AFRICAN UNION

الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

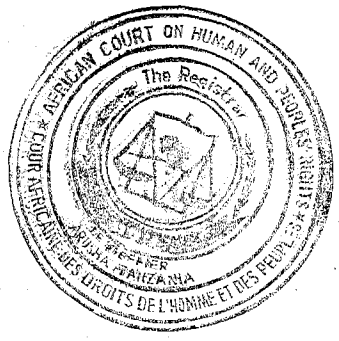
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

In the Matter of

Lohé Issa Konaté

v.

Burkina Faso



Application No. 004/2013

JUDGMENT

The Court composed of: Augustino S. L. RAMADHANI, President, Elsie N. THOMPSON, Vice President, Sophia A. B. AKUFFO; Bernard M. NGOEPE, Gérard NIYUNGEKO, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSE, Ben KIOKO and Kimelabalou ABA, Judges; and Robert ENO, Registrar.

In the matter of:

Lohé Issa Konaté,

Represented by:

Yakaré-Oulé (Nani) Jansen - Counsel
John R.W.D Jones Q.C.

v.

Burkina Faso,

Represented by:

Antoinette OUEDRAOGO, Counsel
Anicet SOME, Counsel

After deliberation,

Delivers the following Judgment:

1. Subject of the Application

1. The Court is seized of this matter by way of an Application dated 14 June 2013 and filed by Barristers John R.W.D Jones, Q.C and Yakaré-Oulé (Nani) Jansen, acting on behalf of Lohé Issa Konaté, a Burkinabé national and Editor-in-Chief of *L'Ouragan* Weekly published in Burkina Faso; the Application was received at the Registry on 17 June 2013 and registered as No. 004/2013.

2. Attached to the Application is a request for provisional measures on which the Court ruled by Order dated 4 October 2013.

A. Facts of the case

3. Prosecution for defamation, public insult and contempt of Court was initiated against the Applicant following the publication, in *L'Ouragan* on 1 August 2012, of an article written by him and titled "*Contrefacon et traffic de faux billets de banque – Le Procureur du Faso, 3 policiers et un cadre de banque, parrains des bandits*" ("Counterfeiting and laundering of fake bank notes – the Prosecutor of Faso, 3 Police Officers and a Bank Official – Masterminds of Banditry") as well as an Article by Roland Ouédraogo titled "*Le Procureur du Faso: un torpilleur de la justice*". (The Prosecutor of Faso – a saboteur of Justice"). The Applicant had published a second article written by himself in another issue of *L'Ouragan* dated 8 August 2012; that article was titled "*Déni de justice – Procureur du Faso: un justicier voyou?".* ("Miscarriage of Justice – the Prosecutor of Faso: a rogue officer").

4. Having been accused in all three above-mentioned articles, the Prosecutor, Placide Nikiéma, filed a complaint for defamation, public insult and contempt of Court, against the Applicant and Mr. Ouédraogo. It is on these grounds that criminal proceedings were brought and damages sought, against the Applicant, before the Ouagadougou High Court.

5. On 29 October 2012, the Ouagadougou High Court sentenced the Applicant to a twelve (12) month term of imprisonment and ordered him to pay a fine of 1.5 Million CFA Francs (an equivalent of 3000USD), the same court ordered the Applicant to pay the Complainant damages of 4.5 Million CFA Francs (an equivalent of 9000USD) as damages and interest, and court costs of 250,000 CFA Francs (an equivalent of 500USD).

6. Further, as additional penalties, the Court ordered that *L'Ouragan* Weekly be suspended for a period of six (6) months and for the operative provisions of the judgment to be published in three successive issues of *L'Evenement, L'Observateur Paalga, Le Pays* and *L'Ouragan* Newspapers and, in the case of the latter, in its first issue upon its resumption of activity and for a period of four months, at the cost of the Applicant and Mr. Roland Ouedraogo.

7. On 10 May 2013, the Ouagadougou Court of Appeal confirmed the judgment of the Ouagadougou High Court.

8. The Applicant alleges that *L'Ouragan* is a private Weekly with "an independent editorial policy focussing mainly on political and social issues"; that the paper "has been the object of various legal proceedings in Burkina Faso due to its style in news reporting".

B) Alleged violations

9. The Applicant submits in his Application that "the jail term, huge fine, damages as well as the court costs violate his right to freedom of expression which is protected under various treaties to which Burkina Faso is a Party"; he also alleges notably the violation of his rights under Article 9 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), and Article 19 of the International Covenant on Civil and Political Rights (hereinafter, referred to as "the Covenant").

