Ajavon v Benin (merits) (2019) 3 AfCLR 130

Application 013/2017, *Sébastien Germain Ajavon v Republic of Benin*

Judgment, 29 March 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant, a businessman and politician, was prosecuted for drug trafficking but acquitted. The Respondent State subsequently obstructed the operation of three companies in which the Applicant is a majority shareholder. The Applicant was then charged with the same crime before a newly established court named Anti-Economic Crimes and Terrorism Court which convicted and sentenced him to twenty (20) years imprisonment. The Applicant claimed that the Respondent State violated his rights to life, equal protection of the law, non-discrimination and equality before the law, dignity, liberty and security, fair trial, property, freedom of expression, privacy, freedom of association, and the independence of the judiciary. The Court held that the Respondent State violated the Applicant's rights to fair trial, property, dignity, and its obligation to guarantee the independence of courts.

Jurisdiction (status, French Declaration of the Rights of Man and of the Citizen, 45)

Admissibility (disparaging statements, 72-76; exhaustion of local remedies, effectiveness, 116)

Fair trial (competent court, 131-141; defence, 153, 154, 173, 174; information about charges, access to record of proceedings,162, 163; right not to be tried again for an offence he has already been acquitted, 180-184; presumption of innocence, 194, 198; appeal, 213-215; equality of arms, 224-226;

Dignity (honour, reputation and dignity, 253-255)

Property (prevention of commercial activity, 266-269, closure of media, 271, 272)

Independent judiciary (executive interference, 281-282)

Dissenting opinion: BENSAOULA

Admissibility (conditions not raised by Parties, 8)

Separate opinion: NIYUNGEKO

Fair trial (defence, 5, presumption of innocence, 7, 8, 17; appeal, 10-12)

Independent judiciary (executive interference, 15)

I. The Parties

1. Mr Sébastien Germain Ajavon, (hereinafter referred to as "the Applicant") is a businessman and politician of Benin nationality.

He was prosecuted for cocaine trafficking before the Cotonou First Class Court of First Instance which acquitted him; he was subsequently sentenced to twenty (20) years in prison by the newly created Anti-Economic Crimes and Terrorism Court hereinafter referred to as "CRIET".

2. The Republic of Benin (hereinafter referred to as "the Respondent State") became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), on 22 August 2014. Furthermore, the Respondent State deposited the Declaration provided under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive Applications directly from individuals and NGOs, on 8 February 2016.

II. Subject of the Application

A. Facts of the matter

3. The documents on file show that between 26 and 27 October 2016, the *Gendarmerie* (para-military force) of the Autonomous Port of Cotonou and the Benin Customs Department received warnings from the Intelligence and Documentation Services at the Office of the President of the Republic about the presence of a huge quantity of cocaine in a container of frozen goods imported by the company – *Comptoir Mondial de N*égoce (COMON SA) of which the Applicant is the Chief Executive Officer. Based on this information, a judicial inquiry was, on 28 October 2016, instituted against the Applicant and three of his employees for the trafficking of eighteen kilogrammes (18kgs) of pure cocaine.

4. After eight (8) days in custody, the Applicant and three of his employees were arraigned before the Criminal Chamber of the Cotonou First Class Court of First Instance. By Judgment No. 262/IFD-16 of 4 November 2016, two of the employees were acquitted outright; but the Applicant and one of the employees were acquitted on the benefit of the doubt.

5. Two weeks later, the Customs Administration suspended the licence of the container terminal of the *Société de Courtage de Transit et de Consignation* (SOCOTRAC). Then, on 28 November 2016, the High Authority for the Audio-visual and Communication (HAAC) cut the signals of the radio station SOLEIL FM and those of the TV channel SIKKA TV. The Applicant has alleged that he is

the majority shareholder in all these companies.

6. On 2 December 2016, the Applicant requested and obtained from the Registry of the Cotonou Criminal Chamber of the First Class Court of First Instance, an attestation that no appeal or complaint has been filed against the Judgment No. 262/IFD-16 of 4 November 2016. Furthermore, the Applicant avers that, in January 2017, he learnt from rumours that the Prosecutor General had lodged an appeal against the said judgment, but that no notice thereof was served on him.

7. On 27 February 2017, believing that the issue of international drug trafficking and the subsequent proceedings were a "conspiracy" by the Respondent State against him and violated his rights guaranteed and protected by international human rights instruments, the Applicant decided to bring the case before this Court.

8. In October 2018, following the establishment of a Court named *"Cour de Répression des Infractions Economiques et du Terrorisme*" (Anti-Economic Crimes and Terrorism Court hereinafter known as "CRIET"), the Applicant was once again tried by this new Court for the same crime of international drug trafficking and sentenced to twenty years in prison, and to pay five million CFA Francs in fines with an international arrest warrant. The Applicant contends that this new procedure also violated his rights guaranteed by international human rights instruments and prays this Court to find that there have been the said violations in the case already pending before it.

B. Alleged violations

9. In his Application filed on 27 February 2017, the Applicant alleges that the Respondent State violated his rights guaranteed by the Charter and by the 1789 Declaration of the Rights of Man and of the Citizen, particularly his rights as follows:

"i. the right to equal protection of the law guaranteed by Articles 3(2) of the Charter and 12 of the 1789 Declaration of the Rights of Man and of the Citizen;

ii. the right to respect for the dignity inherent in the human person guaranteed by Article 5 of the Charter, notably the trespass on his honour and his reputation;

iii. the right to liberty and to his security enshrined in Article 6 of the Charter and Article 7 of the 1789 Declaration of the Rights of Man and of the Citizen;

iv. the right to have his cause heard guaranteed by Article 7 of the Charter;

v. the right to presumption of innocence until proven guilty by a competent court, guaranteed by Articles 7(1)b of the Charter and 9 of the 1789 Declaration of the Rights of Man and of the Citizen;

vi. the right to property guaranteed under Article 14 of the Charter;

vii. the duty of the State to guarantee the independence of the courts guaranteed by Article 26 of the Charter".

10. In his new allegations filed before this Court on 16 October 2018 after the CRIET Judgment, the Applicant contends that, by that procedure, the Respondent State violated his rights as listed hereunder:

"i. the right to be informed of the charges preferred against him;

ii. the right to access the record of proceedings;

iii. the right for his cause to be heard by competent national courts;

iv. the right for his case to be heard within a reasonable time;

v. the right to respect for the principle of independence of the judiciary;

vi. the right to be assisted by Counsel ;

vii. the right to respect for the principle of *non bis in idem* ;

viii. the right to respect for the principle of two-tier jurisdiction (right of appeal)."

11. In further submissions dated 27 December 2018 titled "Additional Submissions" received at the Registry on 14 January 2019, the Applicant alleges that the Respondent State, through a series of laws at variance with international conventions, violated his rights as follows:

"i. the right to an independent and impartial tribunal;

ii. the right to an effective and meaningful trial ;

iii. the principle of equality of arms and equality of the parties;

iv. the principle of equality before the law;

v. the principle of prior legality;

vi. the right to freedom of association;

vii. the right to non-discrimination and equality before the law;

viii. the right to private life and to the secrecy of private correspondence;

ix. the right to freedom of expression;

x. the right to equal protection of the law given the lack of independence and impartiality of the National Intelligence Control Commission."

III. Summary of the procedure before the Court

12. The Application was received at the Registry on 27 February 2017 and on 31 March was served on the Respondent State which filed

its Preliminary Objections Brief on 1 June 2017.

13. After exchange of the written submissions between the parties on the preliminary objections and on the merits, the Registry, on 27 November 2017, notified the parties that the written proceedings in the case were closed.

14. On 3 April 2018, the Registry further notified the parties that the Court would hold a public hearing on the case on 30 April 2018, and accordingly requested them to submit their briefs on the merits no later than 16 April 2018.

15. On 9 May 2018, the Court held the public hearing on the matter and commenced deliberation.

16. In a letter dated 15 October 2018 received on 16 October 2018, the Applicant filed new allegations by which he informed this Court that the State of Benin recently established a special court named "Anti-Economic Crimes and Terrorism Court" (CRIET) to once again hear the case of international drug trafficking in which he was involved. According to the Applicant, this new procedure generated new violations of his rights and prayed the Court to issue an Order requesting the Respondent State to stay his trial before the CRIET.

17. On 26 October 2018, the Applicant informed the Court that the CRIET had on 18 October 2018 rendered Judgment No. 007/3C. COR sentencing him to twenty years of imprisonment and to pay five million CFA francs in fines, and issued an international arrest warrant against him; he requested an Order for a stay of execution of the said Judgment. On 12 November 2018, the Applicant reiterated his request for a stay of execution of the CRIET Judgment. Notified thereof on 20 November 2018, the Respondent State on 14 November 2018 submitted its observations on admissibility of the new allegations and on the Application for a stay of execution.

18. On 5 December 2018, the Court issued an Order staying the deliberation and reopening written proceedings in the case. It also declared admissible the new evidence filed by the parties after commencement of the deliberation.

19. By another Order issued on 7 December 2018, the Court ordered the Respondent State to stay execution of the CRIET Judgment No. 007/3C.COR pending this Court's final determination on this matter. The Court also allowed the Respondent State fifteen (15) days to submit to the Court, a report on the measures taken to implement the Order for stay of execution of the aforesaid CRIET Judgment.

20. On 7 January 2019, the Applicant requested the Court to bring to the attention of the Assembly of Heads of State and Government

of the African Union, the non-compliance with the Order issued by this Court staying execution of the CRIET Judgment No. 007/3C. COR.

21. On 14 January 2019, the Applicant submitted additional claims to the Court and sought an order for provisional measures to enable him to return to Benin to continue with his political and economic activities and to take part in the 2019 legislative elections.

22. In reaction to that request, the Respondent State on 16 January 2019, contended that implementation of the Order of 7 December 2018 was impossible, that such a measure would amount to a violation of its sovereignty and that it did not intend to implement the Order. The Registry communicated that document to the Applicant on the same day, for information.

23. Pursuant to Article 31 of the Protocol, at the 32nd Ordinary Session of the Assembly of the African Union held in Addis Ababa on 10 and 11 February 2019, the Court reported to the Executive Council of the Union on the non-implementation by the State of Benin**,** of the Order of Provisional Measures issued on 7 December 2018.

24. On 21 February 2019, the Registry after exchange of pleadings and evidence, notified the parties that written submissions had come to a final close and that the matter had been set down for deliberation effective from that date.

IV. Prayers of the Parties

25. The Applicant prays the Court to :

"i. find that it has jurisdiction;

ii. declare the Application admissible;

iii. find and declare that the alleged violations are founded;

iv. find that he, the President of the Association of Benin Businessmen, has seen his reputation tarnished in business circles;

v. find that he is a political figure, candidate at the last presidential elections of March 2016 who scored a total of 23% of the votes and came third in the overall ranking just behind the current Head of State of Benin who had 24%;

vi. find that the matter of drug trafficking has discredited him and caused him diverse damages valued at five hundred and fifty thousand million (550, 000, 000, 000) CFA francs which he claims as reparation".

26. In his further additional pleadings, the Applicant prays the Court to order the Respondent State to suspend the following laws until the Respondent State amends them for compliance with

international human rights instruments to which it is a party:

"i. Law No. 2018-13 of 2 July 2018 amending and supplementing Law No. 2001-37 of 27 August 2002 on judicial organization in the Republic of Benin as amended and creating the Anti-Economic Crimes and Terrorism Court;

ii. Organic Law No. 2018-02 of 4 January 2018, amending and supplementing Organic Law No. 94-027 of 18 March 1999 on the High Judicial Council;

iii. Law No. 2017-05 of 29 August 2017 setting the conditions and procedure for employment, placement of workers and termination of labour contracts in the Republic of Benin;

iv. Law No. 2018-23 of 26 July 2018 on the Charter of Political Parties in the Republic of Benin;

v. Law No. 2018-031 on the Electoral Code in the Republic of Benin;

vi. Law No. 2017-044 of 29 December 2017 on Intelligence in the Republic of Benin;

vii. Law No. 2017-20 of 20 April 2018 on the Digital Code in the Republic of Benin".

27. In its response to the Application and to the allegations made by the Applicant after the CRIET Judgment, the Respondent State prays the Court to:

"i. find that it lacks jurisdiction because the Application is inconsistent with Article 3(1) of the Protocol;

ii. adjudge and declare that the African Court on Human and Peoples' Rights does not have the jurisdiction to entertain cases requiring the Application of a legal instrument which has never been ratified by the State of Benin;

iii. adjudge and declare that even if the Applicant is the owner of the companies in question, he does not have the capacity to seek reparation for the so-called damages suffered by moral entities distinct from his person;

iv. declare the Application inadmissible for manifestly using disparaging language towards the Head of State and the Benin judiciary and for non-exhaustion of local remedies as enshrined in Articles 56(3) and (5) of the Charter and Rules 40(3) and (5) of the Rules of Court;

v. find that the Applications filed by the Applicant are still pending before domestic courts in Benin;

vi. dismiss the prayer for a stay of execution of CRIET Judgment;

vii. adjudge and declare that all the allegations of the Applicant's human rights violations raised in this matter are unfounded;

viii. dismiss all the prayers for reparation made by the Applicant;

ix. hold the Applicant liable to pay the sum of one billion five hundred and ninety-five million eight hundred and fifty thousand (1,595,850,000) CFA francs as damages".

V. Jurisdiction

28. Article 3(1) of the Protocol stipulates that: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and Application of the Charter, this Protocol, and any other relevant Human Rights instrument ratified by the States concerned".

29. Pursuant to Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction ..."

A. Objection to the jurisdiction of the Court raised by the Respondent State

30. The Respondent State raises two objections on jurisdiction: one on material jurisdiction, and the other on personal jurisdiction.

i. Objection to material jurisdiction

31. The Respondent State relies on the provisions of Article 3(1) of the Protocol to challenge the material jurisdiction of the Court on grounds that the violations alleged by the Applicant are political and economic in nature, and are in no way related to a fundamental law contained in the Charter, the Protocol or any other relevant human rights instrument to which it is a party.

