Koutche v Benin (admissibility) (2021) 5 AfCLR 231

Application 020/2019, *Komi Koutche v Republic of Benin*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, who had unsuccessfully challenged one of two criminal trials he faced before the domestic courts of the Respondent State brought this Application claiming that the processes around his trial were in violation of some of his human rights. Following the Respondent State's challenge on admissibility, the Court held that the Application was inadmissible for failure to exhaust local remedies.

Admissibility (civility in pleadings, 34-38; exhaustion of local remedies, 42, 49-52, 60-63; equality of arms, 62; duration of domestic proceedings, 64, 68, 75)

I. The Parties

1. Komi Koutche (hereinafter referred to as the "Applicant") is a politician and a national of Benin, who at the time of filing this Application, claimed to be residing in the United States of America and to have the status of a political asylum seeker in Spain. The Applicant is the subject of criminal proceedings in his country of origin before the Court for the repression of economic crimes and terrorism (CRIET) for misappropriation of public funds.

2. The Application is filed against the Republic of Benin (hereinafter referred to as "the Respondent State") which 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 on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 22 August 2014. The Respondent State also deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the Protocol by which it accepted the Court's jurisdiction to receive applications from individuals and non-governmental organizations (hereinafter referred to as "the Declaration"). On 25 March 2020, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument of withdrawal of its Declaration. The Court ruled that this withdrawal had no effect on pending

cases and also on new cases filed before the entry into force of the withdrawal on 26 March 2021, that is, one year after its deposit.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that following Cabinet meetings of 28 June and 2 August 2017, audit reports on the management of the cotton sector as well as the National Microfinance Fund (hereinafter referred as to "NMF") were published, in which the Applicant was implicated in financial mismanagement and misappropriation.[2]

4. Aggrieved that he was not given the right of response before the publication of the two audit reports, the Applicant filed two lawsuits before the Constitutional Court. The first, relating to the cotton sector, was filed on 2 August 2027, and the second, concerning the FNM sector, was filed on 11 August 2017. In both lawsuits, the Applicant alleged violation by the Respondent State of his rights to be heard and to a defence as protected by Article 17 of the Beninese Constitution and Article 7(1)(b) of the Charter.

5. As regards the first lawsuit, by a decision of 5 December 2017 (DCC 17-251),[3] the Constitutional Court, chaired by Théodore HOLO, found a violation of the principle of adversarial proceedings, as the audit did not afford the Applicant the right to respond to the cotton sector audit report prior to its adoption and publication by the Council of Ministers.

6. With regard to the second lawsuit, on 6 December 2018, the Constitutional Court, presided by Mr. Joseph Djogbenou, the former Minister of Justice and Keeper of the Seals, rejected the Applicant's appeal against the NMF audit, on the ground that the absence of an adversarial hearing in an audit process did not constitute a violation of the Constitution of the Respondent State and the right to a fair trial.

1 *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5, and Corrigendum of 29 July 2020.

2 For the Cotton sector, the Applicant was at the time Minister of Economy, Finance and Denationalization Programmes; for the NMF, he was Director General.

3 The Court decided to join the Applicant's lawsuit with that of Mr. Kpodèto Philibert AZON (Application of 28 June 2017), filed with the Constitutional Court on 31 July 2017, under number 1285/221/REC.

7. In relation to the criminal case pending against him before the CRIET, the Applicant alleges that in March 2018, he learnt, through the press that he was being prosecuted at the initiative of the Minister of Justice, for embezzlement of NMF funds. According to the Applicant, the Minister of Justice and Keeper of the Seals, on 27 August 2018, issued a letter cancelling his ordinary passport, with instructions to arrest him if he entered the national territory or if a travel ticket was found on him. On 3 October 2018, Counsel for the Applicant filed an administrative appeal for the withdrawal of the decision to cancel the Applicant's passport. There was no action on this appeal.

8. On 17 September 2018, the authorities of the Respondent State transmitted the arrest warrant dated 4 April 2018 to the International Criminal Police Organization (hereinafter referred to as "INTERPOL") for the arrest of the Applicant. Although this warrant was cancelled on 6 April 2018 by the Investigating Magistrate in charge of the case, the Applicant was arrested on 14 December 2018, in Madrid by the Spanish authorities based on information provided by INTERPOL in the enforcement of the warrant.

9. On 17 December 2018, the Respondent State sent an extradition request to the Spanish authorities based on the arrest warrant of 4 April 2018. On 28 January 2019, the latter sent another extradition request to the Spanish authorities based on a new arrest warrant issued on 27 December 2018.

10. The Applicant was released on 17 January 2019 by the Central Investigation Tribunal No. 1 and the request of his extradition to the Respondent State was rejected.

11. The Applicant, by two letters dated 7 July and 9 September 2019 received at the Registry, informed the Court that he was no longer the subject of a red alert and that the information regarding the cancellation of his passport had been deleted from the INTERPOL database.

12. It emerges from the file that as at the date of filing this Application, the criminal case before CRIET that commenced in March 2018 against the Applicant and ten (10) other people, was still pending. Furthermore, according to the Respondent State the appeal lodged by the Applicant against the judgment by CRIET, which sentenced him for "embezzlement of public funds and abuse of office", in the proceedings relating to the FNM, to twenty (20) years imprisonment and the payment of a fine of five hundred million (500 000 000 CFA) is still pending before the appeals chamber of CRIET. The Respondent State points out that the preceding has

not been contested by the Applicant.

