AFRICAN UNION

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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 materia*e 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].

[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.

[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.

i). **Availability of remedy at the *Cour de Cassation***

96. The Court shares the view of the Commission that a remedy is available if it can be pursued by the Applicant without any impediment.[8]

97. In the instant case, the Respondent State argues that the Applicant cannot rely on the fact that the five day period was short as a reason for refraining from appealing to the *Cour de Cassation* whereas this could have been done by way of a simple declaration and that consequently, the argument on the unavailability of court judgments and the brevity of the time limit for appealing to the *Cour de Cassation* would not be sufficient reason for failing to exhaust that local remedy. He points out that the only obligation which the Applicant has is to deposit or request to be deposited within a period of two (2) months following his declaration of appeal, a submission to the Registry of the jurisdiction where the appeal was filed.

98. The Applicant submits that he has not appealed to the *Cour de Cassation* because the five-day deadline for such appeals under the Burkinabé judicial system is unreasonably short, especially as he did not have the complete text of the judgment on which he could have relied in his appeal. He contends that the unreasonably short time limit rendered the process ineffective. He further contends that a remedy not mentioned in the reasons or grounds of appeal may not be raised subsequently, hence the importance of having the judgement.

99. In the view of the Court, the issue of the brevity of the five-day time limit for appeals, and of the unavailability of the impugned court judgments are related.

100. The Court notes that Article 575 (1) of the Criminal Procedure Code of Burkina Faso provides that "to appeal to the *Cour de Cassation* … the State and the parties are allowed five clear days after the impugned judgment is delivered *inter partes*

[8] African Commission on Human and Peoples Rights, *Sir Dawda K. Jawara v. Gambia,* Communication No. 147/95-149/96, para 31; African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe,* Communication No. 284/03, para 116

against them". Article 590 of the same Code for its part provides that, "an Appellant may either make a statement or, within a period of two months, submit a Brief setting out his grounds of appeal to the Registry of the Court with which the appeal is lodged …".

101. Appeals at the *Cour de Cassation* may therefore be brought in two different ways: either through a notice of appeal together with the submission of a head of argument within a time limit of five days from the pronouncement of the impugned judgement or through a notice lodged within the same five day time limit and the submission of a brief of argument within two months after the said statement is made. The appellant is not therefore required to submit his brief at the time of the notice of appeal, or within five days after the impugned judgment. The issue at hand is in regard to the content of the notice of appeal. Can an appeal be properly lodged when the appellant is not in possession of the impugned judgment at the time of drafting his notice of appeal?

102. The Respondent State claims that the full judgment was pronounced in the presence of the Applicant and his Counsel. Moreover, it alleges that parties are allowed to obtain an extract from the Registrar in Court; which extract contains all the operative provisions and suffices for use in lodging appeals. Furthermore, while in detention, the Appellant may still appeal.

103. The Court notes that Article 485 of the Burkinabé Criminal Procedure Code provides that:

> "Judgements must include the grounds and the operative paragraph or paragraphs. Grounds constitute the basis for the judgment. The operative paragraphs layout the offences on the basis of which the indictee is found guilty or held liable as well as the punishment, the applicable law and the damages. Judgement is pronounced by the presiding Judge. The operative paragraphs state the crimes, of which the indictee is declared guilty or liable, as well as the sentence, the law applied and the damages. The judgment is read by the Presiding Judge"

104. The reasoning is therefore an important component of the judgment as highlighted in Article 569 (1) of the Burkinabé Criminal Procedure Code which states that "Judgments of the lower Courts as well as the rulings and judgments of the Courts of last resort shall be declared null and void if they do not provide the reasons or if such reasons are insufficient or contradictory and do not enable the Cour [de cassation] to consider and to determine whether its operative provisions comply with the law".

105. The reasoning being the basis for the impugned judgment enables the Appellant to prepare his grounds of appeal. The said reasons need not be known to the Appellant at the time of lodging the notice of appeal within five clear days of the pronouncement of the impunged judgement: they become or are necessary for the Appellant's brief for submission within two months, as from the date on which the notice is made.

106. It is therefore not necessary, in the Court's view, for the Applicant to be availed of the impugned judgement at the time of the notice of appeal. Besides, the Court notes that it is possible for the Appellant, while in detention to lodge his notice of appeal by making his intention known through the submission of a simple letter to the Senior Superintendent of the Prison (Criminal Procedure Code of 1968, Article 584).