32. It argues that, to the extent that the jurisdiction of the Court "opens and closes" on violations of the rights guaranteed in the African Charter, the Protocol or other relevant human rights instrument ratified by the States concerned, political rights such as the right to stand for election and stay in power do not fall within the ambit of Article 3(1) of the Protocol.

33. The Respondent State also contends that the prayers for reparation and for damages resulting from the allegations that the conduct of the Respondent State's services tarnished the Applicant's reputation, do not fall within the jurisdiction of the Court.

34. The Respondent State further contends that the Applicant's reference to the French Declaration of the Rights of Man and of the Citizen is not binding on the Republic of Benin and deprives this Court of jurisdiction, given that the said Declaration has never been ratified by the Republic of Benin.

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35. The Applicant refutes the Respondent State's objection to material jurisdiction and argues that the court may be seized of cases of violation of rights covered by the Charter and other regional and international human rights instruments, where such violations are perpetrated by State parties to the Protocol.

36. He further avers that the violations he has suffered are human rights violations which relate to the manner in which the judicial investigations were conducted; notably: the right to liberty, the right to own property, the presumption of innocence and the right to a fair trial, rights enshrined under Articles 6, 7, and 14 of the Charter to which Benin is a party.

37. The Applicant lastly contends that the Court has jurisdiction to hear cases of violation raised by him because it is not the nature of the damage that determines the Court's jurisdiction but rather the nature of the rights violated.

38. Regarding the reference made to the French Declaration of the Rights of Man and of the Citizen of 26 August 1789, the Applicant avers that it does not diminish the value of his Application in terms of human rights violation disputes even though the instrument is not ratified by the Respondent State. This Declaration, according to him, is the founding text in the recognition of human rights in the world and constitutes, to date, a reference document and source of inspiration for all human rights protection instruments.

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39. The Court notes that the objection to its material jurisdiction raised by the Respondent State hinges on two arguments: on the one hand, whether or not it has jurisdiction to adjudicate human rights violations which may lead to reparation of damages of commercial and political nature; and, on the other, whether or not jurisdiction is established where the alleged violations are based on an instrument which does bind the Respondent State.

40. The Court first notes that it is vested with a general mission to protect all human rights enshrined in the Charter or any other relevant human rights instruments ratified by the Respondent

State.[1]

41. The Court holds that human rights violations may, in different degrees, lead to diverse prejudices for the victim which include economic, financial, material and moral or other forms of prejudice. Prejudice is therefore a consequence of the violation of a right and the nature of such prejudice does not determine the material jurisdiction of the Court.

42. As it has already established in the case of *Peter Joseph Chacha v United Republic of Tanzania* that, "as long as the rights allegedly violated come under the purview of the Charter or any other human rights instrument ratified by the State concerned",[2] the Court will exercise its jurisdiction. In the instant case, the Court notes that the "commercial and political" prejudice for which the Applicant seeks reparation relate to the rights guaranteed under the Charter *inter alia*: presumption of innocence, the right to liberty, the right to own property, the right to the dignity of the human person and to reputation and the right to equal protection of the law.

43. The Court consequently notes that its material jurisdiction is established to consider a matter in which the Applicant requests it to find that there has been violation of his rights as referred to herein-above (paragraphs 9, 10 and 11) and to order reparation of the attendant prejudices, regardless of their commercial or political nature.

44. The Court also affirms that, in the instant case, its jurisdiction is established because political rights, such as the right to stand for election and to remain in power are covered by Article 13(1) of the Charter.

45. As to whether or not the Court has jurisdiction to consider violations based on non-compliance with the 1789 Declaration of the Rights of Man and of the Citizen, the Court notes that this Declaration is not an international instrument, but is rather a text of French internal law which does not impose any obligation on the Respondent State. The Court cannot therefore extend its

1 Application 009/2011. Judgment of 14 June 2013 (Merits), *Reverend Christopher Mtikila v United Republic of Tanzania* (hereinafter referred to as "*Christopher Mtikila v Tanzania* (Merits)") para 82.1.

2 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (*hereinafter referred to as *"Peter Joseph Chacha v Tanzania* Judgment (Admissibility)"), para 114.

jurisdiction to cover that Declaration.

46. Accordingly, the Court dismisses the objection to its material jurisdiction raised by the Respondent State.

ii. Objection to personal jurisdiction

47. The Respondent State takes issue with the Applicant for bringing his case before the Court in order to obtain reparation for prejudice suffered by companies that have a legal personality distinct from his. Thus, the Court cannot find the Application admissible, since, in the instant case, it has been seized in respect of violations against a private legal entity that does not fulfil the requirements set forth in Article 5(3) of the Protocol.

48. It also submits that the alleged prejudice resulting from the suspension of SOCOTRAC's customs agent license, the suspension of the container terminal of the same company and the closure of "SOLEIL FM" radio station and "SIKKA TV" television outlet was not personally suffered by the Applicant.

49. The Respondent State consequently contends that, since the Applicant personally sought reparation for damages suffered by companies, the Application must be found inadmissible for lack of *locus standi.*

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50. In his Response, the Applicant asserts that he is clearly entitled to bring the Application against the State of Benin in his capacity as the General Manager of COMON SA, manager and majority shareholder of SOCOTRAC, Chief Executive Officer of SIKKA INTERNATIONAL, promoter of SIKKA TV and General Manager of SOLEIL FM radio station. He submits in conclusion that he has direct interest in all the companies in which he is majority shareholder.

51. He also submits that it is on the basis of that capacity that he has pleaded economic prejudice resulting from the Respondent State's determination to really ostracise him and to ruin him economically.

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52. The Court notes that its personal jurisdiction covers *locus standi,* which is the legal title under which a person is vested with the power to submit a dispute to a court.[3]

53. In this respect, the Court recalls that it has already held that: "… as a human and peoples' rights court, it can make a determination only on violations of the rights of natural persons and groups mentioned in Article 5 of the Protocol, to the exclusion of private or public law entities."[4]

54. In the instant case, the Court notes that the Applicant brought his Application before the Court in his personal capacity and not as a representative of legal entities and that the rights alleged to have been violated are individual rights. It further notes that, despite the fact that the Applicant is a majority shareholder and chief executive officer of the companies, his action does not concern the other shareholders nor the business relations that link them, nor any irregularity in the existence or functioning of the said companies. The Applicant's action tends to presume that his rights have been violated and to seek reparation of the consequences thereof or of the direct damage that he might have suffered personally as a result of the said violations.

55. In light of the foregoing, the Court holds in conclusion that all the requirements set out in Articles 5(3) and 34(6) of the Protocol on personal jurisdiction are fulfilled given that the Applicant is a natural person and acted in that capacity.

56. Consequently, the Court dismisses the objection to personal jurisdiction raised by the Respondent State.

B. Other aspects of jurisdiction

57. The Court notes that its temporal and territorial jurisdiction are not contested by the Respondent State. Moreover, nothing in the case file indicates that its jurisdiction does not extend to these two aspects. The Court therefore notes that, in the case at issue, it has:

i. temporal jurisdiction, insofar as the alleged violations occurred after the Respondent State had ratified the Charter and the Protocol;

3 See Dictionary of international public law *(Dictionnaire de droit international public*) (2001) 916.

4 Application No 038/2016. Ruling of 22 March 2018 (admissibility), *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, (hereinafter referred to as the "*Jean-Claude Roger Gombert v Republic of Côte d'Ivoire* Judgment (Admissibility)") para 47.

ii. territorial jurisdiction, insofar as the facts of the case took place in the territory of a State Party to the Protocol, in this case, the Respondent State.

58. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

On admissibility of the additional submissions

59. On 14 January 2019, the Applicant alleges that the Benin laws in force in the Respondent State listed in paragraph 26 of this Judgment are not in conformity with international conventions and violate the rights of Benin's citizens.

60. The Applicant prays the Court to order the Respondent State to suspend all such laws until they are amended for conformity with the international instruments to which Benin is a party. He also prays the Court to order the Respondent State to submit to it a report on the execution of its decision on the non-conformity of the said laws within a timeframe that would serve as a moratorium.

61. Invoking Rule 34(4) of the Rules of Court, the Respondent State argues that this text establishes the immutability of the dispute and that the claims of the parties which form the subject of the dispute are set out in the original Application. Acknowledging however, that even though the subject of the dispute may be modified in the course of the proceedings by supplementary Applications, the Respondent State contends that such amendment must have sufficient nexus, a connection with the initial claims.

62. The Respondent State further submits that the Applicant does not plead violation of his rights by any of the laws of which he seeks annulment or suspension and that, besides, the said laws were adopted and incorporated into Benin legal *corpus* long after the Applicant's referral of the case to the Court. It therefore prays the Court to declare the Applicant's additional submissions unfounded and dismiss the same.

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63. The Court notes that, among the laws submitted to it for examination of conformity, the one establishing CRIET has

connection with the initial Application, but the same cannot be said of the others.

64. Accordingly, the Court declares inadmissible the additional submissions which are not connected with the instant Application, except for the law creating CRIET.

Admissibility of the Application

65. In terms of Article 6(2) of the Protocol, "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter".

66. In accordance with Rule 39(1) of its Rules: "The Court shall conduct preliminary examination ... of the admissibility of the Application in accordance with articles 50 and 56 of the Charter and Rule 40 of these Rules ".

67. Rule 40 of the Rules, which in substance restates Article 56 of the Charter, sets out the criteria for admissibility of Applications as follows:

"1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the parties

68. The Respondent State raises two objections to the admissibility of the Application: one, in relation to the use of disparaging language and, the other, in relation to the non-exhaustion of local remedies.

i. Objection based on the use of disparaging language in the Application

69. The Respondent State contests the admissibility of the Application on the ground that the words used by the Applicant are grossly disparaging, dishonourable to the dignity inherent in the function of Benin Head of State and degrading towards the Benin judiciary. In his view, the Applicant's use of the terms "machination", "obvious interference with the principle of separation of powers", "interferences with domestic judicial decisions", and "mockery of a trial" is inconceivable and outrageous to the Head of State and Benin justice system. The Respondent State adds that the said remarks with regard to Benin judiciary are unsustainable since, procedurally, the Applicant was entitled to a fair trial, equitable and respectful of his rights. It submits for this reason that the Application must be declared inadmissible.

70. For his part, the Applicant affirms that the terms used in the Application are a reflection of the serious attacks he suffered; that the remarks termed as disparaging are well measured and in no way affect the dignity, reputation or integrity of the Head of State.

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71. The Court notes that, generally, disparaging or insulting language is that which is meant to soil the dignity, reputation or integrity of a person.[5]

72. In determining whether a remark is disparaging or insulting**,** the Court has to "satisfy itself as to whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or 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 in the administration of justice. The language must be aimed at undermining the integrity and status

5 Application 004/2013. Judgment of 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso*, (hereinafter referred to as "*Lohé Issa Konaté v Burkina Faso* Judgment (Merits)") para 71**;** ACHPR, Communication 268/03 – *RADH v Nigeria* (2005) paras 38-40; Communication 284/03 *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* (2005) paras 51-53.

of the institution and bringing it into disrepute".[6]

73. The Court further finds that public figures including those who hold the highest government positions are legitimately exposed to criticism such that for remarks to be regarded as being disparaging to them, the remarks must be of extreme gravity and manifestly affect their reputation.[7]

74. In the instant case, the Respondent State fails to show how the use of terms like "machination" and "manifest interference" affects the reputation of the Head of State. It also fails to show how the use of terms such as "interference in the decisions of the judiciary" by the Applicant are aimed at corrupting the minds of the public or any other reasonable person, or undermining the integrity and the status of the President of the Republic of Benin or that they were used in bad faith.[8]

75. The Court notes that, in the instant case, taken in their ordinary meaning, the impugned statements are aimed simply at giving a presentation of the facts of the Application and do not translate to personal hostility on the part of the Applicant, neither are they insulting to the person of the Head of State of Benin or the Benin judiciary.

76. Accordingly, the statements made by the Applicant in this Application cannot be termed as disparaging or an attack on the Head of State of Benin and the judiciary of that country.

77. In view of the foregoing, the Court dismisses the objection based on the use of disparaging language in the Application.

ii. Objection based on non-exhaustion of local remedies

78. The Respondent State submits that the present Application does not meet the conditions of admissibility set out in Articles 56(5) of the Charter and Rule 40(5) of the Rules. It refers to three types of remedies supposedly open to the Applicant who chose not to exhaust them: the remedy before the Constitutional Court for violation of human rights, the remedy provided under Article 206 of the Benin Code of Criminal Procedure and the appeal for annulment of administrative decisions on grounds of abuse of

6 *Lohé Issa Konaté v Burkina Faso,* Judgment (Merits), *op cit* para 70.

7 See also Human Rights Committee: Communication 1128/2002: *Rafael Marques de Morais v Angola,* Views of 14 March 2005 para 6.8

8 *Lohé Issa Konaté v Burkina Faso* (Merits) *op cit* para 72.

power.

79. It contends that the Applicant should have seized the Constitutional Court which is empowered by the Benin Constitution to hear all allegations of human rights violation. It affirms that for having ignored this effective and available procedure under Benin law, the Applicant has not exhausted the local remedies, pursuant to the provisions of the Charter.

80. The Respondent State further contends that regarding reparation of damages resulting from an abusive judicial procedure, the Applicant could have exercised the remedy provided under Article 206 of the Benin Code of Criminal Procedure.[9]

81. It also submits that the violations alleged by the Applicant before this Court, notably, the right to presumption of innocence, the right to fair trial and the right to freedom, could have been redressed in the domestic Courts pursuant to the above-mentioned Article 206; if, the Applicant claims that the said violations occurred subsequent to the judicial proceedings which resulted in the Judgment of 4 November 2016. For the Respondent State, in so far as the Applicant has not made use of the remedy provided under Article 206 of the Benin Code of Criminal Procedure before bringing the case before this Court, his complaint must be dismissed for failure to exhaust the local remedies.