B. Alleged violations

13. The Applicant alleges the following violations:

Before the Constitutional Court

i. The right to an impartial and independent court, protected by Article 7(1) of the Charter, Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as " the ICCPR");

As regards procedure before the CRIET:

ii. Violation of Rule 7(1)(a) of the Rules of the ACHPR, Articles 10 of the UDHR, 14 of the ICCPR and Rule 26 of the Rules of the ACHPR for lack of independence and structural objective impartiality of CRIET (Investigating Committee of the Judgment and Appeals Chambers);

iii. Violation of Rules 2 and 3 of the Rules of the ACHPR for unequal protection before the law;

iv. Violation of Article 14(5) of the ICCPR for the lack of a two-tier trial as regards stopping referral which was the basis of the sentence of the Applicant;

v. Violation of Rule 7(1)(b) of the Rules of the ACHPR for breaching the presumption of innocence.

Cancellation of the passport of the Applicant

vi. Violation of Rule 12(2) of the Rules of the ACHPR, Article 2 of the ECOWAS Protocol on free movement and Article 12 2) and (4) of the ICCPR.

As regards the arrest and request for extradition

vii. Find violations of Rules 2, 3, and 6 of the Rules of the ACHPR.

On the right to respect of property

viii. Find the violation of Rule 14 of the Rules of the ACHPR.

On the right to dignity and good reputation

ix. Find the violation of Rule 5 of the Rules of the ACHPR.

On the right to vote and to participate in the conduct of the political affairs of one's country

x. Violation of Rule 13 of the Rules of the ACHPR and Articles 25 of the ICCPR and 21 of the UDHR.

III. Summary of the Procedure before the Court

14. On 23 April 2019, the Applicant filed with the Registry of the Court the Application together with a request for provisional measures, which were served on the Respondent State on 28 May 2019. The Respondent State was required to submit its Response to

the Application and to the request for provisional measures within sixty (60) and fifteen (15) days from the date of receipt of the notification, respectively.

15. On 2 December 2019, the Court issued a Ruling on provisional measures ordering the Respondent State to "stay the proceedings for cancelling the Applicant's passport until the final judgment (...)".

16. After several extensions of time at the behest of the Parties, they filed their submissions on the merits and reparations within the time limit set out by the Court.

17. On 9 December 2020, the pleadings were closed and the Parties notified thereof.

IV. Prayers of the Parties

18. The Applicant prays the Court to:

1. Order the Respondent State to annul all proceedings against the Applicant stemming from the Cabinet meeting of 2 August 2017 as well as all subsequent decisions for failure to follow procedure and for violation of the adversarial principle.
2. Order the Respondent State to annul the decision No. DCC 18-256 of 6 December 2018, of the Constitutional Court, and any subsequent decisions for violation of the adversarial principle and violation of the principle of independence and impartiality.
3. Order the Respondent State to annul all criminal proceedings pending before the criminal chambers of CRIET and, *a fortiori*, the decision to dismiss the Applicant from the investigating committee of 25 September 2019 cited above and the sentence of 4 April 2020 (No. 0014/CRIET/C.CRIM) as well as any other decision emanating from these proceedings;
4. Order the Respondent State to annul the arrest warrant of 27 December 2018;
5. Order the immediate release of those arrested in relation to this matter;
6. Order the Respondent State to repeal the effects of the decision to cancel the passport of the Applicant of 27 August 2018 and to provide him with identification and travel documents to enable him to travel across borders freely;
7. Order the Respondent State to amend the ministerial decision of the Ministry of Justice and Legislation of 22 July 2019 cited above to make it consistent with the provisions of the African Charter on Human and Peoples' Rights (ACHPR) and the ICCPR;

8. Order the Respondent State to amend Law No. 201 18-13 of 2 July 2018 on the establishment of CRIET to make it consistent with the provisions of the African Charter on Human and Peoples' Rights and the ICCPR;
9. Order the Respondent State to amend the Law No. 2078-02 of 2 July 2018 on the Supreme Council of the Judiciary to make it consistent with the provisions of the African Charter on Human and Peoples' Rights and the ICCPR and to guarantee the principle of full and total independence and objective impartiality of judges;
10. Order the Respondent State to amend decree No. 2019-462 of 30 September 2019 to make it consistent with the provisions of the African Charter on Human and Peoples' Rights, the ICCPR and to guarantee the principle of full and total independence and objective impartiality of judges;
11. Order the Respondent State to pay the Applicant the sum of 17 455 775 Euros (seventeen million, four hundred and fifty-five thousand, seven hundred and seventy-five Euros).

19. For its part, on the form, the Respondent State prays the Court to find that the Application is inadmissible "due to the use of disparaging language, for failing to exhaust local remedies, for not having been filed within a reasonable time after the exhaustion of local remedies."

20. On the merits, the Respondent State prays the Court to dismiss all of the Applicant's allegations and to find that:

i. The independence and impartiality of the Beninese judiciary has not been called into question;
ii. The Applicant was not discriminated against during the proceedings before the CRIET;
iii. The Applicant does not prove the alleged violation of his right to the presumption of innocence;
iv. The Applicant's passport has not been cancelled and that the Applicant travels freely with his ordinary passport;
v. The Applicant's assets are disproportionate to his objective means;
vi. The Applicant has not proved the alleged damage to his image caused by the actions of the State;
vii. There is no interference of such a nature as to impede his right to participate in public affairs;
viii. There are no grounds for reparations.