107. The Court concludes that in the instant case, the time limit of five (5) days for the Applicant to lodge his notice of appeal, though short, was not an obstacle for him to appeal. The Court therefore finds that the appeal at the *Cour de Cassation* is a remedy available to the Applicant.

ii. The effectiveness and sufficiency (or adequacy) of the remedy at the *Cour de Cassation*

108. The Court is of the view, same as the Commission, that a remedy is deemed effective if it offers prospects of success[9], is found satisfactory by the complainant or is capable of redressing the complaint.

109. It should be noted that the remedy envisaged under Rule 40 (5) of the Rules of the Court are considered in the application submitted to the African Court. In the present matter, the Applicant essentially prays the Court to declare that the Burkinabé Laws on the basis of which he was held criminally and civilly liable are in breach of the right to freedom of expression. The issue therefore is to ascertain if the *Cour de Cassation* could, under Burkinabé Law, rule on such a request and thus ultimately overturn the laws in question.

110. As the Court had already noted in the matter of *Norbert Zongo and Others v. Burkina Faso* "…in the Burkinabé Legal system, the appeal to the *Cour de Cassation* is a remedy intended to repeal, for violation of the law, a judgment or a ruling delivered as a last resort (criminal procedure Code of 21 February 1968, Article 567 et seq). The appeal does not therefore allow for the law itself to be annulled but only applies to the Judgment in question, either due to wrongful application or interpretation of the law. Far from causing an annulment of a law, the *Cour de Cassation* is on the contrary charged with ensuring the strict observance of the law by other lower domestic courts.

111. In such circumstances, it is clear that the Applicant in the instant case was not in a position to expect anything from the *Cour de Cassation* in relation to his request for the annulment of the Burkinabé laws, in pursuit of which he was convicted.

112. Indeed, in the Burkinabé judicial system, it is the Constitutional Council that is responsible for overseeing compliance of such laws with the Constitution, including in the provisions of the latter which guarantee human rights (Article 152 of the Constitution). In addition, Article 157 of the Constitution which provides for the institutions entitled to bring matters before the Constitutional Council for the purpose of determining the compliance of

laws with the Constitution does not make reference to individuals. As a result, the Applicant could not seize the Constitutional Council in order to have the laws, on the basis of which he was convicted, overturned.

113. On the basis of all the foregoing considerations, it could be said that the Burkinabé Legal System does not afford the Applicant in the present matter any effective and sufficient remedy to enable him overturn the Burkinabé laws which he is complaining about. Consequently therefore, the Applicant did not have to exhaust the remedy at appeal or any other remedy for that matter, after his final conviction on the merits by the Ouagadougou Court of Appeal on 10 May 2013.

114. The Court, having concluded that the remedy at appeal was ineffective and insufficient and, further that the appeal to the Constitutional Council was unavailable, does not need to rule on the submissions made by the Applicant regarding the risk of an unduly prolonged process of appeal that he might have had to undergo before the *Cour de Cassation*.

115. Having ruled that it has the jurisdiction to hear the matter, and having concluded on the admissibility of the Application, the Court will now consider the merits of the matter.

V. MERITS OF THE MATTER

116. The Applicant contends in his Application that his sentence to a term of imprisonment, the huge fine and damages as well as the Court costs violate his right to freedom of expression protected by various treaties to which the Respondent State is a party. More specifically, he accuses the Respondent State of violating Articles 9 of the Charter and 19 of the Covenant. He further alleges that Article 66(2*) (c)* of the Revised Treaty of the Economic Community of West African States of 24 July 1993 has been breached.

117. In its Response, the Respondent State argues that it has ratified “all international human rights conventions and treaties” and denies any violation of Article 9 of the Charter and 19 of the Covenant. It further argues that the provisions of the Information and Penal Codes, as well as their enforcement by Burkinabé Courts

were neither vague nor uncertain. It submits that the sentence pronounced against the Applicant is consistent with recent European Court of Human Rights (ECHR) judgments and was a necessary and proportionate response aimed at protecting the rights of Placide Nikiema, the Prosecutor of the Republic, considering the prejudice he suffered and the gravity of the statements made against him by the Applicant.

118. To be able to rule on the allegation by the Applicant that his imprisonment, being ordered to pay a huge fine, damages and court costs, violate his right to freedom of expression, the Court will first mention the provisions of the relevant Burkinabé law in the instant case.

A. Provisions of Burkinabé law challenged in the instant case

119. The Court notes that the 2 June 1991 Constitution of Burkina Faso upholds freedom of expression and freedom of the press as fundamental liberties. Article 8 of the Constitution provides that "freedom of expression, the press and the right to information are guaranteed. Every individual has the right to express and disseminate his opinions within the limits of the laws and regulations in force".

