161 of the Evidence Act, 1973 (NRCD 323) to ground a cause of action.

4. Whether these documents as aforesaid, are in the category of hearsay evidence, and therefore in breach of section 118 of the Evidence Decree 1975 (NRCD 323)

5. Whether this Court would not go contrary to the principle of sovereign equality of states, if it decides on the case which bears on the conduct of officials of a foreign state, i.e. United States of America.

We need to note that after the Defendants filed their Statement of Case, the Plaintiffs, on 16th May 2016, filed a motion on notice for an order directing the Defendants to produce a copy of the agreement between Ghana and the USA for the transfer of the said two persons to, and their resettlement in, Ghana. The Defendants vehemently opposed the application on grounds the salient points of which were to the effect that:-

a. The Plaintiffs must first demonstrate the existence of an agreement of the kind contemplated by Article 75 which governs the execution of treaties agreements and conventions and does not cover every 'agreement' such as "'Note Verbales' without (sic) another state or non state actor".
b. The agreement that resulted in the arrival of the said two persons in Ghana are notes verbales, which are "purely administrative and confidential in nature and are not to be approved by Parliament and are therefore not caught under Article 75…."
c. Because the said notes verbales are confidential, their disclosure will violate Section 1 of the State Secrets Act, 1962 (Act 101)
d. The agreement is a privileged matter pursuant to NRCD 323 and their disclosure would be prejudicial to the interests of the state"
e. The Plaintiffs bears the burden of to prove that the notes verbales fall under article 75 and they must win their case on the strength of their own documents and not that of the defendants.

On 12th July 2016, the Court pursuant to Article 135, held in-camera proceedings and the Deputy Attorney General submitted the documents. The court, having examined the same, on 28th July 2016 concluded that the State Secrets Act did not apply to the documents and ruled that the Plaintiffs' motion be granted and that the documents be admitted into evidence as Exhibit A, with the admonition that the same was produced

to be used by counsel for Plaintiff in furtherance of this litigation and for no other purpose. I have mentioned this aspect of the matter because it is evident that the Plaintiffs subsequently relied, not only on the arguments raised in the affidavit in opposition to the motion to produce, but also on a portion of Exhibit A to bolster their additional arguments in support of their case.

We also must note that on January 10, 2017, the Court struck out issues 3 and 4 as set out in the Defendants' Memorandum of Issues. At the same sitting, the Court, on an oral application (no objection from the Defendant) granted leave to the Plaintiffs to file further arguments of law on Issue 1 of the Memorandum of Issues filed by the Defendants. The further arguments, filed on January 31st 2017, may be summarized as follows:-

a. It is the content or substance of an agreement that matters not the nomenclature the government may choose to give an agreement. Article 75 is not limited to treaties and exhibit A is an agreement between two states (Ghana and the USA) and is described as such therein, and therefore whatever other label the Defendants put on it cannot change its substance.
b. Under the provisions of Article 1 of the Vienna Convention on the Law of Treaties, 1969, a treaty is an international agreement, in written form and governed by international law, concluded between states, whether or not embodied in a single or multiple instruments, however designated. Consequently, Exhibit A, which sets out Ghana's obligations in clear terms has all the features of a treaty and is within the contemplation of Article 75.

c. In any event Article 75 also deals with agreements and conventions executed as part of Ghana's international relations.

By an order dated 10th May 2017, the Court directed the parties to file legal submissions on the relevance of Articles 83 and 84 to Article 75, on Treaties, and the applicability of estoppel in international law upon an executed treaty. As at the expiration of the time limit fixed by the Court, i.e., 24th May 2017, the Defendant had complied with the Court's order. The Court notes that the Plaintiffs eventually filed their submissions on 16th June 2017, which was grossly out of time, without leave of the Court. However, in view of the fact that this is a constitutional matter and, therefore its outcome is a matter of public interest, the Court has, nevertheless, taken into account salient parts of the arguments canvassed by the Plaintiffs in their written submissions, which are, in sum, as follows:

a. As a dualist state, Ghana's consent to be bound by an international agreement is only deemed to have been properly secured after the same has been approved or ratified by Parliament.