V. Jurisdiction

21. Article 3 of the Protocol provides that:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of

the Charter, the Protocol and any other relevant Human Rights instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

22. Furthermore, Rule 49(1) of the Rules of Court[4] provides that "[t]he Court shall conduct a preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules."

23. It follows from the above provisions that the Court must preliminarily, conduct an examination of its jurisdiction and rule on any objections raised, if any. The Court notes that in this case, the Respondent State did not raise any objections to its jurisdiction. Nevertheless, the Court is required to examine its material, personal, temporal and territorial jurisdiction.

24. The Court notes that there is nothing on the record to indicate that it does not have jurisdiction in this matter. The Court, therefore, concludes as follows:

i. It has material jurisdiction, since the Applicant, as indicated in paragraph 13 of this judgment, alleges the violation of human rights under the Charter, ICCPR and the UDHR, instruments to which the Respondent State is a Party.

ii. It has personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and had deposited the Declaration which allows individuals and non-governmental organizations to bring cases directly before the Court. In this regard, the Court recalls its position that the withdrawal by the Respondent State of its Declaration on 25 March 2020 has no effect on the present application, since the withdrawal was made after the application had been filed with the Court;[5]

iii. It has temporal jurisdiction, insofar as the alleged violations were perpetrated, after the entry into force of the above-mentioned instruments;

iv. It has territorial jurisdiction, in so far as the facts of the case occurred in the territory of a State Party to the Protocol, namely the Respondent State.

25. In light of the foregoing, the Court finds that it has jurisdiction in the present case.

VI. Admissibility

26. Article 6(2) of the Protocol stipulates that, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of

4 Formerly Rule 39(1) of the Rules of Court, 2 June 2010.

5 See paragraph 2 above.

Article 56 of the Charter".

27. Rule 50(1) of the Rules of Court[6] provides that "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules".

28. Rule 50(2) of the Rules of Court,[7] which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with of the following conditions:

a. Indicate their authors even if the latter request anonymity,
b. Are compatible with the Constitutive Act of the African Union and with the Charter,
c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
d. Are not based exclusively on news disseminated through the mass media,
e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Court is seized with the matter, and
g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

A. Conditions of admissibility in contention between the parties

29. The Respondent State raises two objections to the admissibility of the Application based on, firstly, the use of disparaging language and, secondly, the non-exhaustion of local remedies.

i. Objection based on the use of disparaging language

30. The Respondent State considers the allegations that: "several cases have been initiated by the Government with the sole purpose of either to keep Komi Koutche out of the country (…) or to embroil him by means of a transformed judiciary" by laws that render justice pro-governmental rather than republican; "The

6 Formerly Rule 40 of Rules of Court, 2 June 2010.

7 *Ibid.*

ultimate goal of all these clumsily mounted manoeuvres against Mr. Koutche (...)" and that "(...) the Government tends to persecute dissenting voices and to weaken opposition figures by using the courts as an instrument for personal political ends (...)" .

31. According to the latter, by these remarks, "the Applicant undermines the prestige and credibility of the institutions of the Republic of Benin and jeopardises their effectiveness by resorting to terminology that is in no way necessary for the need to enjoy freedom of expression or to firmly denounce alleged human rights violations."

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32. The Applicant prays the Court to reject this objection, on the ground that in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe,*[8] the African Commission on Human and Peoples' Rights (hereinafter referred to as to "the Commission") has developed its jurisprudence in the direction of a less strict interpretation of the test, in the name of the right to freedom of expression. He argues that "the Respondent State … does not show how the terminology used is disparaging or insulting, and fails to substantiate any grievance in this regard."

33. The Applicant further contends that his "remarks cannot be deemed to undermine the prestige and credibility of the institutions of the Republic of Benin, since he only reported the facts in his application in a tone that highlights the violations of rights of which he is a victim."

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34. The Court notes that exchange of pleadings between the Parties and any other type of intervention before the courts must obey rules of civility and good conduct, so as to avoid the use of legal

8 Comm. 293/04 (May 22, 2008).

proceedings to undermine the dignity, reputation or integrity of persons or institutions.

35. The Court notes that the issue here is whether or not the above words cited by the Respondent State are offensive within the meaning of Rule 50 of the Rules. In this regard, the Court has in the past shared the Commission's view that words are considered to be offensive if they are aimed at:

> [I]ntentionally violating the dignity, reputation and integrity of a judicial official or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.[9]

36. The Court endorses the Commission's position that this condition of admissibility must be examined in light of the right to freedom of expression under section 9(2) of the Charter.[10] In this regard, the Court recalls its jurisprudence that:

> Certain statements are of the kind that is expected in a democratic society and should thus be tolerated, especially when they originate from a public figure as the Applicant is. By virtue of their nature and positions, government institutions and public officials cannot be immune from criticisms, however offensive they are; and a high degree of tolerance is expected when such criticisms are made against them by opposition political figures. [11]

37. In the instant case, the Court notes that nothing in the words cited above shows that they are intended to undermine the dignity, reputation or integrity of the officials or institutions of the Respondent State.

38. The Court further notes that, in light of the case law on freedom of expression set out above, the Applicant, being a politician, the Respondent State must be more tolerant of the language used in his submissions in a situation with political implications as in the instant case.