82. It further contends that the Judgment rendered on 4 November 2016 is undergoing an appeal lodged by the Attorney General, pursuant to Article 518 of the Benin Code of Criminal Procedure.

83. The Respondent State submits that the matter of suspected drug trafficking has not been definitively determined through a final or irrevocable judgment since it has been invoked before CRIET leading to a judgment on 18 October 2018. It argues that Counsel for the Applicant having lodged cassation appeal against the Judgment of CRIET, local remedies have not been exhausted.

84. The Respondent State presents that the appeal against the decision to withdraw the customs agent licence of SOCOTRAC, the suspension of the container terminal as well as the cutting of the radio and TV signals should have been exhausted before the Courts in Benin.

85. It expressly cites Article 818 of Law No. 2008/07 of 28 February 2011 on the Commercial, Social, and Administrative and

9 Art 206 of the Benin Code of Criminal Procedure provides that: "Any person who had been remanded in custody or any abusive detention may, when the Judgment ends in dismissal, release or discharge or acquittal which constitutes *res judicata* obtain compensation if he proves that as a result of the detention or the remand in custody, he suffered particularly serious current damages".

Accounting Procedure in the Republic of Benin which provides that: "Administrative Courts shall have jurisdiction over all cases arising from all acts emanating from all administrative authorities in their area of jurisdiction. The following may result from such cases: 1. Application to set aside a judgment for abuse of power by administrative authorities; 2…"

86. The Respondent State contends that pursuant to this Article 818, decisions rendered by the Directorate of Customs and Indirect Taxes on the withdrawal of SOCOTRAC customs agency licence and the suspension of the container terminal of the same company are administrative decisions which may be challenged in administrative courts.

87. Regarding the disruption of radio and TV signals by the Higher Audio-visual and Communication Authority (HAAC), the Respondent State invokes Article 65 of Organic Law No 92-021 of 21 August 1992 which provides that "Apart from disciplinary action, the decisions of the Higher Audio-visual and Communications Authority are subject to appeal before the Administrative Chamber of the Supreme Court".

88. It contends that in regard to the afore-mentioned two complaints, the Applicant seized the Administrative Chamber of the Cotonou First Class Court of First Instance, with an Application for annulment, and that this action is still pending before the said Chamber.

89. For the Respondent State, the arguments adduced by the Applicant are null and void in as much as the matter has neither been unduly prolonged nor are the remedies ineffective; it prays the Court to declare the Application and all subsequent requests inadmissible.

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90. Contesting the objection to the admissibility of his Application on grounds of non-exhaustion of local remedies, the Applicant submits that, although the country has in place a number of remedies, all of them may not be applicable to all situations, and that, if a remedy is inadequate in a given case, it is obvious that it does not need to be exhausted.

91. The Applicant also submits that there are exceptions to the rule of prior exhaustion of local remedies and that this Court has already

held that where the local remedies are inapplicable, ineffective and unavailable or where they do not offer prospects of success or cannot be used without hindrance by the Applicant, the latter is not required to exhaust the remedies in question. He cites the case of the Constitutional Court and argues that the interference of political power in the affairs of the judicial authorities and the fact that the decisions of the Constitutional Court have never been executed, are all elements that make the remedy before that Court ineffective.

92. The Applicant further refutes the Respondent State's assertion that the procedure to obtain reparation under Article 206 of the Benin Code of Criminal Procedure was available to him. He submits that, in as much as the Attorney General lodged an appeal for the sole purpose of unreasonably prolonging the proceedings and preventing him from obtaining redress, he was no longer able, in that state of confusion, to exercise the remedy set out in Article 206 of the Benin Code of Criminal Procedure.

93. He further avers that, given the total lack of an independent and impartial judiciary, the remedies provided under Article 206 of the Benin Code of Criminal Procedure, mentioned by the Respondent State, must be considered ineffective and insufficient.

94. With regard to the appeal against the CRIET Judgment of 18 October 2018, the Applicant submits that he filed cassation appeal against the decision even though, under the law establishing the special court, cassation appeal does not offer him the possibility of re-examination of the merits of the case. He argues in conclusion that this is an extraordinary remedy which he does not necessarily have to exhaust.

95. In view of the above observations, the Applicant prays the Court to take into consideration the unavailability, ineffectiveness and the unsatisfactory nature of the remedies that he is supposed to have exhausted and declare his Application admissible.

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96. The Court notes that, in the instant case, the Respondent State alleges the existence of several remedies, some of which he contends the Applicant has not exhausted, and others that have been requested in the course of the procedure.

97. The Court notes that it has always insisted that in order for the rule of exhaustion of local remedies to be fulfilled, the remedies

which have to be exhausted must be ordinary judicial remedies.[10]

98. The Court recalls that exhaustion of local remedies means that the case which the Applicant wishes to bring before the international court has been brought, at least in substance, before the national courts, where such courts exist, and the remedies are sufficient, accessible and effective.

99. The Court, therefore, is seeking to establish whether, at national level, the remedies available before the Constitutional Court, those provided under Article 206 of the Benin Code of Criminal Procedure, those before the administrative courts and the cassation appeal, exist and are available.

a. On the existence and availability of local remedies

100. In terms of Article 114 of the Benin Constitution of 11 December 1990, "The Constitutional Court is the highest court of the State in constitutional matters. It shall rule on the constitutionality of laws and shall guarantee basic human rights and fundamental freedoms. It is the regulatory body for the functioning of institutions and the action of public authorities". It follows that the Constitutional Court also adjudicates human rights violations.

101. The Court notes that, with respect to the protection of human rights, the Constitutional Court of Benin makes a determination, at first instance on alleged violations of human rights, as guaranteed by the Constitution of Benin, the Universal Declaration of Human Rights and the Charter.[11] It further notes that the Constitutional Court has jurisdiction to adjudicate applicants' right to compensation.[12]

102. On the basis of this finding, the Court notes that the remedy before the Constitutional Court of Benin is available.

103. With regard to reparation for damages resulting from abusive judicial proceedings provided in Article 206 of the Benin Code of Criminal Procedure, the Court notes that it is open to any person who has been subject to police custody or improper detention

10 Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania* (hereinafter referred to as "*Alex Thomas v United Republic of Tanzania"* (Merits)"), para 64.

11 See Articles 7, 114 and 117 of the 11 December 1990 Constitution.

12 Since 2002, the Constitutional Court no longer limited itself to noting violations of human rights, but also pronounces on reparations as was the case in Decisions: DCC 02-052 of 31 May 2002, *Fanou Laurent, Rec*, 2002,para 217; Decision DCC 13-053 of 16/5/2013, *Serge Prince Agbodjan*. Decision DCC 02-058 of 4/6/2002 *Favi Adèle* and Judgment 007/04 of 9 February 2004 of the Cotonou First Instance Court.

and whose proceedings have resulted in a decision of dismissal, release or acquittal, to seek compensation for the damage caused by the said proceedings. The recourse provided under Article 206 of the Benin Code of Criminal Procedure is**,** in addition to the one before the Constitutional Court, an internal remedy and is available to the Applicant.

104. The Court notes, moreover, that for the purposes of appeal, the Applicant submitted to the administrative courts issues concerning the withdrawal of the customs' agency licence and the closure of SOCOTRAC container terminal.

105. The Court lastly notes that the Applicant also lodged cassation appeal against the CRIET's Judgment of 18 October 2018.

106. In light of the foregoing, the Court finds that at national level, there were remedies available to the Applicant which the latter could have exhausted.

107. The Court notes, however, that the Applicant's reaction to the Respondent State's objections relate mainly to the effectiveness of these local remedies and their ability to remedy the violations he alleges.

108. In the instant case, the Applicant relies on the lack of independence or the dysfunction of the justice system, and also on the slowness of the system, to buttress the objections invoked.

b. On effectiveness of the local remedies

109. The Court notes that it has already stated that, as regards the exhaustion of local remedies, it does not suffice for the remedy to exist just to satisfy the rule. The local remedies that the Applicant is supposed to exhaust should not only be found to exist, but must also be effective, useful and offer reasonable prospects of success or be capable of providing redress for the alleged violation.[13]

110. The Court considers that the rule of exhaustion is neither absolute nor applicable automatically.[14] In the same vein, international jurisprudence, in particular the European Court, has affirmed that in interpreting the rule of exhaustion of local remedies, it has regard to the circumstances of the case, such that it realistically takes into account not only the remedies provided in theory in the national legal system of the Respondent State, but also the legal and political context in which the said remedies are positioned

13 *Norbert Zongo and others v Burkina Faso* (Merits), *op cit* para 68. *Lohé Issa Konaté v Burkina Faso* (Merits), *op cit* para 108.

14 *Rev. Christopher Mitikila v Tanzania* (Merits), *op cit* para 82.1.

and the personal situation of the Applicant.[15]

111. The Court notes that the judicial proceedings conducted in 2016 and the proceedings before the CRIET in 2018 have a nexus of continuity and the Court will consider the issue of exhaustion of local remedies globally on account of this link.

112. The Court notes that generally and as concerns all the remedies that the Applicant could have exercised in 2016 (remedy before the Constitutional Court, remedy on the basis of Article 206 of the Code of Criminal Procedure, remedy before administrative jurisdictions) the circumstances surrounding the Prosecutor General's appeal and the CRIET's Judgment in 2018 confirm the Applicant's apprehensions regarding their effectiveness.

113. With regard, in particular, to the remedy provided under Article 206 of the Benin Code of Criminal Procedure, the Court notes that there was evidence of judicial malfunction to the point of making the said remedy unavailable to the Applicant. The Court holds that the parties acknowledged that the appeal lodged by the Prosecutor General against the Judgment of 4 November 2016 had not been served on the Applicant, and that the recording of the same in the register of appeals in the Court Registry was done on 26 December 2016, after the Applicant had received an attestation precluding him from appealing or filing an Application to set aside the judgment. Hence, it is apparent that the Prosecutor General's appeal in the end placed the Applicant in a state of confusion, such that he could not utilise the remedy provided under Article 206 of the Benin Code of Criminal Procedure, and this, *ipso facto* rendered the remedy unavailable. Thus, failure in the obligation to effect service was transformed into an impediment for the Applicant to exercise the local remedies and exhaust them.

114. Regarding the remedies before administrative courts, the Court notes that, against the decisions taken by HAAC and the customs administration, the Applicant brought two actions for annulment for abuse of power. The Court further notes that the two appeals filed, respectively, under No. COTO/2017/RP/01759 dated 15 February 2016, did not generate any court decision, at least until the Applicant's trial before CRIET, thus contributing to fuelling the mistrust or suspicion over the effectiveness of the justice system.

115. The impediments to the exercise of the remedies available to the Applicant were also illustrated after the CRIET Judgment of 18 October 2018. It is apparent from the documents on file that the

15 ECHR, Application 21893/93, *Akdivar and others v Turkey,* Judgment of 16 September 1996, para 50. See also Application 25803/94, *Selmouni v France,* Judgment of 28 July 1999, para 74.

cassation appeal by the Applicant was never engaged, because the Special Prosecutor before the CRIET failed to transmit the Applicant's case file to the Supreme Court.

116. On the basis of these findings, the Court holds that the prospects of success of all the proceedings for reparation of the damages resulting from the Judgment of 4 November 2016 are negligible. The Court finds that, even though domestic remedies were there to be exhausted, the particular context of the present case rendered the said remedies inaccessible and ineffective for the Applicant who thus sees himself exempted from the obligation to exhaust the local remedies.[16]

117. The Court holds in conclusion that the present Application cannot be dismissed for non-exhaustion of local remedies.

B. Admissibility conditions not in contention between the parties

118. The conditions regarding the Applicant's identity, the Application's compliance with the Constitutive Act of the African Union, the nature of evidence, reasonable time from the date local remedies were exhausted, and the principle that the Application should not raise any matter or issues previously settled by the parties in accordance with the principles of the United Nations Charter or the Constitutive Act of the African Union, or the provisions of the Charter or any other legal instrument of the African Union as required under paragraphs 1, 2, 4, 6 and 7 of Rule 40 of the Rules are not in contention between the parties.

119. The Court also notes that nothing on file shows that any of the said conditions has not been met in the present case. Accordingly, the Court considers that the conditions set out above have been fully met.

120. In light of the foregoing, the Court declares that this Application is admissible.

VII. The Merits

A. Alleged violation of the right to a fair trial

121. The Applicant alleges that his rights guaranteed and protected under Article 7(1) of the Charter have been violated in several

16 *Lohé Issa Konaté v Burkina-Faso* (Merits), *op cit*. para 114.

respects and successively enumerates his rights to be tried by a competent court, to be notified of the charges preferred against him, to access the case file, not to be tried twice for the same act, to be tried within a reasonable time, to be assisted by counsel, to exercise an effective and meaningful remedy and the right to the presumption of innocence.

122. The Court notes that Article 7(1) of the Charter invoked by the Applicant, provides that: "1. Every individual shall have the right to have his cause heard. This comprises:

a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b. The right to be presumed innocent until proved guilty by a competent court or tribunal;

c. The right to defence, including the right to be defended by counsel of his choice;

d. The right to be tried within a reasonable time by an impartial court or tribunal."

123. As for Article 14(7) of ICCPR, this reads as follows: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

124. The Court notes that the provisions of Article 7(1) above relate to the overall requirement of procedural fairness such that they are interrelated and do frequently overlap, even if they are distinct and can be assessed differently.

i. Alleged violation of the right to be tried by a competent court

125. The Applicant argues that if the law confers on the CRIET the jurisdiction to hear certain cases and prescribes that those cases undergoing investigation or inquiry be transferred to it, cases already adjudicated are not affected by this prescription. He further argues that this would be otherwise only where the law created the CRIET as a second-instance court or a court of appeal for decisions rendered in cases within its jurisdiction prior to the entry into force of the law that established it, which for the

Applicant is not the case.

126. Invoking Article 20[17] of Law 2018-13 of 2 July 2018 creating CRIET, the Applicant argues that, in accordance with this law, no mention is made that the CRIET can be seized of cases already tried, but rather of cases under investigation and inquiry.

