

**Actions pour la Protection des Droits de l'Homme (APDH) v
Côte d'Ivoire (2016) 1 AfCLR 668**

Actions pour la Protection des Droits de l'Homme (APDH) v The Republic of Côte d'Ivoire

Judgment, 18 November 2016. Done in English and French, the French text being authoritative.

Judges: KIOKO, NIYUNGEKO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON, GUISSÉ, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: ORE

The case dealt with the law regulating the composition, organisation and functioning of the Ivorian Electoral Commission. The Court held that the African Democracy Charter and ECOWAS Democracy Protocol were human rights instruments in terms of Article 3 of the Court Protocol. On the merits, the Court held that these instruments did not prescribe any precise characteristics of an independent and impartial electoral body. An electoral body would, however, be deemed independent if 'it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality'. In the case at hand the imbalance in representation in favour of the ruling coalition amounted to a violation of its obligation to establish an independent and impartial electoral management body.

Jurisdiction (human rights instruments, 49, 57-61, African Democracy Charter and ECOWAS Democracy Protocol, 63-65,

Admissibility (exhaustion of local remedies: availability, effectiveness, sufficiency, 93; administrative jurisdiction, 96-98; constitutional validity decided by Constitutional Council, 101, outcome of local remedies already known, 103)

Political participation (independent and impartial electoral body, 116-118; balanced composition of electoral body, 125-133, 150)

Equal protection of the law (political candidates, 151)

Separate opinion: OUGUERGOUZ

Political participation (distinguish between impartiality and independence, 14-16, 22)

Remedies (Court should not go beyond Applicant's prayers, 30-31)

I. The Parties

- 1.** The Applicant, Actions pour la Protection des Droits de l'Homme, herein-after referred to as "APDH", presents itself as an Ivorian Non-Governmental Human Rights Organization established in March 2003, for the promotion, protection and defence of human rights. It also declares that it has Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission").
- 2.** The Respondent State, the Republic of Côte d'Ivoire, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter on Human Rights") on 31 March 1992, 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 25 January 2004 (date of its entry into force). The Respondent State deposited the declaration accepting the jurisdiction of the Court to receive cases from individuals and non-governmental organizations on 23 July 2013.

II. Subject of the Application

- 3.** The Applicant has seized the Court with a prayer to rule that Law No 2014 335 amending Law No 2001-634 of 9 October 2001, providing for the composition, organization, duties and functioning of the Independent Electoral Commission (IEC) is not in conformity with the international human rights instruments ratified by the Respondent State, more particularly the African Charter on Democracy, Elections and Governance (hereinafter referred to as "the African Charter on Democracy") and to the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management and Resolution (hereinafter referred to as the "ECOWAS Democracy Protocol") and consequently order the Respondent State to amend the law in question in light of its international commitments.

A. Context and facts of the matter

- 4.** This matter has its origin in the adoption by the National Assembly of the State of Côte d'Ivoire on 28 May 2014 of Law No 2014-335, relating to the Independent Electoral Commission of the State of Côte d'Ivoire.
- 5.** It is noteworthy that the Ivorian Electoral body was established by Edict No 2000-551 of 9 August 2000. Prior to that date, elections were organized and managed by the State through the Ministry of Internal Affairs. The Edict was subsequently amended on several occasions.
- 6.** As indicated in Article 17 of the aforesaid Edict, the National Electoral Commission (NEC) was a transitional body with the task to organize the presidential, legislative and municipal elections of 2000. Its mandate was expected to come to an end not later than fifteen (15) days after the proclamation of the results of the municipal elections.
- 7.** After the above elections, and pursuant to the establishment of the institutions provided by the Constitution of 1 August 2000, the

Parliament, on 9 October 2001, adopted Law No 2001-634 establishing the Independent Electoral Commission (IEC).

8. The attempted military coup d'état of 19 September 2002 which after its failure transformed into a military-political rebellion did not make it possible to see the new IEC at work.

9. In the ensuing political negotiations¹ aimed at resolving the crisis, Parliament, on 14 December 2004, adopted Law No 2004-642 amending the above mentioned Law No 2001-634 of 9 October 2001.

10. This IEC was composed of the representatives of the political parties as well as those of the armed movements, members of the rebellion.

11. Notwithstanding the advent of the said Law, it was only after the conclusion of the Pretoria Agreement² and the signing of Presidential Decisions Nos. 200506/PR of 15 July 2005 and 2005-11/PR of 29 August 2005 that it became possible to establish the Central Commission of the IEC in its current configuration.

12. This IEC was also temporary because Article 53 of the Presidential decision 2005-06, above mentioned, provided that the mandate of members of the said IEC was supposed to expire at the end of the general elections of 2010.

13. It is therefore pursuant to the above provision that the Government adopted and got the National Assembly to vote on 28 May 2014, that is, slightly over one year before the general elections of 2015, the aforementioned Law No 2014-335 impugned by the Applicant in the instant case.

14. Two days after the adoption of the Law by the National Assembly, Mr Kramo Kouassi, acting on behalf of a group of 29 parliamentarians of the National Assembly, on 30 May 2014, seized the Constitutional Council of Côte d'Ivoire with a prayer to declare four (4) provisions of the aforesaid law (Articles 5, 15, 16 and 17) unconstitutional. According to him, the provisions in question violate the right to equality before the law enshrined in the Ivorian Constitution in its Article 2 which provides that "All human beings are born free and equal before the law and Article 33(1) which provides that "the suffrage shall be universal, free, equal and secret".

15. Mr Kramo Kouassi alleged that the presence within the IEC Central Commission of a personal representative of the President of the Republic and a personal representative of the President of the National Assembly constitutes a breach of the principle of equality of candidates given the fact that, according to him, the first can stand as a candidate to succeed himself, and the latter also fulfils the eligibility requirements set forth by the electoral law.

¹ These negotiations which resulted in the Agreement known as Linas-Marcoussis Agreement or Kléber Agreement took place in a meeting held from 15 to 26 January 2003 at Linas-Marcoussis, France, with the aim to put an end to the civil war which had been raging since 2002.

² The Agreement was signed on 6 April 2005.

16. He maintained further that the representation in the IEC, of the Minister in charge of Territorial Administration, the Minister in charge of Economy and Finance, the High Judicial Council, the region Prefect, the Department Prefect and the Sub-Prefect is superfluous in the sense that the law governing the IEC in its Article 37, provides that the latter shall be accorded Government assistance in terms of administrative, financial and technical staff, whose support is required for the proper functioning of its services; that the said representation is not only worthless but is also unfair in as much as it creates, in favour of the President of the Republic, an unequal treatment on account of the over-representation of the latter within the IEC.

17. Consequently, he prayed the Constitutional Council to declare that the aforementioned provisions of the impugned law are not in conformity with the Constitution.

18. In a Decision rendered on 16 June 2014, the Constitutional Council dismissed Mr Kouassi's prayers and declared that the impugned provisions were in conformity with the Constitution. The law was then promulgated on 18 June 2014.

19. It was in this context that APDH, on 12 July 2014, seized the Court with the instant case.

B. Alleged violations

20. The Applicant alleges that the Respondent State violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law and to equal protection by the law, as prescribed in particular by Articles 3 and 13(1) and (2) of the Charter on Human Rights, Articles 10(3) and 17(1) of the African Charter on Democracy, Article 3 of the ECOWAS Democracy Protocol, Article 1 of the Universal Declaration of Human Rights and Articles 26 of the International Covenant on Civil and Political Rights (herein-after referred to as "the Covenant").

III. Procedure before the Court

21. The Application was received at the Registry on 12 July 2014.

22. On 26 September 2014, the Registry notified the Respondent State that an Application had been filed against it, and invited the latter to submit a Response thereto within 60 days of receipt of the notification pursuant to Rule 37 of the Rules.

23. On 7 October 2014, the Registry forwarded a copy of the Application to the other entities mentioned in Rule 35 of the Rules.

24. On 9 January 2015, the Registry contacted the Respondent State, drawing its attention to the expiry of the 60 days' timeframe allowed for it to file its Response to the Application.