b. The combined effect of Articles 11 and 14 of the Vienna Convention is that where a treaty is subject to ratification, the formal exchange or deposit of the instrument of ratification is necessary to bring it into effect. Thus, in the case of Ghana, where a Treaty, Agreement or Convention is subject to ratification, unless there has been a formal exchange or deposit of the instrument of ratification, same cannot be said to have come into effect. In other words, the signature of the President does not, in and of itself, express the consent of Ghana to be bound nor does it create an obligation to ratify the agreement.

c. Approval by Parliament of an international agreement does not only have domestic constitutional effect but it also establishes the country's willingness to be bound to an obligation at the international level. In support of this submission, the Plaintiffs cited the South African case of Glenister v President of the Republic of South Africa [2001] ZACC 6, 2011 (3) SA 347 (CC) for persuasive effect.

d. There is no agreement between the Republic of Ghana and the United States of America since the Republic of Ghana has not yet expressed its consent to be bound by such an agreement. According to the Plaintiff, it, therefore, stands to reason that the issue as to whether or not same can be terminated does not arise at all.

e. On the issue of the role of the National Security Council, Plaintiffs position was that it was never the intention of the framers of the 1992 Constitution that the National Security Council might in any instance derogate from the power of Parliament under Article 75 (2) of the 1992 Constitution. Hence, approval of all Agreements is the sole prerogative of Parliament.

f. The Plaintiffs finally submitted that, in the circumstances, the Executive be ordered by the Court to validate the agreement herein by submitting the same to Parliament for ratification.

The salient points of the Defendant's submissions are as follows:

a. Article 84 states the functions of the National Security Council which include *inter alia* considering and taking appropriate measures to safeguard the internal and external security of Ghana.

b. The President by Article 83 does not act by himself. Thus, the entire National Security Council established by the Constitution and assigned the functions in Article 84 to ensure the security of Ghana has not suggested by any means whatsoever that the security of the Country has been endangered by this action.

c. The Plaintiff is unnecessarily worried, and has not established any reason why this Court or the people of Ghana must be worried about the security of the country. The Plaintiff has also not established that the President did not consider the relationship between the two provisions in agreeing with the Government of the United States of America to admit the two former detainees into Ghana.

d. On the question of estoppel in International law upon an executed treaty, Article 42 of the Vienna Convention on the Law of Treaties, 1969 prescribes a certain presumption, on the basis of the doctrine of pacta sunt servanda, as to the validity and continuance in force of a treaty. Thus unless a treaty is invalid, the general principle of international law is that it must be performed in good faith by the parties to it and a party is estopped from resiling from it.

e. Based on Article 46 of the Vienna Convention on the Law of Treaties, a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. The said violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith. The Defendant cited in support of her submission, the judgment of the International Court of Justice (ICJ), dated October 10, 2002, in the matter concerning the Land and Maritime Boundary between Cameroon and Nigeria, where the Court, based on Article 46, paragraph 1, of the Vienna Convention held that the Marouna Declaration, as well as the Yaounde II Declaration, have to be considered as binding and as establishing a legal obligation on Nigeria, for the reason that the provisions of Nigerian law limiting the capacity of the Head of State of Nigeria to conclude treaties was not sufficiently manifest within the meaning of Article 46 of the Vienna Convention.

f. Based on the foregoing legal arguments, Defendant submitted that the agreement between the Government of Ghana and the Government of the United States has to be considered as binding and establishing a legal obligation on Ghana, and Ghana is estopped from resiling from it.

ANALYSIS

The clear and incontrovertible facts in this matter are:

a. That there was an agreement, evidenced in some form of writing, between the Government of the Republic of Ghana and Government of the United States of America to resettle in Ghana for two years or more, two persons formerly detained by the USA at its facility at Guantanamo Bay, namely, Mahmud Umar Muhammed Bin Atef and Khalid Muhammad Salih Al-Dhuby.

b. That pursuant to the said agreement, the said persons have actually been brought into, and at all material times reside in, Ghana.

Thus, the core issue of import to be determined in this matter is whether or not Exhibit A, the document or instrument made between Ghana and the USA is in the category of 'agreement' contemplated by Article 75, which, therefore, ought to have been placed before Parliament for ratification. All the other issues are ancillary to this one.