120. In the present case, the provisions of Burkinabé law challenged by the Applicant are those of Article 109, 110 and 111 of the Information Code of 30 December 1993 and those of Article 178 of the Penal Code of 13 November 1996.

121. Articles 109, 110 and 111 of the Information Code provide as follows:

> Article 109: *"Any allegation or imputation of a fact which undermines the honour or image of a person or profession amounts to defamation. Direct publication or by way of reproduction of such allegation or imputation is punishable even if it is done in conditioned circumstances or if it is aimed at a*

person or profession not expressly identified, but which identity is made possible through speech, outcries, threats, written or in print form. Any disparaging, contemptuous or insulting language not leaning on any imputation is considered an insult."

Article 110: "*Defamation committed by one of the names provided in Article 2 above against the Court's Tribunals, Armed Forces, State Officials shall be punished with a term of imprisonment of from 15 days to 3 months and a fine of from 10,000 – 500,000 Francs or one of either penalties"*.

Article 111: *The same shall apply where defamation is committed using the same means, due to their functions or status, against Members of Parliament or Government, one or more members of the Supreme Judicial Council, a citizen in-charge of a service or entrusted with a temporary or permanent official duty, a Judge, a member of the Jury of Courts or Tribunals or a witness as a result of his or her testimony. Defamation committed against the same persons in regard to their privacy shall be dealt with under Article 110 above"*.

122. Article 178 of the Penal Code provides that:

"Where one or more Legal Officers, juries or Assessors are the object of contempt in the exercise of their duties or in the course of such performance whether such contempt be in words or in print or drawings not made public and intended in all these cases to tarnish their image and honour, the guilty party shall be punished with a term of imprisonment from six months to one year and a fine of from 100 000 to 500 000 CFA francs or one of the penalties"

123. The Applicant claims that "the provisions under which he was arrested are not sufficiently precise to qualify as 'law', and this could constitute sufficient reason to limit freedom of expression" and therefore do not meet the criteria contained under

Articles 9 of the Charter and 19 of the Covenant.

B. Consideration of possible violation by the Respondent State of its international obligations

124. The Court will rule first on the allegation of violation by Burkinabé laws of the right to freedom of expression in light of Article 9 of the Charter and Article 19 of the Covenant. It will later consider the allegation of violation of the right to freedom of expression by Burkinabé Courts in the light of the same provisions.

i). Restrictions imposed by Burkinabé laws on freedom of expression

125. The Court will now consider whether restrictions on the freedom of expression imposed by the Respondent State are provided by "law", within international standards, pursue a legitimate objective and are a proportionate means to attain the objective being sought.

a. The restriction must be provided by law

126. In the Applicant's view, "the requirement for the restriction of the right to freedom of expression to be provided by law is more important than a mere existence of a law for that purpose in a country's national legislation". He notes that the law "must be clear enough such that individuals can adapt their conduct accordingly".

127. The Respondent State notes that "the provisions of the Penal and Information Codes, relating to freedom of expression and of the press have been drafted virtually in the same words as those of the French Law of 29 July 1881 on press freedom" and that the "European Court of Human Rights has always considered the provisions of the 29 July 1881 Law on press freedom to be accessible and predictable in light of Article 10 (2) of the Convention on the Protection of Human Rights and Fundamental Freedoms". The Respondent State submits that "its

national laws on freedom of expression are clear and precise enough". This position was reaffirmed and defended at the Public Hearing of 20 and 21 March 2014.

128. The Court recalls that the UN Human Rights Committee defined in a relatively precise manner the concept of "law" as set out in Article 19 (2) of the Covenant. In the Committee's view:

> "[…]to be considered as "law", norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public. The law cannot give persons who are in charge of its application unlimited powers of decision on the restriction of freedom of expression. Laws must contain rules which are sufficiently precise to allow persons in charge of their application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted"[10].

129. In its consideration of communications regarding Article 9 of the Charter, the Commission has held that "Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase "within the law", under Article 9 (2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation[11]. Here the phrase "within the law" must be interpreted in reference to international norms which can provide grounds of limitation on freedom of expression"[12].

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[10] *Human Rights Committee, Keun-Tae Kim v. The Republic of Korea, Communication No. 574/1994, CCPR/C/64/D/574/1994, 4 January 1999, para 25*

[11] *African Commission on Human and Peoples' Rights, Kenneth Good v. The Republic of Botswana, Communication No. 313/05, para 188*

[12] *African Commission on Human and Peoples' Rights, Malawi African Association and Others v. Mauritania, Communication No. 54/91-61/91-98/93-164/97-196/97-210/98, para 102*

130. In the instant case, the Court is of the view that restrictions on freedom of expression are indeed provided by law as they are part of the Penal and Information Codes of Burkina Faso. These two instruments therefore represent the law as it exists in Burkina Faso with regard to the right to freedom of expression.

