XYZ v Benin (judgment) (2020) 4 AfCLR 49

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

Judgment, 27 November 2020. Done in English and French, the French text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD.

The Applicant brought this action alleging that the Respondent State had violated certain rights protected in the Charter and other human rights instruments to the extent that the national parliament was illegitimate, and the electoral commission was not independent and impartial. The Court held that the Respondent State had only partly violated some of the rights claimed.

Jurisdiction (annulment of elections, 28-30; material jurisdiction, 31-32)

Admissibility (abuse of *actio popularis*, 44, victim requirement, 55, 57; exhaustion of local remedies, 71)

Procedure (joinder and non-joinder, 50)

Right to participate freely (independence and impartiality of electoral commission, 116, 118, 120, 122, 123)

Equal protection of law (nature of obligation, 151-152)

Reparation (basis for, 158; power to annul elections 168; counterclaim, 173)

I. The Parties

1. XYZ (hereinafter referred to as "the Applicant") is a national of Benin. He requested anonymity which was granted to him by the Court in accordance with Article 56(1) of the Charter and Rules 41(8) and 50(2)(a) of the Rules of the Court (hereinafter referred to as "the Rules"). He challenges the independence and impartiality of electoral bodies as well as the composition of the National Assembly.

2. The Application was filed against the Republic of Benin (hereinafter referred to as "the Respondent State") which 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. It further made the Declaration provided for in Article 34(6)

of the Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations. On 25 March 2020, the Respondent State deposited, with the Chairperson of the African Union Commission, the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that the Respondent State amended its electoral law No. 2019-43 of 15 November 2019 (hereinafter referred to as "the Electoral Code of 2019) less than six months before the 17 May 2020 local and municipal elections which, he contends, is contrary to the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance, supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter referred to as the "ECOWAS Protocol on Democracy").

4. The Applicant submits that the National Assembly, which amended the electoral laws, is itself illegitimate because it is composed solely of members of the presidential camp, with no "serious" opposition political party being a part of it.

5. The Applicant further alleges that, in implementing the revised electoral laws, the Respondent State set up the "*Conseil d'orientation et de supervision de la Liste électorale permanent informatisée*" [*Guidance and Supervision Council of the Permanent Computerised Electoral List*] (hereinafter referred to as "the COS-LEPI") and the "*Commission électorale nationale autonome"* [*Independent National Electoral Commission*] (hereinafter referred to as "the CENA"), bodies in charge of organising a national electoral census and establishing the permanent computerised voters' list, as well as organising the elections.

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling of 5 May 2020 (provisional measures), §§ 4-5 and the Corrigendum of 29 July 2020.

6. The Applicant questions the independence and impartiality of these two bodies, given that their members represent only the political parties of the presidential camp. He concludes that the municipal and local elections of 17 May 2020 could not be considered free, fair and transparent and that they must therefore be annulled by this Court.

B. Alleged violations

7. The Applicant alleges the:

i. Illegitimacy and illegality of the National Assembly in amending electoral laws;

ii. Violation of the obligation to create independent and impartial electoral bodies, under Articles 13(1) of the Charter, Article 17 of the African Charter on Elections and Democracy (hereinafter referred to as "the ACDEG") and Article 3 of the ECOWAS Protocol on Democracy;

iii. Violation of the obligation to not make unilateral and substantial amendments of electoral laws less than six months before the elections, provided for in Article 2(1) of the ECOWAS Protocol on Democracy;

iv. Violation of the obligation to guarantee national and international peace and security, provided for in Article 23 of the Charter;

v. Violation of the right to equal protection of the law, guaranteed by Article 3(2) of the Charter.

III. Summary of the Procedure before the Court

8. The Application on merits was received at the Registry on 2 September 2019. In his Application, the Applicant requested for anonymity, citing personal security reasons.

9. During its 53rd Ordinary Session held from 10 June 2019 to 5 July 2019, the Court granted the Applicant's request for anonymity and informed the parties accordingly.

10. The Application on merits was served on the Respondent State on 12 December 2019.

11. On 26 September 2019, the Applicant filed a request for provisional measures which was dismissed by an Order of the Court of 2 December 2019.

12. After various extensions requested by the Parties, they filed their submissions on the merits and reparations within the extended time limit set by the Court.

13. Pleadings were closed on 12 November 2020 and the Parties were duly notified.

IV. Prayers of the Parties

14. The Applicant prays the Court to rule or find that the Respondent State violated the following:

i. The right of citizens to participate freely in the government of their country, guaranteed by Article 13(1) of the Charter;

ii. The right to equal protection of the law, guaranteed by Articles 10(3) of the ACDEG, 3(2) of the Charter and 26 of the International Covenant on Civil and Political Rights;

iii. The obligation to establish an independent and impartial electoral body in accordance with Article 17 of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy;

iv. The obligation to guarantee national and international peace and security, provided for in Article 23 of the Charter;

v. The obligation not to unilaterally amend electoral laws less than six months before the election without a "political majority";

vi. The obligation to hold transparent, free and fair elections;

vii. The electoral process of 17 May 2020 is null and void;

viii. The Respondent State shall bear the costs.

15. The Respondent State prays the Court to declare that it lacks jurisdiction on the following grounds:

i. The Court does not have the power to annul an election;

ii. The Applicant does not allege any human rights violations.

16. The Respondent State prays the Court to declare the Application inadmissible for the following reasons:

i. The Applicant is misusing the right to seize the Court;

ii. There is no link between the main Application and the Additional Application;

iii. The Applicant's lack of standing and lack of proof of victim status.

17. The Respondent States further prays the Court to declare the Application inadmissible for the following reasons:

i. The Application is incompatible with the Charter and the Constitutive Act of the African Union;

ii. The Applicant failed to exhaust local remedies.

18. The Respondent State prays the Court to find that:

i. CENA members enjoy sufficient immunity that protects them from possible pressures;

ii. Electoral Code of 2019 is the result of a consensual political consultation which led to its adoption more than six months before the municipal elections of May 2020;

iii. There is no act of the electoral process relating to the 2020 local elections that is flawed in such a way as to warrant the annulment of said elections;

iv. COS-LEPI was legally and legitimately instituted and its bureau is legitimate;

v. There is no violation by the State of Benin of the right the citizens to participate in the government of their country.