10. 10. Article 9 of the Charter provides as follows:

"1) Every individual shall have the right to receive information.
2) Every individual shall have the right to express and disseminate his opinions within the laws and regulations".

11. Article 19 of the Covenant, for its part, provides that:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order or of public health or morals".

12. The Applicant also refers to the violation of Article 66 (2) (c) of the Revised Treaty of the Economic Community of West African States (ECOWAS) of 24 July 1993, (hereinafter referred to as "the Revised ECOWAS Treaty") in which State Parties undertook to protect the rights of Journalists, which according to him is, "the profession in the exercise of which the Applicant's rights were violated"

13. On the merits, the Applicant prays the Court to:

"1. Declare in law that his punishment, especially his conviction as well as his being ordered to pay a huge fine, civil damages and court costs are in violation of the right to freedom of expression;

2. Note that Burkina Faso laws on defamation and insult are repugnant to the right to freedom of expression or, failing this, declare that the jail term for defamation is a violation of the right to freedom of expression, and order Burkina Faso to amend its laws accordingly;

3. Order Burkina Faso to compensate him, in particular, for loss of income and profit and to award him damages for the moral prejudice suffered".

14. The Applicant reiterates his prayers in his Reply dated 18 November 2013.

II. Procedure before the Court

15. The Court was seized of the matter by an Application dated 14 June 2013. By letter dated 10 July 2013, addressed to Counsel for the Applicant, the Registrar acknowledged receipt of the Application, pursuant to Rule 34 (1) of the Rules of Court (hereinafter referred to as "the Rules").

16. In his Application, the Applicant, who was promptly imprisoned after judgment was delivered by the Ouagadougou High Court on 29 October 2012, also sought provisional measures which "involve requiring Burkina Faso to have him released immediately or, alternatively, provide him with adequate medical care".

17. Pursuant to Rule 35 (2) of the Rules, the Registrar forwarded a copy of the Application to the Respondent State by letter dated 10 July 2013, addressed to the Minister of Foreign Affairs of Burkina Faso, via the Embassy of Burkina Faso in Addis-

Ababa, Ethiopia. In the same letter, the Registrar requested the Respondent State to provide, within thirty (30) days of receipt of the Application, the names and addresses of its representatives, in conformity with Rule 35 (4) of the Rules and to respond to the Application within (60) days, as required under Rule 37 of the Rules.

18. Pursuant to Rule 35 (3) of the Rules, by another letter of the same date, the Registrar forwarded a copy of the said Application to the Chairperson of the African Union Commission and through her, to the Executive Council of the African Union and to all the other States Parties to the Protocol on the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter, referred to as "the Protocol").

19. By Note Verbale dated 18 July 2013, the Embassy of Burkina Faso and Permanent Mission to the African Union in Addis Ababa, Ethiopia, acknowledged receipt of the letter from the Registrar dated 10 July 2013.

20. On 26 November 2013, a request to appear as *Amici Curiae* was submitted by the following non-governmental organizations: Centre for Human Rights, *Comite Pour la Protection des Journalistes,* Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers' Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers.

21. The *Amici Curiae* Briefs were submitted to the Registry of the Court on 12 February 2014.

22. On 16 September 2013, the Respondent State submitted its Response.

23. On 4 October 2013, the Court ruled on the Applicant's request for provisional measures by Ordering the Respondent State to provide "the medical care and medication required in view of his health situation."

24. On 18 November 2013, the Applicant submitted his Reply.

25. The Court having decided to hold a Public Hearing, the said hearing was held at the Seat of the Court in Arusha on 20 and 21 March 2014, in the course of which the Parties and the representatives of organizations appearing as *amici curiae* made their oral submissions and observations.

For the Applicant:

-Yakare-Oule (Nani) Jansen, Counsel
- John R.W. D. Jones, Q. C.

For the Respondent State:

- Antoinette OUEDRAOGO, Counsel
- Anicet SOME, Counsel

Appearing as *Amici Curiae*: Centre for Human Rights, *Comite Pour la Protection des Journalistes*, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers.

Donald DEYA, Advocate
Simon DELANEY, Advocate

26. At the Public Hearing, Members of the Court put questions to the Parties and the latter responded.

27. On 22 March 2014, Counsel for the Parties and organizations appearing as *Amici Curiae* forwarded their submissions to the Court.