25. On 15 April 2015, the Applicant transmitted additional pleadings to its initial Application. On 8 May 2015, the Applicant prayed the Court to enter a judgment in default on the ground that the Respondent had, up till then, failed to file its Response to the Application.

26. At its 37th Ordinary Session held from 18 May to 5 June 2015, the Court received the Respondent State's Response and, in the interest of justice, decided to accept the same even though it was submitted out of time.

27. On 2 June 2015, the Respondent's Response was transmitted to the Applicant who, by email dated 8 June 2015, notified the Registry of its intention not to file a Reply to the Respondent State's Response. The Applicant prayed the Court to render its decision on the basis of the initial Application, the additional pleadings and the annexes submitted on 15 April 2015.

28. At its 38th Ordinary Session held from 31 August to 18 September 2015, the Court decided, pursuant to Rule 45(2) of the Rules³ and paragraph 45 of its Practice Directions, to solicit the opinion of the African Union Commission and the African Institute for International Law on the question as to whether the African Charter on Democracy is a human rights instrument within the meaning of Article 3 of the Protocol.

29. The two institutions transmitted their opinions on 29 October 2015 and 7 January 2016, respectively.

30. On 8 January 2016, the Registry notified the Parties of the closure of written procedure and of the date set for a Public Hearing.

31. On 8 February 2016, the Respondent State filed, out of time, additional observations in which it raised objections to the admissibility of the Application. After deliberation, the Court decided to accept the observations, in the interest of justice.

32. On 15 February 2016, the Registry transmitted the Respondent State's observations to the Applicant and invited the latter to file its observations.

33. On 18 May 2016, the Registry obtained from the Commission confirmation that the NGO, APDH, indeed has Observer Status before it, in accordance with Article 5(3) of the Protocol.

34. On 3 March 2016, the Court had a Public Hearing during which the Judges⁴ heard the oral pleadings of the Parties:

For the Applicant:

Mr Guizo Bernard TAKORE, President, APDH Judicial Committee.

For the Respondent State:

- 1) Mr Moussa SEFON, Justice Advisor, Office of the President of the Republic;
- 2) Mr Mamadou DIANE, Human Rights and Humanitarian Action Advisor, Office of the President of the Republic;

³ The Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.

⁴ The Court on its own motion may invite an individual or organization to act as amicus curiae in a particular matter pending before it.

- 3) Mr Ibourahéma M. BAKAYOKO, Magistrate; Director, Protection of Human Rights and Public Freedoms, Ministry of Human Rights and Public Freedoms.

35. At the same Hearing, the Judges put questions to which the Parties provided answers.

IV. Prayers of the parties

36. The following prayers were presented by the Parties in the written procedure:

The Applicant:

37. In its Application, APDH prays the Court to rule that the aforementioned Law No 2014-335 is not in conformity with the African Charter on Democracy and, consequently, order the State of Côte d'Ivoire to review the said law in light of its international commitments.

38. In its additional pleadings, the Applicant prays the Court to:

- i) Declare and rule that its Application is well founded;
- ii) Declare and rule that the Ivorian Law No 2014-335 of 5 June, 2014 (sic) on the Independent Electoral Commission especially the new Articles 5, 15, 16 and 17 thereof, violates the right to equality of everyone before the law as well as the right to an independent and impartial national electoral body with responsibility for management of elections as provided under Articles 10(3) and 17(1) of the African Charter on Democracy;
- iii) Consequently, order the State of Côte d'Ivoire to make its electoral body compliant with the provisions of the aforesaid Charter.

The Respondent:

39. In its Response, the Respondent State prays the Court to rule that the Application is unfounded and, consequently, order the Applicant to withdraw the same.

40. In its additional pleadings, the Respondent State prays the Court to declare the Application inadmissible for failure to exhaust local remedies and if the Court declares the Application admissible, to rule that it is not founded in law and consequently dismiss the same.

41. The Parties reiterated their prayers during the Public Hearing.

V. Jurisdiction of the Court

42. According to Rule 39(1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction; and shall, in that regard, satisfy itself that it, successively, has personal, material, temporal and territorial jurisdiction to hear the case.

A. Personal jurisdiction

43. The Protocol provides that the State against which an action has been instituted must not only be a Party to the Protocol, but also, with respect to cases instituted by individuals or NGOs, it must have made and deposited the declaration accepting the jurisdiction of the Court to

receive such cases under Article 34(6) of the Protocol read together with Article 5(3) thereof.

44. In the instant case, the Court has noted that the Respondent State became a Party to the Protocol on 25 January 2004 and deposited the declaration contemplated under Article 34(6) of the Protocol on 23 July 2013. The Court therefore has jurisdiction to hear the instant case in respect of the Respondent State.

45. Regarding the Applicant, the Court observes that the Application was filed on behalf of an Ivorian Non-Governmental Organization, APDH, which has Observer Status before the Commission.

46. It follows from the foregoing that the Court's personal jurisdiction in the instant case, with respect to both the Respondent and the Applicant, has been established.

B. Material jurisdiction

47. Article 3(1) of the Protocol provides 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 State concerned".

48. The Court has already noted that the Respondent State is a Party to the Charter on Human Rights and the Protocol. It notes also that the Respondent State became a Party to the Covenant on 26 March 1992, the ECOWAS Democracy Protocol on 31 July 2013, and to the African Charter on Democracy on 28 November 2013.

49. The Court however also has to satisfy itself that these two instruments, namely: the African Charter on Democracy and the ECOWAS Democracy Protocol, are human rights instruments within the meaning of Article 3 of the Protocol.

50. The Court recalls that it sought the opinion of the African Union Commission and the African Institute for International Law on this issue.

51. The African Union Commission points out that the objectives of the African Charter on Democracy as spelt out in Article 2(1) thereof include, to "promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights"; that by Article 3(1) of the same Charter, State Parties undertake to implement it in accordance with the principles of "respect for human rights and democratic principles"; that as per Article 4 of the Charter on Human Rights, State Parties commit themselves to promote democracy, the principle of the rule of law and human rights and recognize popular participation through universal suffrage as the inalienable right of the people; that furthermore, as per Article 6, State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility.

52. The African Union Commission states in conclusion that, in view of the foregoing and other provisions, the African Charter on Democracy

may be described as “a relevant human rights instrument” which the Court has jurisdiction to interpret and implement

53. For its part, the African Institute for International Law notes that the link between democracy and human rights has been established by several international human rights instruments, especially the Universal Declaration of Human Rights in its Article 21(3) which provides that:

“The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

54. The Institute also contends that the African Charter on Democracy is a human rights instrument in the sense that it confers rights and freedoms to individuals. According to the Institute, this Charter explains, interprets and enforces the rights and freedoms enshrined in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa⁵ and the Kigali Declaration of 2003. It declares that this Charter also forms part of the continental human rights architecture and is integrated into several decisions of the African Commission on Human and Peoples’ Rights. According to the Institute, the said legal instruments should not be read separately but rather together.

55. The Institute states in conclusion that, in view of the aforesaid, a State which does not honour its obligations under Article 17 of the African Charter on Democracy is in breach of several human rights including the individual right of everyone to freely participate in the public affairs of his/her country and the collective right to self-determination.

56. The Court takes note of the observations of the African Union Commission and the African Institute for International Law.

57. The Court holds that, in determining whether a Convention is a human rights instrument, it is necessary to refer in particular to the purposes of such Convention. Such purposes are reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on State Parties for the consequent enjoyment of the said rights.

58. On the express enunciation of subjective rights, this is illustrated by provisions, which directly confer the rights in question.

59. Article 13(1 and 2) of the Charter on Human Rights provides that:

- “1. Every individual shall have the right to participate freely in the government of his country, either directly through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of the country.”

60. Regarding the prescription of obligations for States, the Charter on Human Rights in its Article 26 stipulates that

5 AHD/Decl.9 (XXXVIII), 2002.

“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”.

61. The Court further notes that, where a State becomes a Party to a human rights treaty, international law obliges it to take positive measures to give effect to the exercise of the said rights.

62. Article 1 of the Charter on Human Rights stipulates that:

“The Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them”.