19. The Respondent State requests the Court to order the Applicant to pay the State two billion (2,000,000,000) CFA francs, as a counterclaim, for all damages suffered.

V. Jurisdiction

20. When the Court is seized of an application, it shall undertake a preliminary examination of its jurisdiction. Article 3 of the Protocol provides as follows:

1. 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 instruments ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

21. Furthermore, under Rule 49(1) of the Rules,[2] "[t]he Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

22. It follows from the above provisions that the Court must, in respect of any application, conduct a preliminary assessment of its jurisdiction and rule on the objections raised, if any.

23. The Court notes that, in the present case, the Respondent State has raised objections relating to the Court's material jurisdiction. It has, moreover, raised the Court's lack of personal jurisdiction to hear allegations of violations of its obligation under the ECOWAS Protocol on Democracy.

A. Objection to material jurisdiction

24. The Court notes that the Respondent State raises two objections, that is, (i) its lack of jurisdiction to annul an election and (ii) the failure by the Applicant to invoke a case of violation of human rights. The Court will examine these two objections together

2 Formerly, Rule 39(1) of the Rules of 2 June 2010.

under material jurisdiction because they are linked.

25. The Respondent State alleges that, under Article 26 of the Rules,[3] the Court has no jurisdiction to annul municipal and local elections that have not been disputed at the domestic level, and that such a decision would be a breach of its sovereignty. The Respondent State argues that "[t]he Court's mission is to ensure the protection of human rights and not to engage in challenging the legal system of the Member States".

26. The Respondent State further argues that, under Article 3(1) of the Protocol, the Court has jurisdiction to entertain cases of human rights violations and that, under Article 34(4) of the Rules,[4] the Application must indicate the alleged violation. The Respondent State submits that in the instant case, the Applicant was required to "[i]ndicate in a characteristic way, the alleged violations of human rights, and not merely refer to hypothetical cases."

27. The Applicant did not reply.

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28. As regards the objection that the Court lacks jurisdiction to annul an election that has not been challenged at the national level, the Court observes that such a measure falls within the scope of the forms of reparation for human rights violations. In this regard, Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

29. The Court holds that, under the above cited provision, its power to order remedies is contingent on the prior finding of a violation of human or peoples' rights and the appropriateness of such measures in the instant case, the Court is of the opinion that, contrary to the allegation of the Respondent State, its material jurisdiction cannot be conditioned on the fact that the elections have not been challenged at the national level.

30. Based on the foregoing, the Court finds that it has the power to order the annulment of an election if it deems this measure

3 Current Rule 29(1)(a) of the Rules of 25 September 2020.

4 Current Rule 41(1)(f) of the Rules of 25 September 2020.

appropriate to remedy the violation found. This objection is therefore dismissed.

31. With regard to the objection relating to the Applicant's failure to specify a human rights violation, the Court notes that, under Article 3 of the Protocol cited above, it has the power to hear any allegation of a human rights violation. The Court considers that in order for it to have material jurisdiction, it suffices that the rights which are alleged to have been violated are protected by the Charter or by any other human rights instrument ratified by the State concerned.[5]

32. In the instant case, and contrary to the Respondent State's objection, the Court notes that the Applicant alleges the violations by the Respondent State of human rights and obligations under the Charter, the ECOWAS Protocol on Democracy and Good Governance and ACDEG[6] which are instruments it is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.[7]

33. Consequently, this objection is dismissed.

B. Objection to the Court's personal jurisdiction

34. The Respondent State alleges that the Court does not have jurisdiction to hear the case because, in accordance with Article 10 of Additional Protocol A/SP/01/05 on the ECOWAS Court of Justice (ECOWAS Court), applications against Member States for failure to fulfil their obligations are reserved for specific entities and individuals are not included among them.

35. The Applicant did not reply.

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5 *Franck David Omary & ors v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 371, § 74; *Peter Chacha v United Republic of Tanzania* (ruling on admissibility) (28 March 2014) 1 AfCLR 413, §118.

6 The Respondent State became a party to the ACDEG on 11 July 2012 and the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance, supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Resolution, Peacekeeping and Security (ECOWAS Protocol on Democracy) on 20 February 2008.

7 See *Actions pour la protection des droits de l'homme v Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016) 1 AfCLR 668, §§ 47-65.

36. The Court notes that the Respondent State raises this objection as a condition of admissibility. However, the objection relates to jurisdiction and must be examined in this section because it is an exception relating to the matter Applicant's standing before the Court.

37. The Court notes at the outset that the Respondent State's allegation is based on the conditions governing the jurisdiction of the ECOWAS Court and the admissibility of applications before that court, which are not applicable to this Court. The conditions of access to this Court by individuals are governed by the Protocol and its Rules. Consequently, this objection is baseless and is therefore dismissed.

C. Other aspects of jurisdiction

38. Having found that there is nothing on the record to indicate that it does not have jurisdiction with respect to the other aspects of jurisdiction, the Court concludes that it has:

i. Personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and Non-Governmental Organisations to bring cases directly before the Court. In this vein, the Court recalls its earlier position that the Respondent State's withdrawal of its Declaration on 25 March 2020 does not have effect on the instant Application, as the withdrawal was made after the Application was filed before the Court.[8]

ii. Temporal jurisdiction, in so far as the alleged violations were committed, in respect of the Respondent State, after the entry into force of the applicable human rights instruments;

iii. Territorial jurisdiction, since the alleged acts occurred on the territory of a State Party to the Protocol, namely the Respondent State.

39. In the light of the foregoing, the Court declares that it has jurisdiction to hear the present Application.

VI. Preliminary objections

40. The Court notes that the Respondent State has raised preliminary objections relating to the admissibility of the Application, namely: A) abuse of *actio popularis*, B) the lack of connection between the main Application and the additional Application, and C) lack of standing and of evidence of victim status.

8 See paragraph 2 above.

41. The Court points out that even though, under the Protocol and the Rules, these exceptions are not specifically provided for, it is required to examine them.

A. Preliminary objection on abuse of *actio popularis*

42. The Respondent State alleges that the unknown Applicant is misusing "*actio popularis"*, by using the facilities of access to the Court to file a number of applications, including "Applications Nos. 207/2019, 218/2019, 232/2019, 316/2019, 317/2019, 232/2019 349/2019, 391/2019, and 447/2019".