28. As part of the written proceedings, the following submissions are made by the Parties:

On behalf of the Applicant,

In the Application, the Applicant submits that his sentence, the fines and damages ordered against him, as well as the closure of his Newspaper, are a violation of his right to freedom of expression.

In the Reply,

The Applicant prays the Court:

1. To Declare the preliminary objections raised by Burkina Faso as unfounded and to Rule the Application admissible;

2. To Rule in favour of the Applicant on the merits, Grant the relief sought, Allow and Order the damages as set out in paragraph 131 of the Application.

On behalf of the Respondent State,

1. On the objections: in the main

   To note that Application No. 003/2013 of 14 June 2013 by the Applicant does not comply with the admissibility requirements as set out in Articles 56 (2), (3)

and (5) of the African Charter, as well as in Rules 34(2), 40(2), (3) and (5) of the Rules of Court and should therefore be declared inadmissible;

2. In the alternative, on the merits:
   And, in the event of the Court ruling that the Application is admissible and contrary to all expectations, to dismiss it as unfounded;

29. During the Public Hearings of 20 and 21 March 2014, the Applicant does not amend his submissions; the Respondent State for its part maintains its position but raises a new objection, challenging the Applicant's status as a Journalist.

III. Jurisdiction of the Court

30. Rule 39 (1) of the Rules (hereinafter referred to as "the Rules"), provides that the Court must first conduct preliminary examination of its jurisdiction. The Court notes in this regard that even if the Respondent State raises no objections; it is still required to satisfy itself, *proprio motu,* that it has the jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci,* to hear the Application.

31. First, on its *ratione personae* jurisdiction, the Protocol requires the State against which action is brought to have ratified the said Protocol and other relevant human rights instruments mentioned in Article 3 (1) thereof, but also, in regard to Applications from individuals or non-governmental organizations, to have made the declaration accepting the jurisdiction of the Court to consider such Applications, in conformity with Article 34 (6) of the Protocol (Article 5(3)).

32. In the present case, the Court notes that Burkina Faso became a Party to the Charter and to the Protocol on 21 October 1986 and 25 January 2004 respectively, and that the declaration required under Article 34 (6) of the Protocol was deposited on 28 July 1998 and took effect on the date of entry into force of the Protocol, that is, 25 January 2004. The Court therefore finds that it has jurisdiction over the Respondent State.

33. The Court must however satisfy itself that it also has jurisdiction over the Applicant. In this regard, the Court notes that the Application is filed on behalf of an individual, Issa Lohé Konaté, by Barrister John R.W.D. Jones and Barrister Yakaré-Oulé (Nani) Jansen.

34. The Court therefore finds that it has the *ratione personae* jurisdiction to hear this matter both in regard to Applications by the Respondent State as well as by the Applicant.

35. Secondly, on the jurisdiction *ratione materiae* of the Court, Article 3 (1) of the Protocol provides that the Court's jurisdiction "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other human rights instruments ratified by the States concerned".

36. In the instant case, the Applicant alleges violation, by the Respondent State, of Article 9 of the Charter, Article 19 of the Covenant as well as Article 66 (2) (c) of the Revised ECOWAS Treaty. The Court notes in this regard that the Respondent State is a Party to the Charter and also to the Covenant as of 4 April 1999, when the latter instrument became enforceable in regard to the Respondent, as well as the Revised ECOWAS Treaty which it ratified on 24 June 1994.

37. Consequently, the Court has the *ratione materiae* jurisdiction to consider the matters raised in the Application.

38. On its *ratione temporis* jurisdiction, the Court is of the view that in the instant case, the relevant dates are those of the entry into force, with regard to the Respondent State, of the Charter (21 October 1986), the Protocol (25 January 2004),

and the Covenant (4 April 1999) as well as the optional declaration accepting the jurisdiction of the Court to hear Applications from individuals or non-governmental organizations (25 January 2004).

39. The alleged violation of the Applicant's right to freedom of expression stems from the latter's conviction by the Ouagadougou High Court and the fact that the conviction was upheld on 10 May 2013 by the Ouagadougou Court of Appeal.