131. The Court is of the view that Articles 109, 110, 111 of the Information Code and 178 of the Penal Code are drafted with sufficient clarity to enable an individual to adapt his/her conduct to the Rules and to enable those in charge of applying them to determine what forms of expression are legitimately restricted and which are unduly restricted.

b. The restriction must serve a legitimate purpose

132. The Court is of the view that for a restriction to be acceptable, it does not suffice for it to be provided by law and be written precisely; it must serve a legitimate purpose.

133. As the Commission noted, the Court is of the view that "the reasons for possible limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained.[13]"

134. In exercising its function of protecting the rights and freedoms contained in the Charter, the Court is of the view that the only legitimate reasons to limit these rights and freedoms are stipulated in Article 27 (2), namely that rights "shall be exercised in respect of the rights of others, collective security, morality and common interest.[14]"

[13] *African Commission on Human and Peoples' Rights, Media Rights Agenda, Constitutional Rights Project v. Nigeria, Communication No. 105/93-128/94-130/94-152/96, para 69*
[14] *Ibid para 68*

135. The Court further notes that the legitimate purpose of a restriction is stated in Article 19 (3) (a) and (b) of the Covenant, and consists in respecting the rights and reputation of others or the protection of national security, public order, public health or public morality[15].

136. In the instant case, the aim of Articles 109, 110 and 111 of the Information Code of Burkina Faso is to protect the honour and reputation of the person or a profession; that of Article 178 of the Criminal Code of Burkina Faso is more specifically to protect the honour and reputation of Magistrates, jurors and assessors in the performance of their duties or in the course of performing the duty.

137. The Court is of the view that this is a perfectly legitimate objective and therefore the limitation thus imposed on the right to freedom of expression by the Burkinabé legislation is consistent with international standards in this area.

138. Having reached the conclusion that the limitation on freedom of expression is provided by the law of the Respondent State and that it responds to a legitimate objective, the Court must now examine if this restriction is necessary to achieve the objective.

c. Limitation must be necessary to achieve the set objective

139. In his Application, the Applicant argues that the protection of the reputation of others, including public figures, can be ensured "appropriately and proportionately" by civil law on defamation. He added that because of their severity, the sanctions meted out on him (imprisonment, fines, civil damages, shut down of his newspaper) violate his right to freedom of expression. The Applicant therefore contends that the Respondent State's law violates the right to freedom of

[15] *Human Rights Committee, Keun-Tae Kim v. The Republic of Korea, Communication No. 574/1994, CCPR/C/64/D/574/1994, 4 January 1999, para 12.2*

expression as it raises defamation and libel as criminal offenses or at the very least, because it punishes those offenses through a custodial sentence.

140. The Respondent State argues for its part that the sentences imposed by the Burkinabé Courts take into account the seriousness of the defamatory, libelous and derogatory statements made by the Applicant in his publication and its repeat, following his conviction in connection with another matter. It also argues that civil convictions against the Applicant are also commensurate to the severity of the immeasurable damage, especially moral, suffered by Mr. Placide Nikiéma. The Respondent State also argues that its national legislation does not affect the right to freedom of expression; it further stresses that the latest report from the NGO, *Reporters Without Borders* ranks Burkina Faso among countries in the world where this freedom is most respected.

141. *The Amici curiae*, for their part, note that the 1993 Burkinabé law on information imposes criminal penalties for defamation, that is to say, in relation to exercising the right to freedom of expression which is protected by international instruments to which the Respondent State is a party and the latter therefore violates its international commitments to protect human rights. They state that Article 9 of the Charter guarantees the right to freedom of expression and that the decisions and publications of the Commission state clearly that criminal sanction for defamation against a public figure is a violation of that right.

142. Furthermore, according to the *amici curiae*, the Commission thus adheres to universal consensus that criminalization of defamation of or insulting a public figure, is against the right to freedom of expression and the functioning of a free society. Laws on criminal defamation according to them are a remnant of colonialism and they are inconsistent with an independent and democratic Africa; they are an obstacle to efforts aimed at ensuring accountability and transparency of government action.