43. The Applicant did not reply.

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44. The Court notes that an application is said to be abusive, among others, if it is manifestly frivolous or if it can be discerned that an applicant filed it in bad faith contrary to the general principles of law and the established procedures of judicial practice. In this regard, it should be noted that the mere fact that an applicant files several applications against a particular Respondent State does not necessarily show a lack of good faith on the part of the applicant. More substantiation regarding, for example, the applicant's intention to unjustifiably put a burden on the Respondent State to constrain its litigation capacity is required.

45. The Court further notes that the fact that an application was prompted by reasons of political propaganda, even if it were established, would not necessarily render the application abusive and that, in any event, that fact can only be established after a thorough examination of the merits.

46. The Court therefore concludes that the issue of abuse of rights, which is essentially a question of the merits, cannot be decided at the present stage of the proceedings.

B. Preliminary objection on the lack of a link between the Main Application and the Additional Application

47. The Respondent State alleges that an Additional Application is admissible only if it is sufficiently linked to the main application. The Respondent State further argues that, in the present case, the main Application Nos. 020/2019 and 021/2019 relates to

the Criminal Code and the annulment of the conviction of Mr Lionel Zinsou, whereas the Additional Application relates to the annulment of the municipal and local elections." In support of its allegation, the Respondent State cites the Court's decision in the case of *Sébastien Ajavon v Republic of Benin*[9] of 29 March 2019.

48. The Applicant did not reply.

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49. The Court notes that Rule 62 of the Rules[10] provides:

1. The Court may, at any stage of the proceedings, either on its own accord or upon an Application by any of the parties, order the joinder or disjoinder of cases and pleadings as it deems appropriate.

50. The Court, when it deems necessary, may seek the opinion of the Parties on the joinder and disjoinder. The Court notes that pursuant to the above provision, it has the power to join and separate proceedings. However, the present case not being a case of disjoinder, the Court considers that it has, *a fortiori*, the prerogative to dismiss additional submissions and order that they be used to open new proceedings, if the interests of the proper administration of justice so require.

51. Contrary to what the Respondent State asserts as regards the judgment in *Sebastian Ajavon v Republic of Benin*, the Court considers that in the present case, the allegations of violations in the additional submissions filed by the Applicant warranted that these be considered as a new Application and which was registered as such. This preliminary question is therefore dismissed.

C. Preliminary objection on lack of *locus standi* and lack of proof of victim status

52. The Respondent State alleges that the Applicant, who is anonymous, submitted a dozen applications to the Court, adding that "in none of the cases did the Applicant give reasons for his personal interest in bringing proceedings. He does not present

9 *Sébastien Ajavon v Republic of Benin* of 29 March 2019, ACtHPR, Application 013/2017, Judgment of 29 March 2019 (merits), §§ 63-64.

10 Formerly, Rule 54 of the Rules of 2 June 2010.

himself as a victim of human rights violations. There is however a principle that legal action is conditioned by, *inter alia*, capacity, standing and interest in bringing proceedings. The interest in taking legal action must be current, legitimate and personal."

53. The Respondent State argues that the Applicant's failure to demonstrate his personal stake in the litigation makes the Application an *actio popularis,* - an allegation which the Applicant refutes. In this regard, the Respondent State relies on the Dissenting Opinion of Judge Fatsah Ouguergouz in the case of *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania,* according to which "[a]n action before the Court is indeed only allowed it's the applicant justifies his or her own interest in initiating it."

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54. The Court notes that under Article 5(3) of the Protocol, "the Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status with the African Commission and individuals to institute cases directly before it…"

55. The Court notes that these provisions do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. It is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring these complaints to the Court without a need to demonstrate a direct individual interest in the matter.[11]

56. In the instant case, the Court observes that the Applicant alleges that the contested provisions of Benin's electoral laws are not in conformity with the Charter, the ACDEG and the ECOWAS Protocol on Democracy.

11 African Commission on Human and Peoples Rights, Communications 25/89, 47/90, 56/91, 100/9, *World Trade Organisation Against Torture, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah (WTOAT) v Zaire*, §. 51.

57. The Court notes that these allegations are matters of public interest in that the contested legal provisions are of interest to all citizens as they have a direct or indirect bearing on their individual rights and the security and well-being of their society and country. Considering that the Applicant himself is a citizen of the Respondent State and that the revised provisions of the electoral laws have a potential impact on his right to participate in the government of his country, it is evident that he has a direct interest in the matter.

58. The Court, therefore, dismisses this objection.

VII. Admissibility

59. Under Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter".

60. In accordance with Rule 50(1) of the Rules,[12] "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."

61. Rule 50(2) of the Rules,[13] which substantially incorporates Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors even if the latter request anonymity;

b. Are compatible with the Constitutive Act of the African Union and with the Charter;

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;

d. Are not based exclusively on news disseminated through the mass media;

e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and

g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

12 Formerly, Rule 40 of the Rules of 2 June 2010.

13 *Ibid*.

62. The Respondent State raised two objections on admissibility of the Application.

A. Conditions of admissibility in contention between the Parties

63. The Respondent State raises two objections to the admissibility of the Application, namely: i) that the Application is incompatible with the Charter and Constitutive Act of the African Union and ii) that local remedies have not been exhausted.

i. Objection based on incompatibility of the Application with the Charter and Constitutive Act of the African Union

64. Relying on the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission") case law in *Fredrick Korvac v Liberia*,[14] *Hadjali Mohamed v Algeria*[15] and *Seyoum Ayele v Togo*[16] the Respondent State alleges that the Applicant's allegations are based on fears that municipal and local elections will prevent serious candidates from vying for the office of President of the Republic. It concludes that such a request is inconsistent with the Charter and the Constitutive Act of the African Union.

65. The Applicant did not reply.

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66. Regarding this condition, the Court recalls that it has held that:
> The substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned, without necessarily requiring that the specific rights alleged to have been violated be specified in the Application.[17]

14 Communication No. 1/88, *Hadjali Mohamed v Algeria*.

15 Communication No. 13/88, *Fredrick Korvac v Liberia*.

16 Communication No. 35/89), *Seyoum Ayele v Togo*.

17 *Peter Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 418, § 118.