40. Hence, the Court notes that the alleged violation of the Applicant's right to freedom of expression is likely to have occurred on 10 May 2013 or well after the Respondent State had become Party to the Charter and the Covenant, and had made the declaration accepting the Court's jurisdiction to receive Applications from individuals or non-governmental organizations. Consequently, the Court finds that it has the *ratione temporis* jurisdiction to hear the allegation of violation of the right to freedom of expression raised in this case.

41. The Court finally notes in regard to its *ratione loci* jurisdiction that this is an issue not disputed by the Respondent State; further, it is of the opinion that the *ratione loci* jurisdiction cannot be disputed as the alleged violations occurred in the territory of the Respondent State.

42. It therefore follows from the above considerations that the Court has jurisdiction to consider the human rights violation alleged by the Applicant.

IV. Admissibility of the Application

43. The Respondent State raises objections based on Rule 40 of the Rules, which reiterates the provisions of Article 56 of the Charter. However, it also raises an objection relating to the failure to identify the Respondent State as well as the capacity of the Applicant as a journalist.

A. Objection relating to the failure to identify the Respondent State

44. In its Response to the Application, the Respondent State submits that:

> "Although the Applicant in his Application provided correct information on himself (Lohé Issa Konaté), as well as the names and addresses of the persons designated as his representatives, however, in the case of the Respondent, the information provided was neither specific nor correct.
>
> In fact, the Respondent indicated that in the Application, mention was made of the "People's Democratic Republic of Burkina Faso" which does not refer to the State of Burkina Faso".
>
> [...]
>
> "Burkina Faso therefore humbly prays the Court to note that the Party mentioned in Lohé Issa Konaté's Application (People's Democratic Republic of Burkina Faso) does not refer to it. Moreover, it has no capacity to appear as Respondent in this Application filed against *The People's Democratic Republic of Burkina Faso*".

45. In his Reply dated 18 November 2013, the Applicant concedes that an error had been made in writing out the name of Burkina Faso on the cover page, as well as on pages 2 and 7 of the Application, and apologized for the typographical error as follows:

> "The Applicant concedes that an error was made in writing out the name of the Respondent State on the cover page as well as on pages 2 and 7. The Applicant regrets having made that error and apologizes for any inconvenience it might have caused though he also contends that, that error cannot be equated to a "failure to identify the Respondent State". Except for the pages mentioned, the Respondent State is properly identified throughout the Application as "Burkina Faso", which (as stated on several

occasions in the response) is the official name of the Respondent State".

46. In the view of the Court, an error as such in the title of the Application, though related to the identity of the Applicant or the Respondent State, cannot therefore be deemed to constitute a ground for the inadmissibility of the Application. In its Order *in the Matter of Karata Ernest and Others v. The United Republic of Tanzania*, in which the Court was required to rule on the issue of whether it may amend the title of an Application before it, by substituting the name of a Party which was erroneously mentioned with the name of the proper Party, the Court ruled that it had the discretion to effect such amendment to the title of the Application if it were deemed necessary and that the change of the title of the Application would not adversely affect either the procedural or substantive rights of the Respondent".[1]

47. In the instant case, it would appear that even if the Applicant has on occasion, in his Application used the name "Peoples' Democratic Republic of Burkina Faso", the alleged violations by the Applicant clearly stem from a decision of the Burkinabé courts. That aside, Burkina Faso has filed a Response to the Application; it has even complied with some of the 4 October 2013 interim measures required by the Court in the Order on Provisional Measures in this same matter.

48. On these grounds therefore, the Court finds that the Party designated in the Application as "People's Democratic Republic of Burkina Faso" is indeed Burkina Faso, the Respondent State.

[1] African Court on Human and Peoples Rights, *in the Matter of Karata Ernest and Others v. The United Republic of Tanzania*, Application No. 001/2012, Order, 27 September 2013, paragraphs 6 and 7.

B. Objection relating to Applicant's lack of status as a Journalist

49. During the Public Hearing of 20 and 21 March 2014, the Respondent State objected to the admissibility of the matter due to the Applicant's lack of capacity as a Journalist. It argued that: "The basic instruments of your Court require that the Applicant provide all the particulars concerning him in his Application. Maybe we do regret somewhat for having responded in too much of a haste to this Application. As, subsequently, we did notice that Konaté Lohé Issa was not even a Journalist and not registered with the administrative services which are supposed to legalize the creation and existence of a Newspaper. He does not have a Press Card which was instituted some three or four years ago. [...]"

50. The Respondent State also alleges that the Applicant was engaged in "illegal practice", in that, "he was not registered with the taxation services", and that his "Newspaper was not registered as a media outlet with the taxation services."