127. He submits that, as far as he is concerned, the facts brought before the CRIET have already been adjudicated at first instance, that the Judgment became definitive and that, in the circumstances, the CRIET is in no way competent to retry the case. He avers in conclusion that the Respondent State has violated Article 14(1) of ICCPR in as much as the Respondent State has caused him to be tried by an incompetent court.

128. The Respondent State submits that in the present case, the CRIET had full jurisdiction, as a court of appeal, to hear the appeal lodged by the Attorney General of the Cotonou Court of Appeal against Judgment No. 262/1FD-16 of 4 November 2016.

129. It states that the fact that the Applicant challenges the jurisdiction of the CRIET by suggesting that the latter has been seized of a case that has already been tried, is unfounded. The Respondent State also submits that, in the first instance, the case that involved the Applicant was tried in *flagrant delicto* proceedings and that, pursuant to Articles 447 *et seq.* of the Benin Code of Criminal Procedure, the CRIET has jurisdiction to hear any appeal, and that in the circumstances, the investigation should be conducted before the court of appeal or before the CRIET.

130. Also relying on the provisions of Article 20 of Law No. 2018-13 of 2 July 2018, the Respondent State maintains that the CRIET is competent to hear the procedure up to delivery of decision.

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131. The Court notes that the question of the competence of the CRIET

17 This text reads as follows: "Upon the establishment of the Anti-Economic Crimes and Terrorism Court, the procedures within the ambit of its jurisdiction, including investigations or inquiries pending before the competent courts shall, upon requisition by representatives of the competent public prosecutor's office, be transferred to the Special Prosecutor of the court for continuation, as the case may be, of the prosecutor's investigation by the Special Prosecutor, of the investigation by the commission of inquiry, the resolution of litigations in matters of freedoms and detention by the chamber of liberties as well as detention and Judgment by the court".

challenged by the Applicant is based on whether the case of high-risk international drug trafficking brought before it in September 2018 was pending before the Cotonou Court of Appeal within the meaning of article 5 *in fine* of Law No. 2018-13 of 2 July 2018 according to which the cases pending before the courts shall be transferred by the latter to the CRIET.

132. In the present case, the Court notes that while the Applicant alleges that Judgment No. 262/1FD-16 of 4 November 2016 has become *res judicata,* for lack of appeal or opposition, the Respondent State submits that the judgment has been appealed.

133. The Court notes that in order to declare itself competent, the CRIET considered that the case of international drug trafficking which involved the Applicant and was the subject of Judgment No. 262/1FD-16 of 4 November 2016, is an ongoing case insofar as the said Judgment was appealed by the Attorney General.

134. In accordance with Article 20 of Law No. 2018-13 of 2018 establishing CRIET, the latter hears drug-trafficking cases and, apart from flagrancy cases and referral orders, a court which, at the time of setting up the CRIET, is seized of a case within the latter's jurisdiction, must transfer such a case to the CRIET.

135. It is clear from the pleadings before this Court that, following a statement dated 27 December 2016, the Attorney General of the Cotonou Court of Appeal appealed the Judgment No. 262/1FD-16 of 4 November 2016 delivered by the First Instance Court of Cotonou, but without getting the appeal registered in that Court's Register of Appeals and without notification thereof to the Respondent State, in this case, the Applicant.

136. The Court notes that in all judicial proceedings, and even more so in criminal matters, the launch of a procedure is actualized by notification thereof to the adverse party. It is by such action of notification that a fact, an act or a procedure is brought to the knowledge of the person concerned. Notification is of crucial importance in the procedure especially as it "alerts" the addressee who therefrom sees himself concerned by the procedure and offers him the opportunity to participate therein[18]. In view of international jurisprudence, the Court considers that it is "the official notification, issued by the competent authority levelling an accusation of committal of a criminal offence" which constitutes

18 *Georg Brozicek v Italy,* Judgment of 19 December 1989, *op cit* paras 57 and 58.

the accusation and triggers the criminal action.[19]

137. In the instant case, notification of the appeal against the Judgment of 4 November 2016 was essential and was supposed to be the starting point for the Appellant's bid to have the case reopened. Notification is not just an act of information; it produces legal effects. The absence of notification of the appeal to the Applicant renders the Attorney General's appeal ineffective, and the Court has already established that an effective remedy is one that produces the desired effect.[20]

138. The Court notes, moreover, that since 26 December 2016 up to the referral to the CRIET in September 2018, the Attorney General's appeal was never invoked before the Cotonou Court of Appeal and no procedural act was accomplished thereon**.** The Attorney General did not attempt to forward the appeal for inclusion in the register of appeals at the Registry of the First Instance Court of Cotonou; and did not, either, proceed to enrol the case before the criminal chamber of the Court of Appeal as required by the Rules of Procedure. Besides, it is apparent from the documents on file that, apart from the rumours in circulation, it is sequel to the summons issued by the CRIET on 26 September that the Applicant was seized of a notification emanating from a judicial authority to re-open the case on which judgment had been rendered on 4 November 2016.

139. In view of the foregoing, the Court considers that, for having not been filed according to the rules set by law, the Attorney General's appeal of 26 December 2016 has no effect on the Applicant. Consequently, the CRIET was seized of a case that cannot be characterized as "ongoing before" the Court of Appeal and cannot be binding on the Applicant. As at the date of seizure of the CRIET, the Judgment that the Respondent State said has been appealed, had already acquired the authority of *res judicata.*

140. The Court finds that even though the CRIET has the material jurisdiction to hear cases of drug trafficking, the case as concerned the Applicant, did not fall under the jurisdiction of the CRIET as of the date on which it was seized. It follows therefore that the CRIET had no jurisdiction to hear the case.

141. From the foregoing, the Court finds that the Applicant's right to be tried by a competent court guaranteed by Article 7(1)(a) of the

19 *Idem* para 38.

20 *Akdivar and others v Turkey* Judgment, *op cit* para 73.

Charter has been violated.

ii. Alleged violation of the right to defence

142. The Applicant alleges that his right to defence guaranteed by Article 7(1)(c) of the Charter was violated by the Respondent State in several respects, namely: the right to present evidence, receive notification of the charges, access the record of the proceedings and to be represented by counsel.

a. The right to full investigation and to present evidence

143. The Applicant complains about the summary trial procedure to which he was subjected. According to him, this procedure is exceptional and was brought against him for the sole purpose of violating his right to defence and having him sentenced swiftly.

144. He alleges that the Judgment of 4 November 2016, which ended up in his acquittal on the benefit of the doubt, did not offer him the means to fully demonstrate his innocence, because according to him, the Cotonou First Instance Court refused to admit his evidence as regards the conspiracy of which he was victim.

145. The Applicant also submits that the investigation was conducted in such a way that traces of the "conspiracy" which he has always denounced were wiped away. He contends in that regard that, fingerprints on the seals and the sachets containing the drugs were not taken; that these were erased and that the cocaine was swiftly destroyed. He also contends that the investigating officers should have taken the temperature of the frozen gizzards and that of the cocaine to determine whether both types of product were introduced into the container at the same time.

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146. The Respondent State submits that the Applicant is unfounded in arguing that his summary trial was intended to violate his rights, and that he has never been prevented from tendering any evidence; none of his rights have been violated, the trial having been conducted in strict compliance with the law. It asserts that the summary trial procedure was initiated with the aim of preserving the Applicant's rights in the best possible way by

avoiding provisional detention which might not be justified.

147. Referring to the operative part of the Cotonou First Instance Court Judgment No. 262/1FD-16 of 4 November 2016 ruling on *flagrante delicto,* the Respondent State contends that, contrary to the Applicant's allegations, the seized drugs were first sealed and placed in the hands of the law at the Registry of the Cotonou First Instance Court before it was destroyed.

148. The Respondent State also affirmed that the Mediterranean Shipping Company (MSC) Benin SA, which transported the container with the drugs on behalf of the company COMON SA, was indeed heard in the context of the investigation by the joint judicial commission of inquiry set up specifically for the needs of the case, and that it appeared before the CRIET as a civil party.

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149. The right to defence set out in Article 7(1)(c) of the Charter is a key component of the right to a fair trial and reflects the potential of a judicial process to offer the parties the opportunity to express their claims and submit their evidence. The Court notes that the domain of Article 7(1)(c) of the Charter applies to all stages of the proceedings in a case, from the preliminary investigation to the pronouncement of judgment, and is not limited solely to the conduct of hearings.

150. The Court notes that, to buttress his allegations, the Applicant makes reference to both the summary trial and the investigation procedure.

151. Regarding the argument that the summary trial procedure supposedly affected the Applicant's right of defence, the Court notes that the summary trial *per se* does not violate the right to defence.

152. On the question of investigation, the Court reiterates that the exigency of the right to defend oneself also implies the possibility for the accused to adduce evidence contrary to that invoked by the other party, interrogate the witnesses brought against him or call his own witnesses.

153. The Court further holds that, had the investigation been conducted as described in paragraph 144, the Applicant would have had the chances of being acquitted outright rather than on the benefit of

the doubt.

154. The Court considers that the investigation as it was conducted did not allow the Applicant to organize his defence.

155. It is apparent from the case file that, at the preliminary investigation stage, the Applicant's wish that the investigation cover the entire chain of the container transport, from the point of departure to the Autonomous Port of Cotonou or be extended to other investigations of scientific nature which would have been decisive in determining the origin of the illicit product, was not taken into account.

156. The Court holds in conclusion that, having failed to meet the above requirements, the Respondent State violated the Applicant's right to defence guaranteed by Article 7(1)(c) of the Charter.

b. Alleged violation of the right to receive notification of the charges and to access the record of proceedings

157. Challenging the proceedings before the CRIET, the Applicant submits that the principle of the right to a fair trial includes the right to be timely informed of the facts and the charges to be presented at the proceedings. He alleges that in this case, he was summoned before the CRIET by an act of the CRIET Special Prosecutor which indicated neither the facts nor the charges relevant to the proceedings.

158. He also states that as of 21 September 2018 up to 4 October 2018, the day of the hearing, he tried in vain to look into the file but without any chance of ever succeeding.

159. The Applicant thus submits that, given that the procedure was likely to give rise to a heavy sentence, the Respondent State deprived him of his right to prepare his defence.

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160. The Respondent State submits that, in appeal, it is superfluous to re-notify the charges, the notification or the right to information having been satisfied at the preliminary inquiry or before the court. It asserts that the Applicant was notified of the role of the CRIET as it was clearly stated that he was being prosecuted for "high-risk international drug trafficking". It alleges that in practice, the elements of a criminal case are not portable, but rather are to

be requested, and that it is up to each party, at its own expense, to request from the registry, either the transmission of the documents on file, or the possibility of consulting the file on the spot.

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161. The Court notes that, in all proceedings, even more so in criminal cases, the purpose of notification of charges is to enable the accused to be informed of the nature of the charges brought against him to enable him to properly prepare his defence. The right to acquire knowledge of the record of proceedings is also an important aspect of the right to a fair trial and is related to the right to defence, more particularly the principle of equality of arms between the parties. Courts therefore, have an obligation to strike a fair balance between the parties with a view to enabling them to be aware of and comment on all the evidence tendered by the adverse party.

162. The Court notes that, in this case, the Respondent State does not contest that, before the CRIET, not only did the Applicant not receive the file but also that his lawyers were refused on-site consultation. In the circumstances, the Court considers that the Applicant was deprived of the opportunity to be fully informed of the proceedings and of the charges levelled against him and to understand the stakes involved in the case. The Court also considers that mentioning the role of the Court before which the Applicant was arraigned for "high-risk international drug trafficking offence" is not sufficient to relieve that court of the obligation to disclose the record, regardless of whether or not such record is portable or is available on request**.** The Court finds that, in so doing, the CRIET totally deprived the Applicant of the facilities necessary for preparation and presentation of his arguments in conditions which guarantee for him an equitable and balanced trial.

163. Consequently, the Applicant's rights to be informed of the charges brought against him and to gain access to the record of the proceedings, guaranteed under Article 14(3)(a) of ICCPR, were violated.

c. Alleged violation of the right to be represented by counsel

164. Invoking Article 14(3)(d) of ICCPR, the Applicant alleges that before the CRIET, his right to counsel was violated. He argues that, in criminal matters, the accused may request to be tried in his absence by being represented by his lawyer or by a public defender, adding that, in both investigative and criminal cases, even in the absence of a letter, the tribunal and the Assize Courts are obliged to hear the lawyer who comes forward to defend the accused or the detainee, the absence of a letter affecting only the characterization of the judgment; that being the case, the Applicant had before the date of 18 October 2018, apologised and indicated that he did not intend to appear.

165. The Applicant alleges that despite the above correspondence, the CRIET against all expectation, refused to receive his panel of lawyers on the pretext that the CRIET should first indict him.

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166. The Respondent State refutes the Applicant's allegations and asserts that the Applicant's right to counsel has not been violated. It submits that the Applicant enjoyed all his rights to defence before the First Instance Court of Cotonou, in as much as he was assisted by at least twenty-six (26) lawyers; and that the said lawyers did not at any time during the procedure, request a postponement thereof so as to better prepare their defence.

167. The Respondent State contends that it was rather the Applicant who, in deciding not to appear before the CRIET, failed to fulfil the legal conditions for him to be assisted in his absence. The Respondent State submits that examination of the case before the CRIET was not limited to issues of civil interest or objections but also concerned matters relating to the merits of the case.

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168. The Court notes that, in the instant case, the Applicant complains

of the violation of his right to be represented by counsel in his absence as guaranteed by Articles 7(1)(c) of the Charter and 14(3)(d) of ICCPR.[21]

169. It is apparent from the above text that to ensure the fairness of trial, every accused person or detainee may provide his own defence or be assisted by a counsel he himself designates or has accepted, where the latter has been appointed by the court, and this, at any stage of the proceedings.