63. The Court therefore holds that the obligation on the part of State Parties to the African Charter on Democracy and to the ECOWAS Democracy Protocol to establish independent and impartial national electoral bodies is aimed at implementing the aforesaid right prescribed by Article 13 of the Charter Human Rights, that is, the right to participate freely in the Government of one’s country, either directly or through freely chosen representatives in accordance with the provisions of the law.

64. The European Court of Human Rights also came to a similar conclusion when it had to determine, for the first time, complaints regarding the violation of Article 3 of Protocol No 1 to the European Convention on Human Rights on the right to free elections.⁶

65. In view of the foregoing, the Court, in conclusion, holds that the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same.

C. Temporal jurisdiction

66. The Court holds that, in the instant case, the relevant dates are the date of the entry into force, for the Respondent State, of the above-mentioned international instruments ratified by that State, and that of the deposition of the declaration prescribed by Article 34(6) of the Protocol allowing individuals and non-governmental organizations to bring cases directly to the Court. Given that the facts on which the alleged violations are based took place after the aforesaid dates (*supra*. paragraphs 44 and 48), the Court finds that it has temporal jurisdiction to hear the case.

⁶ Article 3 of Protocol No 1 to the European Convention on Human Rights reads as follows: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. The European Court indicated that the above-mentioned Article at first sight looks different from the other provisions of the Convention and its Protocols which guarantee the rights. The Court however held that this Article guarantees subjective rights such as the right to vote and to stand as a candidate in elections (*Mathieu-Mohin and Clerfayt v Belgium*, Judgment of 2 March 1987, series A No 113, paras 46-51).

D. Territorial jurisdiction

67. The Court notes that the facts on which the alleged violations are based occurred on the territory of the Respondent State. It therefore holds that it has territorial jurisdiction to hear the case.

68. It therefore follows from all the foregoing considerations that the Court has the jurisdiction to hear the instant case.

VI. Admissibility of the Application

69. According to the aforementioned Rule 39 of the Rules,

"the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules".

70. According to 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".

71. Rule 40 of the Rules which, in substance, replicates the contents of Article 56 of the Charter provides as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions.

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 this procedure is 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 a 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".

72. Whereas some of the above conditions are not in contention between the parties, the Respondent State raised objections relating to the language used in the Application and exhaustion of local remedies.

A. Admissibility conditions which are not in contention between the Parties

73. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union and the Charter, the nature of the evidence, the time limit for seizure of the Court and the principle according to which an Application must not concern cases previously settled by the Parties (sub rules 1, 2, 4, 6 and

7 of Rule 40 of the Rules and Article 56 of the Charter) are not in contention among the Parties.

74. The Court considers that nothing in the pleadings submitted before it by the Parties suggests that any of the foregoing conditions has not been met in the instant case.

75. The Court considers that the said conditions have been met in the instant case.

B. The admissibility conditions in contention between the Parties

i. Objection to admissibility on the ground of the language used by the Applicant

76. In its additional observations, the Respondent State maintains that the Applicant's written submissions contain insulting language towards it and its institutions.

77. It argues that when the Applicant states that "the Constitutional Judge curiously refused to censor this law", it was casting aspersions on the credibility of this institution; that by stating that "the President of the Constitutional Council later tendered his resignation" without explaining why, the Applicant seems to be insinuating that the resignation was orchestrated by the institutions of the State, especially the President of the Republic who appointed the Judge.

78. The Respondent State further submits that casting doubts on the composition of the Independent Electoral Commission itself is a way of saying that the election organized by the said Commission is not valid and, consequently, that the elected President is not worthy of representing his country.

79. The Respondent State in conclusion maintains that the aforementioned language is insulting towards it and casts doubts on the dignity and honour of the President of the Republic.

80. The Applicant denies the Respondent State's allegations and submits that the language used is not insulting. It contends that it has said the truth and that, besides, the information has been disseminated by the media; that it was only presenting the facts as they happened.

81. In this respect the Commission indicated that:

"... in determining whether a certain remark is disparaging or insulting ... the Commission has to satisfy itself whether the said remark or language ... 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..."⁷

82. In the instant case, the Court notes that the Respondent State has not produced evidence showing that the expressions used above by the Applicant were disparaging or insulting.

⁷ African Commission on Human and Peoples' Rights: *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication No 284/2003, 3 April 2009, para 91.

83. The Court further holds that the Applicant was only presenting the acts of the Ivorian authorities and that none of the expressions used is insulting towards the latter.

84. It therefore dismisses the objection to the Application's admissibility on that ground.

ii. Objection to admissibility on grounds of failure to exhaust local remedies

85. In its additional submissions to the brief in Response, the Respondent State reiterates that the Applicant did not exhaust the local remedies before filing the case before the Court. It contends that the Applicant could have seized the Constitutional Council to determine the unconstitutionality of the impugned law; that in Côte d'Ivoire, the said remedy is truly judicial within the meaning of this notion as understood by the Commission; that, in fact, upon being found grounded, the remedy results in the annulment of the adopted law.

86. The Respondent further contends that the Ivorian administrative law makes it possible to hold the State liable for its legislative activity; and that such procedure may lead the State to either abrogate an impugned law or amend the same.

87. The Respondent State argues, lastly, that it lies with the Applicant to produce evidence as to the exhaustion of local remedies, failing which its Application would be declared inadmissible; that this is also the position of the African Commission in Communications Nos. 127/94 and 198/97, *in the Matter of Sana Dumbuya v The Gambia and SOS Esclaves v Mauritania*.

88. In conclusion, the Respondent State prays the Court to rule that the Applicant has not exhausted the aforementioned local remedies and, therefore, declare the Application inadmissible.

89. Concerning the unconstitutionality of the impugned law, the Applicant contends that, according to Article 77(2) of the Ivorian Constitution, human rights advocacy associations may refer to the Council only the laws relating to public freedoms; that given that the impugned law is a law governing an independent administrative authority, no remedy is open to non-governmental organizations and individuals to solicit the withdrawal or review of such a law.

90. In its additional observations, the Applicant further contends that, according to Article 77 of the Ivorian Constitution, the Constitutional Council should be seized only prior to promulgation of laws; that even if the Applicant were entitled to seize the Constitutional Council, it would be necessary that the Applicant be informed of the adoption of such a law by the National Assembly.

91. It maintains that, in Côte d'Ivoire, the only means by which the existence of a law is brought to the attention of the citizens, is the publication thereof in an Official Gazette after its promulgation; that, in the circumstances, it would be impossible for human rights associations to seize the Constitutional Council prior to promulgation of the laws as required by the Constitution.

92. The Applicant made no observation on the competence of the administrative jurisdictions suggested by the Respondent State.

93. As underscored in the Court's jurisprudence as well as in that of the Commission,⁸ in the Application of the rule governing exhaustion of local remedies, the following three conditions must be met, namely: availability, effectiveness and sufficiency of the remedies.

94. In the Matter of *Noéb Zongo and Others v Burkina Faso*,⁹ for example, the Court decided that "the effectiveness of a remedy is measured in terms of its ability to solve the problem raised by the Applicant".

95. In the same vein, the Inter-American Court of Human Rights held that:

"... Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted".¹⁰

96. Regarding the remedies before administrative jurisdictions as mentioned by the Respondent State, Article 5(2) of Ivorian Law No 94-440 relating to the Supreme Court provides that the Administrative Chamber "shall hear in the first instance and without appeal cases of annulment on the grounds of abuse of authority, against decisions emanating from the administrative authorities".

97. It follows from the aforementioned provision that administrative jurisdictions are not competent to hear cases of unconstitutionality of laws.

98. The Court therefore holds that the administrative remedy is not sufficient and, for this reason, that the Applicant did not have to exercise it.

99. Concerning the unconstitutionality of the impugned law, the Court notes that Article 77 of the Ivorian Constitution provides that:

"The laws can, before their promulgation, be referred to the Constitutional Council by the President of the National Assembly or by one-tenth at least of the Deputies or by the parliamentary groups. The associations of the defense of the Rights of Man legally constituted can equally refer to the Constitutional Council the laws concerning the public freedoms. The Constitutional Council decides in a time period of fifteen days counting from its seizing."