51. The Court notes that this issue was only raised by the Respondent State at the Public Hearing of 20 March 2014. The Court nevertheless granted the late submission and allowed the Applicant to respond to the allegations; which response was provided at the same Hearing. Counsel for the Applicant submits that the Applicant was convicted and punished as a Journalist who had written an article, because he had complied with the requirements of the Information Code. In their view, that was the judgement that was delivered.

52. The Court notes further that the Respondent State does not rely on the provisions of either the Charter, the Protocol or the Rules in support of its allegations.

53. The status of the Applicant as a Journalist is however of some significance, considering the facts of this case; the Court therefore deems it useful to rule on this issue.

54. As said earlier, the Respondent argues that the Applicant (including *L'Ouragan* Newspaper) has no Press Card and is not registered with the taxation services or the administrative authorities which are in charge of legalizing the existence of a Newspaper, which allegation is not challenged by the Applicant.

55. The issue here is whether, by not complying with the above administrative formalities, the Applicant cannot claim to be a journalist.

56. In this regard, the Court notes that it is in his capacity as a Journalist that the Applicant was punished by the Courts of Burkina Faso; that his weekly newspaper *L'Ouragan,* has been in existence since January 1992.

57. In the view of the Court, assuming that Applicant has not complied with some of the administrative requirements in Burkina Faso, he all the same has the *de facto* status of a Journalist, on the basis of which he was convicted by the courts of that country.

58. The Court notes that at any rate Articles 9 of the Charter and 19 of the Covenant guarantee the right of freedom of expression to anyone regardless and not only to journalists.

59. The Court therefore concludes that the Respondent's allegation that the Applicant did not have the status of a journalist is unfounded and the Application cannot therefore be declared inadmissible on those grounds.

C. Objections based on Article 40 of the Rules

1). Objections to the admissibility of the application drawn from the incompatibility of the application with the Constitutive Act of the African Union and the Charter.

60. Rule 40(2) of the Rules provides as follows: "to be compatible with the Constitutive Act of the African Union and the Charter".

61. The Respondent State claims that the name mentioned in the Application, not being that of Burkina Faso, a State Party to the Constitutive Act of the African Union and the Charter, the Application should be declared inadmissible as it is inconsistent with Rule 40 (2) of the Rules, for being incompatible with the Charter.

62. The Court notes in this regard that the argument of the Respondent State rests on the allegation that the name on the Application, which is "People's Democratic Republic of Burkina Faso", does not refer to it. As the Court has already decided, in the present case, the Respondent State is Burkina Faso. The Application is not therefore incompatible with the Constitutive Act of the African Union or the Charter.

63. The Court therefore holds that the Application cannot be deemed inadmissible in this case on the grounds of the alleged failure to comply with the provisions of Rule 40 (2) of the Rules.

2). Objection based on the nature of the language used in the Application

64. Rule 40(3) of the Rules provides that [the Application] "must not contain disparaging and insulting language".

65. The Respondent State alleges that the Applicant uses disparaging language in referring to its identity. At the Public Hearing of 20 March 2014, it states that:

> "When, instead of "Burkina Faso", one says "People's Democratic Republic of Burkina Faso", the Court should take note that this refers, in a devious and biased manner, to the former peoples democracies of Eastern Europe and to a sadly notorious People's Republic in Asia over which everyone agrees that its main characteristics were or are dictatorship and massive violations of human rights. Therefore, to refer to Burkina Faso as "People's Democratic Republic" in a case where it stands accused of violating freedom of the press and freedom of expression, cannot be deemed to be trivial or considered as a mere oversight, as the Applicant claims; it is indeed disparaging within the meaning of Rule 40 of the Rules and Article 56 of the Charter".

66. The Applicant however submits that the name "People's Democratic Republic" is merely an unfortunate typographical error and that the Respondent State has not shown how such an error would be prejudicial to its position in the present case.

67. The basic concern here is to ascertain whether the name "People's Democratic Republic" as used by the Applicant in designating the Respondent State may be considered as disparaging or insulting towards the latter and as a result, invalidate the Application on the basis of Articles 56 (3) of the Charter and Rule 40 (3) of the Rules.

68. Rule 40 (3) of the Rules provides that an Application must "not contain any disparaging or insulting language". Article 56 (3) of the Charter further states that the language in question must not be directed against "the State concerned and its institutions or the OAU".