9 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 70. See also *Boubacar Sissoko and 74 Others v Republic of Mali*, ACtHPR, Application No. 037/2017, Judgment of 25 September 2020 (merits and reparations), § 28; and Communication 284/2003, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (3 April 2009) ACHPR, § 91.

10 Communication no 284/2003, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (3 April 2009) ACHPR, §§ 91-96.

11 *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November, 2017) 2 AfCLR 165, § 160. See also *Boubacar Sissoko and 74 Others v Mali* (merits reparations), § 29; *Sébastian Germain Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits), § 73.

39. Accordingly, the Respondent State's objection is dismissed.

ii. Objection based on non-exhaustion of local remedies

40. The Court further notes that the Respondent State raised an objection based on non-exhaustion of local remedies indicating that the Applicant had domestic remedies available to him including before the Constitutional Court, the CRIET, the administrative courts and the Supreme Court.

41. For his part, the Applicant relies on: a) his having exhausted the remedy before Constitutional Court; b) that the remedy sought before CRIET is ineffective; c) that appeal proceedings before the administrative courts were unduly prolonged; d) that Appeals Chambers and the Judicial Chamber of the Supreme Court lack independence and impartiality and e) the political context prevents him from exhausting available remedies.

42. The Court notes that it has consistently held that the requirement of exhaustion of local remedies applies only to ordinary, available and effective judicial remedies.[12] In order to rule on the objections raised by the Respondent State, the Court thus will examine below the domestic remedies exercised by the Applicant or which those which he should have exercised before the national courts.

a. Appeal to the Constitutional Court

43. The Respondent State submits that the Applicant did not lodge, before the Constitutional Court, a case alleging the violations that he is making before this Court. According to the Respondent State, contrary to the Applicant's allegation, the case brought before the Constitutional Court was on the violation of the right to defence, while the case before CRIET, which is the subject matter of the application before this court was for misappropriation of public funds when he was Head of FNM. The Respondent State submits that the Applicant, having failed to submit to the Constitutional Court the violations he alleges before this Court, cannot claim to have exhausted the remedy available to him before the Constitutional Court.

12 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 64. See also *Wilfried Onyango Nganyi and 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

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44. The Applicant alleges that he exhausted the remedies before the Constitutional Court, given that he brought before it a case of "the violation of the constitutionally guaranteed principle of adversarial proceedings, with respect to the two management audit reports of the cotton sector, on the one hand, and the NMF on the other hand." According to the Applicant, "the Constitutional Court, presided over by Mr. Djogbenou (former Minister of Justice and Attorney General of President Talon ...), on 6 December, 2018, rendered Judgment No. DCC 18-256 on the NMF case only. In the said Judgment, the Constitutional court held that there had been no violation of the right to defence, contrary to a previous Judgment of the Constitutional Court composed differently".[13]

45. The Applicant alleges that "from the inception of the new Constitutional Court, the former Minister of Justice, Mr. Joseph Djogbenou who is the personal counsel of President Talon became the new President of the Constitutional Court in June 2018. He had been charged with prosecuting Mr. Komi Koutche on behalf of the executive in his capacity as Minister of Justice within the purview of the case relating to the management of the FNN and it was only when he became President of the Constitutional Court that the matter of Komi Koutche was examined on 6 December 2018."

46. The Applicant alleges that "All the actions of the Benin government against [him] stem from an audit whose conditions he challenged due to the non-respect of the adversarial principle before the highest court in the field of human rights in Benin. He has therefore exhausted local remedies with regard to the originating fact which led to all the charges that will be brought against him in terms of procedure."

47. The Applicant contends that "since the Constitutional Court is the highest court of the Beninese order, competent to hear violations of principle of a constitutional nature, it stands to reason that the Applicant has effectively exhausted the existing domestic remedies in this matter."

13 Decision of the Constitutional Court DCC 17-251 of 5 December 2017 on the cotton sector.

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48. The Court notes that in its decision DCC18-256 OF 6 December 2018 in the FNN matter, the Constitutional Court found that the adoption of the audit report by the Cabinet without hearing the Applicant did not violate his right to defence. The Constitutional Court held that the Applicant had the possibility of defending himself before administrative and judicial bodies if the said audit report was used to initiate disciplinary or judicial procedures against him. The question, therefore, is whether or not, through this decision of the Constitutional Court, it can be said that the Applicant exhausted local remedies.

49. The Court recalls that the requirement to exhaust local remedies entails that issues brought before it for determination must be, on the merits, the same as those that have been brought before the highest domestic court with jurisdiction in the matter.[14] It is not enough that the Applicant merely seized that court. It is also necessary for him to have submitted to it, in substance, the same complaints as those he raises before this Court.

50. The Court notes that the Applicant's appeal before the Constitutional Court was in relation to the violation of the adversarial principle and the right to defence, in relation to the adoption of the FNM audit report without previously hearing the Applicant. The violations alleged by the Applicant in the instant case, which are set out in paragraph 13 of this judgment, are related to new composition of the Constitutional Court, the proceedings before the CRIET against the Applicant, the cancellation of his passport, his arrest and extradition request, his rights to property, dignity and reputation, and to participate in the conduct of public affairs of his country.

51. The Court considers that the subject matter of the appeal before the Constitutional Court and that of the Application before this Court are not the same, in substance, and the Applicant cannot claim to have exhausted the domestic remedies before the Constitutional Court.