100. The Court observes that the impugned law does not relate to public freedoms and that, for that reason, the Applicant could not refer

⁸ *Reverend Christopher Mtikila v Tanzania* (Application 009-001/2011), Judgment of 14 June 2013 para 82.1; *Lohé Issa Konaté v Burkina Faso* (Application 004/2013), Judgment of 5 December 2014 para 92 See also Communications Nos. 147/95 and 149/96, *Sir Dawda Jawara v The Gambia*, para 32.

⁹ Application No 013/2011, Judgement of 28 March 2014, para 68.

¹⁰ *Velasquez-Rodriguez v Honduras*, Judgment of 29 July 1998 (Series C), No 4, para 64.

it to the Constitutional Council for determination of its conformity with the Constitution.

101. The Court further observes that the Constitutional Council of the State of Côte d'Ivoire has already ruled on the constitutionality of the impugned law in its Decision on the Application filed by Mr Kramo Kouassi acting on behalf of a group of 29 parliamentarians of the National Assembly (*supra*, paragraph 18). The Constitutional Council held that the impugned provisions were in conformity with the Constitution.

102. In the circumstances, it is clear that the Applicant in the instant case could expect nothing from the Constitutional Council with respect to its prayer for annulment of the impugned law.

103. The Court, in its previous judgments in the Matters of Reverend Christopher R. Mtikila and Lohé Issa Konaté, decided that “there was no need to go through the same judicial process the outcome of which was known”.¹¹

104. In view of the aforesaid, the Court finds that it was not necessary for the Applicant to exercise the remedies mentioned by the Respondent (*supra*, paragraphs 85 and 86).

105. The Court consequently declares the Application admissible.

106. Having declared that it has jurisdiction to deal with this matter and that the Application is admissible, the Court will now consider the merits of the case.

VII. Merits of the case

107. The Applicant alleges that the Respondent State violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law and to equal protection by the law, as prescribed in particular by Articles 3 and 13(1 and 2) of the Charter on Human Rights, Articles 10(3) and 17(1) of the African Charter on Democracy, Article 3 of the ECOWAS Democracy Protocol, Article 1 of the Universal Declaration of Human Rights and Article 26 of the Covenant.

A. The allegation according to which the Respondent State violated its obligation to establish an independent and impartial electoral body

108. The Applicant submits that the right for the citizens to have national independent and impartial electoral bodies emanates from the commitment made by the said States under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol; that implementation of the said commitment is reflected in the

¹¹ *Reverend Christopher R Mtikila (Preliminary Objection of Inadmissibility)* Judgment of 14 June 2014, para 82.3 and *Lohé Issa Konaté* (Application 004/2013, Judgment of 5 December, 2014, para 112.

obligation also emanating from these provisions; that the State Parties, including Côte d'Ivoire, have the obligation to establish and strengthen independent and impartial national electoral bodies.

109. The Applicant contends that a majority of the members of the Ivorian electoral body represent personalities, groups and political parties; that since the latter have special interests to protect, their representatives cannot claim to be independent or impartial; that an agent is hardly independent of his superior from whom he receives the directives required to discharge his mandate; that this lack of independence is valid for all members of the IEC representing personalities or political parties.

110. The Applicant argues that, in choosing this mode of representation of personalities and political parties for the composition of its electoral body, the Respondent State violated its commitment to establish an independent and impartial body for management of elections.

111. The Respondent State refutes the Applicant's allegations. It maintains that the composition of the electoral body integrates all the parties concerned for the proper conduct, transparency and credibility of the electoral exercise; that the current configuration of the IEC was arrived at consensually; that, besides, this practice is consistent with the letter and spirit of the ECOWAS Democracy Protocol, especially Article 3 thereof.

112. With respect to representation of personalities and political parties within the IEC, the Respondent State contends that, within the meaning of Article 5 of the impugned law, representation as a mandate does not bind members of the IEC to the personalities and political parties; that the said members of the electoral commission are not subject to any administrative hierarchy nor do they receive instructions from the Government; that it was in fact for this reason that the impugned law describes the IEC as "an independent administrative authority endowed with legal personality and financial autonomy".

113. The Respondent State further maintains that the appointment of members of the Bureau of the IEC Central Commission through election is sufficient proof of the independence and impartiality of this body.

114. Article 17(1) of the African Charter on Democracy on which the Applicant relies, provides that:

"State Parties affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principle Governing Democratic Elections in Africa.

To this end, State Parties shall establish and strengthen independent and impartial national electoral bodies responsible for the management of elections".

115. Article 3 of the ECOWAS Democracy Protocol also mentioned by the Applicant provides that:

"The bodies responsible for organising the elections shall be independent and/or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies".

116. The foregoing provisions show that there are no precise indications as to the characteristics of an “independent” and “impartial” electoral body.

117. According to the Dictionary of International Public Law, “independence” is the fact of a person or an entity not depending on any other authority than its own or at least not depending on the State in which he exercises his functions. As for impartiality, this is the absence of bias, prejudice and conflict of interest.¹²

118. The Court holds that an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality.

119. This is also the position of the International Institute for Democracy and Electoral Assistance (International IDEA), which is a credible international institution, specialized in electoral matters.¹³

120. Given the fact that the Applicant’s allegations relate to the composition of the Ivorian electoral body, the Court shall determine the independence and impartiality of this body in relation to its structure as prescribed by the impugned law.

121. Regarding the institutional independence of this body, Article 1(2) of the impugned law provides that: “... the IEC is an independent administrative authority endowed with legal personality and financial autonomy”.

122. The above provision shows that the legal framework governing the Ivorian electoral body leaves room for assumption that the latter is institutionally independent.

123. The Court, however, notes that institutional independence in itself is not sufficient to guarantee the transparent, free and fair elections advocated in the African Charter on Democracy and the ECOWAS Democracy Protocol. The electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality, and should be perceived as such.

124. The Court notes that the majority of the members of the Ivorian electoral body are appointed by personalities and political parties contesting elections.

125. The Court is of the opinion that, for a body to be able to reassure the public about its ability to organise transparent, free and fair election, its composition must be balanced.

126. The issue here is therefore to determine whether the composition of the Ivorian electoral body is balanced.

127. Article 5 of the impugned law provides that:

“The Independent Electoral Commission shall comprise a Central Commission and local Commissions at regional, departmental, communal and sub-prefectural levels. Members of the Central Commission shall

¹² Jean Salmon *Dictionary of International Public Law* - Bruxelles, 2001, pp 570 and 562.

¹³ *Electoral Management Design: Handbook of the IDEA* (2010) 7.

comprise: i) 1 (one) representative of the President of the Republic; ii) 1 (one) representative of the President of the National Assembly; iii) 1 (one) representative of the Minister of Territorial Administration; iv) 1 (one) representative of the Minister of the Economy and Finance; v) 1 Magistrate appointed by the High Judicial Council; vi) 4 (four) representatives of the Civil Society two of whom shall be drawn from faith-based organizations, one from Non-Governmental non-religious Organizations and a Lawyer appointed by the Bar; vii) 4 (four) representatives of the party or political coalition in power; viii) 4 (four) representatives of opposition political parties or groups".

128. The foregoing provision shows that the ruling political party and coalition, and political groupings of the Opposition are each represented by four (4) members.

129. The Court however notes that the Government in place is further represented by four (4) other members, namely, one representative of the President of the Republic, one representative of the President of the National Assembly, one representative of the Minister in charge of Territorial Administration, and one representative of the Minister in charge of Economy and Finance.

130. The Government is, therefore, represented by eight (8) members as against four (4) for the Opposition.

131. The Court observes further that the impugned law provides, in its Article 36, that the IEC Central Commission shall take its decisions by simple majority of the members present.

132. The imbalance in the composition of the Ivorian electoral body was also noted by the African Union Election Observer Mission (AUEOM) which, in its report of 27 October 2015, indicated as follows:

"... In view of its composition, AUEOM found that there was an imbalance in the numerical representation of the ruling coalition and the political parties. AUEOM noted that the electoral authority does not command consensus within the political class, although the current IEC is the outcome of negotiations between the ruling party and the opposition parties, despite its heavy political component. From its exchanges with the socio-political actors, the Mission clearly perceived the mistrust of a section of the opposition and the civil society as to the impartiality of the electoral body..." (Registry translation)

133. The foregoing shows that the Ivorian electoral body does not meet the conditions of independence and impartiality and cannot be perceived as such.