67. The Court notes that in the present case, the request for annulment of the municipal and local elections to enable "serious opposition candidates" to vie for the office of President of the Republic", cannot be deemed to be incompatible with the Charter and Constitutive Act of the African Union. On the contrary, the Applicant prays the Court to find violations of human rights provided for in the Charter, the ACDEG and the ECOWAS Protocol on Democracy. Furthermore, Article 3(h) of the Constitutive Act of the African Union provides that one of the objectives of the African Union shall be the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments. In addition, the Court finds that the Applicant's Application states facts which relate to human and peoples' rights protected under the Charter.[18]

68. This objection is therefore dismissed.

ii. The objection based on the non-exhaustion of local remedies

69. The Respondent State alleges that there are local remedies provided for in Article 110 of the Electoral Code of 2019, which gives jurisdiction to the Supreme Court to hear "all electoral disputes relating to local elections." It argues that the same article provides for "the possibility of a re-run if necessary", adding that "persons interested in seeking this remedy have done so and rulings have been issued by the Supreme Court".

70. The Applicant did not reply.

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71. The Court has consistently held that the requirement of exhaustion of local remedies applies only to ordinary, available and effective[19] judicial remedies. As to the existence of local remedies, the Court

18 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015 (2015) 1 AfCLR 465, § 52.

19 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015 (2015) 1 AfCLR 477, § 64. See also *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 522, § 95.

notes the Respondent State's contention that the Applicant did not seek these remedies before the Supreme Court pursuant to Article 110 (1)(2)(3) of the Electoral Code of 2019, which reads as follows:

> All electoral disputes pertaining to local elections fall under the jurisdiction of the Supreme Court.
>
> In all cases, the Supreme Court shall have a maximum of six months from the filing of any appeal, within which to render its decisions and order a re-run of elections.
>
> The re-run of legislative or local elections shall be held in two rounds maximum.

72. In addition, the Court notes that Article 117 of the Beninese Constitution provides that "the Constitutional Court shall, as a matter of obligation, rule on the constitutionality of organic laws and laws in general before their promulgation".

73. It follows from the above provisions that the existence of local remedies is not in dispute. It therefore remains to be seen whether local remedies are effective to redress the violations alleged by the Applicant.

74. The Court notes that the Applicant bases the alleged violations on the illegitimacy of the National Assembly, unilaterally and substantially amending the electoral laws within a period of six months prior to the elections and thus the consequences of these violations not only on national and international peace and security but also on his right to equality before the law. More specifically, the Applicant bases his request for the annulment of the local and municipal elections primarily on the fact that the Electoral Code of 2019 was amended by an illegitimate National Assembly.

75. The Court observes that the reasons given by the Applicant in support of his allegations of violations relate to the conformity of the contested provisions of the Electoral Codes of 2018 and 2019 with the Charter, the ACDEG and the ECOWAS Protocol on Democracy, rather than to the substantive legality of the local and municipal elections of 17 May 2020.

76. The Court points out that these issues were previously decided on by the Constitutional Court of the Respondent State in its Decisions DCC18-199 of 2 October 2028 and DCC19-525, of 14 November 2019. In these decisions, the Constitutional Court found the two challenged Electoral Codes to be in conformity with the Constitution.

77. The Court observes that a constitutional review in the Respondent State involves both a review of the procedure followed for the

adoption of the law and a review of its content,[20] and that the declaration of conformity of a law with the constitution also implies its conformity with the Charter. In this case, the declaration of constitutional conformity of the Electoral Code, including the procedure for its adoption, presupposes its conformity with the Charter and its additional instruments.

78. In the light of the foregoing, the Court considers that it would not be reasonable to ask the Applicant to submit to the Constitutional Court matters on which the said Court has previously ruled on.

79. The Court consequently dismisses the objection of non-exhaustion of local remedies raised by the Respondent State.

B. Other conditions of admissibility

80. The Court notes that the Parties do not dispute that the Application meets the requirements set out in Articles 56(1)(3)(4)(6) and (7) of the Charter and Rules 50(2) (a)(c)(d)(f) and (g) of the Rules.[21] However, the Court must examine whether these conditions are met.

81. The Court notes that the condition set out in Rule 50(2) (a) of the Rules[22] has been met, as the Applicant has clearly indicated his identity even though the Court granted anonymity.

82. The Court observes that the Application is not drafted in disparaging or insulting language and thus, meets the requirement specified in Rule 50(2) (c) of the Rules of Court.

83. The Court observes that the present Application is not based exclusively on news disseminated by the mass media but rather concerns legislative provisions of the Respondent State, and therefore satisfies the requirement set out in Rule 50(2)(d) of the Rules.

84. The Court notes that the Electoral Code of 2018 which is contested by the Applicant was promulgated on 9 October 2018, following the decision by the Respondent State's Constitutional Court of its conformity with the constitution (DCC 18-199 of 02 October 2018). The Application was filed on 2 September 2019, that is, ten (10) months and twenty-four (24) days later. The 2019 Electoral Code, invoked by the parties in their submissions following the filing of

20 Article 35 of the Rules of the Constitution provides, within the context of control of conformity with the Constitution: "The Constitutional Court shall take decisions regarding the law as a whole, with respect to both its substance and drafting procedure."

21 Formerly, Rule 40 of the Rules of 2 June 2010.

22 Formerly, Rule 40(1) of the Rules of 2 June 2010.

the Application, was promulgated on 15 November 2019, after the filing of the Application, thus, not relevant in the computation of reasonable time.

85. Given the fact that the adoption of the Electoral Code of 2018 was followed by attempts to find local remedies by political actors over its annulment, the Court is of the view that ten (10) months and twenty-four (24) days are reasonable to file an Application before it, in accordance with rule 50(2)(f) of the Rules .

86. Lastly, the Court notes that the present Application does not concern a case that has already been settled by the Parties in accordance with either the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter or any legal instrument of the African Union. It therefore fulfils the condition set out in Rule 50(2)(g) of the Rules.

87. In the light of the foregoing, the Court concludes that the Application satisfies all the conditions of admissibility laid down in Article 56 of the Charter and Rule 50 of the Rules and, accordingly, declares it admissible.

VIII. Merits

88. The Applicant alleges the following: A) The illegitimacy and illegality of the National Assembly in amending electoral laws; B) The violation of the obligation to establish independent and impartial electoral bodies; C) The violation of the obligation to not make unilateral and substantial amendments of the Electoral Code of 2019 laws less than six months before the elections; D) The violation of the obligation to guarantee national and international peace and security; E) The violation of the right to equal protection of the law.