52. The Court further notes that, before the Constitutional Court, the Applicant should have raised before it the issue of its lack of impartiality and independence. This especially, because according to the Applicant himself, the new President of the Constitutional

14 *Sébastien Germain Ajavon v Bénin* (merits), § 98.

Court, and lawyer of the President of the Republic, had been charged, in his capacity as Minister of Justice, with prosecuting him for mismanagement of the FNM.

53. Based on the foregoing, the Court upholds the objection raised by the Respondent State.

b. Remedies before the CRIET

54. The Respondent State alleges that "prior to bringing a case before international human rights courts, domestic remedies must be exhausted," which, according to it, "postulates that the Applicant must have 'substantially' invoked before the domestic courts the claim that he is making before this Court." The Respondent State contends that this requirement affords the Respondent State "the opportunity to reform the effects of the decision resulting from an impugned act by the State. *In fondo*, it is a requirement that stems from the sovereignty of the State."

55. The Respondent State submits that "the Applicant did not even try to argue his case before the national courts in a timely manner. He avoided appearing before judges and resorted to multiple correspondences in an attempt to stop the proceedings against him. To date, no decision on the merits of the case has been rendered against the Applicant and, moreover, no decision has been rendered after the exercise of the appeals."

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56. The Applicant alleges that the appeal before CRIET is ineffective and unrealistic. He submits that CRIET is a court of exceptional or *ex post* jurisdiction and that the proceedings before it do not comply with the basic principles of law.

57. He observes that this Court has already found that the CRIET does not provide for a right of appeal as guaranteed in Article 14(5) of the ICCPR but also that Article 12 of the law establishing the CRIET does not establish equality between the parties since a convicted person could not appeal whereas the Prosecutor could do so in case of acquittal.

58. The Applicant indicates that this fact is also confirmed by the Decision rendered by the Central Investigating Court No. 1 of the *Audiencia Nacional de Madrid* (National High Court of Madrid), which rejected the Applicant's extradition request, stating that

there are grounds to fear that extraditing the Applicant may infringe his right to an ordinary judge predetermined by law, and that his persecution is politically motivated. He notes that the Commission for the Control of INTERPOL's Files also expressed the same fears as the *Audiencia Nacional de Madrid* (National High Court of Madrid).

59. The Applicant alleges having encountered difficulties in travelling to participate in the proceedings from 12 March 2020[15] and in obtaining information relating to his trial before the CRIET, in particular the fact that he was not notified of the committal judgment by the Investigating Commission, neither was he notified of the hearing. He only learned of the date of the hearing through the lawyer for Mr. Edenakpo, co-accused, whereas the CRIET knows his lawyers.

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60. The Court notes that the *ratio legis* of the requirement to exhaust local remedies lies in the need to afford States, through their domestic courts, the opportunity to prevent or redress the violations alleged against them.[16]

61. The Court also notes that, to determine whether there has been compliance with the requirement of exhaustion of local remedies, the relevant domestic proceedings to which the Applicant is party should have been completed by the time he filed the Application before this Court.[17] It follows from this therefore, that the Applicant's allegation that there was no two-tier jurisdiction before the CRIET must be dismissed because the Applicant could have waited until the completion of the first-instance proceedings before CRIET.

15 According to the Applicant, he resides in the United States, in the State of Maryland. A state of health emergency and disaster was declared on 5 March 2020 in the State of Maryland to combat the spread of the Covid-19 virus. On 12 March 2020, the Governor of the State of Maryland, Lawrence J. Hogan, issued an Order for the imposition of strict containment measures and social restrictions, which was amended on 23 and 30 March 2020.

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Judgment of 4 December 2020 (merits and reparations), § 49.

17 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application 010/2018, Ruling of 25 September 2020 (jurisdiction and admissibility), § 41.

62. With regard to the violation of the right to equality of arms, the Court notes that in *Sébastien Germain Ajavon v Benin*, it held that the infringement of this right was occasioned due to the fact that a convicted person could not appeal the ruling issued by CRIET, whereas the Prosecutor could do so in case the accused person was acquitted.[18] The Court reiterates that the so-called impossibility of appealing does not absolve the Applicant from awaiting the end of proceedings before CRIET. Be that as it may, the allegation of violation of the principle of equality of arms relates to the merits, not to the exhaustion of local remedies.

63. The Court notes that pursuant to Article 56(6) of the Charter and Rule 50(2) of the Rules, where domestic proceedings are pending , it cannot be seized of the matter except if the matter is unduly prolonged. In the instant case, the Court notes that at the time it was seized of the Application, proceedings against the Applicant before CRIET, which started in March 2018, were ongoing. In the circumstances, the Court must decide whether the domestic proceedings were unduly prolonged such as to allow the Applicant to seize it before the end of the proceedings.

64. The Court considers that in assessing whether or not the duration of the proceedings relating to domestic remedies is normal or abnormal must be made on a case-by-case basis, taking into account the circumstances of each case.[19] In its analysis, the Court "takes into account, in particular, the complexity of the case or of the procedure relating to it, the conduct of the parties themselves and that of the judicial authorities in determining whether the latter have shown a degree of passivity or clear negligence." [20]

65. The Court notes that the complexity of this case is not in dispute, not only because of the number of persons prosecuted – eleven (11) in all – but also the complex nature of the offences being prosecuted, namely, abuse of office, embezzlement, illicit enrichment, money laundering, lack of licence and corruption.