143. The *Amici curiae* go on to suggest that the State can impose restrictions on freedom of expression but that these restrictions should be for legitimate purposes and be required to achieve these objectives. One of the main criteria for determining whether a measure is necessary in a democratic society is to determine if it is proportionate to the set objective. They argue that criminalizing the tarnishing of the image of a public figure is a disproportionate sanction in view of the interest that the Respondent State aims to protect. The *Amici curiae* add that criminalizing defamation not only disproportionately penalizes the accused, but also has a chilling effect on public discussions on matters of general interest.

144. Based on the foregoing, Counsel for the *amici curiae* contend that in so far as it provides for criminal sanctions, the Burkinabé information law goes counter to freedom of information.

145. In order to consider the need for a restriction on freedom of expression, the Court notes that such a need must be assessed within the context of a democratic society; it also notes that this assessment must ascertain whether that restriction is a proportionate measure to achieve the set objective, namely, the protection of the rights of others.

146. The general framework under which that need and proportionality should be assessed was also raised in Article 19 (3) of the Covenant which provides that "the enjoyment of freedom … comprises special duties and responsibilities. It may therefore be subject to certain restrictions which must be clearly laid down by the law and which are necessary:

a) to the respect of the rights and reputation of others,
b). to safeguard national security, public order, health or public morality".

147. This general framework was also raised by the Commission, the UN Human Rights Committee, the European Court and the Inter-American Court.

148. As this Court noted above, the Commission stated that "any restriction on freedom of expression must be ... necessary in a democratic society".[16]

149. As concerns proportionality of punishment against the right to freedom of expression, in its decision of 3 April 2009 on *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, the Commission considered that even when a State is concerned with ensuring respect for the rule of law, it should nevertheless adopt measures that are commensurate to this objective. The Commission in fact took into consideration the fact that "in law, the principle of proportionality or proportional justice is used to describe the idea that the punishment for a particular offense should be proportionate to the gravity of the offense itself. The principle of proportionality seeks to determine whether, by State action, there has been a balance between protecting the rights and freedoms of the individual and the interests of society as a whole".[17] Thus, according to the Commission, in order to determine that an action is proportional, a number of questions should be asked, such as: Are there sufficient reasons to justify the action?, Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?" [18]

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[16] Principle II (2) of the *Declaration of Principles on the Freedom of Expression in Africa,* adopted by the Commission on 23 October 2002.

[17] African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe,* Communication No. 284/03, para 176

[18] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe c. Zimbabwe*, Communication No. 284/03, par. 176; by raising these issues when considering the case, the Commission was therefore of the view that the closing of the Newspaper of the Complainants amounted to a violation of their right to the Freedom of Expression *ibid*., par. 178.

150. In considering *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the Commission also noted that "the fact that the government bans a specific publication is disproportionate and unexpected. Laws made to be applied specifically to an individual or corporate body are likely to be discriminatory and to fall short of equal treatment before the law, as guaranteed by Article 3. The banning of these publications is therefore inconsistent with the law and is therefore a violation of Article 9 (2)" [19]. In the same vein, it said that restrictions on freedom of expression should be based on a legitimate public interest and the disadvantages of limitation should be strictly proportionate to and absolutely necessary to achieve the desired benefit[20].

151. In its Declaration of Principles on Freedom of Expression in Africa mentioned above, the Commission had already laid down the rule that "sanctions should never be so severe as to interfere with the exercise of the right to freedom of expression[21]".

152. In its General Comment No. 34, the UN Human Rights Committee stressed that:

> "Laws on defamation must be carefully formulated so as to ensure that they meet the necessity requirement stipulated in paragraph 3 and that they should not be used, in practice, to stifle freedom of expression.[22]"

153. It also considered that the limitations must be "proportional" to achieve a legitimate objective[23]. It explained the notion of proportionality in the following manner:

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[19] African Commission on Human and Peoples Rights, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda c. Nigeria, Communication No. 140/94-141/94-145/95,* para 44

[20] *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria,* Communication No. 105/93-128/94-130/94-152/96, para 69

[21] African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa,* paragraph 1 of Principle XII ("Protection of Reputation")

[22] Human Rights Committee, *General Observation No. 34, Article 19: Freedom of Opinion and Freedom of Expression,* para33

"Restrictions should not be too wide-ranging. The Committee noted in its General Comment No. 27 that "restrictive measures must comply with the principle of proportionality; they must be appropriate to achieve their protective function, they must be the least disturbing means among those that might help achieve the desired result and they must be proportionate to the interest to be protected [...]. The principle of proportionality must be respected not only in the law that institutes the restrictions, but also by the administrative and judicial authorities charged with enforcing the law.[24]"

154. A similar position was adopted by the European Court in its decision on the case of *Tolstoy Miloslavsky vs. the United Kingdom,* where it concluded that although damages were provided by law, they are not necessary in a democratic society, "when there is no guarantee, given the magnitude of the combined lethargic state of the domestic rule of law at the time, a reasonable relationship of proportionality to the legitimate goal pursued[25]". Jurisprudence of the Inter-American Court is in the same direction[26].