A. Alleged illegitimacy and illegality of the National Assembly.

89. The Applicant alleges that “Article 13 of the Charter affirms that voters, candidates and elected representatives are equal in matters relating to elections”. In this regard, he states that “[t]he Charter requires due compliance with the forms, procedures and operations that accompany it.”

90. The Applicant considers that “[t]he National Assembly which voted the new Electoral Code applied during the May 2020 elections is illegal and illegitimate”, as it “is not representative of the people and therefore cannot vote an electoral code that allows the holding

of free, multiparty and transparent local and municipal elections.".

91. He further contends that "[t]he absence of opposition political parties in the local and municipal election process is indisputable", due to the fact that "[t]he political parties that participated in the elections are all close to Mr. Patrice Talon."

92. By way of illustration, the Applicant notes the low turn-out in opposition strongholds, including that of former President Boni Yayi in Tchaourou or in the Cadjèhoun district of Cotonou, where participation did not exceed 10%. He also cites the low turnout (16.14%) in the Zongo district of Cotonou at the polling station where Mr. Patrice Talon voted.

93. As a result of the above situation and the Applicant's forced exclusion from direct participation in the government of his country as well as his inability to choose his "political status", the Applicant considers that Articles 1, 2, 13(1) and 20(1) of the Charter were violated, as were Articles 3 and 4 of ACDEG, Articles 1(i)(2) of the ECOWAS Protocol on Democracy and Chapter 4.B of the Bamako Declaration of 3 November 2000.[23]

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94. Responding to the request for annulment of the local and municipal elections the Respondent State disputes the above allegation in general terms, arguing in particular that "the closeness of political actors in no way detracts from the legality of democratic elections, as the Applicant does not raise any legal arguments to support his allegation of non-compliance with the substantive or formal requirements of the electoral process as provided for by the law in force."

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23 Bamako Declaration, adopted on 3 November 2000 by Ministers and Heads of Delegation of States and Governments of Francophone Countries, at the International Symposium on the review of the practices of democracy, rights and freedoms in the Francophone Countries.

95. The Court notes that the Applicant refers to violations of Articles 1, 2, 13(1) and 20(1) of the Charter as well as Articles 3 and 4 of the ACDEG, 1(i)(2) of the ECOWAS Protocol on Democracy and Chapter 4.B of the Bamako Declaration of 3 November 2000. However, the Court finds that the above allegations of violations fall within the scope of Article 13(1) of the Charter cited above.

96. The Court notes the Applicant's allegation that the National Assembly which passed a law on a new electoral code is illegal because it did not represent the Beninese people; that few strong political opposition parties were able to present candidates in local and municipal elections; and that he was excluded from direct participation in the government of his country and from choosing his "political status".

97. The Court notes that the issue here is whether these allegations amount to a violation of the Applicant's right to participate freely in the government of his country.

98. The Court notes in the instant case that the Applicant makes assertions without substantiating them. Indeed, he does not show to what extent the non-representative nature of the National Assembly affects his ability to exercise his legislative power and, consequently, how such a situation affects his right to participate directly in the government of his country and to choose his "political status". In this regard, the Court recalls, as it has previously stated, that "[g]eneral statements to the effect that these rights have been violated are not enough. More substantiation is required."[24]

99. In the light of the foregoing, the allegation of violation of the Applicant's right to participate directly in the government of his country is dismissed.

B. Alleged violation of the obligation to establish independent and impartial electoral bodies

100. According to the Applicant, Article 13 of the Charter, Article 17 of ACDEG, the Commission's resolutions adopted between 1996 and 2008 on elections and democracy, in particular Resolution 164(XLVII) on elections in South Africa, and Article 3 of ECOWAS Protocol on Democracy point to "the obligation to establish and strengthen independent and impartial electoral bodies".

101. On the basis of the Public International Law Dictionary (Brussels, 2001), the Applicant defines independence as "the fact of a person or an entity not depending on any other authority than its own",

24 *Alex Thomas v Tanzania* (merits), § 140.

and impartiality as "the absence of bias, prejudice and conflict of interest". He considers "[t]hat an independent electoral body must enjoy administrative and financial independence and provide sufficient guarantees as to the independence and impartiality of its members."

102. The Applicant recognises that the COS-LEPI "[a]ppears to be a real electoral body in the process of organising elections in Benin". He nevertheless challenges its current composition on the grounds that the parliamentary minority that appointed the four members of COS-LEPI is not a real opposition, given that all its members support the political actions of the President of the Republic, Patrice Talon.

103. The Applicant further questions the independence and impartiality of the Director General of the National Institute of Statistics and Economic Analysis (INASE) and the Director of the National Civil Registry Service by virtue of the fact that they are Government appointees.

104. The Applicant contends that independence and impartiality require that other actors in the electoral process such as the executive have no disciplinary power over the electoral body. In this regard, he criticises the Respondent State for keeping the budget coordinator of CENA in custody for 48 hours, and for sending by the Minister of Finance of the Inspector General of Finance to CENA who revealed a cash shortfall of three hundred and twenty-five billion (325,000,000,000) billion CFA francs.

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105. The Respondent State alleges that, in accordance with Article 13 paragraph 1 of the Electoral Code 2019, "CENA is a legal entity. It is completely independent of the institutions of the Republic ..."

106. The Respondent State argues that, under Article 25 of Electoral Code of 2018 applicable at the time of the impugned acts, "[p]ersons serving on CENA may not be prosecuted, arrested, detained or tried for opinions expressed or acts committed in the performance of their duties". In the opinion of the Respondent State, this provision gives immunity to the members of CENA; and, consequently, the fear of violation alleged by the Applicant does not amount to a violation of the applicable instruments.

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107. The Court notes that Article 17(1)(2) of ACDEG provides that:

> State Parties re-affirm their commitment to regularly hold transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall:
>
> 1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
> 2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner.

108. Article 3 of the ECOWAS Protocol on Democracy provides that:

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

109. According to the Court, it follows from the above provisions "that an electoral body is independent when it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality".[25]

110. In the present case, the Court notes that the Applicant does not question the administrative and financial autonomy of COS-LEPI and CENA. The Applicant however questions the independence and impartiality of the members of COS-LEPI appointed by the parliamentary minority and the disciplinary power the government has over the members of CENA.