134. In the same vein, the European Court of Human Rights, with regard to the independence and impartiality of tribunals, held that "in order to maintain confidence in the independence and impartiality of the court, appearances may be of importance".¹⁴

135. The Court, in conclusion, consequently holds that by adopting the impugned law, the Respondent State violated its commitment to establish an independent and impartial electoral body as provided

14 Case of *Findlay v United Kingdom* (Application No 22107/93), Judgment of 25 February 1995, para 76.

under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol.

136. Consequently, the Court further holds that the violation of Article 17 of the African Charter on Democracy affects the right of every Ivorian citizen to participate freely in the conduct of the public affairs of his country as guaranteed by Article 13 of the Charter on Human Rights.

B. The allegation according to which the Respondent State has violated its obligation to protect the right to equality before the law and equal protection by the law

137. The Applicant maintains that the impugned law accords advantages to certain candidates at the expense of others; that the President of the Republic, for instance, is over-represented within the IEC whereas independent candidates and those of the Opposition are not represented therein; that proof thereof is that out of the 17 members comprising the Central Commission of the Ivorian electoral body, 13 through various entities, represent the President of the Republic, either as representatives of political parties, or representatives of political personalities (President of the Republic, President of the National Assembly, various Ministers) or as representatives of the institutions under his control (High Judicial Council).

138. The Applicant further submits that the said members can, during elections, tilt the balance in favour of the President of the Republic who is a candidate for his own succession, or in favour of partisan candidates at the expense of independent candidates and candidates of the Opposition.

139. The Applicant in conclusion maintained that by adopting the impugned law, the Respondent State violated its commitment to protect the rights to equality before the law and the right to equal protection by the law as enshrined in several international human rights instruments to which the State is a Party, especially the Charter on Human Rights (Article 3), the African Charter on Democracy (Article 10(3)), the ECOWAS Protocol on Democracy and Good Governance (Article 3), the Universal Declaration of Human Rights (Article 1), and the Covenant (Article 26).

140. The Respondent State refutes this allegation, arguing that it is difficult to understand the Applicant's complaint over the representation of the so-called independent candidates because according to the Respondent State such a claim challenges the strong presence of members appointed by the political parties or the political authorities.

141. It further contends that no provision of the impugned law deprives Ivorian citizens that have fulfilled the requisite conditions of the right to participate in the public affairs of their country.

142. The Court notes that equality and non-discrimination are fundamental principles of international human rights law and that everyone, without distinction, should enjoy all the rights.

143. Article 10(3) of the African Charter on Democracy on which the Applicant particularly relies, provides as follows: "State Parties shall

protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society.”

144. Article 3 of the Charter on Human Rights also mentioned by the Applicant provides that: “1. Every individual shall be equal before the law 2. Every individual shall be entitled to equal protection of the law”.

145. Article 26 of the Covenant is much more detailed in this regard. It provides as follows:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

146. The principle of “equality” in law presupposes that the law protects everyone without discrimination.¹⁵

147. Concerning discrimination, it is defined as a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria.¹⁶

148. In the same vein, the European Court of Human Rights declared in the Matter of *Yumak and Sadak v Turkey* that:

“With regard to electoral systems, the Court’s task is to determine whether the effect of the rules governing parliamentary elections is to exclude some persons or groups of persons from participating in the political life of the country, and whether the discrepancies created by a particular electoral system can be considered arbitrary or abusive or whether the system tends to favour one political party or candidate by giving them an electoral advantage at the expense of others”.¹⁷

149. The Court has found that the composition of the Ivorian electoral body is imbalanced in favour of the Government and that this imbalance affects the independence and impartiality of that body.

150. It is therefore clear that in the event that the President of the Republic or another individual belonging to his political family presents himself as a candidate for any election, be it presidential or legislative, the impugned law would place him in a much more advantageous situation in relation to the other candidates.

151. The Court therefore holds that, by not placing all the potential candidates on the same footing, the impugned law violates the right to equal protection of the law as enshrined in the several international human rights instruments mentioned above, ratified by the Respondent State, especially Article 10(3) of the African Charter on Democracy and Article 3(2) of the Charter on Human Rights.

15 *Dictionary of Human Rights* under the direction of Joël Andriantsimbazovina, Hélène Gaudin, Jean-Pierre Maguenaud, Stéphane Rials and Frédéric Sudre, French University Press, 2008, p 284.

16 Jean Salmon (ed) *Dictionary of International Public Law*, under the direction of, Bruxelles, Brussels, 2001, p 344.

17 Application 1022/03, Judgment of 8 July 2008, para 21.

VIII. Costs

152. The Court notes that the Parties did not make any submissions as to costs. In accordance with Rule 30 of the Rules, each Party shall bear its own costs.

153. For these reasons,

THE COURT,

Unanimously:

- 1) Declares that it has jurisdiction to hear this case;
- 2) Dismisses the objection to the admissibility of the Application on the grounds of the nature of the language used by the Applicant;
- 3) Dismisses the objection to the admissibility of the Application on the grounds of failure to exhaust local remedies;
- 4) Declares the Application admissible;

By a majority of nine (9) votes for and one (1) against, Judge El Hadji GUISSE dissenting:

5) Rules that the Respondent State has violated its obligation to establish an independent and impartial electoral body as provided under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol, and consequently, also violated its obligation to protect the right of the citizens to participate freely in the management of the public affairs of their country guaranteed by Article 13(1) and (2) of the African Charter on Human and Peoples' Rights;

6) Rules that the Respondent State has violated its obligation to protect the right to equal protection of the law guaranteed by Article 10(3) of the African Charter on Democracy, Article 3(2) of the African Charter on Human and Peoples' Rights and Article 26 of the International Covenant on Civil and Political Rights;

7) Orders the Respondent State to amend Law No 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the aforementioned instruments to which it is a Party;

8) Orders the Respondent State to submit to it a report on the implementation of this decision within a reasonable time which, in any case, should not exceed one year from the date of publication of this Judgment;

Unanimously,

9) Rules that each Party shall bear its own costs.

Separate opinion: OUGUERGOUZ

1. I subscribe to the Court's decisions as regards its jurisdiction to hear the Application and as regards the Application's admissibility. As for the merits of the case, I consider inadequate the reasoning behind the judgment as to the lack of independence and impartiality of the

Independent Electoral Commission. I also have reservations on the legal consequences that the Court draws from this lack of impartiality and independence (the *Ne eat judex ultra petita partium* principle).

2. Before expressing my position on the last two points, I would like to point out that in examining its material jurisdiction, namely, the question as to whether or not the legal instruments allegedly violated, are “relevant human rights instruments”, the Court could have fleshed out its reasoning by highlighting the dialectical link between democracy, and respect for human rights and fundamental freedoms,¹ and by making reference, for example, to the substantial observations presented by the African Institute for International Law and, to a lesser extent, by the African Union Commission.² At the request of the Court, these two institutions submitted observations on the question as to “whether the African Charter on Democracy is a human rights instrument within the meaning of Article 3 of the Protocol” (paragraphs 28 and 29 of the judgment). However, the Court limited itself to reproducing some of the observations (see paragraphs 51-55) and “takes note of the observations” (paragraph 56), without taking the same on board in its reasoning (see paragraphs 57-65).