170. The Court also notes that the national law, in this case, Article 428 of the Benin Code of Criminal Procedure recognises for individuals the same right to be represented when it provides that, "Whatever the penalty incurred, the accused may, by letter addressed to the President and attached to the record of the proceedings, apply to be tried in his absence. He can be represented by counsel and the trial shall be deemed to be adversarial. ... .However, where the court deems it necessary to have the accused appear in person, he shall again be summoned at the instance of the public prosecutor, for a hearing the date of which shall be set by the court ..."

171. The Court holds that the right to be represented by a lawyer, the purpose of which is to ensure the adversarial nature of the proceedings is practical and effective, such that its exercise allows the defendant the latitude to appear personally or to be represented. Any limitation to the exercise of this right must meet the exigency of necessity.

172. In the instant case, the Respondent State does not adduce reasons as to why it was deemed necessary that the Applicant should appear in person, to the point of depriving him of the right to be represented by counsel for his defence in proceedings that earned him a sentence of twenty years in prison. In this case, the Court finds that the Applicant had previously addressed to the CRIET a letter indicating that he did not intend to appear in person and requested to be tried in his absence.

173. The Court notes that the right to be assisted by counsel is practical and effective such that its exercise is not to be subjected

21 Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises: (c) The right to defence, including the right to be defended by counsel of his choice". Article 14.3(d) of the ICCPR provides that: " In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

to excessive formalism. Given the effectiveness of the Applicant's right to defence, the CRIET needed to avoid such formalism, and by so doing preserve the fairness of the proceedings. The Court considers that in the instant case, the proportionality between the CRIET's order for the Applicant to appear in person and safeguarding the rights of the defence has not been observed, and holds that failure by a duly summoned accused to appear cannot deprive him of his right to be represented by counsel.

174. The Court holds in conclusion that the Applicant's right to be represented by counsel before CRIET, guaranteed by Article 14(3)(d) of ICCPR has been violated.

iii. Alleged violation of the principle of "*non bis in idem*"[22]

175. Invoking Article 14(7) of ICCPR, the Applicant submits that the Respondent State's justice system tried him twice for the same facts, in breach of the principle of *"non bis in idem".*

176. He argues that no provision of Law No. 2018-13 amending and supplementing Law No. 2001-37 of 27 August 2002 on Judicial Organization in the Republic of Benin has made the CRIET a superior court to retry offences within its jurisdiction, as well as offences tried before the entry into force of the law that established it. He also argues that, in this case, the facts referred to the CRIET, had already been the subject of a judgment at the first instance and that the CRIET could not therefore, retry the case. The Applicant submits that the Respondent State clearly violated Article 14(7) of ICCPR.

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177. The Respondent State, for its part, submits that it has not violated the principle of *non bis in idem*, for the simple reason that, the judgment rendered at first instance was appealed by the Attorney General and is therefore not definitive. It argues that this principle is used in law only to express the fact that an accused tried and acquitted or convicted by a decision not subject to appeal can no longer be prosecuted for the same act. It contends that this

22 See Art 4 of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984.

principle applies only in cases where the decision has become *res judicata.*

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178. The Court notes that although the Charter does not contain any specific provision on the principle of *"non bis in idem",* this constitutes a general principle of law as reiterated by Article 14(7) of ICCPR which stipulates that: **"**[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

179. The principle of *"non bis in idem"* literally means that a person cannot be prosecuted and tried twice by the courts of the same State for an offence for which he has been acquitted or convicted. To assess whether, before the CRIET, the Applicant was tried for the same case as that which had been tried by the Cotonou First Class Court of First Instance, the Court takes into account the factual and legal aspects of the matter.[23]

180. As regards the facts, the Court notes that the proceedings before the CRIET involved the same parties as those that appeared before the Cotonou First Class Court of First Instance, namely: the Public Prosecutor's Office as prosecutor, the Benin Customs as a civil party, the Applicant and three of his employees as the party accused. Additionally, seized by the Special Prosecutor, the CRIET essentially adjudicated the facts and complaints heard by the First Instance Court. Definitively, the two courts heard the same case, that is, the international trafficking of 18 kilogrammes of cocaine.

181. In terms of compliance or otherwise with the principle, the Court notes that it is for reasons of the identity of the two procedures that the CRIET, in the operative part of its Judgment, declared that it reversed "in all its provisions the Judgment 262/1FD-16 of 4 November 2016".

182. The Court also notes that the term *idem* relates not only to the identity of the parties and the facts, but also to the authority of *res judicata*. On this point, the Court has already noted that the appeal against the Judgment of 4 November by the Attorney General cannot be binding on the Applicant. As at the date of

23 The European Court held that the principle of *non bis in idem* must be understood as "prohibiting the prosecution or trial of a person for a second "offence" in so far as it originated from identical facts or facts which are the same in substance. See ECHR, Applications 18640/10; 18647/10; 18663/10; 18668/10; 18698/10: *Great Stevens et al v Italy*, Judgment of 4 March 2014, para 219.

seizure of the CRIET, the said Judgment had already acquired the authority of *res judicata* and the Respondent State could no longer rely on any ongoing case.

183. It follows that the proceedings before the CRIET were in violation of the prohibition of prosecution or criminal punishment in a case for which the Applicant had already been tried and acquitted by a final Judgment that became definitive in accordance with the extant laws and procedures of the Respondent State.

184. The Court finds that the principle of *"non bis in idem"* under Article 14(7) of ICCPR has been violated.

iv. Alleged violation of the right to presumption of innocence

185. The Applicant contends that from the moment of his arrest, and throughout the investigation up to the trial before the Cotonou Court of First Instance, the Customs, the *Gendarmerie* and the Prosecutor's Office in Cotonou violated his right to presumption of innocence by leading the Benin public to believe that he was a drug trafficker.

186. He submits further that the fact that the Court acquitted him on the benefit of the doubt rather than outright acquittal helped to nurture suspicion in regard to his guilt and doubts over his innocence. The Applicant believes that the Attorney General's appeal arbitrarily kept him in a state of *"presumption of guilt",* thus violating Article 7(1)(b) of the Charter.

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187. Refuting the Applicant's contentions, the Respondent State submits that the presumption of innocence is a "... principle which implies that the accused person must be acquitted on the benefit of the doubt by the trial court where his guilt is not proven and that during the trial itself, the person must be held not guilty and respected as such".

188. The Respondent State submits that, while in police custody, the Applicant who was not regarded as a detainee or an indictee, remained at the disposal of the Maritime *Gendarmerie* Company of the Autonomous Port of Cotonou for the purposes of investigation; adding that he was never presented as a

perpetrator, co-perpetrator of, or an accomplice in, the offence of international high-risk drug trafficking and that his right to be presumed innocent has not been violated.

189. Article 7(1)(b) of the Charter provides that: "(1) [e]very individual shall have the right to have his cause heard. This comprises: (b) The right to be presumed innocent until proved guilty by a competent court or tribunal".

190. The presumption of innocence means that any person prosecuted for an offence is presumed, à priori, not to have committed it, so long as his guilt is not established by an irrevocable Judgment. It follows that the scope of the right to presumption of innocence embraces the entire procedure from the time of examination to the pronouncement of final judicial decision, and that violation of the presumption of a person's innocence "may be ascertained even in the absence of final conviction where the judicial decision concerning the person reflects the feeling that he is guilty".[24]

191. In the instant case, the Applicant submits that his right to presumption of innocence was violated throughout the judicial process and also by the fact that his acquittal was based on the benefit of the doubt, and by the abusive appeal of the Attorney General.

192. With respect to the allegation that the Applicant's right to presumption of innocence was violated throughout the investigation process up until the Judgment of 4 November 2016, the Court notes that; respect for the presumption of innocence is binding not only on the criminal judge but also on all other judicial, quasi-judicial and administrative[25] authorities.

193. It is apparent from the documents on file that, as far back as 28 October 2016, the Commandant of the *Gendarmerie* Brigade of the Port of Cotonou held a press conference at which he accused the Applicant of importing cocaine valued at nine billion CFA Francs. Moreover, in June 2017, other former senior officers of the Port of Cotonou unequivocally asserted that "he is the cause of his misfortunes; it is he that placed his drugs to provoke popular insurrection in the event of arrest, and this was denounced by his friends in a video. ... They are all aware that the Ajavon family is

24 ECHR, Application 8660/79; *Minelli v Switzerland,* Judgment of 25 March 1983, paras 27 and 37, Series A No 62.

25 See ECHR, Application 15175, Matter of *Allenet de Ribemont v France,* 10 February 1995, para 41.

in this business ".

194. In the present case, the public statements of certain high level political and administrative authorities on the case of international drug trafficking prior to the Judgment and even after the 4 November 2016 acquittal Judgment on the benefit of the doubt were susceptible to creating in the mind of the public, suspicions regarding the Applicant's guilt, and indeed the sustenance of the said suspicion.

195. With respect to the Applicant's allegation that his acquittal on the benefit of the doubt violates his right to the presumption of innocence, the Court notes that a decision to acquit on the benefit of the doubt does not violate the presumption of innocence. This would only be the case if the terms of the acquittal decision on the benefit of the doubt leaves room to believe that the person being discharged is guilty.

196. In the instant case, the Court notes no ambiguity in the terms of the Judgment of 4 November 2016 and holds that the said judgment of acquittal on the benefit of the doubt does not violate the right to the presumption of the innocence of the Applicant.

197. As regards the allegation that the Attorney General's appeal violated the Applicant's right to presumption of innocence, the Court considers that an appeal against a judgment, even an outright acquittal decision, is a right and cannot be considered an infringement of the presumption of innocence. However, the non-notification to the Applicant, of the Attorney General's appeal before the matter was transferred to the CRIET, was such that the Applicant was kept under suspicion of guilt.

198. In view of the foregoing, the Court holds in conclusion that, in this case, the acquittal judgment on the benefit of the doubt does not violate the Applicant's right to presumption of innocence. However, the statements of the public authorities violated the Applicant's right to presumption of innocence as provided under Article 7(1)(b) of the Charter.

v Alleged violation of the right to be tried within a reasonable time

199. The Applicant asserts that the drug trafficking case that involved him has been marked, in procedural terms, by incomprehensible incidents that border on the denial of justice. He regards as unreasonable the two-year period between the appeal lodged stealthily by the Attorney General and the proceedings before the

CRIET.

200. The Applicant also submits that the Attorney General's desire to bury the case pending establishment of the CRIET is manifest, because similar cases that occurred after his acquittal judgment were already adjudicated both at first instance and on appeal. He considers that the dysfunction of the judicial public service, the duration and the blocking of the appeal procedure did not respect the requirement of reasonable time for rendering a judgment, and violates the international conventions ratified by the Respondent State.

201. In refuting the Applicant's allegations, the Respondent State asserts that, while it is recognized that litigants are entitled to have their case tried within a reasonable time, no specific timeframe has been set by law or by international jurisdictions. The Respondent State contends that it cannot be validly argued that the right to a trial within a reasonable time has not been respected; adding that, in the circumstances of the proceedings, there is nothing indicating that the parties to the proceedings or the authorities are at the root of the prolonged delay invoked by the Applicant.

202. It contends that since the appeal lodged by the Attorney General, one year, nine months and twenty-two days elapsed, and that in Benin's practice, this timeframe is more than reasonable, especially in the instant case, given that the functioning of the justice system was disrupted during the judicial years 2016-2017 and 2017-2018 by several strikes which considerably slowed down the course of the proceedings.

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203. The Court reiterates that the reasonableness of a procedure is assessed according to the circumstances of each case, and that such assessment requires a global evaluation of the said circumstances.[26] In similar cases, the Court assessed the duration of the proceedings taking into account certain criteria particularly the complexity of the case, the Applicant's conduct, that of the competent authorities and the stakes inherent in the litigation for

26 *Norbert Zongo and others v Burkina Faso* (Merits) *op cit* para 92; Application 007/2013. Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, para 91; Application 011/2015. Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania*, para 52.

the parties.[27]

204. In the instant case, the Court notes that the Applicant complains about the length of time that elapsed between the Judgment of 4 November 2016 and the proceedings before the CRIET, which was the same as the proceedings before the Court of Appeal on appeal by the Attorney General. On this point, the Court has already noted that before the Court of Appeal, no procedural act was accomplished since the alleged appeal of the Attorney General, and that in the very absence of notification of the appeal to the Applicant, the said appeal has no effect on the latter.

205. In this respect, the Court holds that it cannot draw any inference from a procedure marred by substantial procedural flaws or examine whether it has complied with the requirements of reasonable time.

206. The Court therefore holds in conclusion that the Applicant's allegation is baseless.

vi. Alleged violation of the right to two-tier jurisdiction

207. The Applicant contends that the principle of two-tier jurisdiction guaranteed by Article 14(5) of ICCPR, is a component of the right of defence, and is clearly a constitutional principle in Benin law. He argues however that, Article 19(2)[28] of Law No. 2018-13 of 2 July 2018 amending and supplementing Law No. 2001-37 of 27 August 2002 on Judicial Organization in the Republic of Benin as amended, and the creation of the CRIET, deprived him of the right to invoke the rule of two-tier jurisdiction.

208. He alleges that the only remedy available to him against the CRIET's decision is the cassation appeal. However, according to him, in ruling on the cassation appeal, the Supreme Court of Benin has no jurisdiction to re-try the facts, but rather to verify the same and determine whether the law has been respected.

209. The Applicant argues that the absence of a two-tier jurisdiction runs counter to the international conventions that the Respondent State has ratified and that, as such, the point must be made that the law establishing the CRIET does not take into consideration the principle of a two-tier jurisdiction and violates his right to a fair

27 *Idem*.

28 Article 19 paragraph 2 provides as follows: "The Judgments of the Anti-Economic Crimes and Terrorism Court shall be reasoned. They shall be pronounced in open court, and shall be subject to cassation appeal by the convicted person, the public prosecutor and the civil parties".

trial.

210. The Respondent State submits that, in the present case, the principle of a two-tier jurisdiction has been meticulously observed because the Applicant's case has been heard not only by the Cotonou First Instance Court, but also on appeal by the CRIET. It further submits that in the instant case, the CRIET, acting as an appellate court, heard the appeal prior to entering a guilty verdict, adding that the appeal procedure is not absolute, and that the fact that the litigant is offered the opportunity to file the cassation appeal amounts to an opportunity to have his case reconsidered.