111. The Court notes that at the time of the acts alleged against the Respondent State, the Electoral Code in force was that of 2018, whose Article 137 provides that COS-LEPI was composed of: five MPs from the parliamentary majority; four MPs from the parliamentary minority; the Director General of the National Institute of Statistics and Economic Analysis; and the Director of the National Civil Registry Office.

112. The Court notes that the issue at hand is whether the appointment of the four members of COS-LEPI by the parliamentary minority as well as the appointment of the Director General of the National Institute of Statistics and Economic Analysis (INASE) and of the

25 *Suy Bi Gohore Emile v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2017, Judgment (15 July 2020) (merits), § 200; *Actions for the Protection of Human Rights v Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016), 1 AfCLR 683, § 118.

Director of the National Civil Registry Office by the Government cast doubt on its independence and impartiality. For CENA, the question is whether the Government's exercise of disciplinary power over the CENA budget coordinator constitutes a violation of its independence and impartiality. To answer these questions, one must first determine whether COS-LEPI and CENA are electoral bodies within the meaning of the above-mentioned provisions.

113. On this issue, the Court notes that the Applicant's assertion that COS-LEPI "[appears to be a genuine electoral body in the process of organising elections in Benin]" is not challenged by the Respondent State. The Court infers from this that the parties agree that COS - LEPI is a genuine electoral body.

114. As regards CENA, its nature as an electoral body is obvious [considering that its mandate] involves the "[p]reparation, organisation of the election process, supervision of voting operations and centralisation of results...", according to Article 16 paragraph 1 of the 2018 Electoral Code.

115. Having made this clarification, the Court will now examine the independence and impartiality of CENA and COS-LEPI.

i. The Independence and impartiality of CENA

116. The Court notes that the Applicant questions the independence and impartiality of CENA, seeing that the CENA budget coordinator was kept in custody for 48 hours and that the Minister of Finance sent the Inspector General of Finance to CENA who revealed a cash shortfall of three hundred and twenty-five billion (325,000,000,000) billion CFA francs. The Applicant concludes that, as a result, the Respondent State challenged the standard that requires the executive not to have any disciplinary power over the electoral body.

117. On this point, the Court notes that, in accordance with paragraphs 1 and 2 of Article 20 of the Electoral Code of 2018 applicable at the time of the impugned acts, CENA was composed of: five members, appointed by the National Assembly, two by the parliamentary majority, two by the parliamentary minority and one judge.[26]

118. It follows from the above that the CENA budget coordinator is not a member of CENA but rather a public accountant who works at CENA under the supervision of the Ministry of Finance. The

26 Article 20: The Independent National Electoral Commission (CENA) is composed of five (05) members appointed by the National Assembly. They are chosen from among personalities recognized for their competence, probity, impartiality,

disciplinary authority to which he is subjected should therefore not be confused with control over CENA members who, according to Article 25 of the aforementioned text, "[c]annot be prosecuted, arrested, detained or tried for opinions expressed or acts committed in the performance of their duties."

119. Consequently, the Court is of the opinion that the allegation of CENA's lack of independence and impartiality has not been demonstrated. This allegation is therefore dismissed.

ii. The independence and Impartiality of COS-LEPI

120. On the issue of lack of independence and impartiality of the four members of COS-LEPI due to their having been appointed by the parliamentary minority which does not represent a genuine opposition, the Court notes that it is not in dispute that the appointees belong to political parties that are distinct from that of the President of the Republic. It further notes their being close to the party in power or the President of the Republic is a question of their freedom to decide on matters of political alliance which, moreover, concerns the right of association provided for in Article 10 of the Charter.[27]

121. With regard to the two Directors General who are members of COS-LEPI, the Court notes that the Respondent State does not dispute that they are appointed by the Government. Moreover, Article 11 of Law No. 94-009 of 28 July 1994 on the creation, organisation and functioning of Offices of a social, cultural and scientific nature provides that the "Director General shall be appointed by a decree by the Council of Ministers, on the recommendation of the Supervising Minister, and after consultation with the Minister in charge of public and semi-public enterprises."

122. The Court notes that the two Directors General do not sit on COS-LEPI in a personal capacity but by virtue of their functions as Directors General. Given that they are appointed and dismissed by the Government, their functional independence means that in practice, they present themselves as representatives of the government on COS-LEPI. As a result, an external observer may reasonably doubt that a Director General who is appointed and could be dismissed by a government would refuse to follow the

morality, patriotism, and are appointed as follows: - two (02) by the Parliamentary Majority; - two (02) by the Parliamentary Minority; - one (01) Judge.

27 *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 113.

instructions of the one who appointed him or that he would not try to favour the appointing authority, if need be.

123. The Court has previously held that the composition of an electoral body must be balanced.[28] In this case, seven out of the eleven members of COS-LEPI, are under the control of the Government, namely: the five appointed by the parliamentary majority and the two Directors General who are appointed by the Government.

124. In the light of all the above, the Court concludes that, by virtue of its composition, COS-LEPI does not offer sufficient guarantees of independence and impartiality, and cannot therefore be perceived as providing such guarantees[29] as required by Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

125. Consequently, the Respondent State has violated Article 13(1) of the Charter, in addition to Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

C. Unilateral and substantial amendment of electoral laws less than six months before the election

126. The Applicant submits that the Respondent State is a party to the ECOWAS Protocol on Democracy, as reaffirmed by its Constitutional Court in its decision DCC 15-086 of 14 April 2015. He concludes that the Respondent State is subject to Article 2(1) of the ECOWAS Protocol on Democracy which provides that "[n]o substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors."

127. The Applicant interprets Article 2(1) of the ECOWAS Protocol on Democracy as prohibiting substantial reforms of the electoral law within six months prior to elections, unless with the consent of a large majority of political actors. He alleges that in this case, "[t] he reform of the Electoral Code was voted after the non-inclusive political dialogue, thus without the consent of a large majority of the political actors."

128. The Applicant further alleges that, between 15 November 2019 (the date when the Electoral Code of 2019 was adopted) and 2 March 2020 (the date set by CENA for the start of the submission of applications for the local and municipal elections) less than six months had elapsed.

28 *Actions pour la protection des droits de l'homme v Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016 2016) 1 AfCLR 668, § 125.

29 *Idem*, § 133.