Article 75 reads 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."*

To ascertain the meaning of this article, and in particular the word 'agreement' as used in contradistinction to 'treaty' and 'convention' we must bear in mind the provisions of Article 73 of the Constitution which states, that:

> *"73 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."(emphasis mine)

This provision echoes the Directive Principle of State Policy stated in Article 40(a) of the Constitution that: -

"In its dealings with other nations, the Government shall –
(a) Promote and protect the interest of Ghana…."

One, also, must not lose sight of the words of Sowah JSC *(as he then was)* in Tuffuor v Attorney-General [1980] GLR 637, which have over the years served as highly valued guiding principles in the interpretation of the Constitution of Ghana: -

"The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana…. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.

We must, furthermore, bear in mind Section 10(4) of the Interpretation Act, 2009 (Act 792) which provides that:

"(4) Without prejudice to any other provision of this section, a Court shall construe or interpret a provision of the Constitution or any other law in a manner

(a) that promotes the rule of law and the values of good governance,

(b) that advances human rights and fundamental freedoms,

(c) that permits the creative development of the provisions of the Constitution and the laws of Ghana, and

(d) that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of the laws of Ghana.

The Defendant seeks to persuade us that, in interpreting article 75, we must make a distinction between an agreement intended to create a legal liability and one which, although made between two state parties, is not intended to create legally binding obligations and rights. We, however, received very scant help regarding the basis for such a distinction save that, according to the Defendant, such distinction, is based on 'State Practice'. Unfortunately, the references made in support of such distinction relate not to Ghana's Constitution or State Practices developed therefrom, but rather to practices in the United States of America, where there appears to be a long-standing practice to distinguish between 'executive agreements', which are signed by their President without the approval of Congress, and treaties that require such approval. The Defendant also made reference to the Republic of South Africa, where such distinction is specifically provided for in their Constitution.

Why we should interpret the terms of our Constitution in line with the provisions of another State's constitution, and why we must follow another State's practices, the Defendant failed to give us any cogent reasons or make any compelling showing. With specific reference to Ghana, the Defendant could only make mention of 'technical cooperation agreements, agreements on joint military training sessions and memoranda of understanding in support of certain international causes' without exhibiting any textual examples of what she termed Executive Agreements. In any event, it is clear that the submissions of the Defendant dealt with instruments the substance of which are in an entirely different category from the one in issue herein.

The language of Article 75 is perfectly clear. The Article forms part of the set of provisions governing the role of the Executive arm of government in Ghana's international relations. The scope of the Article deals with treaties in general (c.f. the side notes) and the body of the text makes reference to 'treaties, agreements and conventions'. It is also clear that the instruments referred to relate to Ghana's international relations with other countries or groups of countries and the Article requires that such instruments must be ratified by Parliament. The Constitution makes no mention of any formal distinctions that are dependent on the formality with which such an instrument is formatted or brought into being. From the aforementioned principles of constitutional interpretation in Ghana, there is no doubt that where, by various forms of documentation, the Government of Ghana binds the Republic of Ghana to certain obligations in relation to another country or group of countries, an international agreement comes into existence. Taking into account the substance of Exhibit A, we are in no doubt that, despite the form in which it has been drafted and the text couched, it is intended to create an obligation on the part of Ghana to the USA whereby, inter alia, Ghana binds herself to 'receive' and 'resettle' the said two persons,

and assure that, 'for at least two years, or longer if warranted by circumstances,' these persons are kept under such conditions (i.e. monitored and surveilled) as would accord with 'the security assurances in this agreement to be implemented'.

Furthermore, it also appears that, under the agreement, Ghana is obliged to integrate the two persons into Ghanaian society. This is a unique obligation, since it compels the virtual migration of the two persons into Ghana. If the arguments of the Defendant were to be taken seriously, (i.e., that the transaction being by way of a note verbale ('executive agreement, memorandum of understanding, diplomatic note', or what have you) is merely an administrative one), then the question arises as to the exact status of the said persons now that they are in Ghana. Are they migrants? (should the application of our sovereign laws on immigration be compelled by another state?) Are they refugees? (their situation does not fall into the definition of 'refugee' under Article 1 of the UN 1951 Convention on the Status of Refugees (as amended by the 1967 Protocol thereto; or Article 1 of the 1969 AU Convention Governing Specific Aspects of Refugee Problems in Africa). There is, therefore, no doubt that the arrangement, unique as it is, cannot be made without parliamentary ratification.