69. The Court recalls in this regard that the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"), when considering Communication No. 284/2003 (2009), has established the criteria for what would amount to disparaging or insulting language within the meaning of the two provisions cited above, when used in an Application.

70. The Commission has stated that:

> "The operative words in Article 56(3) are *disparaging* and *insulting* and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, disparaging means to speak *slightingly of ... or to belittle ...* and insulting means to *abuse scornfully or to offend the self-respect or modesty of ...*"[2]

Again, according to the Commission:

> "In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation and integrity of a judicial official or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute [...]"[3].

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[2] African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication n° 284/2003, 3 April 2009, paragraph 88 (French version).

[3] Id., paragraphe 91.

71. The Commission concludes its consideration of the matter as follows:

> "...The Respondent State has not established that by stating that one of the judges of the Supreme Court "was omitted", the complainants have brought the judiciary into disrepute. The State has not shown the detrimental effect of this statement on the judiciary in particular and the administration of justice as a whole [...], no evidence to show that it was used in bad faith or calculated to poison the mind of the public against the judiciary".[4]

72. In the present case, the Court is of the opinion that the Respondent State has not shown in what manner the name "People's Democratic Republic", as used by the Applicant, undermines the dignity, reputation or integrity of Burkina Faso. It has also failed to prove that such designation is used for the purpose of poisoning the minds of the public or of any reasonable person or that it is intended to subvert the integrity and status of Burkina Faso or to bring it to disrepute. Furthermore, it has not shown that such designation is used in bad faith by the Applicant.

73. The Court therefore holds from the above that the term "People's Democratic Republic" is not disparaging or insulting towards the Respondent State. The Application therefore complies with the requirements of Article 56 (3) of the Charter and Rule 40 (3) of the Rules and will not be declared inadmissible based on the above provisions.

3). Objection to the admissibility of the Application drawn from failure to exhaust local remedies

74. Rule 40(5) provides that: [the Application] "be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

[4] Id., paragraphe 96.

75. In its Response, the Respondent State also objects to the admissibility of the Application for failing to exhaust local remedies.

76. The records show that, the Applicant does not dispute the fact that he has not exhausted all the local remedies available within the Burkinabé legal system. The matter in contention between the Parties however lies on the one hand, in ascertaining if the duration of proceedings at the *Cour de Cassation* in Burkina Faso may be considered as unduly prolonged within the meaning of Articles 56 (5) of the Charter and Rule 40 (5) of the Rules; and on the other hand, to know whether remedy at the *Cour de Cassation,* neglected by the Applicant, was available, effective and sufficient.

a). General Observations

77. The first limb of the phrase of this Rule provides that [the Application] "be filed after exhausting local remedies" and the second "... unless it is obvious that this procedure is unduly prolonged." The Court notes that in addition to this exception, there are other criteria listed by the Commission and other international human rights courts based on the criteria of availability, effectiveness and sufficiency of local remedies. The Court will come back to the details of these criteria.

78. The rule regarding the exhaustion of local remedies prior to referral to an international human rights court is one that is recognized and accepted internationally[5]. Referral to international courts is a subsidiary remedy compared to remedies available locally within States. The Commission has so underscored in several of its decisions

79. For instance, in its consideration of the Communication: Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe, it states that:

"It is a well-established rule of customary international law that before international

[5] *See European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 35 (1)), American Convention on Human Rights (Article 46 (1)(a)), Optional Protocol to the Covenant (Article 5 (2) (b)).*

proceedings are instituted, the various remedies provided by the State should have been exhausted".

[...]

"International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations"[6].

80. As seen from the jurisprudence of the Commission, States are not considered to have violated their human rights obligations if their internal laws provide effective and sufficient remedy for victims.

b). The issue of unduly prolonged process of appeal at the Cour de Cassation

81. In response to the Application, the Respondent State argues that the Applicant relies solely on information obtained from the website of the *Cour de Cassation* in Burkina Faso to argue that appeals took on average seven years. It submits that the Applicant does not provide any precision as to his real source of information, the type and number of cases involved. The Respondent concludes that based on its jurisprudence, the arguments tabled by the Applicant are unfounded.