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[23] *Idem*

[24] *Idem*

[25] In several cases, the European Court, bearing in mind the earnings of the Complainants held that fines and/or damages charged to them were disproportionate when compared to the damage endured, see for instance, ECHR, *Steel and Morris v. The United Kingdom,* Application No. 68416/01 (2005); ECHR, *Tolstoy Miloslavsky v. The United Kingdom,* Application No. 18139/91 (1995); ECHR, *Koprivica v. Montenegro,* Application No. 41158/09 (2011); ECHR, Filipovic v. Serbia, Application No. 27935/05 (2007). It further takes into account the deterrent effect that such disproportionate fines and damages could have on newspapers in the country. For instance, in the case of *Tolstoy Miloslavsky v. The United Kingdom,* the European Court held that the imposition of excessive penalties had a deterrent effect on the exercise of the freedom of expression and was of the view that the granting of excessive damages for defamation constituted a violation of Article 10 of the European Convention of Human Rights, ECHR, *Tolstoy Miloslavsky v. The United Kingdom*, Application No. 18139/91 (1995), para 55

[26] "In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to safeguard essential legally protected interests from the more serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State", *Tristant Donoso v. Panama,* Series C, No. 193 (2009), para 119; the Court further clarified as follows; "the Court does not deem any criminal sanction regarding the right to inform or give one's opinion to be contrary to the provisions of the convention; however, this possibility should be carefully analysed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the Party who brings the criminal proceedings", *Ibid*, para 120

155. In assessing the need for restrictions on freedom of expression by the Respondent State to protect the honour and reputation of others, this Court also deems it necessary to consider the function of the person whose rights are to be protected; in other words, the Court considers that its assessment of the need for the limitation must necessarily vary depending on whether the person is a public figure or not. The Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the Commission, “people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether”.[27]

156. The Court considers that there is no doubt that a prosecutor is a "public figure"; as such, he is more exposed than an ordinary individual and is subject to many and more severe criticisms. Given that a higher degree of tolerance is expected of him/her, the laws of States Parties to the Charter and the Covenant with respect to dishonouring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honor or reputation of an ordinary individual.

157. In the instant case, the Court notes that Article 110 of the Information Code of the Respondent State provides that defamation committed against members of the judiciary, the army and the constituted corps shall be punishable by a prison term of fifteen (15) days to three (3) months and a fine of 100 000 to 500 000 or one of both fines only.” And that Article 178 of its Penal Code provides that “when one or more Magistrates, jurors or Assessors are victims of contempt in words or in writing or in drawings not made public, while exercising their duties, which may tarnish

[27] *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria,* Communication n° 105/93-128/94-130/94-152/96, *par 74*

their image and reputation, the culprit will be sentenced to a prison term of from six (6) months to one (1) year and a fine of 150 000 to 1,500,000 CFA francs.

158. The European Court points out that criminal defamation laws should be used only as a last resort, when there is a serious threat to the enjoyment of other human rights[28]. According to this Court, the exceptional circumstances justifying a prison term are for example, the case of hate speech or incitement to violence[29]. It was of the view that the use of civil proceedings in defamation cases should be preferred to criminal proceedings.[30]

159. As for the Inter-American Court, it holds that States should use these laws only as a last resort[31] and rejected imprisonment for defamation, considering it as disproportionate and in violation of freedom of expression[32].

160. On this score, the U.N. Human Rights Commission recals that some international bodies have condemned any attempts at custodial sentence, both in the specific case of defamation as, in general, the peaceful expression of an opinion[33]. It cites the example of the Human Rights Commission which, since 1994, has expressed concern over the risk of custodial sanctions in cases of defamation in certain countries[34].