66. With respect to the conduct of the parties, the court notes that there is no evidence on the record that the Respondent State or its counsel engaged in conduct that led to the delay in finalization of the case. The Court further notes that the investigative measures

18 *Sébastien Germain Ajavon v Bénin* (merits), § 213.

19 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92.

20 See *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and merits) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and Others v Tanzania* (merits), § 136.

taken, including arrest warrants and the shortening of time limits of proceedings before the Supreme Court, indicate the interest of the judicial authorities of the Respondent State in determining and adjudging the case expeditiously. Moreover, the Applicant's non-appearance at certain hearings, due to the fact that he resides abroad, may be considered to have contributed to the delayed proceedings.

67. Regarding the Applicant's difficulty to appear before the domestic courts due to the Covid-19 restrictive measures, the Court considers that this is traceable to 12 March 2020, which is subsequent to its referral on 23 April 2019, and cannot therefore be taken into consideration.[21] Even if this fact were to be taken into account, it would be one of the reasons to justify the extension of proceedings before the national courts.

68. The Court notes that the Applicant has not shown how a non-conclusion of his case in one (1) year and one (1) month, which is the time that elapsed between the beginning of the proceedings and the seizure of the Court, can be considered as an undue prolongation of the criminal trial before the CRIET.

69. The Court further notes that the allegation based on the position of INTERPOL and *Tribunal Central d'Instruction N° 1 of Audiencia Nacional* of Madrid (National High Court of Madrid) in relation to the CRIET concern, respectively, the assessment of the grounds for the request for extradition of the Applicant and the assessment of the deletion of his passport data from the INTERPOL database. In the instant case, however, the issue is about the exhaustion of domestic remedies before the CRIET. In this regard, the Court reaffirms that the Applicant could have waited until the completion of the first-instance proceedings before CRIET (see paragraph 60 above), instead of casting aspersions on the ability of the CRIET.[22] This argument therefore, does not stand.

70. On the alleged difficulties in obtaining information relating to his trial before CRIET, the Court notes that this fact is subsequent to the filing of this Application. It cannot, therefore, examine this issue.

21 *Yacouba Traoré v Republic of Mali*, CAfDHP, Application No. 010/2018, Judgment of 25 September 2020 (jurisdiction and admissibility), § 41; ECHR, *Baumann v France*, Application No. 33592/96, 22 May 2001, § 47.

22 *Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 143. See also, *Diakité Couple v Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 53.

71. Based on the foregoing, the Court upholds the objection raised by the Respondent State.

c. Appeals before Administrative Courts

72. The Respondent State alleges that the Applicant's passport has never been seized and that the appeal against the so-called decision to cancel his passport is still pending before administrative courts. It concludes that local remedies were not exhausted.

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73. The Applicant alleges that he lodged "an appeal at a senior administrative level for the withdrawal of the arbitrary decision to cancel his ordinary passport ... To date, this appeal has received no response. The same applies to the appeal against abuse of authority to the President of the Cotonou First Class Court of First Instance on 15 February 2019."

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74. The Court notes that the issue that arises here is whether the Applicant's administrative and judicial appeals before domestic administrative and judicial courts were unduly prolonged.

75. The Court recalls that for it to decide whether a domestic proceeding is unduly prolonged, it takes into consideration, the date on which the case is filed at the domestic court and the date of its referral to this Court. In the instant case, the Court notes that on 3 October 2018, Counsel for the Applicant filed an administrative appeal to the President of the Respondent State for the withdrawal of the decision to cancel his passport. They also filed a request relating to abuse of power to the President of the Cotonou first class Court of First Instance on 15 January 2019.

76. In view of the fact that the Court was seized on 23 April 2019, six (6) months and twenty (20) days elapsed with respect to the appeal relating to the cancellation of the Applicant's passport.

Regarding the request before the Cotonou first class Court of First Instance, two (2) months had elapsed.

77. The Court considers that, in relation to the administrative appeal against the decision to cancel the Applicant's passport, this appeal cannot be taken into account because it is not a judicial appeal already analysed in the preceding paragraph.

78. As regards the abnormally prolonged nature of the case before the Court of First instance of Cotonou, the Court notes that the Applicant does not adduce evidence to show how two (2) months and eight (8) days constitute an unreasonable delay of the proceedings before the Cotonou first class Court of First Instance.

79. Accordingly, the Court upholds the objection raised by the Respondent State.

d. Remedies before the Appeals Chambers of CRIET and the Judicial Chamber of the Supreme Court

80. The Respondent State asserts that, appeals before the Appeals Chamber of CRIET and the Judicial Chamber of the Supreme Court are available and efficient, and that the Applicant's allegations cannot exempt him from exhausting local remedies. Specifically, it affirms that contrary to the Applicant's statements, the fact that the Judge who had presided over the Trial Chamber became President of the Appeals Chamber of CRIET does not call into question the impartiality of this body, since the appeal has not even taken place yet.

81. The Respondent State further contends that, according to Article 129 of the Constitution, "magistrates are appointed by the President of the Republic, on the proposal of the Minister of Justice and Attorney General, after receiving the opinion of the Supreme Council of the Judiciary)" and that this method of appointment does not raise any problem regarding the independence of the national courts. The Respondent State further asserts that under Article 126 of the Constitution, "the security of tenure of Beninese judges is unlimited. No judge may be assigned, promoted, or transferred without his or her consent."