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[6] *African Commission on Human and Peoples Rights, Zimbabwe Lawyers for Human Rights and Associated Newspapers v. Zimbabwe, Communication No. 284/03, para 99 and 100. See also African Commission Sir Dawda K. Jawara v. Gambia, African Commission No. 1495-149/96. Para 31.*

82. In its Reply, the Applicant notes that it is difficult to establish the average duration of a case at the *Cour de Cassation* in Burkina Faso because the public has no easy access to such information. However, he concludes that relying on the information contained in expert reports, the average duration of a case on appeal in Burkina Faso may be between five (5) and nine (9) years.

83. The Applicant is of the view that the duration of four (4) years having been considered as unduly prolonged by the Commission and other international human rights institutions, his appeal in this case would have been unduly prolonged and therefore he stood a better chance before the African Court than before the *Cour de Cassation*.

84. The Court is of the view that since the alleged unduly prolonged procedure before the *Cour de Cassation* concerns only a remedy which has not been resorted to, the issue will be combined with the efficiency and sufficiency of remedies at the *Cour de Cassation*, which will be considered later.

c). **Availability, efficiency and sufficiency of remedies at the *Cour de Cassation***

85. In its Response, the Respondent State argues that the Applicant had not availed himself of all the local remedies at his disposal which might have enabled him to repair any alleged violations; he had therefore failed to provide Burkina Faso with the opportunity to repair the alleged violations, whereas such remedy did exist within the legal structures of Burkina Faso, by way of an appeal, as provided in Articles 567 to 598 of the Criminal Procedure Code.

86. Relying on the jurisprudence of the Commission in regard to the criteria of availability, effectiveness and sufficiency of remedies, the Respondent State maintains that in the instant case, the remedy exist, is effective and available, easily accessible and capable of repairing the alleged violations. It further

submits that the Applicant has failed to show in practical terms how an appeal at the *Cour de Cassation* is not accessible, effective or sufficient to redress the alleged violations.

87. At the Public Hearing of 20 March 2014 and in its oral submissions, the Respondent State maintains the same position, casting doubt on the good faith of the Applicant in this case. It argues that the Applicant has been given a fair trial in open court, assisted by counsel and has acknowledged the facts and even sought forgiveness from the tribunal and then asked for presidential pardon, thus demonstrating his acceptance of the judgments of the local courts.

88. The Applicant states in his Application that although an appeal is possible in formal terms, it is not effective as a remedy under the terms of Article 56 (5) of the Charter. He submits that for local remedies to be exhausted, they have to be "available, effective and sufficient". However, in the present case, the period of five clear days provided by the laws of the Respondent State for filing an appeal is unreasonably short, particularly as he does not have a complete text of the judgment on which to rely in lodging his appeal. He argues that the unreasonably short period renders the process ineffective.

89. Relying also on the jurisprudence of the Commission in regard to the criteria of availability, effectiveness and sufficiency of remedies, the Applicant argues that if local remedies do not meet the criteria, he is not obliged to exhaust them before taking the matter to an international court.

90. At the Public Hearing of 20 March 2014, the Applicant reiterates his position on the effectiveness of an appeal at the *Cour de Cassation*; which according to him, could not hear the merits of the case and therefore could not have satisfied his prayer and approve payment for reparation.

91. The Court notes that in the Burkinabé legal system, an appeal is a remedy that seeks to reverse, a final ruling or judgment which is at variance with the law (Articles 567 et seq of the Criminal Procedure Code of 21 February 1968 as updated on 30 April 2005).

92. As was held in the Court's judgment in the Matter of *the Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabé Movement for Human and Peoples Rights v Burkina Faso* in ordinary language, being effective refers to "that which produces the expected result and therefore the effectiveness of a remedy as such is measured in terms of its ability to solve the problem raised by the complainant[7].

93. In the circumstance, the Court had held the view that the appeal at Cour de Cassation as provided for in the Burkinabe Legal system is an effective remedy that individual Applicants could resort to in order to comply with the requirement regarding the exhaustion of local remedies as set out in Article 56 (5) of the Charter and Rule 40 (5) of the Rules.

94. The Court however stresses the fact that although it could be said that the appeal at the *Cour de Cassation* in the Burkinabé judicial system exists and is an effective remedy in theory, the issue of its effective application in the present case is a matter that requires closer attention.

95. In the instant case, the concern is whether the remedy, that is, appeals at the *Cour de Cassation* was available (or accessible), effective and sufficient.

[7] African Court on Human and Peoples' Rights, Application No. 013/2011, Judgment of 28 March 2014, p.24, para 68.