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[28] ECHR, *Gavrilovic v. Moldavia,* Application No. 25464/05 (2009), para 60

[29] ECHR, *Cumpana and Mazare v. Romania,* Application No. 33348/96 92004), para 115; ECHR, *Mahmudov and Agazade v. Azerbaijan,* Application No. 38577/04 (2008), para 50

[30] ECHR, *Lehideux et Isorni v. France,* September 1998, para 57 ; ECHR, *Radio France and all v. France,* Application No. 53984/00 (2004), para 40 ; ECHR, *Raichinov v. Bulgaria,* Application No. 47579/99 (2006), para 50; ECHR, *Kubaszewski v. Poland,* Application No. 571/04 (2010), para 45; ECHR, *Mahmudov and Agazade v. Azerbaijan,* Application No. 35877/04 (2008), para 50; ECHR, *Lyashko v. Ukraine,* Application No. 210/40/02 (2006), para 41 (f); ECHR, *Fedchanko v. Russia,* Application No. 33333/04 (2010); ECHR, *Krutov v. Russia,* Application 15469/04 (2009); ECHR, *Lombardo et al. v. Malta,* Application No. 7333/06 (2007)

[31] IACHR, *Trisant Donoso v. Panama,* Series C, No. 193 (2009), para 20

[32] see *inter alia,* IACHR, *Herrera-Ulloa v. Costa Rica,* 2 July 2004, Series C, No. 107, para 124-135; IACHR, *Palamara Iribarne v. Chile,* 22 November 2005, Series C, No. 135, para 63; IACHR, *Canese v. Paraguay,* 31 August 2004, Series C, No. 111, p.104

[33] *Id*

[34] *Id*

161. Having indicated that limitations should be proportionate to achieve a legitimate objective, the U.N. Human Rights Committee, on its part, also considers that:

> "States Parties [to the Covenant] should take care to avoid excessively punitive measures and penalties. If necessary, Party States should put reasonable limits on the obligation of the defendant to reimburse court costs to the party which won the case. States parties should consider decriminalizing defamation and, in all cases, the application of criminal law should be confined to the most serious cases and imprisonment is never an appropriate penalty[35]."

162. In the present case, the Court notes that the Respondent State recognizes all the merits of decriminalization in that it stated that the issue "is under discussion in Burkina Faso which has the concern, like many other countries around the world, to comply, as quickly as possible, with the guidelines on this subject issued by international and Community bodies ".

163. In essence, the Court notes that, for now, defamation is an offense punishable by imprisonment in the legislation of the Respondent State, and that the latter failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary.

164. Accordingly, the Court opines that sections 109 and 110 of the Information Code and section 178 of the Penal Code of Burkina Faso on the basis of which the Applicant was sentenced to a custodial sentence is contrary to requirements of article 9 of the Charter and article 19 of the Covenant. The Applicant having also mentioned article 66 (2) (c) of the Revised ECOWAS Treaty under which States parties undertake to "respect the rights of journalists", the Court finds that the Respondent State also failed in its duty in this regard in that the custodial sentence under the above legislation constitutes a disproportionate interference in the

[35] Human Rights Committee, *General Observation No. 34, Article 19: Freedom of Opinion and Freedom of Expression, para 47*

exercise of the freedom of expression by journalists in general and especially in the Applicant's capacity as a journalist.

165. Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.

166. The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments.

ii). **Consideration of allegations of violations relating to action by Burkinabé Courts**

167. Regarding the sentencing of the Applicant by the Ouagadougou High Court to a twelve month term of imprisonment for defamation, contempt and insult, and the confirmation of that sentence by the Ouagadougou Court of Appeal, the Court recalls that it had already ruled that any custodial sentence relating to defamation is inconsistent with the Charter, the Covenant and the Revised ECOWAS Treaty. Consequently, the enforcement of such laws by the Burkinabe Courts also amounts to a violation of the relevant human rights provisions in this regard. At any rate, the Respondent State has not shown that such convictions were necessary and proportionate to protect the rights and reputation of Mr. Placide Nikiema.

168. Regarding the overall costs charged to the Applicant, in the Application, he contends that "this amounts to one more violation of his right to freedom of expression". He adds that the total amount of 6 Milliom CFA Francs (an equivalent

of 12,000 USD) representing 20 times the GDP per capita in Burkina Faso, according to the World Bank. The Respondent submits in response that the civil sanctions were proportionate to the gravity of the considerable prejudice (above all, moral prejudice) suffered by Placide Nikiema.

169. The Court finds that the Respondent State has not demonstrated that the sentence of the Applicant as well as the suspension of the Weekly *L'Ouragan* for a period of six months was necessary to protect the rights and reputation of the Prosecutor of Burkina Faso.

170. From the foregoing, the Court concludes that all sentences pronounced by the High Court and confirmed by the Ouagadougou Court of Appeal were disproportionate to the aim pursued by the relevant provisions of the Information Code and the Burkinabé Penal Code. Since the conduct of the Burkinabé courts, fall squarely on the Respondent State,[36] the Court is of the view that the latter failed in its obligation to comply with the provisions of article 9 of the Charter, article 19 of the Covenant and article 66 (2) (c) of the revised ECOWAS Treaty with regard to the Applicant.