129. He concludes that the aforementioned Article 2(1) of the ECOWAS Protocol on Democracy was violated as the Electoral Code was adopted less than six months before the local and municipal elections were held, and without the consent of a large majority of political actors.

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130. The Respondent State refutes the Applicant's computation of the dates, arguing that the six months should be between 15 November 2019 and 17 May 2020, the date of the elections, which, according to the Respondent, is more than six months.

131. The Respondent State avers that the ECOWAS Protocol on Democracy was adopted "within the framework of the ECOWAS community with strict rules of control which are binding to this Court when it makes uses of it."

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132. The Court notes that Article 2(1) of the ECOWAS Protocol on Democracy provides that "[n]o substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a large majority of Political actors."

133. The Court notes that the Respondent State ratified the ECOWAS Protocol on Democracy on 21 December 2001 and there is nothing in the record to indicate that it is no longer a party to it. In this regard, the Applicant asserts that the Constitutional Court of the Respondent State in its decision DCC 15-086 of 14 April 2015 reaffirmed that the Respondent State is still bound by this Protocol.

134. The Court notes that Article 2(1) cited above sets out the following requirements: i) that the reform must relate to the electoral law; ii) that it must be substantial; and (iii) that it must not take place during the six months preceding the elections, except with the consent of a large majority of the political actors.

135. The Court notes that the first two conditions are not discussed, and there is nothing on the record to indicate that the electoral law has not been substantially reformed.

136. The Court notes, on the other hand, that the Parties do not agree on the computation of the six-month period and on the consensual reform. It is therefore necessary to determine the meaning of the term «elections» in the context of the ECOWAS Protocol on Democracy and the date of departure of the computation of the six (06) month period.

137. The Court is of the opinion that in the context of this Protocol, "elections" means the date of voting, that is, 17 May 2020, which was the date of the local and municipal elections. The starting date of assessment of six (6) months is 15 November 2019, which corresponds to the date of publication of the Electoral Code of 2019 in the Official Gazette. Between 15 November 2019 and 17 May 2020, six months and two days elapsed.

138. Accordingly, the Court finds that the Respondent State did not violate its obligation not to modify the electoral law six (6) months preceding the elections.

D. Alleged violation of the obligation to ensure national and international peace and security

139. The Applicant alleges that multiple violations of human rights and obligations, including the unbalanced composition of COS-LEPI affecting the independence and impartiality of this electoral body, and discrimination, constitute a threat to peace. He considers that peace is not only the absence of war.

140. The Applicant avers that "the weakening of human rights, justice and democratic institutions is the bedrock of terrorism". In this regard, he refers to "the coincidence of the unfortunate events of 1 and 2 May 2019 in Cadjèhoun and the abduction of French tourists in the Pendjari Park by jihadists from Burkina Faso." For the Applicant, this may result in a potential violation of Article 23(1) of the Charter by the Respondent State.

141. The Respondent State did not respond to this allegation.

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142. Article 23 of the Charter states:

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:

i. any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;

ii. their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

143. The Court notes that serious and massive violations of human rights, especially in the electoral context, can lead to the deterioration of national and international peace and security. It recalls that situations in which the poor organisation of elections, accompanied by serious and massive violations of human rights, led to disturbances that caused enormous loss of human life and material damage, are in the public domain.

144. The Court is convinced that while there is an ever-growing link between human rights and peace, the Applicant is making unsubstantiated allegations in the instant case. In this regard, the Court observes that "[g]eneral statements to the effect that this right has been violated are not enough. More substantiation is required."[30]

145. This allegation is, therefore, dismissed.

E. Alleged violation of the right to equal protection of the law

146. The Applicant alleges that "[t]he composition of COS-LEPI is totally unbalanced in favour of the Government and that this imbalance affects the Independence and impartiality of this electoral body"

147. He alleges that "by failing to place all potential candidates on an equal footing, the current composition of COS-LEPI violates the right to protection of the law, enshrined in the various human rights instruments mentioned above and ratified by the Respondent State, particularly Article 10(3) of the ACDEG and Article 3(2) of the Charter.

30 *Alex Thomas v Tanzania* (merits), § 140.

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148. The Respondent State contends that the composition of COS-LEPI does not present any element of illegality, as Article 137 of the Electoral Code of 2018 provides that COS-LEPI shall be composed of 11 members designated as follows: five members from the parliamentary majority, four from the parliamentary minority, the Director General of the National Institute of Statistics and Economic Analysis and the Director General of the national service in charge of civil status.

149. The Respondent State alleges that, in accordance with what was agreed with the Law, Administrative Affairs and Human Rights Commission of the National Assembly, five members of COS-LEPI were appointed by the "*Union Progressiste*", which is the parliamentary majority. The "*Republican Bloc*", which is the parliamentary minority, nominated the remaining four members. According to the Respondent State, the members of COS-LEPI were appointed in accordance with Article 137 of the Electoral Code of 2018 cited above. The composition of COS-LEPI is therefore legal and legitimate.

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150. Article 3 of the African Charter provides as follows: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

151. The Court notes that the principle of equality before the law ensues from this text[31] and, as formulated, consists of two parts: the first relates to the obligation of the entities in charge of applying the law to do so equally with respect to all. The second part implies that the law itself treats people equally.[32]

31 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Burkinabe Movement for Human and Peoples' Rights v Burkina Faso* (merits) (2014) 1 AfCLR, § 167; See also *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application 018/2018, Judgment of 15 July 2020 (merits and reparations), § 87.

32 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR, §§ 150-152.

152. The Court notes that, in the instant case, the provision challenged by the Applicant affords the same opportunity to all political parties - be they from the majority or minority in the National Assembly - to become members of COS-LEPI depending on their level of representation. In this regard, the Court has previously held that this principle "does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations."[33] Indeed, the difference in treatment between majority and minority parties with regard to representation in COS-LEPI stems from their differences in representation in the National Assembly.

153. The Court notes, based on the foregoing, that the distribution of seats in COS-LEPI is in line with Article 137 of the Electoral Code of 2018. This conclusion is, moreover, not disputed by the Applicant. Rather, he argues that the parliamentary minority does not constitute a serious opposition as it is close to the President of the Republic. However, this type of consideration falls within the political sphere that the Court is not supposed to deal with, unless they result in human rights violations.

154. In the light of the foregoing, the Court dismisses the Applicant's allegation.

IX. Reparations

155. The Applicant requests the Court to order remedial measures for the violations of his rights, including the amendment of the electoral law and the annulment of the local and municipal elections of 17 May 2020.