3. I would also like to point out that the inadmissibility objection based on the Applicant’s non-exhaustion of local remedies was filed very much out of time by the Respondent State. The said objection was raised in the Additional Observations filed by the Respondent State on 8 February 2016 (see paragraph 31 of the judgment),³ in response to the Additional Observations dated 4 November 2015 filed by the Applicant on 5 November 2015. In terms of Rule 52(2) of the Rules,

- 1 On this question, see for example, the Universal Declaration on Democracy adopted by the Inter- Parliamentary Council on 16 September 1997 at its 161st Session held in Cairo. Paragraph 6 thereof stipulates that: “Democracy is inseparable from the rights set forth in the international instruments recalled in the preamble” (notably the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights); paragraph 12 for its part provides that: “the key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people’s will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organise political parties and carry out political activities” - text in *Union Interparlementaire, La démocratie: Principes et réalisations*, Genève, 1998, pp. III-VIII. See also Article 7 of the Inter-American Democratic Charter adopted by the General Assembly of the Organization of American States on 11 September 2011: “Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.”
- 2 The Brief of the African Institute for International Law consists of 25 pages; while that of the Legal Counsel of the African Union Commission contains 3 pages.
- 3 The Respondent State had been invited to file this pleading before 1 January 2016; on 8 February 2016, it actually filed two documents dated 3 and 5 February 2016 respectively, titled “Government’s Opinion on the Additional Submission of the APDH to the African Court”; it was in the document dated 5 February 2016 that it raised the objection to the admissibility of the Application on grounds of non-exhaustion of local remedies.

however, that objection should have been raised ‘at the latest before the date fixed by the Court for the filing of the first set of pleadings to be submitted by the party who intends to raise such objections’, that is, at the latest during the month of December 2014 (see paragraph 22 of the judgment; and yet, this first pleading to be submitted by the Respondent State, i.e. its Brief in Response filed on 19 May 2015 (without any Application for extension of time) contained no preliminary objection. Although that brief was filed out of time, the Court decided to accept the same “in the interest of justice” (see paragraphs 24, 25 and 26 of the judgment). The plea of inadmissibility on grounds of non-exhaustion of local remedies contained in the afore-mentioned Additional Observations was therefore raised outside the time limit prescribed by Rule 52(2) and, indeed, subsequent to the closure of the written procedure. The Court also decided to accept Respondent State’s additional observations still “in the interest of justice” (see paragraph 31 of the judgment).

4. In my opinion, the Court should have explained the term “interest of justice” which it invokes in this case, more so because the preliminary objection in question was raised after the closure of the written procedure on 8 January 2016 (see paragraph 30) and because the Applicant formally opposed the filing⁴ of the said observations. Proper administration of justice requires that the time limits prescribed by the Court must be scrupulously respected by the parties, especially where such time limits concern a procedural aspect as crucial as the Court’s jurisdiction or an Application’s admissibility. This does not mean that the Court cannot show flexibility in certain circumstances; it must however ensure that cases are properly managed and that it keeps control of the procedure. In the instant case, the Court could have indicated that exhaustion of local remedies is a cardinal condition for admissibility of an Application and that it therefore behoves the Court to examine this condition even in the absence of an objection by the Respondent State in this regard (see Rule 39 of the Rules of Court).⁵ In view of its fundamental nature, this condition of admissibility could indeed be likened to a condition in respect of public order.

5. I would now address the two key questions which led me to write this separate opinion.

I. The Independent Electoral Commission’s lack of independence and impartiality

6. Article 17(1) of the African Charter on Democracy, Elections and Governance, violation of which is alleged, provides that; “State Parties shall establish and strengthen independent and impartial national electoral bodies responsible for the management of elections”. Since this instrument does not contain a definition of the concepts of

⁴ See his *Pleadings Paper* dated 3 March 2016, pp. 6-7 and *the Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, pp 5-6 (Mr Guizot Takoré’s pleadings).

⁵ Paragraph 1 of this Article provides that “the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application...”

“independence” and “impartiality”, it lay with the Court to define the concepts and identify the criteria enabling it to ascertain the existence or otherwise of these two requirements.

7. The Court thus began by quoting the definition of these two concepts as given by doctrine, as follows:

“According to the Dictionary of International Public Law, “independence” is the fact of a person or an entity not depending on any other authority than its own or at least, not depending on the State in which he exercises his functions. As for “impartiality”, this is the absence of bias, prejudice and conflict of interest”⁶ (see paragraph 117 of the judgment).

8. In the following paragraph however, the Court gave a purely formalist and tautological definition of *independence*. According to the Court,

“An electoral body is independent when it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality” (paragraph 118).

9. After referring to Article 1(2) of the Law challenged by the Applicant, which provides that “... the IEC is an independent administrative authority endowed with legal personality and financial autonomy” (paragraph 121), the Court concludes that “... the legal framework governing the Ivorian electoral body leaves room for assumption that the latter is institutionally independent” (paragraph 122).

10. However, the Court does not spell out the content of the said “institutional independence” of the Commission and how this independence differs from “independence” in the proper sense of the term, i.e. independence defined as the Commission’s non-dependence “on any other authority than its own”. The Court merely notes that this “institutional independence” on its own is not enough to guarantee the holding of transparent, free and fair elections as advocated by the African Charter on Democracy and the ECOWAS Democracy Protocol”, and that “the electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality, and should be perceived as such” (paragraph 123).

11. After a brief examination of the composition of the Electoral Commission, (paragraphs 124-132), the Court concludes that “the Ivorian electoral body does not meet the conditions of independence and impartiality and cannot be perceived as such”.

12. It is my opinion that the Court’s treatment of this issue of independence and impartiality is inadequate, and that greater clarity would have been achieved, had the treatment been conducted more systematically. I believe, in particular, that it was necessary to make a clear distinction between the independence of the Electoral Commission and its impartiality. I also believe that it was not possible to draw conclusions as to the “institutional independence” of the Electoral Commission solely on the basis of its description under Article

⁶ The Dictionary of International Public Law defines *impartiality* more precisely as follows: “Absence of bias, prejudice and conflict of interest in a judge, arbitrator, expert or person in a similar position with respect to the parties before him or in relation to the question he must settle”, Jean Salmon (Dir.), *Dictionary of International Public Law*, Bruxelles/AUF, Brussels, 2001, p. 562.

1(2) of the impugned law, and without examination of the composition of this Commission. Only such an examination could enable the Court to ascertain the Commission's institutional independence and, hence, its impartiality.

13. In the instant case, it behoved the Court to clearly distinguish between the independence of the Commission and its impartiality. The Applicant itself had taken care to make such a distinction in its submissions and pleadings. In its Additional Observations of 14 April 2015,⁷ its Additional Brief of 4 November 2015⁸ and in its oral pleadings documents of 3 March 2016,⁹ it devotes two separate sections to the lack of independence and impartiality of the Independent Electoral Commission. In particular, the Applicant pointed out the close link between the two concepts in these terms: "the one who depends on another is hardly independent of his superior from whom he receives the directives required to discharge his mandate".¹⁰

14. There is, it is true, a dialectic relation between the impartiality of any person and the latter's independence. As has been rightly pointed out, the impartiality of a person is indeed "a function of his independence, that is, the absence of restriction, influence, pressure, incitement or interference direct or indirect,¹¹ that may be exercised on (this person) by anyone and for any reason". The Electoral Commission's impartiality could thus have been measured with the yardstick of its independence.

15. Although closely linked, the concepts of *independence* and *impartiality* must, however, be distinguished from each other (see, for example, the distinction made in paragraph 117 of the judgment).

16. Depending on its composition, any organ (judicial, arbitral or electoral) can be both independent and impartial, just as it can be independent and yet partial. Thus, for example, the Protocol establishing the present Court sets out a number of incompatibilities, absolute¹² and relative,¹³ designed to ensure both the independence and impartiality of Members of the Court.¹⁴ A judge must be absolutely independent, that is, "depend on no other authority than his own", reason for which Rule 5 of the Rules prohibits him from performing

7 See pp. 10-12.

8 See pp. 8-10.

9 *Oral pleadings document*, pp. 21-22.

10 *Additional claims*, p. 11.

11 *Dictionary of International Public Law*, *op. cit.*, p. 562

12 The incompatibilities in question are absolute where they apply to all members of the Court; they are generally aimed at ensuring the independence of the judge.

13 The incompatibilities in question are relative where they apply individually to a member of the Court and in relation to a specific case; they seek rather to ensure the impartiality of a judge in a particular case and to render him unfit to sit in such case.