With regard to the Defendant's submission that, in the context of Article 75, 'agreement' must necessarily take its meaning from the 'company it keeps' i.e. treaty and convention, we note the terms of Article 1 of the Vienna Convention on the Law of Treaties defining a Treaty as:

> *"An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'*

A convention is an agreement amongst nations, i.e. a multilateral treaty, such as the Vienna Convention. An agreement is also for the purposes of the Article 1, a treaty by the definition of treaty (supra). In other words, as has been noted above, our Constitution bears no distinction between executive and non-executive agreements.

To buttress the argument that a state is estopped from resiling on an international agreement, the Defendant quoted a portion of the decision of the International Court of Justice dated October 10, 2002 in the matter concerning the Land and Maritime Boundary between Cameroon and Nigeria, to wit[1];

> "*…the Court notes that there is no general legal obligation for States to keep themselves informed of the legislative and constitutional developments in*

[1] At pgh. 265 (page 242) http://www.icj.org/docket/files /94/13803.pdf

other States which are or may become important for the international relations of these States."

Certainly, this position is untenable in the context of the modern dispensation of international relations, which is characterised by, and operates within an environment of, democracy and written constitutions. It is the duty of any party to an agreement to conduct basic due diligence on the capacity of the other contracting party to ensure the soundness of the agreement vis a vis prevailing constitutionality and constitutionalism. A State, with all the resources at its disposal, cannot absolve itself from its failure to perform this basic inquiry into the legislative and constitutional requirements of other States which are or may become relevant or important for grounding international relations of mutual States.

Additionally, the above-quoted portion of the decision of the ICJ has a tendency to become inimical to the rationale underpinning the establishment of Foreign Missions, Embassies, High Commissions etc. In this era of technology, no State should play the proverbial ostrich and pretend not to know or be interested in the affairs of other States with which it initiates dealings in the international environment, and thereby contract blindly in the hope the other State-party acts in good faith and with full capacity. Such regularity cannot be presumed any longer, especially in a democratic dispensation. A State is, therefore, duty bound to conduct the necessary due diligence when entering into international agreements with Ghana to ensure that such agreements are in consonance with our Constitution and, therefore, enforceable.

Consequently, we hold that, upon a true and proper interpretation of Article 75 of the 1992 Constitution of Ghana, the President of the Republic of Ghana, in agreeing to the transfer of Mahmud Umar Muhammad Bin Atef and Khalid Muhammad Salih Al-Dhuby to the Republic of Ghana, required the ratification by an Act of Parliament, or a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament, and by virtue of the failure to obtain such ratification the agreement is unconstitutional.

S. A. B. AKUFFO (MS)

(CHIEF JUSTICE)

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

ATUGUBA, JSC:-

I have had the advantage of reading the characteristic brilliant judgment of Sophia Akuffo C.J. As she has set out in extenso the salient facts of this case, I would not repeat them except when necessary. It has not been easy for me to track down the crux of the nature of the agreement between Ghana and the United States in this case. Is it an immigration matter, a security matter or a resettlement matter?

What however seems to be clear to me is that it involves the reception and handling of two aliens. An alien is simply a person who is not a citizen of a particular country under consideration. Thus for whatever reasons these two Yemeni citizens have been brought down to Ghana from Guantanamo Bay camp, they are here as aliens. That being so, what is the law in this country with regard to powers over aliens? The answer is deeply embedded in international law. Thus in *Captan v. Minister for Home Affairs (Minister of Interior)* (1970) 2 G&G 1223 2d at 1228 Akufo-Addo C.J**.** delivering the unanimous judgment of the Court of Appeal (sitting as the Supreme Court) said:

> **"The principle underlying the matter before us is one that has long been established in international law, and it is that an independent sovereign state has the power inherent in sovereignty to decide what foreign nationals it will admit into its community, what conditions it will impose on such admission, and to expel at any time any aliens admitted into residence. If we may quote a passage from *1 Philimore, International Law,* section 220: 'It is a received maxim of international law that the government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it or may require and compel their departure from it.'"**

Continuing he said at 1233:

> **"The exercise of the power of the executive and of the legislature over aliens is inextricably intertwined with the conduct of the State relations with foreign countries, and the conduct of foreign relations is peculiarly within the province of what are called the political departments of state i.e. the executive and the legislature."**

From the trend of his judgment it is quite clear that the court meant to say that the sovereign power of Ghana over aliens is exercisable by the Executive though the Legislature may regulate its exercise through legislation such as the **Aliens Act, 1963 (Act 160)** together with its regulations. The Court however stressed that the source of the power over aliens was not the Aliens Act which merely regulated the exercise of that power but the principle of international law, ut supra. See also *Principal Immigration Officer v. O'Hara* (1994) 1 LRC 138, Supreme Court, Zimbabwe, at 144-145.

The exercise of this sovereign right over aliens is not a matter for ratification, it is complete in itself. Thus in *Edusei v. Attorney-General and Another* (1996-97) SCGLR 1 at 6 Amua-Sekyi JSC stated the facts of the case, as far as relevant as follows:

> **"In or about January 1984, certain persons, among them the plaintiff, who were said to be engaged in espionage activities on behalf of the Government of the United States were permitted to leave Ghana under an agreement between the Governments of Ghana and the United States. In return, the Government of the United States permitted one Soussoudis who had been convicted in the United States of engaging in espionage activities on behalf of the Government of Ghana, to leave the United States."**

It is pertinent to note that even in 1984 S 8(2) of the **Provisional National Defence Council (Establishment) Proclamation, 1981 (PNDCL 42)** provided that:

> **"The Council shall execute or cause to be executed treaties, agreement or conventions in the name of Ghana, so however that such treaties, agreements or conventions shall come into force on ratification by the Council."**

No issue however arose as to the compliance with this provision in the Edusei case. Presumably, Ghana and the United States merely exercised their undoubted sovereign power over aliens (though one of the persons involved, the plaintiff, was a Ghanaian). Again in, *Republic v. High Court (Commercial Division), Accra; Ex*

Parte Attorney-General (NML Capital LTD & Republic of Argentina Interested Parties) (2013-2014) 2 SCGLR 990 a military vessel of Argentina came to Ghana under a military exercise agreement between Ghana and Argentina but no issue of parliamentary ratification was involved. Although Argentina waived its sovereign rights of immunity under a judgment obtained against it in the American courts, this Court held that under public international law it is inconceivable for a military asset of a foreign country to be seized in execution of a judgment. These two cases are here cited by way of analogy. All told, it is that a deep-seated principle of international law commonly recognized by the nations of the world cannot easily be overridden by the courts. The settled executive powers of a sovereign state cannot be abrogated except by express statutory provision. It is a settled principle that it is expected that a statute will be construed to be consistent with the common law rather than against it.

I need not go further except to say that if the agreement be regarded not as a matter affecting aliens simpliciter but is in essence a security issue, then the 1992 Constitution having specifically confided that matter for consideration and decision to the National Security Council under Articles 83-84 of the 1992 Constitution of the Republic of Ghana could not have also contemplated the applicability of the general provision of Article 75 to it. That would produce a conflict. See *Ghana Bar Association v. Attorney- General* (Abban case) (2003 – 2004)1 SCGLR 250.

To conclude just as a customary agreement is not turned into a common law agreement simply because it has been committed into writing, an agreement concerning the reception, residence and expulsion of aliens which is an indisputable power of sovereignty of states remains as such, even though it has the features of a treaty, and is not to be prejudiced or held to be within the purview of Article 75 of the Constitution. Indeed the government is constitutionally bound under article 73 to conduct its affairs in line with such international principles.

For all these reasons I with diffidence, cannot go along with the majority decision of this case.

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

COUNSEL

NANA ADJEI BARFOUR-AWUAH FOR THE PLAINTIFF

DOROTHY AFRIYIE-AWUAH, CHIEF STATE ATTORNEY FOR THE DEFENDANT