156. The Respondent State requests the Court to deny the claim for reparations made by the Applicant and order the Applicant to pay the Respondent State two billion (2,000,000,000) CFA francs, as a counterclaim, for all the damage suffered and incurred.

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33 *Jebra Kambole v Tanzania* (merits and reparations), § 87.

157. Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

158. The Court has previously held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is established and a causal nexus is established between the wrongful act and the harm caused. As the Court stated earlier, the purpose of reparations is to ensure that the victim is placed in the situation he or she was in prior to the violation.[34]

159. The Court recalls that it had previously found that the Respondent State violated the Applicant's rights under Articles 17(1) of ACDEG, 2(1) and 3 of the ECOWAS Protocol on Democracy and, consequently, Article 13(1) of the Charter.

A. Non-pecuniary reparations

160. The Applicant prays the Court to order the Respondent State to amend its Electoral Code of 2019 and to annul the 17 May 2020 local and municipal elections.

i. Amendment of the Electoral Code

161. The Applicant requests the Court to order the Respondent State to amend the Electoral Code. The Respondent State objects to this request on the grounds that it is ill-founded.

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162. The Court notes that the prohibition to amend electoral laws less than six months prior to the elections without consensus is a principle that aims to avoid changes that favour or disadvantage certain candidates or political parties on the imminence of elections, regardless of the content of the amendment.

34 See *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 116-118, and *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabe des droits de l'homme et des peuples v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR, § 60.

163. The Court notes that apart from the fact that it is expressly forbidden to amend electoral laws less than six months before elections, the substance of the amended law may also be at issue. In the present case, the Applicant is not challenging a specific provision of the amended Election Code, but rather the fact that it was amended less than six months before the elections.

164. Furthermore, the Court notes that it has not found a violation of the Respondent State's obligation not to unilaterally and substantially amend electoral laws less than six months before the election without the consent a large majority of political actors.

165. Accordingly, this request is rejected.

ii. Annulment of the 17 May 2020 local and municipal elections

166. The Applicant asks the Court to annul the local and municipal elections of 17 May 2020 on the grounds that they were organised by non-independent and impartial electoral bodies, namely, CENA and COS-LEPI, and because the Electoral Code was amended less than six months before the elections by an illegitimate National Assembly.

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167. The Court notes that it has not established the illegitimacy of the National Assembly nor the lack of independence or impartiality of CENA. However, it found that the Electoral Code was amended less than six months before the elections of 17 May 2020 and that the composition of COS-LEPI was unbalanced, given that seven of its eleven members are controlled by the Government and have decision-making powers as a majority.

168. The Court observes that, under Article 27(1) of the Protocol, it has sufficient powers to order a Respondent State to take measures to annul an election, if it deems it appropriate to remedy the situation. In doing so, it takes into account the gravity of the violations found, their implications for the credibility of the entire electoral process and the impact of such a measure on the security and stability of the country.

169. The Court notes that in the present case, the Applicant has not demonstrated that the violations found had a substantial impact

on the credibility of the entire electoral process. Nothing on the record indicates that the electoral process was affected by the said violations to such an extent as to warrant annulment of the elections as the most appropriate measure to remedy the situation.

170. The request is therefore denied.

B. Counterclaim

171. The Respondent State prays the Court to "find that the anonymous Applicant's claims are null and void and find him liable for, and order him to pay the Respondent State's counterclaim in the sum of CFA francs two billion (2,000,000,000) as reparation for having caused the State to have a judgment against it that would adversely affect its image."

172. The Applicant did not reply.

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173. The Court notes from the record that the Respondent State's counterclaim is based on its allegation that the Applicant abused his right to seize the Court. However, the Court recalls its finding above that the Applicant has not abused his right to access the Court or the established procedures of the Court (see paragraph 45 of this Judgment). The Court has also not established that the Application is unfounded and baseless, as claimed by the Respondent State. The Court has rather found a violation of the Applicant's right, as a result of the Respondent State's failure to establish a balanced composition of the COS-LEPI. The fact that a judgment against the Respondent State is rendered by the Court, even though this may adversely affect its image, does not, *per se*, entitle the Respondent State to make a counterclaim.

174. Consequently, the Court finds that this prayer is unfounded and thus dismisses it.

X. Costs

175. The Applicant requests that the Respondent State be ordered to pay the costs.
176. The Respondent State did not submit specifically on costs.

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177. The Court notes that Rule 32(2) of the Rules[35] provides that "Unless otherwise decided by the Court, each party shall bear its own costs, if any."
178. The Court rules that, in the circumstances of the case, each party shall bear its own costs.

XI. Operative part

179. For these reasons,
The Court,
Unanimously:
On jurisdiction
i. *Dismisses* the objection on jurisdiction.
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objections of the admissibility of the Application.
iv. *Declares* that the Application is admissible.

On merits
v. *Finds* that the allegation of illegitimacy and illegality of the National Assembly has not been established;
vi. *Finds* that the allegation of lack of independence and impartiality of CENA has not been established;
vii. *Finds* that the Respondent State did not violate the Applicant's right to equal protection of the law prescribed in Article 3(2) of the Charter;

35 Formerly, Rule 30(2) of the Rules of 2 June 2010.

viii. *Finds* that the Respondent State did not violate the obligation not to modify the electoral law in the six (6) months preceding the legislative elections of 17 May 2020, provided for by Article 2(1) of the ECOWAS Protocol on Democracy;
ix. *Finds* that the Respondent State has violated the right of citizens to participate freely in the government of their country, provided for in Article 13(1) of the Charter, since the composition of COS-LEPI does not provide guarantees of independence and impartiality as required by Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy;

On reparations
Pecuniary reparations
x. *Dismisses* the counterclaim of the Respondent State.

On non-pecuniary reparations
xi. *Dismisses* the request to annul the municipal and local elections of 17 May 2020.
xii. *Orders* the Respondent State to take necessary measures to bring the composition of COS-LEPI into conformity with the provisions of Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy before any election.

Implementation and reporting
xiii. *Orders* the Respondent State to submit to the Court, within three (3) months of the date of notification of this Judgment, a report on measures taken to implement the orders on paragraph xii herein.

On costs
xiv. *Rules* that each Party shall bear its own costs.