82. The Respondent State also alleges that the careers of Supreme Court magistrates are being extended to meet the need for justice delivery as a public service, and these magistrates continue to enjoy the same rights and obligations as before.

83. The Respondent State refutes the alleged collusion between two of its representatives, Advocate Assogba, and Advocate KOUNDE, respectively with the President of the Supreme Court and the Minister of Justice. In the case of Assogba, the Respondent State

contends that the document attached by the Applicant contradicts his allegation and that in the case of Advocate Kounde, his relationship with the Minister of Justice dates back to the time when he was a trainee lawyer.

84. The Respondent State further refutes the alleged collusion between the Judicial Chamber of the Supreme Court and the prosecutor of CRIET, stating in its press briefing that the latter spoke of the appearance of twenty-nine (29) administrative officials allegedly guilty of embezzlement of public funds and did not, in any case, mention the name of Komi Koutche. In addition, the Respondent State argues that the Applicant himself acknowledges that his file was not on the provisional docket of the criminal session.

85. On the shortening of the time limit for the proceedings, the Respondent State alleges that it is a gratuitous decision taken on the basis of an application and is not contradictory. It argues that the Applicant was notified at the town hall, and the said notification was served on his lawyer, Advocate Théodore Zinsou.

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86. The Applicant alleges that the Appeals Chambers of the CRIET are not independent mainly because the presiding judge of the Trial Court that convicted him was appointed President of the Appeal Court by Cabinet, upon recommendation by the Minister of Justice and after the opinion of the Supreme Council of the Judiciary.

87. Regarding the appeals before the Judicial Chamber of the Supreme Court, the Applicant alleges that he appealed to the said Court against the arrest warrant of 27 December 2018 and the indictment and referral order of 25 September 2019. He further alleges, however, that these remedies proved ineffective and fruitless due to the fact that the magistrates of the said Court and the Public Prosecutor's Office are retired persons who have been recalled from retiring by the Government, pursuant to Decrees No. 2019-150 of 29 May 2019 and Decree 2019-426 of 30 September 2019.

88. The Applicant states that according to these two decrees, "retired magistrates who wish to return to office must make an express request to the Head of State." These decrees, in his view, "do not specify the objective criteria adopted by the executive to select a particular candidate." As a result, "the total discretionary

power of the executive validating their candidacy makes them beholden to the Head of State by duty of gratitude (consciously or unconsciously)".

89. He also states that at the request of the Judicial Officer of the Treasury representing the Respondent State and through the office of Advocate Assogba, from the Office of the President of the Constitutional Court and Minister of Justice, originator of the case, and of Mr. Kounde, from the Office of the Minister of Justice, the Supreme Court reduced the time limits of the proceedings.

90. The Applicant further cites the collusion between the Judicial Chamber of the Supreme Court and the CRIET Prosecutor in the fact that "the Supreme Court was to render its judgment on 13 March 2020. On the eve of the ruling (12 March 2020), the Prosecutor of CRIET, during a press briefing, revealed that the proceedings of Mr. Komi Koutche were among the cases to be judged".

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91. The Court notes on the one hand, that the Respondent State contends that the Applicant has not exhausted available and efficient local remedies, notably, before the Constitutional Court, CRIET and the Supreme Court, on the other hand, the Applicant does not challenge the existence of such remedies. According to the Respondent State, the Applicant alleges rather that these judicial bodies are inefficient due to the fact that they lack independence and impartiality.

92. On the efficiency of the local remedies, the Court recalls that it adopted the jurisprudence of the Commission according to which "it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainants to cast aspersions on the ability of the domestic remedies of the State". [23]

93. The Court notes that in the instant case, the Applicant challenges the efficiency of the entire judicial system of the Respondent State without providing sufficient information to prove it. The information

23 *Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 143. See also, *Diakité Couple v Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 53.

provided by the Applicant, notably the procedure for appointing judges and the lack of impartiality of some judges stem from the substance and do not prevent him from exhausting all available remedies in the internal judicial system to test its efficiency.

94. In view of the foregoing, the Court upholds the objection raised by the Respondent State.

e. Objection based on the fact that the political context cannot excuse the Applicant from exhausting domestic remedies

95. The Respondent State contends that the Applicant ought to have exhausted local remedies and rejects the claim by the latter of the political context to justify the failure to exhaust local remedies. Specifically, it alleges that "from 2016, Benin initiated the process of cleaning up public management. In this regard, certain institutions were audited, including Société Béninoise de Manutention Portuaire, Office national pour l'appui à la sécurité alimentaire, Centrale d'achat des intrants agricoles, Conseil national des chargeurs du Bénin and Fonds national de la microfinance."

96. The Respondent State alleges that, like other institutions, the management audit of FNM for the financial years during which Mr. Komi Koutche was in charge revealed numerous serious irregularities, and that it was in the light of these irregularities and cases of misappropriation of public funds that the judicial processes were initiated against the Applicant and other executive staff of FNM and other institutions audited.

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97. The Applicant alleges that, with the coming of the new regime, democracy has retrogressed, with the media under close surveillance and the judiciary subjugated. He contends that the Government tends to persecute dissenting voices and to weaken opposition figures by manipulating the judiciary to achieve individual political gains. In his case, he considers himself to be politically persecuted like other opposition members and that the Government has initiated several legal court cases for the purpose of removing him from the country or using a compromised

judiciary to jail him.