171. The Court adds that, as regards more specifically the payment of a fine, damages, interests and costs, the Respondent has failed to show that the amount fixed by the High Court of Ouagadougou and confirmed by the Court of Appeal does not excessively exceed the income of the Applicant. The amounts of the fine, damages, interests and costs seem all the more excessive in that the Applicant was deprived of revenue from publishing the weekly, due to its suspension for a period of six months.

[36] Article 4 ("Conduct of Organs of a State"), of the Draft Articles on the responsibility of States for internationally wrongful acts adopted by the International Law Commission on 9 August 2001 provides as follows: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State, 2. An organ includes any person or entity which has that status in accordance with the international law of the State."

C. Reparations

172. Both in his written submissions and at the Public hearing, the Applicant prays the Court to order the Respondent State to amend its legislation if it finds that it violates international obligations of the latter. He also prays the court to order the Respondent State to compensate, "particularly to offset the loss in income and profits and award him compensation for moral prejudice."

173. Pursuant to Rule 63 of the Rules,, "the Court shall rule on the request for reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' rights or, if the circumstances so require, by a separate decision."

174. Having ruled on all the allegations made by the parties, the Court will rule on the request for compensation in a ruling, after the Parties have submitted their observations on the matter.

D. COSTS

175. The Court notes that Rule 30 of the Rules provides that: *"Unless otherwise decided by the Court, each party shall bear its own costs*." Based on all the circumstances of the case, the Court finds that there is no reason to depart from the provisions of Rule 30 above.

176. On these grounds,

THE COURT

1) Unanimously,
Declares that it has jurisdiction to hear the Application;

2) Unanimously,
States that this Application is Admissible;

3) Unanimously,
Declares that the Respondent State violated article 9 of the Charter, article 19 of the Covenant and article 66(2)(c) of the revised ECOWAS Treaty due to the existence of custodial sentences on defamation in its laws;

4) By 6 votes for and 4 votes against,
Declares that the Respondent State did not violate article 9 of the Charter, article 19 of the Covenant and article 66(2)(c) of the revised ECOWAS Treaty, due to the existence of non-custodial sanctions on defamation in its laws;

5) Unanimously,
States that the Respondent State violated article 9 of the Charter, article 19 of the Covenant and article 66 (2)(c) of the revised ECOWAS Treaty because of the conviction of the Applicant and sentence to a term of imprisonment;

6) Unanimously,
States that the Respondent State violated article 9 of the Charter, article 19 of the Covenant and article 66 (2)(c) of the revised ECOWAS Treaty because of the conviction of the Applicant to pay an excessive fine, damages, interests and costs;

7) Unanimously,
Says that the Respondent State violated article 9 of the Charter, article 19 of the Covenant and article 66(2)(c) of the revised ECOWAS Treaty because of the conviction of the Applicant to the suspension of his publication for a period of six (6) months for defamation;

8) Unanimously,
Orders the Respondent State to amend its legislation on defamation in order to make it compliant with article 9 of the Charter, article 19 of the Covenant and article 66 (2)(c) of the Revised ECOWAS Treaty:

- by repealing custodial sentences for acts of defamation; and
- by adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments.

9) Unanimously,
Orders the Respondent State to report to the Court within a reasonable time, on the measures taken to implement the orders in 8 above, and in any case, not exceeding two years, from the date of this Judgment;

10) Unanimously,
Orders the Applicant to submit to the Court his brief on reparation within thirty (30) days from the date of delivery of this judgment; Also directs the Respondent State to file its brief in response on the reparation within thirty (30) days after receipt of the Applicant's brief;

11) Unanimously,
States that each party shall bear its own costs.

Done in Addis Ababa, this fifth day of December, two thousand and fourteen, in French and English, the French text being authoritative.

Signed:

Augustino S. L. Ramadhani, President

Elsie N. Thompson, Vice President

Sophia A. B. AKUFFO, Judge

Bernard M. NGOEPE, Judge

Gérard Niyungeko, Judge

Duncan Tambala, Judge

Sylvain ORE, Judge

El Hadji GUISSE, Judge

Ben KIOKO, Judge

Kimelabalou ABA, Judge; and

Robert ENO, Registrar

Pursuant to article 28(7) of the Protocol and Rule 60(5) of the Rules, Justices Thompson, Akuffo, Ngoepe and Tambala, Dissenting in part. The dissenting opinion is attached to this judgment.