



AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Application No. 001/2014

Actions pour la Protection des Droits de l'Homme (APDH)

v. Republic of Côte d'Ivoire

Separate Opinion of Judge Fatsah 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 freedoms¹, and by

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

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 Commission². 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 judgment³), 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, 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

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.

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

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..."

independent and impartial national electoral bodies responsible for the management of elections". Since this instrument does not contain a definition of the concepts of "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

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*, Bruylant/AUF, Brussels, 2001, p. 562.

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 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 2015⁷, its Additional Brief of 4 November 2015⁸ and in its oral pleadings documents of 3 March 2016⁹, 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,

⁷ See pp. 10-12.

⁸ See pp. 8-10.

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

¹⁰ *Additional claims*, p. 11.

influence, pressure, incitement or interference direct or indirect¹¹, 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 relative¹³, designed to ensure both the independence and impartiality of Members of the Court¹⁴. 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 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 nature¹⁵.

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).

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".

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

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 Bangalore 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.

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

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 entities²¹; whereas impartiality has both subjective and objective aspects²². The European Court had already, as far back as 1982, developed specific criteria for determining a court's impartiality²³.

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.

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 of Aguas de Barcelona S.A., and InterAguas 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.

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 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

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.

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 alleges violation of only the African Charter on Democracy, Elections and Governance²⁶; it made a similar allegation in its additional application dated 14 April 2015²⁷, its additional brief dated 4 November 2015²⁸, and at the public hearing held on Thursday 3 March 2016²⁹. The content of paragraphs 37³⁰ and 38³¹

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 Cote 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".

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 submissions³². 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 pleadings³³.

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

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.

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 expressed³⁸. It also indicated that it cannot rule beyond a request made by a party³⁹.

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

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 (El 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 found 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).*

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 2016⁴¹).

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 Rights⁴³, 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.


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 ..."

It was therefore up to the Court to rigorously distinguish between the two 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.



Fatsah Ouguergouz
Judge

