

African Court on Human and Peoples' Rights

X .Y .Z

V / Republic of Benin

Application 059/2019

Dissenting Opinion joined to Order of 02 December 2019

1. In the above-mentioned Order *X Y Z v. the Republic of Benin*, I beg to disagree with the decision of the majority of the judges of the Court on two main issues, that is, deciding not to grant the provisional measures sought and I do not agree with the draft of the operative part.

i) Deciding not to grant the provisional measures sought

2.) It, in fact, emerges from the Order that the Applicant prayed the Court to "order the Respondent State to suspend deliberations on the administrative structure known as the Orientation and Supervision Board established by the constitutional Court in view of the municipal and local elections and to abstain from any act or action which could lead to irreparable harm".

3.) Article 27(2) of the Protocol states that "in case of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary". Furthermore, Rule 51(1) of the Rules of the Court provide that, "the Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

4.) By definition, provisional measures are measures taken under emergency situations without any prejudice to the merits to avoid irreparable harm and whose effects will cease with the decision rendered by the Court on the merits of the case before it. The urgency is determined by the irreparable or aggravated prejudice and the possibility of reinstating the rights on the date the decision on the merit is rendered.

5.) It emerges from the facts which constitute the basis for the request for provisional measures that the Applicant, in his Application on the merits, prayed the Court to order the State of Benin to establish independent and impartial electoral organs, to find that the Respondent State violated his rights to freely participate in the governance of the public affairs of his country, of equal protection of the law, the right to national and international peace and security and the African Charter on Democracy, Elections and Good Governance.

6.) From the facts related by the Applicant which were not refuted by the Respondent who failed to reply to the Application of the Applicant even though she was duly notified, it emerges that the independent administrative structure in charge of the national electoral register and the establishment of the permanent computerized electoral list, the subject of the request for provisional measures, is composed only of representatives of the presidential camp and will be used during the elections slated for the first quarter of 2020.

7.) It also emerges from the annual programme of the Court sessions that the first session to be held by the Court in 2020 will be in the month of March. Based on the circumstances, the probability for the matter to be considered on the merits well after the elections should be considered on the one hand.

8.) And, the Applicant questions the reliability of the organ charged with preparing the electoral register with regard to the guarantee for democratic elections where all other categories of persons of Benin nationality will be represented on the other hand. It is evident that the urgency in this matter cannot be over emphasised and that the harm which may befall the Applicant through the activities of this structure, if it remains operational in spite of the merits of the case, which questions the alleged non-democratic nature would be irreparable. Therefore, the extreme gravity and irreparable harm, key elements contained in Article 27(2) of the Protocol are established.

9.) Thus the Court, by limiting itself to paragraphs 24 and 25 and finding that "the request for provisional measures which calls for the suspension of the electoral organ in question also concerns the merits of the case which the Court is called upon to decide, that is, the likely partiality of the structure" and "that the Applicant fails to provide evidence of the urgent and serious nature and the risk of irreparable harm which the structure could cause him...." failed in its obligation to provide reasons for its decisions.

10.) Suspending the activities of a key structure in the electoral process in the Respondent State cannot, in any way, be prejudicial to the merits of the case because if this organ continues to elaborate on the electoral process and the elections are organised, the merits of the case would no longer be required to exist because it will be baseless. Consequently, the Court, out of lack of diligence, will make the Applicant suffer from irreparable prejudice especially because the merits of the case will be based on the impartiality and independence of electoral organs.

11.) The meaning of the expression "does not prejudge the merits of the case" does not, in any case, mean that the circumstances and facts surrounding the main application are not taken into account in determining the urgency and the irreparable damage but that the provisional measures taken do not concern the merits in the present case for example, that the composition of the organs is not independent and that, therefore, the measures taken on that basis run counter to the aforementioned rule.

12.) And that, in the interest of justice, and in order that the merits of the case should not be considered baseless through the effective execution of deliberations of the organ and, therefore, the organization of the elections in the first quarter of 2020, the Court should have granted the request of the Applicant.

ii) **drafting of the operative part of the Order**

13.) It emerges from the operative part of the Order that the Court simply Declared as follow: "by a majority of 9 for and 2 against, decides not to grant the measures." In my opinion, this approach is inconsistent with the terms of Articles 3 and 5(3) of the Protocol and, even, the content of the Order rendered.

14.) In terms of Articles 3 and 5(3) of the Protocol, when the Court is seized of an Application, the Court will carry out a preliminary observation of its jurisdiction. This obligation of the Court was fulfilled from paragraphs 12 to 17 of the Order with references to its jurisprudence which in matters of provisional measures, does not require the Court to ensure that it has jurisdiction on the merits of the case but should simply determine that it has *prima facie* jurisdiction.

15.) That, by concluding in its paragraph 17 that it has *prima facie* jurisdiction, the Court was already determining the first phase of what should have appeared in the operative part. In my opinion, the operative part should have been:

For these reasons

The Court

Unanimously,

Declares that it has *prima facie* jurisdiction

By a majority of 9 for and 2 against.....

Declares the Application for provisional measures unfounded

Judge Bensaoula Chafika