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211. The Court notes that the right to have a case heard by a higher court is provided by Article 14(5) of ICCPR which reads as follows: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

212. The Court notes that the requirement of a two-tier jurisdiction is absolute in criminal matters and is obligatory regardless of the degree of seriousness of the offence or the severity of the penalty incurred by the individual.[29]

213. In the instant case, the Court finds that whereas, before the CRIET, the Applicant was tried for a criminal offence and sentenced to twenty years imprisonment, it was impossible for him to have the facts and the conviction examined by a higher court. The Court notes that, in this case, only the cassation appeal was open to the Applicant. In this respect, the Court notes that it does not at all appear from the provisions of Article 20 of the law establishing the CRIET, cited above[30], that it adjudicates as an appeal court. Besides, a cassation appeal which seeks to "examine the formal or legal aspects of a verdict without considering the facts, is not sufficient under Article 14(5) of ICCPR".[31]

214. In the instant case, the lack or absence of possibility of an appropriate review of the conviction or sentence pronounced by

29 General Comment 32 *op cit* para 45.

30 See Note 17 under para 120 of this Judgment.

31 HRC Communication 2783/206: *Karim Meïssa Wade v Senegal*, para 12.4.

the CRIET is contrary to the right guaranteed under Article 14(5) of ICCPR.

215. From the foregoing, the Court finds that, the provisions of Article 19(2) of the Law establishing the CRIET constitute a violation by the Respondent State of the Applicant's right to have his conviction and sentence reviewed by a higher court.

B. Alleged violation of the right to equal protection of the law, equality before the law and the right to non-discrimination

216. The Applicant submits that the services that alerted the *Gendarmerie* of the Autonomous Port of Cotonou to the discovery of the cocaine in the container belonging to him were those of General Intelligence acting outside their area of competence. According to him, only the agents of the Central Office for *the Suppression of the Illegal Traffic of Drugs and Precursors in Benin (OCERTID)* were empowered to take appropriate action in such circumstances, which was not the case in the domestic proceedings instituted against him whereby the General Intelligence Service substituted itself for the Narcotics and Drugs Police Service.

217. The Applicant infers that by not placing the investigation within the ambit of the offices of OCERTID, he has been treated differently from other litigants in the same situation; and this for him represents a violation of his right to equal protection of the law and to non-discrimination.

218. In his pleadings dated 27 December 2018 received at the Registry on 14 January 2019, the Applicant also argued that the law creating the CRIET, particularly Article 12 thereof, establishes an unequal and discriminatory system between the litigants of the same country by granting to certain persons referred to it the rights which it does not recognize for others. The Applicant submits that this provision violates Articles 3 of the Charter and 26 of ICCPR, and prays the Court to order the Respondent State to suspend the Application of the law until it is amended for compliance with the international instruments to which the Respondent State is a party.

219. Refuting the Applicant's allegation, the Respondent State submits that the fact of having set up an *ad hoc* commission of inquiry is in consonance with the law since criminal investigation which is generally conducted by criminal police officers may also be carried out by any other entity duly constituted by the Public Prosecutor's Office. It further submits that, in the instant case,

the joint commission set up by the State Attorney was intended to preserve the Applicant's rights in the best possible way, adding that the Applicant's allegations are in reality intended to claim special treatment for himself, and that the issue is in no way that of substantiating any violation of his right to equal protection of the law. With regard to the allegation that section 12 of CRIET Act is discriminatory, the Respondent State prays the Court to disregard this additional submission.

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220. The Court notes that the allegations of violation of the Applicant's right to equal protection of the law as well as the right not to be discriminated against are perceived as being at two levels: that is, the level of the preliminary investigation conducted in October 2016, and at the level of Application of the law establishing the CRIET.

221. The Court reiterates that equal protection of the law and non-discrimination presupposes that the law provides for everyone and that it is applicable to everyone in equal measure without discrimination. The Court also reiterates that violation of the rights to equal protection of the law and non-discrimination presupposes that persons in a similar or identical situation have been treated differently.[32]

222. At the level of preliminary investigation, the Court notes that as far back as 29 October 2016, the day after the Applicant's arrest, the Public Prosecutor, by office memorandum, set up a Joint Judicial Commission of Inquiry with the mission "to take over the entire procedure on the facts related to the discovery of drugs in a container at the Port of Cotonou and for which the Cotonou Maritime *Gendarmerie* Company had initiated an investigation on 28 October 2016".

223. It is also apparent from the said office memorandum setting up the Joint Judicial Commission of Inquiry that the latter comprised three (3) members of the Public Prosecutor's Office, three (3) officers of the *Gendarmerie*, one of whom is an officer of the

32 *Alex Thomas v Tanzania* (Merits) *op cit* para 140; Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)") para 85.

maritime *gendarmerie*, and three (3) members of OCERTID, all falling under the category of services entitled to conduct preliminary investigations as prescribed by Articles 13 to 16 of the Benin Code of Criminal Procedure. In the instant case, the intervention of the General Intelligence Services was limited to the alert issued on 27 October 2016 to the *Gendarmerie* of the Autonomous Port of Cotonou regarding the existence of drugs in a container aboard the ship "MSC Sophie". As a result, the Court does not find any form of discrimination or inequality before the law at this level.

224. With regard to the discriminatory nature of the law creating the CRIET, particularly, Article 12 thereof, the Court notes that the said text provides that: "the decisions of the Investigating Commission[33] shall not be subject to ordinary appeal. However, the judgment of discharge can be appealed before CRIET. Depending on the case, the Court admits and determines the case or dismisses the appeal".

225. It is apparent from the above text that the law establishes, in the same procedure, two completely different systems depending on whether the rights of the prosecution or those of convicted persons are at issue. In this regard, the Court notes that while the findings of the Public Prosecutor's Office indicting defendants cannot be appealed, discharge decisions in favour of the person or persons prosecuted are subject to appeal. Thus, the law visibly breaks the balance between the parties to a trial and the equality of all before the law which, in this case, translates into the absence of equality of arms.

226. The Court holds that the provisions of Article 12 of Law No. 2018-13 of 2 July 2018 amending and supplementing Law No. 2001-37 of 27 August 2002 on Judicial Organization in the Republic of Benin as amended, and creating the CRIET, constitute a violation of the Applicant's right to equality before the law and to equal protection of the law.

C. Alleged violation of the Applicant's right to liberty and to security of his person

227. Invoking Article 6 of the Charter, as well as Articles 3 and 9 of the Universal Declaration of Human Rights, the Applicant argues

33 According to Article 10 of the law establishing the CRIET, an Investigating Commission shall be set up, composed of a President and two (02) magistrates with the task to investigate cases.

that his right to liberty has been violated. He considers his arrest and detention in the case of the discovery of the 18 kilogrammes of cocaine in a container of goods he ordered, inappropriate, unjust and arbitrary, adding that although he is the recipient of the container, at no stage in the transport chain did he intervene and that, consequently, his arrest and detention do not meet the legal conditions and guarantees on the deprivation of freedom as protected by international human rights law and international jurisprudence.

228. Referring to his social and political status, the Applicant affirms that as a "food processing business tycoon" and a politician ranked 3rd in the 2016 presidential elections just behind the current President of the Republic who came 2nd, the standard would have been to make him report to the authorities as *per* their dictates, rather than subject him to eight days in custody during which he was interrogated only once whereas he presented all the guarantees of representation.

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229. The Respondent State submits that the Applicant's detention was lawful because it was executed in accordance with the law which provides that the duration of police custody may be up to eight days maximum, adding that in this case, the Benin justice system took all the necessary care and did not go beyond the maximum of eight days.

230. It asserts that police custody is a measure that reduces a person's freedom to come and go during an ongoing procedure, particularly in the case of police investigation; that the measure applies to everyone and the Applicant is not justified to invoke his social or political position to evade the measure.

231. The Respondent State also invokes the provisions of Article 58 of the Benin Code of Criminal Procedure and contends that the Applicant's arrest and detention are not arbitrary in so far as they are legal and well-founded.

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232. Article 6 of the Charter stipulates that: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained ". Articles 3 and 9 of the Universal Declaration of Human Rights provide, respectively, that: "Everyone has the right to life, liberty and security of person" (Article 3) and "[n[o one shall be subjected to arbitrary arrest, detention or exile" (Article 9).

233. It is clear from this text that deprivation of liberty is an exception that is subject to strict requirements of legality and legitimacy, such that arrest or detention is considered as arbitrary where it has no legal basis or contravenes the law.

234. On this point, the Court notes that Article 58 of the Benin Code of Criminal Procedure enshrines freedom as a principle and provides that a person may be detained only where the measure guaranteeing the person's maintenance at the disposal of the investigators is the only way to achieve one of the objectives listed as: 1) allow for the execution of investigations involving the presence or participation of the person; 2) guarantee the presentation of the person before the State Attorney for the purpose of enabling the latter to evaluate the outcome of the investigation; 3) prevent the person from modifying proofs or physical evidence; 4) prevent the person from putting pressure on witnesses or victims and their families; (5) prevent the person from consulting other persons susceptible to being his co-perpetrators or accomplices; 6) ensure implementation of measures to put an end to inordinate actions.

235. It is clear from this Article 58 that, while certain restrictions are intended to ensure the appearance and participation of persons in proceedings, others seek to avoid possible obstacles to investigation, including pressures, popular actions, and deletion or modification of evidence. In the present case, the Court considers that in view of the grounds mentioned in this text and given the Applicant's position as businessman and politician, the judicial authority could reasonably be apprehensive of pressures from him or consultations between the various actors of the export-import chain or indeed popular actions, and opt for custody rather than freedom. Custody could be justified in the circumstances.

236. As regards the duration of the remand in custody, the Applicant argues that for the eight days, he was heard only once. The Court notes that whereas extension of the detention period to a maximum of eight days is provided by law, the opportunity for a hearing is assessed according to the progress of the investigation

procedure and its needs. The law, à priori, does not set the number of times a person in police custody must be heard.

237. The Court holds in conclusion that the Applicant's right to liberty and security of his person guaranteed by Articles 6 of the Charter, 3 and 9 of the Universal Declaration of Human Rights, has not been violated.

D. Alleged violation of the right to respect for dignity and reputation

238. The Applicant alleges that he was brutally arrested without explanation as to why he was arrested. He further alleges that the arrest was carried out instantly, without consideration, and in a high-handed and brutal manner without prior notice.

239. He also alleges that the acquittal judgment on the benefit of the doubt represents an affront to his honour; that, besides, the procedure of summary trial to which he was subjected is an exceptional procedure intended only to arbitrarily deprive him of his liberty and damage his reputation.

240. The Applicant accuses the Benin Head of State of presenting him, both to the public and to the media, as guilty even when he was acquitted. According to him, the statements of the Head of State are intended to publicly tarnish his reputation by denying his innocence.

241. The Applicant further alleges that in April 2017, the Head of State in answer to the questions put by journalists came back on the attack in the programme "African debates" on RFI and France 24, declaring that: "the guy is in a mess. He got himself caught up in a drug trafficking case and the only defence he found is to accuse me. I had kept quiet in his own interest so as not to aggravate his situation because, as you said, he was an ally."

242. He considers that the Judgment of 4 November 2016 against him is in fact an "acquittal-guilty" Judgment which inexorably taints his reputation by making the people of Benin to take him for a real international drug trafficker.

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243. The Respondent State contends that the Applicant's detention was more than respectful of his rights. It affirms that on 28

October 2016, the Applicant was arrested in his capacity as the Chief Executive Officer of the company COMON SA, recipient of the container in which the cocaine was found. It also affirms that at the time of his arrest, the Applicant refused to board the pickup truck of the Maritime *Gendarmerie* Company officers who did not object to his preference to take his own car.

244. The Respondent State refutes the Applicant's allegations that the proceedings were aimed at tarnishing his reputation and that the judgment of acquittal in no way detracts from the Applicant's reputation. It considers the allegations unfounded and without substance.

245. The Respondent State further submits that the Applicant is ill-founded when he alleges that the Head of State "spoke of his guilt in the drug trafficking case, whereas he had been acquitted", because in its view, the Benin Head of State, who is concerned about and respectful of the fundamental principle of separation of powers, did in no way make any statement regarding the case, let alone meddle in it.

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246. The Court notes that the Applicant avers not only that the conditions of his arrest and the acquittal judgment have undermined his dignity, but also that the remarks made by the Head of State cast a slur on his reputation and honour.

i. Allegation that the conditions of the Applicant's arrest undermined his dignity

247. The Court notes that, as the Charter does not specify the time, form and content of the information to be given to a person to explain the reasons for his arrest, international jurisprudence considers that information must be complete and intelligible and must be provided within a very short time frame. The arrest must therefore be based on plausible grounds, that is, on facts or information capable of persuading an objective observer that the person arrested may have committed the offence. For this reason, the Court undertakes a case-by-case analysis based on

the specific circumstances of each case.

248. In the instant case, the Applicant was arrested on 28 October 2016 at the end of a press conference he had conducted on the case of the discovery of cocaine. In the circumstances, the Court notes that even in the absence of prior notice, the Applicant, at the time of his arrest, was not unaware of the reasons as to why the officers of the *Gendarmerie* of the Port of Cotonou, who initiated the investigation, came for him. The Court also holds that the lack of prior notice cannot be considered as a violation of the right of the individual where the circumstances of a case, the gravity of the offence or the speed of the proceedings may justify instant arrest. The reasons for arrest, in such cases, may be given verbally and on-the-spot at the time of arrest.

249. The Court notes, moreover, that the Applicant invokes the brutalities he allegedly suffered without providing a description of the acts that supposedly constituted such brutalities, and that, having refused to board the police pick-up van, the Applicant arrived at his place of detention in his own car.