14 See Articles 16, 17, 18 and 22 of the Protocol and Rules 4, 5 and 8 of the Rules of Court. Similar provisions are contained in the constituent instruments of other international judicial bodies such as the European Convention on Human Rights (Articles 21 and 23(4), the Statute of the Inter-American Court of Human Rights (Articles 11, 18, 19, 20 and 21) or the Statute of the International Court of Justice (Articles 16, 17 and 24).

functions incompatible with this independence, such as “holding political, diplomatic or administrative positions or function as government legal adviser at the national level”. The independence of Members of the Court is, however, a necessary but not sufficient condition. Every judge must also be impartial, that is, not biased, prejudiced or with conflict of interest; reason for which Rule 8(4) of the Rules prohibits him from sitting in cases where there may be a conflict of interest of a personal, material or other nature.¹⁵

17. As regards the independence of a body in general, the European Court of Human Rights as far back as 1984 synthesized its case-law on the subject in the following terms:

“In determining whether a body can be considered to be “independent” - notably of the executive and of the parties...the Court has had regard to the manner of appointment of its members and the duration of their term of office ...the existence of guarantees against outside pressures... and the question whether the body presents an appearance of independence...”¹⁶

18. In its judgment of 25 February 1997 in the case of *Findlay v the United Kingdom*, the European Court recalled the foregoing criteria in its assessment of the independence of a judicial body. On that occasion, it made a clear distinction between this notion of independence and that of impartiality:

“The Court recalls that in order to establish whether a tribunal can be considered as ‘independent’, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.”¹⁷

19. In the judicial field, the distinction between the two concepts of independence and impartiality was further emphasized by the Bengalore Principles of Judicial Conduct (2002).¹⁸ In the quasi-judicial realm, the same distinction has been made by the Guiding Principles on the Independence and Impartiality of UN Human Rights Treaty Body Members (2012).¹⁹ In the area of arbitration, the distinction between

15 For example, no member of the Court may participate in the examination of a case “if he has a personal interest in the case”, in particular because of conjugal or parental relationship with one of the parties, or “if he has expressed in public, through the media, in writing, by public actions or by any other means, opinions which are objectively of such a nature as to impair his impartiality”.

16 Case of *Campbell and Fell v the United Kingdom*, Application No.7819/77; 7878/77, Judgment of 28 June 1984, paragraph 78.

17 Case of *Campbell and Fell v the United Kingdom*, Application No 7819/77; 7878/77, Opinion of 28 June 1984, paragraph 73.

18 Bengalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity and revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, on 25 and 26 November 2002.

19 The said Guiding Principles were adopted in 2012 by the Chairs of the United Nations treaty bodies, who recommended their adoption by the various treaty bodies, including by incorporating them into their rules of procedure.

independence and impartiality has also been made and clarified in a manner similar to that of the European Court.²⁰

20. In addition to the clear distinction between the conditions of independence and impartiality, the aforementioned judicial and arbitral practice has laid down precise standards for assessing the existence of such conditions. Since none of the legal instruments invoked by the Applicant in this case provides a definition or criteria for assessing the independence and impartiality of an independent electoral commission, the Court could have applied the said standards *mutatis mutandis* to determine the independence and impartiality of the Ivorian Electoral Commission.

21. The standards laid down by the European Court in its afore-cited judgment in the case of *Findlay v the United Kingdom* (*supra*, paragraph 18) suggest that the independence of a body is assessed in a purely objective manner, on the basis of the links between its members and external entities;²¹ whereas impartiality has both subjective and objective aspects.²² The European Court had already, as far back as 1982, developed specific criteria for determining a court's impartiality.²³

22. In the instant case, the Court's assessment could be limited to that of independence of the Electoral Commission; which was a purely objective and relatively easy test, since it consisted in examining the composition of that body. It could then, if necessary, examine the question of impartiality of the Commission using, for example, the standards developed by its European counterpart.

23. In view of the composition of the Independent Electoral Commission, the Court could not but conclude that the Commission was not independent, and this conclusion would have enabled the Court to establish that the Commission did not present the appearance

20 Thus, according to an Arbitral Tribunal: "The concepts of independence and impartiality, although linked, are often regarded as distinct, even though the precise nature of the distinction is not always easy to grasp. Generally, independence is linked to the absence of relations with a party that could influence the decision of an arbitrator. Impartiality, for its part, concerns the absence of bias or predisposition towards one of the parties" (original text in English) *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. Argentina Republic*, (ICSID Case No. ARB / 03/19) and *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. The Argentine Republic* (ICSID Case No. ARB/03/17), and *AWG Group Limited v The Argentine Republic (UNCITRAL)*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008, paragraph 28

21 "... to establish whether a court may be considered 'independent', it is necessary to take into account, in particular, the mode of appointment and term of office of its members, the existence of protection against external pressure and whether or not there is an appearance of independence", Application 22107/93, paragraph 73 of the judgment.

22 As for the "impartiality" condition, it has two aspects. First, the court must not subjectively manifest bias or personal prejudice. Secondly, the court must be objectively impartial, that is, offer sufficient guarantees to exclude any legitimate doubt in this respect.

23 See, for example, the case of *Piersack v Belgium*, Application No. 8692/79, Judgment of 1 October 1982, paragraph 30; and the case of *Hauschildt v Denmark*, Application No 10486/83, Judgment of 24 May 1989, paragraphs 46-48.

of an impartial body. This link between the Electoral Commission's lack of independence and its impartiality had, besides, been highlighted by the Applicant in the following terms:

"As agents of the President of the Republic, or members of his government or institutions supporters of which control the senior management, the 13 members of the Central Commission cannot be considered impartial in any way whatsoever".²⁴

24. As the question of independence and impartiality of the Independent Electoral Commission is of crucial importance in the case before the Court, it deserves to be examined in a more methodical and in-depth manner.²⁵

II. The Court made a ruling beyond the bounds of the Applicant's pleadings

25. It seems to me important to indicate that the Applicant invoked only the violation of the right to "equality before the law" and Articles 10(3) and 17(1) of the African Charter on Democracy, Elections and Governance. Contrary to what is stated in the judgment, the Applicant never invoked a violation of the African Charter on Human and Peoples' Rights, the ECOWAS Protocol on Democracy and Good Governance or the International Covenant on Civil and Political Rights. The Applicant did not also invoke a violation of the right to "equal protection of the law".

26. In paragraphs 20 and 107 of the judgment, however, it is stated under "Alleged Violations" that:

"The Applicant alleges that the Respondent State violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law **and to equal protection by the law**, as prescribed by **Articles 3 and 13(1) and (2) of the Charter on Human Rights**, Articles 10(3) and 17(1) of the African Charter on Democracy, **Article 3 of the ECOWAS Democracy Protocol**, **Article 1 of the Universal Declaration of Human Rights** and **Article 26 of the International Covenant on Civil and Political Rights** (hereinafter referred to as "the Covenant") - **emphases are mine**).

27. And yet, it is on the basis of all the allegations contained in that paragraph that the Court made its ruling. It is therefore my opinion that the Court has ruled beyond the bounds of the Applicant's submissions.

28. In both its written pleadings and oral proceedings, the Applicant actually invoked violation of only one of the afore-cited legal instruments, namely, the African Charter on Democracy, Elections and Governance. In its original Application dated 9 July 2014, the Applicant

24 Additional Application, p. 12

25 In this respect, a comparative approach could have been useful - see for example, *Electoral Commissions in West Africa - Comparative Study*, Book edited by Friedrich-Ebert-Stiftung (Abuja Regional Office) with ECOWAS Electoral Assistance Unit, February 2011. To ensure the autonomy of an electoral commission, this study suggests, in particular, that "the interest of the members of the Commission do not conflict with that of the organization of quality elections. This may be the case, for example, where the representatives of the candidates (parties or individuals) have a casting vote in the Commission's decision-making process" p. 102.

alleges violation of only the African Charter on Democracy, Elections and Governance;²⁶ it made a similar allegation in its additional Application dated 14 April 2015,²⁷ its additional brief dated 4 November 2015,²⁸ and at the public hearing held on Thursday 3 March 2016.²⁹ The content of paragraphs 37³⁰ and 38³¹ of the judgment is therefore more faithful to the reality (see to a lesser extent paragraph 3).