98. Referring to this Court's ruling in *Sébastien Ajavon v Republic of Benin*, the Applicant states that "the particular circumstances and, more specifically, the political nature of the instant case absolves the Applicant from exhausting the local remedies, which are certainly available but ineffective insofar as the country's judiciary lacks independence and impartiality."

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99. The Court notes that the issue that arises is whether the political context may absolve the Applicant from exhausting local remedies. In this connection, the Court observes that the prosecution of a politician is not per se a ground for exemption from the requirement to exhaust local remedies. The Court further observes that where, in a particular context, it appears that the political context has significant negative impact on the functioning of the courts, it will take into account, on a case-by-case basis, the scope of the implications of that context in deciding whether to exempt the Applicant from exhausting local remedies.

100. Thus, in *Sebastian Germain Ajavon v Benin,*[24] the Court held 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 and the personal situation of the Applicant.

101. The Court also recalls that in the same case, in dismissing the Respondent State's objection on the ground that local remedies had not been exhausted, it examined the material obstacles[25] which had deprived the Applicant of the remedies which he would have had to exhaust if those obstacles had not been present.

102. The Court notes that in *Sebastian Ajavon v Benin*, referred to by the Applicant, the Court, in finding that the Applicant was exempted from exhausting local remedies, had examined the context of the

24 *Sébastien Germain Ajavon v Bénin* (merits and reparations), § 110.

25 *Ibid,* § 113: for obstacles to recourse pursuant to Article 206 of the Code of Criminal Procedure, § 114 for obstacles to recourse before the administrative courts and § 115 for obstacles to recourse after the judgment of the CRIET.

case in light of the particular circumstances surrounding it.[26] The Court laid emphasis on the specific situation of the victim who in the course of local remedies had faced obstacles resulting from the conduct of the authorities of the Respondent State. Specifically, the Court held 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.[27]

103. The Court notes that, in the instant case, the cases pending before the domestic courts concerning the Applicant were following their normal course at the time they were referred to this Court, and there was no indication that the Applicant was facing serious procedural or other obstacles.

104. The Court also notes that the only impediments that the Applicant cited relate to communication with CRIET and the fact that the State's judicial authorities required his presence in the country in order to ensure his appearance at the hearings. In the Court's view, these facts cannot be considered to constitute an impediment to the exhaustion of domestic remedies. The requirement to appear before a judge, which is an obligation for an indicted person, is not in any way prejudicial and is consistent with the rules of criminal procedure.

105. The Court notes that, in any event, and as recognised by the Parties, the domestic judicial proceedings relating to the cancellation of the Applicant's passport and the mismanagement of public funds are still ongoing, the Applicant having been convicted at first instance by CRIET and the appeal pending before the CRIET Appeals Chambers.

106. From the foregoing, the Court concludes that the political context, as raised by the Applicant, cannot be an obstacle to the exhaustion of local remedies and, therefore, upholds the objection raised by the Respondent State.

B. Other conditions of admissibility

107. The Court notes that the Parties do not dispute that the Application

26 *Ibid,* § 113: for obstacles to recourse pursuant to Article 206 of the Code of Criminal Procedure, § 114 for obstacles to recourse before the administrative courts and § 115 for obstacles to recourse after the judgment of the CRIET.

27 *Ibid*, § 113.

meets the requirements of Article 56(1), (2), (4), (6) and (7) of the Charter and Rule 50(2)(a)(b)(d)(f) and (g) of the Rules.[28]

108. Having concluded that the Application is inadmissible on the basis of non-exhaustion of domestic remedies, the Court does not have to rule on the conditions of admissibility under paragraph 1, 2, 3, 4, 6 and 7 of the Charter and Rules 50(2)(a)(b)(d)(f) and (g) of the Rules[29] which are not under contention between the parties. This is because the conditions of admissibility are cumulative, and if one condition is not met, the Application is inadmissible.[30]

109. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

110. The Applicant prays to Court to order the Respondent State to bear the costs in terms of Lawyer's fees as follows:

a. Barrister Luis Chabaneix: One hundred and fifty-three thousand (153,000 Euros);

b. Barrister Jaime Sanz de Bremond fifty seven thousand three hundred and fifty Euros (57,350 Euros) ;

c. Barrister Gregory Thuan Dit Dieudonne': One hundred and fifty thousand Euros 150,000 Euros

d. Kharti Prakash: Fifty thousand USD (USD50,000);

e. Theodore Zinflou: Ninety million CFA frs. (90,000,000 CFAF);

f. Victorien Fade: Eighty million CFA frs. (80,000,000 CFAF).

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111. The Respondent State did not make any prayers on costs. It merely prayed the Court to dismiss the Applicant's prayers for lack of merit.

28 Formerly Rule 40 of the Rules of 2 June 2010.

29 *Ibid.*

30 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 246, § 63; *Rutabingwa Chrysanthe v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 373, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No. 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

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112. The Court notes that Rule 32(2) of the Rules[31] provides that "unless the Court decides otherwise, each party shall bear its own costs".

113. The Court decides that, in the circumstances of this case, each party shall bear its own costs.

VIII. Operative part

114. For these reasons,
The Court,
Unanimously:
On jurisdiction
i. *Dismisses* the objections to jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Upholds* the objection to the admissibility of the Application on the ground of non-exhaustion of domestic remedies;
iv. *Decides* that the Application inadmissible.

On costs
v. *Orders* each Party to bear its own costs.

31 Formerly Rule 30(2) of the Rules of 2 June 2010.