250. The Court therefore holds in conclusion that the conditions of the Applicant's arrest did not violate Article 5 of the Charter.

ii. The allegation that the remarks made by the Head of State tainted the Applicant's reputation and dignity

251. Article 5 of the Charter provides that: "Every individual shall have the right to the respect for the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

252. It is apparent from the documents on file, particularly the transcript of audio and audio-visual recordings, that on several occasions after the Judgment of 4 November 2016, the Head of State had, for example, on 11 November 2016, made statements regarding the case of cocaine trafficking without equivocation as to the fact that he had been acquitted on the benefit of the doubt.

253. In this respect, on 11 November 2016, that is a few days after the judgement acquitting the Applicant, the Head of State stated as follows: "from the events that occurred a few days ago, I realised the amount of pressure coming from my citizens, and from a good number of political authorities as well as important personalities to accept what is not admissible. Are we ready to fight against impunity? Me, I do not have the impression… When you are involved in wrongful acts which are apparent in the community,

the global community will sanction you". Speaking on the RFI radio station on 16 April 2017 in response to questions put by a journalist, he stated that "Mr.Ajavon finds himself faced with what you have just mentioned (involved in the case of 18 kilograms of cocaine) and did not find anything better".

254. The Court considers that the statements of the Head of State on the media and during the "meetings" on the case of international drug trafficking, after the acquittal judgment were such that would compromise the Applicant's reputation and dignity in the eyes of his partners and in the public at large.

255. Accordingly, the Court concludes that the Applicant's honour, reputation and dignity have been tarnished in violation of Article 5 of the Charter.

iii. Allegation that the acquittal judgment soiled the Applicant's reputation and honour

256. The Court notes that, in law or in fact, a court decision cannot be regarded as a reason to tarnish the honour or reputation of an individual, and the Applicant cannot validly rely on the reason that the acquittal on the benefit of the doubt did not sufficiently remove the equivocation on the not-guilty verdict.

257. The Court finds in this regard that the acquittal judgment on the benefit of doubt does not tarnish the Applicant's honour, reputation and dignity, and does not constitute a violation of Article 5 of the Charter.

E. Alleged violation of the right to property

258. The Applicant alleges that the Respondent State used the "acquittal-guilt" decision of 4 November 2016 to destroy his companies, namely: SOCOTRAC, his radio station and television channel. He submits that the withdrawal of the customs agent licence from his company followed by the cutting of the signals of his radio and television stations were clearly used by the State services to prevent him from carrying on with his business activities.

259. He considers that the ban on broadcasting imposed on his radio and television stations is unfair and infers therefrom a flagrant violation of his right to property guaranteed by Article 14 of the Charter.

260. The Applicant further submits that the prohibition and suspension measures taken by the various administrative services resulted in the loss of the value of his shares in the afore-mentioned

companies and stifled his activities which represent the main source of his income.

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261. Refuting the Applicant's allegations, the Respondent State contends that there has been no infringement of the Applicant's right to property, adding that the companies the Applicant claims to be the owner have not been nationalized or expropriated by the State. Moreover, since licence is granted only to companies that fulfil the requisite legal conditions, the withdrawal of SOCOTRAC's customs agent licence cannot be analysed as a violation of an alleged right to property.

262. As regards the cutting of the signals of the Applicant's media stations, the Respondent State affirms that it is a precautionary measure aimed at regularizing the situation of the two media stations, and that as at the time the Court made its ruling, the said media stations had resumed broadcasting pending the outcome of the contentious proceedings on this issue before Benin courts.

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263. Article 14 of the Charter provides that: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of the appropriate laws."

264. The Court reiterates that it has already held that the right of property in its classic sense, comprises the right to use the thing which is the subject of the right *(usus),* the right to enjoy its fruits *(fructus)* and the right to dispose of it (*abusus).*[34]

265. In the instant case, the Applicant alleges that the measures taken by the administrative authorities against his companies are intended to prevent him from carrying on his commercial activities

34 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Kenya* (hereinafter referred to as "*Commission v Kenya* (Merits)"), para 124.

and benefiting therefrom. It is apparent that the Applicant mainly invokes his rights to use *(usus)* his companies and to enjoy the income therefrom *(fructus).*

i. Alleged violation of Article 14 of the Charter in respect of SOCOTRAC

266. With regard to the withdrawal of SOCOTRAC's customs agent licence, the Court notes that the Respondent State merely asserts that it was a penalty for non-compliance with the requisite conditions, without explaining the nature of the conditions to be fulfilled and whether the conditions in question emanate from a new regulation or existed at the time of incorporation of the company in 2004. The Respondent State also does not indicate whether, in the present case, a formal notice of default accompanied by a moratorium had previously been served on SOCOTRAC.

267. The Court notes, moreover, that contrary to the Respondent State's contention, the letters dated 21 and 23 November 2016, respectively, suspending SOCOTRAC's container terminal and withdrawing its customs agent licence expressly indicate that the said measures were taken "following the discovery of 18 kgs cocaine, a banned substance, in a container said to contain turkey gizzards imported by the company COMON for transfer to the Applicant's container terminal".

268. On the basis of the two letters cited above, the Court considers that the customs authorities were in the wrong regarding the two decisions taken on 21 and 23 November 2016, respectively, whereas already on 4 November 2016, the Cotonou First Class Court of First Instance ruling in the case of 18 kilogrammes of cocaine had acquitted the Applicant.

269. The Court holds in conclusion that the Respondent State violated Article 14 of the Charter for having prevented the Applicant from exercising his commercial activity and to derive income from the said activity.

ii. Alleged violation of Article 14 of the Charter as concerns radio Soleil FM and SIKKA TV

270. With regard to cutting of the signals of the Soleil FM radio and the SIKKA TV channel, the Court notes that the decisions giving rise to the alleged violations were taken by the media regulatory

authority in contravention of the extant rules and procedures.[35]

271. It emerges from the documents on file that prior to HAAC's decision to terminate the activities of the media facilities in question and to seal off SIKKA TV, HAAC did not comply with the extant regulation which provides that the Applicant, holder of the licences, be served with notice of default and that HAAC await findings of non-compliance with the set conditions.

272. The Court holds in conclusion that in closing the Soleil FM and SIKKA TV, the Respondent State violated the Applicant's rights as spelt out in Article 14 of the Charter.

F. Alleged violation of the State's duty to guarantee the independence of the courts

273. The Applicant submits that the Respondent State violated Article 26 of the Charter by breaching its obligation to guarantee the separation of powers, particularly the independence of the judiciary. He denounces political power interference in the conduct of the judicial proceedings against him and speaks of "a plot and machination at the highest echelon of the State" where the jury has turned itself into judge.

274. He contends that the dysfunction and the numerous irregularities that have marked the investigation represent proof that his country's justice system is being exploited and that he has quite simply become a most welcome target.

275. The Applicant asserts that the Head of State himself perpetrated the confusion between his prerogatives and those of the judicial authorities by meddling in the procedure which, in the final analysis, was nothing but a mockery of a trial having resulted in a judgment of acquittal. Buttressing his allegations, the Applicant cited the terms of a press release issued on 4 May 2018 by Benin's main union of magistrates denouncing "the strangle-hold or the 'takeover'" of the judiciary by the executive.

276. The Applicant further submits that after the adoption of the law establishing the CRIET, the Minister of Justice and Legislation and the Officer for Special Duties in the Office of the President of the Republic, at a press conference on 2 October 2018, and on AFRICA 24 television channels, respectively, affirmed that the

35 According to the Organic Law establishing the High Authority for the Audiovisual and Communication (HAAC) in the Republic of Benin, "in case of non-compliance with the recommendations, decisions and formal notices by the holders of licenses for the installation and operation of private sound and television broadcasting companies ... ".

CRIET had jurisdiction to hear the "Ajavon case".

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277. Refuting the Applicant's allegations insinuating that the Head of State was involved in the proceedings against him, the Respondent State submits that the judiciary in Benin is independent and that the Applicant's comments calling to question the independence of the judiciary and insinuating an alleged interference by the Head of State in the said case constitutes an insult against the Head of State and casts a slur on Benin judiciary.

278. The Respondent State also submits that Mr. Edouard LOKO did not intervene in AFRICA 24 in his capacity as the Officer for Special Duties in the Office of the President of the Republic, but rather as an ordinary citizen of Benin. It further stated that the same is true of the Minister of Justice who, as a lawyer, took the pains to make clear that Benin has "sovereign judges who had the freedom to interpret the law."

279. Article 26 of the Charter stipulates that: "The State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter".

280. The Court notes that guaranteeing the independence of the courts imposes on States, not only the duty to enshrine this independence in their legislation but also, the obligation to refrain from any interference in the affairs of the judiciary at all levels of the judicial process.

281. In the instant case, the Court has already noted that the remarks made by senior officers of the executive in this case of international drug trafficking were such that would influence the investigation procedure as well as the opinion of the Judge. This was particularly the case when, on 2 October 2018, while the proceedings initiated against the Applicant before the CRIET were in progress, the Minister of Justice publicly declared that "in regard to the Ajavon case, the CRIET has jurisdiction to hear the matter". In terms of content, the statement of the Minister does not amount to a general statement on the competence of the CRIET; it is rather an affirmation on the competence of the CRIET in connection with a specific case pending before it. The

fact that the Minister further stated that sovereign judges would have the opportunity to interpret the law does not detract from the affirmative nature of his comments on the jurisdiction of the CRIET. Accordingly, the Court finds that the executive interfered with the functions of the judge, the only authority empowered to pronounce on its own jurisdiction.

282. The Court holds in conclusion that by declaring that the CRIET has the jurisdiction to hear a specific case brought before it, the Minister of Justice, member of the executive, interfered in the judge's functions in violation of Article 26 of the Charter.

VIII. Reparations

283. The Applicant alleges that the purported drug trafficking case caused him a series of losses estimated at five hundred and fifty billion (550,000,000,000) CFA Francs for which he seeks compensation. He also alleges that he suffered economic and moral losses, and claims that the case caused him a loss of business opportunities and tarnished his image and reputation.

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284. The Respondent State refutes any idea of reparation for the Applicant and argues that none of the conditions required by law to obtain compensation has been fulfilled. The Respondent State further argues that it is not enough to invoke prejudices to obtain compensation, but this must be sufficiently certain and there must be a link between the damage and the facts generating the damage. It prays the Court to order the Applicant to pay it the sum of one billion, five hundred and ninety-five million, eight hundred and fifty thousand (1,595,850,000) CFA francs in damages.

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285. Article 27(1) of the Protocol provides that: "If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the

payment of fair compensation or reparation".

286. In this respect, Rule 63 of the Rules provides that: "The Court shall rule on the request for the 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 circumstances so require, by a separate decision".

287. In the instant case, pursuant to the provisions of Rule 63 above cited, the Court decides that it will make a ruling on reparations at a later stage of the proceedings.

IX. Costs

288. The Applicant requests the Court to order the Respondent State to reimburse him the procedural costs incurred by him in the domestic proceedings and in this Court.

289. The Respondent State refutes all the Applicant's claims and prays the Court to declare the same unfounded.

290. Rule 30 of the Rules provides that; "Unless the Court decides otherwise, each party shall bear its own costs".

291. In the instant case, the Court decides that it will rule on the cost of proceedings at a later stage.

X. Operative part

292. For these reasons

The Court,

Unanimously

On jurisdiction:

i. *Dismisses* the objections to its jurisdiction*;*

ii. *Declares* that it has jurisdiction;

On admissibility:

iii. *Dismisses* the objections to admissibility;

iv. *Declares* the Application admissible;

v. *Declares* that the additional submissions on the law creating the CRIET and the procedure before the CRIET filed on 14 January 2019, with the exception of those mentioned in paragraph (vi) hereunder, have a nexus with the initial Application and are admissible;

vi. *Declares* that the other additional submissions filed on 14 January 2019 are unrelated to the original Application and are therefore inadmissible;

On merits:

vii. *Declares* unfounded the Applicant's allegation that he was not tried within a reasonable time;

viii. *Finds* that the Respondent State did not violate the Applicant's right to equality before the law guaranteed by Article 3 of the Charter, before the Cotonou Court of First Instance;

ix. *Finds* that the Applicant's arrest and detention conditions were not in violation of Article 5 of the Charter;

x. *Finds* that the Respondent State did not violate the Applicant's right to liberty and security of his person provided under Article 6 of the Charter;

xi. *Finds* that the Respondent State violated the Applicant's right to equal protection of the law guaranteed by Article 3 of the Charter, given that Article 12 of the 2 July 2018 Law creating the CRIET did not establish equality between the parties;

xii. *Finds* that the Respondent State has violated Article 5 of the Charter by undermining the Applicant's reputation and dignity;

xiii. *Finds* that the Respondent State violated the Applicant's right to be tried by a competent court provided under Article 7(1) (a) of the Charter;

xiv. *Finds* that the Respondent State violated the Applicant's right to presumption of innocence enshrined in Article 7(1)(b) of the Charter;

xv. *Finds* that the Respondent State violated the Applicant's right to defence provided under Article 7(1)(c) of the Charter;

xvi. *Finds* that the Respondent State violated the Applicant's right to be notified of the charges and to access the record of the proceedings within the meaning of Article 7(1)(c) of the Charter;

xvii. *Finds* that the Respondent State violated the Applicant's right to be represented by Counsel as provided under Article 14(3)(d) of ICCPR;

xviii. *Finds* that the Respondent State violated the Applicant's right of property provided under Article 14 of the Charter;

xix. *Finds* that the Respondent State violated Article 26 of the Charter for having failed in its duty to guarantee the independence of the Courts;

xx. *Finds* that the Respondent State violated the Applicant's right to a two-tier jurisdiction guaranteed by Article 14(5) of ICCPR, given that Article 19, paragraph 2 of the 2 July 2018 Law establishing the CRIET provides that the decisions of this court are not subject to appeal;

xxi. *Finds* that the Respondent State violated the principle of *"non bis in idem"* provided under Article 14(7) of ICCPR;

On reparations:

xxii. *Orders* the Respondent State to take all the necessary measures to annul judgment No. 007/3C.COR delivered on 18 October 2018 by the CRIET in a way that erases all its effects and to report thereon to the Court within six (6) months from the date of notification of this Judgment.

xxiii. *Declares* that it will rule on other claims for reparation at a later stage;

On costs:

xxiv. Declares that the Court will make a ruling on the issue of reparation at a later stage.