29. It is true that the Applicant mentions the African Charter on Human and Peoples' Rights, the ECOWAS Protocol on Democracy and Good Governance and the International Covenant on Civil and Political Rights in the reasoning of its additional submissions.³² The Applicant merely states, however, that these three instruments also guarantee the "right to equality of all before the law" without expressly invoking their violation. In any event, it makes no mention of these three instruments in relation to the core issue under discussion, namely, the independence and impartiality of the Independent Electoral Commission. The same is true with regard to its pleadings.³³

26 See pp 2, 3, 5 and 6; see also the letter of 7 July 2014 by which the Applicant filed its Application.

27 See pp 1, 8, 12, 13, 14 and 15.

28 "Declare and rule that the [impugned] law violates: 1) the right to equality of all before the law as provided in particular under Article 10.3 of the African Charter on Democracy, Elections and Governance; 2) the right to have independent and impartial national electoral bodies responsible for elections, as provided in particular under Article 17 paragraph 1 of the African Charter on Democracy, Elections and Governance", p. 11.

29 "Mr President, in light of all that we have argued and all the Pleadings that we have sent to the Court, APDH respectfully asks that its Application be declared admissible and that therefore it should be declared that the Ivorian Law governing the Electoral Commission violates Human Rights in its Article 17 of the African Charter on Democracy, Elections and Governance and therefore condemn Côte D'Ivoire to amend its Electoral Law to the provisions of Article 17 of the Charter so that Côte D'Ivoire can truly become a Democratic State as has been stated in the Charter" Mr Guizot Takoré's Pleadings, *Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, pp. 1 and 12; see also the Pleadings Documents dated 3 March 2016, p. 23.

30 "In its Application, APDH prays the Court to rule that the afore-mentioned Law No. 2014-335, is not in conformity with the African Charter on Democracy and, consequently, order the State of Côte d'Ivoire to review the said law in light of its international commitments".

31 "In its additional pleadings, the Applicant prays the Court to ... declare and rule that the Ivorian law No. 2014-335 of 5 June 2014 (*sic*) on the Independent Electoral Commission, especially the new Articles 5, 15, 16 and 17 thereof, violates the right to equality of everyone before the law as well as the right to an independent and impartial national electoral body with responsibility for management of elections provided under Articles 10(3) and 17(1) of the Charter on Democracy".

32 Additional brief pp. 2, 3 and 4.

33 See *Pleadings document* dated 3 March 2016, pp. 16-17. At the hearing, the Applicant, in its reasoning, however indicated that "the established violations of this law, relate to rights such as the right to equality of all before the law, the right to independent and impartial electoral bodies for management of elections, the right to participate in public affairs, the right to self-determination which are guaranteed both by the African Charter on Human and Peoples' Rights, the African Charter on Democracy, Elections and Governance "as well as the ECOWAS Protocol on Democracy and Good Governance and the International Covenant on Civil and Political Rights, *Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, p. 4.

30. By stating in paragraphs 5 and 6 of the operative part of the judgment that “the Respondent State has violated its obligation to establish an independent and impartial electoral body provided under Article 17 of the African Charter on Democracy and Article 3 of ECOWAS Democracy Protocol and, consequently, also violated its obligation to protect the right of the citizens to participate freely in the management of the public affairs of their country guaranteed by the Article 13(1) and (2) of the African Charter on Human and Peoples’ Rights” and that “the Respondent State has violated its obligation to protect the right to equal protection of the law, guaranteed by the Article 10(3) of the African Charter on Democracy, Article 3(2) of the African Charter on Human and Peoples’ Rights and Article 26 of the International Covenant on Civil and Political Rights”, the Court has, in my opinion, ruled beyond the bounds of the Applicant’s prayers, i.e. *ultra petita*.

31. The Court has, in effect, not complied with the *Ne eat judex ultra petita partium* principle which means that the judge must not “accord the Applicant more than is contained in the claims or adjudicate on subjects not included in the respective pleadings of the parties”.³⁴ Claims consist of “precise and direct statement of the subject-matter of the Application that a party to a proceeding before an international jurisdiction invites this jurisdiction to declare and judge”³⁵ and “are essential in determining what the jurisdictional body must decide”.³⁶ Consequently, the parties to a proceeding must “respect the distinction between claims and “the reasons”, given that the jurisdictional body must make a formal ruling only in regard to the claims”.³⁷

32. The International Court of Justice has, for example, held that it has a duty to respond to the requests of the parties as expressed in their final submissions, but also to refrain from ruling on points that are not included in the requests thus expressed.³⁸ It also indicated that it cannot rule beyond a request made by a party.³⁹

34 “Latin phrase meaning “beyond what was asked”. The phrase is usually used in the sense that a judge should not rule “*ultra petita*”, that is, accord to the Applicant more than is contained in the Application or rule on objects not included in the respective submissions of the parties”, *Dictionary of International Public Law*, op. cit., p. 1112.

35 *Dictionary of International Public Law*, op. cit. p. 225.

36 *Id.*

37 *Id.*

38 *Request for interpretation of the Judgment of 20 November 1950 in the asylum case (Colombia v Peru)*, Judgment of 27 November 1950, *ICJ Reports* 1950, p. 402; see also the *Advisory Opinion on the Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, *ICJ Reports* 1973, pp. 207-208 (paragraph 87). For a more recent reference to the principle by the Hague Court, see its Judgment in the case concerning the Land, Island and Maritime Frontier Dispute (*EI Salvador/Honduras, Nicaragua intervener*), *ICJ Reports* 1992, p. 437 (paragraph 126).

39 The Court having noted in the Application as well as in the reply given by counsel on 8 July 1969, that the Belgian Government did not find its claim on an infringement of the shareholders’ rights, it could not go beyond the claims as formulated by the Belgian Government and will not examine the matter further, *Barcelona Traction Light and Power Company Limited (Spain v Belgium)*, *ICJ Reports* 1970, p. 37 (paragraph 49).

33. In the instant case, the Court could not make a ruling regarding the violation of ECOWAS Protocol on Democracy and Good Governance, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights in the absence of the Applicant's claims regarding the violation of these three instruments.

34. In any event, the Court's decision on the violation by the Respondent State of ECOWAS Protocol on Democracy and Good Governance, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights was not necessary. The Court having in effect held that the African Charter on Democracy, Elections and Governance is "a relevant human rights legal instrument", it could interpret and apply only that instrument. Having held in conclusion that the instrument had been breached, such a conclusion was sufficient to meet the Applicant's request.

35. The requirement that a court should not exceed its jurisdiction by refraining from ruling *ultra petita* must be as imperative in the field of human rights as it is in strictly interstate litigation. In my view, it is a public order and legal security related requirement that must prevail over all other considerations. Any exception to this principle of *ultra petita* fundamental procedure runs the risk of undermining the principle of equality of the parties, the imperatives of proper administration of justice and, hence, the confidence reposed by the parties in the judicial institution.

36. In a trial before a human rights court, the judge may, of course, show flexibility with respect to an Applicant who is an individual or a non-governmental organization. The judge may, for example, "adjust" or "interpret" an Applicant's request for the purpose of identifying a right allegedly infringed. That is what the Court did in the present case by finding that the Respondent State violated the right "to equal protection of the law" (see paragraphs 146-151 of the judgment and point 6 of the operational part), whereas the Applicant only alleged the violation of the right to "equality before the law" (see its Additional Submission dated 4 November 2015⁴⁰ and its pleadings of Thursday 3 March 2016).⁴¹

37. There is indeed a difference of nature between the two rights, reason for which the said two rights are enshrined separately by the African Charter⁴² or the International Covenant on Civil and Political Rights,⁴³ for example. In the instant case, it is not the right to equality of all before the law or the equal Application of the law that was at issue, but rather the right of everyone to equal protection of the law. It was therefore up to the Court to rigorously distinguish between the two

⁴⁰ Additional Brief, pp. 1-7 and 11 (see *supra* note 28).

⁴¹ Mr Guizot Takoré's Pleadings, *Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, pp. 4, 11 and 12; see also the *Pleadings document* dated 3 March 2016, pp. 15-17 and 23.

⁴² Article 3: "1. Every individual shall be equal before the law. 2 Every individual shall be entitled to equal protection of the law".

⁴³ Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ...".

rights and indicate, for example, that considerations of proper administration of justice required it to interpret the Applicant's Application in a way that gives it a meaning; and in so doing, the Court would have dispelled the appearance of having also ruled *ultra petita* with respect to the Applicant's second claim.