

XYZ v Benin (provisional measures) (2019) 3 AfCLR 754

Application 059/2019, *XYZ v Republic of Benin*

Ruling, 2 December 2019. Done in English and French, the french text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM, ABOUD

The anonymous Applicant claimed that the Orientation and Supervisory Council (COS) set up to organize an electoral census and establish a permanent computerized electoral role was composed so as to not making it impartial. The Court did not issue the provisional measures requested as the Applicant had not provided evidence of what irreparable damage COS would cause the Applicant.

Jurisdiction (*prima facie*, 13-17)

Provisional measures (evidence, 24)

Separate opinion: BEN ACHOUR

Provisional measures (12, 19, 22)

Separate opinion: BENSAOULA

Provisional measures (11, 12)

I. The Parties

1. On 2 September 2019, the Applicant (hereinafter referred to as “XYZ”) a national of Benin having requested anonymity, seized the Court with an application against the Republic of Benin.
2. On 26 September 2019, the Applicant submitted an application for provisional measures.
3. During its 53th Ordinary session, the Court granted the Applicant request for anonymity.
4. The Republic of Benin (hereinafter referred to as “the Respondent State”) became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State also filed the Declaration provided for in Article 34(6) of the Protocol whereby it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations.

II. Subject of the Application

5. The Applicant alleges that as part of the preparations for the organization of elections, the Respondent State set up an administrative structure called the Orientation and Supervisory Council (COS). This body is responsible for the implementation of Law 2009-10 of 13 May 2009 to organize the in-depth national electoral census and the establishment of the permanent computerized electoral roll.
6. The Applicant questions the neutrality of COS because, according to him, its members represent only the political parties of the presidential majority, no political party of the opposition being a member.
7. The Applicant states that because of this situation, the last parliamentary elections took place without the participation of the opposition parties, which for him is in violation of the Constitution and international instruments on democracy and elections. He believes that the biased nature of this structure also means that the local elections scheduled to be held early in 2019, cannot be free and democratic and thus a threat to the Republic of Benin's democracy.

III. Alleged violations

8. The Applicant alleges the following violations:
 - i. obligation by the State of Benin to establish independent and neutral electoral organs;
 - ii. the right to participate freely in the management of public affairs of his country;
 - iii. the right to equal protection of the law;
 - iv. the right to peace and national and international security;
 - v. the African Charter on Democracy, Elections and Governance.

IV. Summary of the proceedings before this Court

9. On 02 September 2019, the Court received an Application concerning the functioning of the independent administrative structure in charge of the management of the national electoral register and the establishment of the permanent electronic electoral roll called the Orientation and Supervisory Council. (COS).
10. On 26 September 2019, the Applicant submitted an application for provisional measures concerning the operation of this

administrative structure.

11. The application for provisional measures was served on the Respondent State on 4 October 2019 which was granted fifteen (15) days in which to respond. The Respondent State requested for additional time which was granted until 24 November 2019 but it did not yet submit its Response.

V. Jurisdiction of the Court

12. When considering an application, the Court conducts a preliminary examination of its jurisdiction on the basis of Articles 3, 5(3) and 34(6) of the Protocol.
13. However, with regard to provisional measures, in conformity with its constant jurisprudence, the Court does not have to ensure that it has jurisdiction on the merits of the case, but simply that it has *prima facie* jurisdiction.
14. Pursuant to Article 5 (3) of the Protocol, “The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.
15. As mentioned in paragraph 2 of this Ruling, the Respondent State is a Party to the Charter, to the Protocol and has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.
16. On the merits, the rights claimed by the Applicant as having been violated are protected by the Charter, the Protocol of the Economic Community of West Africa (ECOWAS) on Democracy and Good Governance in addition to the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security and the African Charter on Democracy, Elections and Governance (ACDEG), which are instruments that the Court is empowered to interpret and apply under Article 3(1) of the Protocol.
17. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to consider the application.

VI. Provisional measures requested

18. The Applicant prays the Court to order the Respondent State:
 - i. to suspend the work of the administrative structure called Orientation and Supervisory Council (COS) established by the Constitutional Court on 06 September 2019 and the holding of municipal and local

elections pending the decision on the merits of the main application.

- ii. to refrain from any act or action which could cause irreparable damage and which could irreparably prejudice the main application before the Court until it has decided on the said application.
- iii. to send a report to the Court within a time period that the Court may decide to set.

