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(001013-000977) ON

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AFRICAN UNION

الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

ACTIONS POUR LA PROTECTION DES DROITS DE L'HOMME

(APDH)

V.

THE REPUBLIC OF CÔTE D'IVOIRE

APPLICATION 001/2014

JUDGMENT OF 18 NOVEMBER 2016

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

The Court composed of: Ben KIOKO, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Augustino S. L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE, Judges ; and Robert ENO, Registrar.

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein-after referred to as "the Protocol") and Rule 8(2) of the Rules of Court (herein-after referred to as "the Rules"), Judge Sylvain ORÉ, President of the Court, citizen of Côte d'Ivoire, did not hear this case.

In the Matter of:

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

1) Mr. Abraham Denis YAUROBAT, President, APDH National Executive Bureau;
2) Mr. Guizo Bernard TAKORE, President, APDH Judicial Committee.

versus

The Republic of Côte d'Ivoire represented by:

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

After deliberation,
renders the following Judgment:

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 negotiations[1] 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 Agreement[2] and the signing of Presidential Decisions Nos. 2005-06/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.

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[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.

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.

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 Rules[3] and paragraph 45 of its

[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.

Practice Directions[4], 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 Judges heard the oral pleadings of the Parties:

For the Applicant:

Mr. Guizo Bernard TAKORE, President, APDH Judicial Committee.

[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.

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) 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 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.

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 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 Africa[5] 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.

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

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 or 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 "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 rights prescribed by Article 13 of the Charter on 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

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[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 (Case of *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 2 March 1987, series A No. 113, pp. 22-23, §§ 46-51).

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.

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

1) 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]

[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, paragraph 91.

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.

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.

2) 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 *Nobert 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.

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

[9] Application No. 013/2011, Judgement of 28 March 2014, paragraph 68

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

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 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

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

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 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

[12] *Dictionary of International Public Law - Jean SALMON, Bruylant, Brussels, 2001, pages 570 and 562.*
[13] *Electoral Management Design: Handbook of the IDEA*, 2010, page 7

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 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 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

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

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*[17] 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".

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.

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[15] *Dictionary of Human Rights* under the direction of Joël Andriantsimbazovina, Hélène Gaudin, Jean-Pierre Maguénaud, Stéphane Rials and Frédéric Sudre, French University Press, 2008, page 284

[16] *Dictionnary of International Public Law*, under the direction of Jean SALMON, Bruylant, Brussels, 2001, page 344

[17] Application 1022/03, Judgment of 8 July 2008, paragraph 21

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.

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 GUISSÉ 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.

Signed:

Ben KIOKO, Vice-President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Augustino S.L. RAMADHANI, Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

El Hadji GUISSE, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge;

and Robert ENO, Registrar.

Done at Arusha, this Eighteenth Day of November 2016 in English and French, the French text being authoritative.

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the separate opinion of Justice Fatsah Ouguergouz is attached to this Judgement.