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Dissenting opinion: BENSAOULA

1. I concur with the opinion of the majority of judges in regard to the admissibility of the Application, the jurisdiction of the Court and the operative part of the Judgement.

2. However, I am of the view that the manner in which the Court dealt with the admissibility of the Application is not in tandem with the provisions of Articles 6(2) of the Protocol, 50 and 56 of the Charter, and Rules 39 and 40 of the Rules of Court.

3. In terms of Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules".

4. This clearly implies as follows:
If the parties raised objections to the jurisdiction of the Court and the admissibility of the Application, the Court shall decide.

- If one of the objections is founded, the Court shall deal with it …. Because they are cumulative.
- If on the contrary neither of the objections is founded, the Court will be obliged to discuss the other issues on admissibility not discussed by the Parties and will conclude.

Where the Parties do not raise any objection

5. The Court has the obligation to analyse all of them and to do so in the order in which they are presented. It indeed seems to me to be illogical that the Court should select one of the conditions... (reasonable time) for instance… whereas the identity of the Applicant may pose problems and therefore not covered ; or any other condition enumerated earlier.

6. It emerges from the judgement which is the subject of this separate opinion, that after discussing the objections raised by the Respondent State to the admissibility of the Application and after finding that the objections were unfounded (objection to the use of disparaging language in the Application and that of failure to exhaust local remedies) the Court limited itself in paragraph 112 to citing the other conditions stating that they were not in contention between the Parties.

7. And in paragraph 113 the Court notes, "That nothing in the file indicates that any of the conditions had not been met in the instant case". "And that consequently the Court finds that the above mentioned conditions have been entirely met".

8. In my view, this expedited approach of discussing the other conditions of admissibility not in contention between the Parties goes contrary to the spirit of Articles 56 of the Charter, 6 the Protocol and Rule 40 of the Rules which require the Court to discuss those conditions.

9. Especially because after having discussed the objection to the exhaustion of local remedies and found in paragraph 110 "that the chances of success of all cases for reparation of damages resulting from the alleged violations are negligible" and that "even where the local remedies to be exhausted exist the particular circumstances surrounding the case make them inaccessible and inefficient……"

10. The Court invariably should have focused on the condition of reasonable time linked to the above mentioned objection pursuant to paragraph 6 of Article 56 of the Charter and Rule 40 of the Rules.

11. And that declaring as we see in paragraph 113 that "the Court notes that nothing in the file indicates that any of the conditions have not been met ….." has as a consequence, made the operative part of the judgement on admissibility baseless at least in relation to the conditions which were not in discussion between the Parties and consequently the Court.

Provisions of Article 56 of the Charter, 6(2) the Protocol and Rules 39 and 40 of the Rules

12. It should be noted that with regard to the objection raised by the Respondent State on the failure to exhaust local remedies, the Court found that the particular circumstances surrounding this case made the said remedies inaccessible and ineffective for the Applicant who is therefore not required to exhaust the local remedies.

13. Meanwhile, the Court should also have determined on the issue of reasonable time of the filing of the Application, because in terms of Article 56 of the Charter paragraph 6 and Rule 40 of the Rules, applications must be filed "within a reasonable time from the date local remedies were exhausted **or** from the date set by the Court as being the commencement of the time limit within which is shall be seized of the matter".

14. Having found grounds for failure to exhaust local remedies and having excused the Applicant for failing to exhaust them, the Court should have, pursuant to the above-mentioned article, retained a date as the beginning of its own seizure….such as the date of the of the CRIET judgement, 18 January 2018 for instance.

15. In my opinion, by failing to deal with this condition the Court weakened its finding on the admissibility of the Application.

16. Thus, if in the Court's jurisprudence it interpreted "local remedies" which are binding to the Applicant such as ordinary remedies, this jurisprudence is not binding to the Applicant in determining reasonable time because in my opinion the Court could compute reasonable time as from the date an extraordinary remedy is filed or on the date the judgement is rendered. And that in this way the Court could have applied the second rule enshrined in Articles 56(6) of the Charter, 6(2) the Protocol and Rules 39 and 40(6) of the Rules.

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Separate Opinion: NIYUNGEKO

1. I concur with the findings and the Judgment of the Court, as seen in the operative part of the Judgment [paragraph 292]. However, I am of the view that on certain issues, the reasoning in the Judgment could have been strengthened (I) Furthermore, I find

that the Court failed to make a finding on one issue (II) Again, it failed to reflect in the operative part some findings made in the body of the Judgment (III) Lastly, it also included in the operative part measures which were not specifically analysed in the body of the judgment (IV).

I. On certain issues, the reasoning of the Judgment could have been stronger

2. As we are all aware, the 10 June 1988 Protocol establishing the Court obliges the latter in its Article 28(6), to give reasons for all its Judgments without exception.[1] In my opinion, on certain issues, the reasoning of the Court is erroneous and insufficient.

3. This is the case with the allegation made by the Applicant that the procedure of immediate appearance to which he was subjected in 2016 was a violation of his right to defence [paragraph 143].

4. On this allegation, the Court responded in a paragraph as follows: "Regarding the argument according to which the summons to appear immediately would have been a violation of the right to defence of the Applicant, *the Court notes [that] immediate appearance in itself is not a violation of the right to defence*" [paragraph 151. Italics added].

5. In doing so, the Court did not at all explain the finding it made. The Court ought to have indicated, based on the information contained in the file on the legislation of the Respondent State, that the procedure of immediate appearance is simply an expedited procedure, within which the right to defence may be guaranteed. This strangulating conclusion of the Court is astonishing.

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6. It is same with the allegation made by the Applicant according to which his right to presumption of innocence was violated. In paragraph 194, the Court declares as follows:
"In the instant case, the *public statements made by some high political and administrative officials* on the issue of international drug trafficking, before and after the acquittal judgment on the benefit of the doubt of 4 November 2016, could raise suspicion of guilt of the Applicant in the

1 This article has: "the judgment of the Court is motivated". See also Article 61(1) of the Rules of Procedure of the Court

minds of individuals or *even a survivor of the said suspicion of guilt*" [Italics added. See also paragraph 198].

7. On the one hand however, the Court did not use the relevant excerpts of declarations made by political and administrative authorities in support of its position. The only declarations referred to by the Court are those of the Brigade Commander of the Gendarmerie of the Port of Cotonou, and former senior officials of the Port of Cotonou [paragraph 193], they are neither political nor administrative authorities. In particular, the Brigade Commander of the Gendarmerie in Cotonou made his declaration simply to explain to the media and the public the reasons for the Applicant's arrest, which in itself should not necessarily constitute a violation of the right to presumption of innocence. As regards the former senior officials of the port of Cotonou, the Court failed to state whether or not they were still in active service, or else why should their statements be put in the mouth of the Respondent State. In that regard, to be more convincing, the Court ought to have clearly indicated the excerpts of the incriminating public declarations of "some senior and administrative officials" of the Respondent State.

8. On the other hand, in the same paragraph 194 above, the Court finds that even the public declarations of political and administrative authorities made *after* the acquittal Judgment on the benefit of the doubt could constitute a violation of the presumption of innocence. Article 7(1)(b) of the Charter however is clear and refers to the presumption of innocence "until his guilt is proven by a competent court". The Court cannot even rely on the appeal of the Prosecutor General against the acquittal judgment of 4 November 2016 to consider that the issue of the guilt of the Applicant had not been determined, because, it considers elsewhere that this appeal is not impugned by the Applicant [paragraph 139]. On this issue, the Court ought to have limited itself to the declarations eventually made *before* the judgment of 4 November 2016.

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9. There is a similar problem faced concerning the alleged violation of the right to a two-tier jurisdiction. In that regard, the Applicant complains that the establishment of "the Court for the repression of Economic Crimes and Terrorism" (CRIET) whose judgments

are non-appellate, "*deprive* him of the right to make use of the rule of the two-tier jurisdiction" [paragraph 207. Italics added], and that "the law establishing CRIET ignores the principles of a *two-tier* jurisdiction and is a violation of his right to fair trial" [paragraph 209. Italics added].

10. In determining these issues, the Court finds that "the provisions of Article 19(2) of the law establishing CRIET is a violation by the Respondent State of the *right of the Applicant* to challenge the declaration of guilt and his sentence by a higher court" [paragraph 215. Italics added].

11. Here the fact is, the Applicant seems to be contradicting himself by contending on the one hand, that the Judgment of the Court of First Instance, First Class of Cotonou dated 4 November 2016 granting his acquittal on the benefit of the doubt is itself not subject to any appeal and that it is *res judicata* [paragraphs 125-127]**,** and on the other hand, as this was stated earlier, the law establishing the CRIET prevents him from going on appeal against the decision of the latter which sentenced him to a twenty year term. In the face of such a situation, in my opinion, the Court ought to have taken note of this contradiction, and finally decided that what is at stake here is not the *rights of* the Applicant himself to a two-tier jurisdiction, but the *law establishing the CRIET*, in its Article 19(2) and make findings on the inconsistency of this provision with Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR), without considering the peculiar situation of the Applicant.[2]

12. Failing to do so, the Court finds a violation which does not exist [paragraph 215]. The Court should rather have drawn an appropriate conclusion, that through Article 19(2) of the law establishing the CRIET, the Respondent State violated Article 14(5) of the ICCPR.

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13. Lastly, the situation is not different regarding the allegation of violation of the duty incumbent on the Respondent State to

2 It is well known in this regard that in the Charter system, the Applicant is not required to prove a personal interest in having a *locus standi*. See especially: African Commission on Human and Peoples' Rights, Communication 277/2003 *Brian Spilg et al v Botswana*, paras 73-85, and the jurisprudence cited.

guarantee the independence of the judiciary. On this issue, the Applicant complains about the language used by the Head of State [paragraph 275], as well as the language used by the Chargé de mission at the Presidency of the Republic and by the Minister of Justice [paragraph 276].

14. By dealing with these allegations, the Court finds that there is violation of the obligation of the Respondent State to guarantee the independence of the judiciary by relying only on the statements of the Minister of Justice [paragraphs 281 and 282]. In so doing, the Court fails to explain why it does not discuss and does not also take into consideration the statements made by the Head of State (which as a matter of fact have not been put in the passage), as well as the statements made by the Chargé de mission at the Presidency of the Republic.

15. In my opinion, the Court should also have reflected on the impugned statements made by the Head of State, and ought to have decided in one way or the other on how they affect the independence of the judiciary and should have proceeded in the same manner to deal with the statements made by the Chargé de mission in question. This approach would have made it possible not only to deal with all the arguments and counter arguments of the parties, but would also have made it possible to consider the Executive as a whole, and not only through one of its representatives without any kind of justification.

II. The Court failed to make a clear finding on this issue

16. In paragraph 197 of the Judgment, after noting and rightly so, that the appeal against a judgment "should not be considered as a violation of the presumption of innocence", the Court however went on to consider that "the absence of a notice of appeal of the Prosecutor General before the seizure of the CRIET maintained the latter in a position of suspicion of guilt".

17. The Court however does not draw any inference, in terms of violation of the right to presumption of innocence in paragraph 198 where it explains its position. The result is that finally we do not really know whether the Respondent State violated the right of the Applicant in that regard. On this issue, the Court should have made a finding in one way or the other, instead of leaving the latter in suspense and shrouded in ambiguity.

III. The Court failed to reflect in the operative part on certain findings made in the body of the judgment

18. This is the case, first of all with regard to the allegation of the right of the Applicant for the investigation to be complete and for his right to adduce evidence.

19. In paragraph 151 cited above in the Judgment, the Court finds that there is no violation in the following terms:

"Regarding the argument that immediate appearance would have violated the rights of the Applicant to defence, the Court notes [that] *immediate appearance in itself is not a violation of the right to defence*" [Italics added].

20. This finding is however not indicated anywhere in the operative part of the Judgment.

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21. It is same with regard to the allegation of violation of the right to defence on the grounds that the Applicant was acquitted by the Court of First Instance, First Class of Cotonou *on the benefit of the doubt*. In paragraph 198 of the Judgment, the Court makes the following findings:

Based on the forgoing, the Court finds that in the instant case, "*the acquittal Judgment on the benefit of the doubt is not a violation of the right to presumption of innocence".* [Italics added. See also paragraph 196]

22. Once again, this finding is not reflected in the operative part of the Judgment.

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23. This is once again the case with regard to the allegation of the right to have his honour, his reputation and his dignity respected. In paragraph 257 of the Judgment, the Court makes the following findings:

"On this issue, the Court finds that the acquittal judgment on the benefit of the doubt is not a violation of the honour, the reputation or the dignity

of the Applicant *and is not a violation of Article 5 of the Charter*" [Italic added].

24. Once again, the operative part of the Judgment does not consider this finding.

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25. All these omissions are problematic because we all know the importance of the operative part of the Judgment. The operative part contains only the decisions of the Court and a measure or a finding not contained in the operative part is considered not to be part of the decision of the Court.

IV. The Court included a measure in the operative part which was not discussed in the body of the Judgment

26. In the same manner, a decision or a finding which is contained in the operative part, but which has not been discussed in the body of the Judgment could constitute a problem.

27. In that regard, the measure found in paragraph (xxii) of the operative part and which orders the Respondent State to take all necessary measures to annul the sentence of the Applicant of twenty years in prison, was not discussed in the body of the Judgment.

28. We understand without doubt that this measure is a logical and direct consequence of the finding that the Applicant's right to be tried by a competent court was violated (the CRIET was not the appropriate court in this case) [paragraph 140]**.** Meanwhile, the Court ought to have stated and explained it clearly in the part of the Judgment dealing with reparations as it is usually done.

29. In all, these lacunae or shortcomings in the reasoning of the Court on certain issues, in addition to the lack of coherence between the reasoning and the operative part in some areas unfortunately leave a vague impression that the Court was in a haste to produce its Judgment and judgments generally need not be prepared in haste.