19. The Court notes that Article 27(2) of the Protocol provides as follows:
“In cases 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”.
20. Furthermore Rule 51(1) of the Rules of Court states 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”.
21. Based on the foregoing provisions, the Court will take into account the law applicable to provisional measures, which are of a preventive nature and do not prejudge the merits of the application. The Court may order them *pendente lite* only when the basic conditions are met: extreme gravity, urgency and the prevention of irreparable harm to persons.
22. The Court notes that the Applicant questions the functioning of the administrative structure (COS) which, because of its imbalanced composition between the ruling party and the opposition parties, would not be neutral and would cast doubts on the smooth organization of future elections.
23. The Court observes that the application for provisional measures to suspend the functioning of the administrative structure, the COS in question also touches on the question of the merits on which the Court is called upon to rule in due course.
24. The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this administrative structure could cause him, as required by Article 27 of the Protocol.
25. In view of the foregoing, the request for provisional measures is rejected.

VII. Operative part

26. For these reasons,
The Court,

- i. *By a majority of 9 for and 2 against, Justices Rafaâ Benachour and Chafika Bensaoula voted against,*
- ii. *Dismisses the application for provisional measures.*

Dissenting opinion: BEN ACHOUR

1. I regret not sharing the Court's decision to dismiss the request for indication of provisional measures made by Applicant XYZ in the case between him and the Republic of Benin (Application 59/2019).
2. The Applicant's prayer is that the Court should order the Respondent State to:
 - i. suspend the work of the administrative structure called Orientation and Supervisory Council (COS) established by the Constitutional Court on 06 September 2019 and the holding of municipal and local elections pending the decision on the merits of the main application.
 - ii. refrain from any act or action which could cause irreparable damage and which could irreparably prejudice the main application before the Court until it has decided on the said application.
 - iii. send a report to the Court within a time period that the Court may decide".
3. Before turning to the present case, it is noteworthy that most international jurisdictions are empowered to pronounce provisional or protective measures.¹ This was the case with the Permanent Court of International Justice (PCIJ), and is also the case with the International Court of Justice (ICJ),² the European

1 Cf R Bernhardt (ed) *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994; L Collins 'Provisional and Protective Measures in International Litigations', *Recueil des Cours de l'Académie de Droit International*, 1992, Vol 23.

2 Article 41(1) of the Statute: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

Court of Human Rights (ECHR)³ and the Inter-American Court of Human Rights,⁴ the Court of Justice of the European Union (CJEU),⁵ and the Economic Community of West African States - ECOWAS - Community Court of Justice (ECCJ).⁶ This is also the case with “quasi-jurisdictional” bodies such as the Human Rights Committee,⁷ the Committee against Torture⁸ and the African

- 3 Rule 99 of the Rules of Court: 1. The chamber or, where appropriate, the president of the section or a duty judge appointed in accordance with paragraph 4 of this article may, either at the request of a party or any other interested person, or *proprio motu*, indicate to the parties any provisional measure they consider necessary to be adopted in the interest of the parties or the proper conduct of the procedure. 2. If necessary, the Committee of Ministers is immediately informed of the measures adopted in a case. 3. The chamber or, where appropriate, the president of the section or a duty judge appointed in accordance with paragraph 4 of this article may invite the parties to provide them with information on any question relating to the implementation of the interim measures indicated. 4. The President of the Court may designate vice-presidents of sections as duty judges to rule on requests for interim measures”.
- 4 Article 63(2) of the Convention: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission”.
Article 25(1) of the Rules of Procedure: 1. At all stages of the proceedings, in cases of extreme urgency and gravity, and when it becomes necessary to prevent irreparable damage to persons, the Court may order, *proprio motu*, or at the request of a party, under the conditions provided for in article 63.2 of the Convention, the provisional measures it deems relevant. “
- 5 Article 160 of the Rules of Procedure of the Court: “1. An application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU or Article 157 TEAEC, shall be admissible only if the applicant has challenged that measure in an action before the Court. 2. An application for the adoption of one of the other interim measures referred to in Article 279 TFEU shall be admissible only if it is made by a party to a case before the Court and relates to that case”.
- 6 Article 79 of the Rules of Procedure: 1. An application under Article 20 of the Protocol shall state the subject- matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. 2. The application shall be made by a separate document and in accordance with the provisions of Articles 32 and 33 of these Rules.
- 7 Article 92 of the Rules of Procedure of the Committee: 1 “Before informing the State party concerned of its final views on the communication, the Committee may inform that State of its views on the advisability of taking interim measures to avoid irreparable harm being caused to the victim of the alleged violation. In so doing, the Committee informs the State party that the expression of its views on the adoption of the said interim measures does not imply any decision on the communication on the merits”.
- 8 Article 114 (1) of the Rules of Procedure: 1. “At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State Party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.”

Commission on Human and Peoples' Rights.⁹

4. The reference text for this Court in matters of provisional measures is Article 27(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights dated 9 June 1998 (hereinafter referred to as "the Protocol") which provides that:
"In cases of extreme gravity or urgency, and when it is necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".
5. For its part, Article 51(1) of the Rules of Court clarified the foregoing provision of the Protocol in these terms:
"Pursuant to 27(2) of the Protocol, 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."
6. In the present case, the Applicant criticizes the partisan composition of the Orientation and Supervisory Council (COS), and in view of the imminent electoral deadline, scheduled, in principle, for the first quarter of 2020, he expresses the fear that by the time the Court will examine the case on the merits, it would be too late, that is, the elections would already have taken place.
7. In dismissing the request for provisional measures, the Court considers that the question of stay of the work of COS prejudices the merits of the case and that evidence of the urgency and seriousness of the situation has not been provided by the Applicant:
"23. The Court observes that the application for provisional measures to suspend the functioning of the administrative structure, the COS in question also touches on the question of the merits on which the Court is called upon to rule in due course.
24. The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this administrative structure could cause him, as required by Article 27 of the Protocol.
25. In view of the foregoing, the request for interim measures is rejected."
8. We do not share the opinion of the majority, as it is apparent to us that the request for provisional measures satisfies the two criteria laid down in Article 27(2) of the Protocol, namely, on the one

9 Rule 98(1) of the Rules of Procedure of the Commission: "At any stage of the Communication, and before the decision on the merits, the Commission may, on its own initiative or at the request of a party to the Communication, indicate to the State party concerned as soon as the situation requires, the provisional measures to be adopted to prevent irreparable harm from being caused to the victim(s) of the alleged violation."

hand, “the extreme gravity or urgency” (I) and, on the other hand, the possibility of “irreparable harm” (II), it being understood that these two criteria are both cumulative and mutually connected. As for the statement that examination of the request for interim measures “also touches on the question of the merits of the matter”, this is self-evident. No examination of a request for provisional measures can disregard the merits of the case, but the decision on provisional measures does not prejudice the merits (III).

I. Extreme gravity or urgency

9. Provisional measures are part of the emergency measures ordered by courts. They have been transposed from internal procedural law to international law. In the international order, they have several similarities with certain internal emergency procedures such as the stay of execution procedure, well known in administrative law. As Justice Cançado Trindade rightly points out, provisional measures have a “preventive dimension” in the international protection of human rights. He specifies that they “represent today a veritable jurisdictional guarantee of a preventive nature and constitute one of the most gratifying aspects of the international action for safeguard of fundamental human rights”.¹⁰
10. Concerning the powers of the AfCHPR to indicate provisional measures, this character of emergency procedure is highlighted by the text of the Protocol which predicates the exercise of this power on “cases of extreme gravity or urgency”. Consequently, the Court must ascertain whether there is urgency, that is, whether there is a real risk that an action prejudicial to the rights of the Applicant will be committed before the Court renders its decision on the merits. The issue is therefore that of parrying as quickly as possible to avoid any complication of the situation.
11. Urgency is obviously not assessed *in abstracto*, but rather on the basis of the facts of the case as they emerge from both the application for provisional measures and from the application regarding the merits. A request for provisional measures cannot be considered by the Court where an application on the merits has not been brought. However, in order to issue provisional measures, the Court does not need to establish the existence

10 AA Cancado Trindade “Provisional measures in the case-law of the Inter-American Court of Human Rights”, Lecture delivered on 2 July 2002 as part of the round table organized in Strasbourg by the International Institute for Human Rights and the University of Paris II. <http://www.corteidh.or.cr/tablas/r26311.pdf>

of violations of the Charter or any other human rights instrument ratified by the Respondent State, or make a definitive ruling on the facts. Indeed, an Applicant may, within the framework of a request for provisional measures, avail himself of the rights recognized by the Charter, once it has been established that continuation of the impugned State action bears the risk of depriving the Court's judgment on the merits, of all effectiveness, thus rendering the application baseless.

12. In the present case, it is *prima facie* established that the composition of COS poses a problem insofar as no political opposition party is represented therein. Furthermore, the imminent date of the communal, municipal and local elections is a fundamental element which the Court should have taken into account in concluding that the element of urgency is established and in ordering, on this basis, the stay of the pursuit of COS work, all the more so because it is absolutely certain that the Court will not be able to rule on the merits of the case before the said elections.

II. Irreparable harm

13. The second criterion set out in Article 27(2) of the Protocol refers to the notion of "irreparable harm". The aim of the provisional measures which the Court may impose is to "avoid" such irreparable harm to persons.
14. In fact, it is needful to institute provisional measures as soon as the Respondent State's behaviour is such as may cause the Applicant harm which will subsequently be very difficult or impossible to adequately erase or repair. Consequently, the purpose of provisional measures is to avoid aggravating a dispute and allow for proper administration of justice.
15. For example, in the *Lagrand* case, the International Court of Justice on 3 March 1999, issued an order for interim measures by which it required the United States, to *inter alia* "take all the necessary measures to ensure that (the German nationals) were not (executed) until a decision is rendered on the case". The two German nationals were, however, executed by the United States.
16. In the matter of the United States diplomatic and consular staff in Tehran, the ICJ considered that "Whereas continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm", the Court finds that "the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of

- the Court, in order to preserve the rights claimed”.¹¹
17. Thus, and as the ICJ notes, “... the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings before the judge, and that no initiative concerning the disputed measures must anticipate the Court’s judgment”¹².
 18. In the case law of all international human rights bodies, the irreparable nature of the harm is decisive for indication of provisional measures. This is the case for regional courts¹³ and also for the United Nations treaty committees or for the African Commission on Human and Peoples’ Rights. In most cases, provisional measures relate to deportation and extradition orders or death sentences¹⁴.
 19. In the present case - *XYZ v the Republic of Benin* - the Court did not seek to ascertain the date of the elections. It merely stated that “The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this structure could cause him, as required by Article 27 of the Protocol”, whereas it is incumbent on the Court itself to so, pursuant to its investigative power. By virtue of its mission to protect human rights, the Court has the duty to ensure that the alleged violation of a human right is not capable of producing irreparable harm and that the violation would be largely completed at the time the Court examines the merits. By failing to do so, the Court may find itself dealing with an application which has become purposeless. We will again quote Judge Cançado Trindade who fully agreed to this point when

11 ICJ:United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Order of 15 December 1979, paras 42 and 43.

12 ICJ: *Case concerning jurisdiction over fisheries (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Request for the indication of provisional measures, Order of 17 August 1972

13 For example, the ECHR received in 2018 (1,540) requests for provisional measures as against (1,683) in 2017. The Court granted the request in 143 cases (compared to 117 in 2017, an increase of 22%) and rejected the requests in 486 cases (compared to 533 in 2017 - a decrease of 9%). The other requests fell outside the scope of Article 39 of the Regulation. 59% of the requests received concerned deportation or immigration cases. Source: ECHR, 2018 Statistical Analysis. https://www.echr.coe.int/Documents/Stats_analysis_2018_FRA.pdf

14 P Olumba “International Jurisdictions and Emergency Procedures in Human Rights Matters”, *African Human Rights Journal* 2011, pp. 341-366.

he wrote that “the object of prevention or provisional measures in international litigation (under international public law) is well known: it is to preserve the rights claimed by one of the parties as to the merits of the case, thus preventing the case from being devoid of purpose and effectiveness, and the final result of the trial from being frustrated”¹⁵.

III. The interim measures order does not prejudice the merits

20. By definition, the measure ordered by the Court is simply provisional. This means that not only is it not final, but that it is also reviewable or even revocable at any time if, having regard to the circumstances of the case, the Court deems such action necessary. This derives from the very nature of orders for provisional measures and the Court’s discretionary power to make a determination.
21. In several of its orders for provisional measures, the Court made clear that its power in such matter can be exercised only in regard to the circumstances of the case. This logically means that it is impossible to consider a request for provisional measures in itself and by itself, while disregarding the elements of the merits. This, in the present case, would be an impossible exercise. To determine the relevance of a request for provisional measures, the Court must imperatively bear in mind the seriousness of the application on the merits, the nature of the alleged human rights violations, the circumstances of such violations, etc. As stated in several of its subsequent orders, “The Court observes that it is up to it to decide in each particular case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred by the above provisions”.¹⁶
22. Similarly, the Court has always made clear in all its orders that “This order deciding [on] provisional measures remains provisional in nature and does not prejudice the Court’s conclusions on the merits of the case”¹⁷ Consequently, in the order at issue, the Court did not have to dismiss the application on the ground that it “also touches on the merits”. This is obvious. Any request for provisional measures also touches on the merits, but it never

15 Cancado Trindade, *op cit*, 14.

16 *Suy Bi Gohore Emile and Others v Republic of Côte d’Ivoire*, Application 44/2019, Order for provisional measures, 28 November 2019.

17 *Idem*.

prejudges the merits. It is this nuance that we would have liked to see the Court enshrine in this order.

Dissenting opinion: BENSAOULA

1. In the above-mentioned Order *XYZ 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 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 Applicant's Application 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, it carries out a preliminary examination 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,

- i. Declares that it has *prima facie* jurisdiction
- ii. By a majority of 9 for and 2 against
- iii. Declares the Application for provisional measures unfounded