

Communication 246/2002- *Mouvement Ivoirien des Droits Humains (MIDH)/Côte d'Ivoire*

Summary of facts

1. On 8 February 2002, the Secretariat of the African Commission on Human and People's Rights (the African Commission) received from Mr. Ibrahima Doumbia, First Vice-President of the *Mouvement Ivoirien des Droits Humains* (MIDH)² a Communication submitted pursuant to Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).
2. The Communication was filed against the Republic of Côte d'Ivoire (State Party³ to the African Charter, hereunder referred to as Côte d'Ivoire) in which MIDH alleges that the Constitution of Côte d'Ivoire, adopted by a minority of citizens during the Constitutional Referendum of 23rd July 2000, contained provisions which are discriminatory to some citizens of Côte d'Ivoire, prohibiting them from performing political functions.
3. The Communication alleges furthermore that the provisions granting immunities to some persons, particularly the members of the National Committee for Public Security (CNSP), the military executive organ which ruled the country during the military transition period (from 24 December 1999 to 24 October 2000), as well as the authors of the coup d'état of 24 December 1999, were discriminatory.

Complaint

4. The Complainant alleges that the events cited above constitute a violation of Articles 2, 3 and 13 of the African Charter and requests the African Commission to recommend to Côte d'Ivoire to review Articles 35, 65 and 132 of the Constitution adopted on 23rd July 2000.

Procedure

5. During the 31st Ordinary Session held in Pretoria, South Africa, from 2nd to 16th May 2002, the African Commission considered this Communication and decided to be seized of the said Communication.

² The MIDH is an NGO based in Côte d'Ivoire and which enjoys Observer Status with the African Commission on Human and Peoples' Rights since October 2001 (30th Ordinary Session).

³ Côte d'Ivoire ratified the African Charter on 6th January 1992.

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6. Through Note Verbale ACHPR/COMM 246/2002 dated 11th June 2002, the Secretariat of the Commission informed the Respondent State (Côte d'Ivoire) of this decision and requested it to provide within two months its arguments on the admissibility of the Communication.
7. Through its letter ACHPR/OBS/266 of the 11th June 2002, the Secretariat of the African Commission informed the Complainant (MIDH) of this decision and requested it to provide within two months its arguments on the admissibility of the case.
8. Through Note Verbale No. 563/MEMREIE/AF/AJC/BAB/VG of 16th October 2002, the Minister of State, Ministry of Foreign Relations and Ivorians living abroad requested the African Commission for extra time to present its arguments and observations on the Communication.
9. This request from the Respondent State which the African Commission received during the 32nd Ordinary Session held from 17 to 23 October in Banjul, The Gambia, prompted the Commission to defer its decision on the admissibility of the Communication to the 33rd Ordinary Session.
10. In Note Verbale ACHPR/COMM 246/2002 of 28th October 2002, the Secretariat of the Commission informed the Respondent State that an extra period of three (3) months was granted and that its arguments and observations on the Communication were expected by end January 2003.
11. The same information was communicated to the Complainant by letter ACHPR/COMM 246/02 of 28th October 2002.
12. Having received no reply from the Respondent State by end January 2003, the Secretariat of the Commission sent a reminder by Note Verbale ACHPR/246/02 of 10th February 2003, drawing the attention of Côte d'Ivoire to the fact that its arguments and observations on the Communication were necessary for the Commission to take a well informed decision on the admissibility of the case during its 33rd Session scheduled for May 2003.
13. During its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the Commission decided to defer its decision on the admissibility of this Communication to its 34th Session, thus granting the verbal request of the delegate of the Respondent State attending the Session for extra time to present its arguments, particularly on the admissibility of the case.
14. The Secretariat of the Commission also gave a copy of the complaint to the delegate of Côte d'Ivoire attending the Session.

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15. On 11th June 2003, through its Note Verbale ACPHR/246/2002, the Secretariat sent a copy of the complaint to the Respondent State by DHL, requesting a rapid response, in any case before the end of August 2003, to enable the Commission make a ruling on the admissibility of the case.
16. The Secretariat also wrote to the Complainant on 11th June 2003 explaining to him the reasons of the postponement of the decision of the Commission on the admissibility of the Communication.
17. During its 34th Ordinary Session which was held from the 6th to 19th November 2003 in Banjul, The Gambia, the representatives of the Respondent State made an oral presentation before the Commission and conveyed the substance of their observations on the issue in a written memo to the Secretariat.
18. During the 35th Ordinary Session which was held from the 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered the Communication and decided to declare it admissible.
19. On 21st June 2004, the Secretariat notified the decision of the African Commission to the parties and requested them to submit their submission on merits within 3 months.
20. At its 36th Ordinary Session, which was held from 23rd November to 7th December 2004, in Dakar Senegal, the African Commission considered the Communication and deferred it to the 37th Ordinary Session pending receipt of the arguments of the Respondent State on the merits of the case.
21. On 20th December 2004, the Secretariat of the African Commission notified this decision to the Respondent State and requested its submission on the merits as early as possible.
22. On the same date, a similar letter was sent to the Complainant requesting him to submit, at the earliest, his arguments on the merits of the case.
23. At its 37th Session, the African Commission, acceding to the request of the respondent Party, deferred its decision on the merits of the Complaint pending receipt of its arguments. This decision was conveyed to both Parties on the 3rd June 2005.
24. On 12 September 2005 a reminder was sent to the Respondent State.
25. On 8th November 2005, the Respondent State forwarded its supplementary submissions on the merits of the Complaint.

26. The Secretariat acknowledged receipt of these submissions and conveyed them to the Complainant on the 10th November 2005.
27. At its 38th Ordinary Session which took place from the 21st November to 5th December 2005 in Banjul, the Gambia, the African Commission considered the Complaint and deferred its decision to the 39th Session.
28. On the 7th December 2005, the Parties were informed of this decision.
29. At its 41st ordinary session held in Ghana in May 2007, the Commission considered the above communication and decided to defer it to its 42nd session on the request of the Respondent State who informed the Commission that it had initiated amicable settlement of the matter with the complainant.
30. By note verbale of 7 July 2007 and by letter of the same date, both parties were notified of the Commission's decision.
31. At its 42nd Ordinary Session, held in Brazzaville, Republic of Congo, the African Commission considered the Communication and deferred its decision to the 43rd Ordinary Session due to confirm from the complainant whether they were engaged in amicable settlement as suggested by the State.
32. By note verbale of 19 December 2007 and by letter of the same date, both parties to the Communication were notified of the Commission's decision.

LAW
Admissibility

Complainant's submissions on admissibility

33. The Complainant submits that the only possible remedy against the Ivorian Constitution is to request its revision, which, though provided for in the said Constitution, "is impossible in the present state of affairs". He added that, under Article 124 of the Ivorian Constitution, "the initiative for the review of the Constitution is a joint undertaking by the President of the Republic and the members of the National Assembly".
34. He argues further that the President of the Republic has on several occasions clearly expressed his opposition to any review of the Constitution. The Complainant also alleges that the President of the Republic has peremptorily asserted that he will never submit the Constitution to a review, which clearly expresses his intention of not applying this mechanism which only he and the Speaker of the National Assembly have the prerogative to initiate.

35. The Complainant alleges further that, the Speaker of the National Assembly, speaking on behalf of all the Deputies of the Forum for National Reconciliation, rejected the possibility of a Constitutional review by asserting that “the people of Côte d’Ivoire do not want a constitutional review”.
36. The Complainant further argues that the final hope to have the Authorities (the President of the Republic and the Speaker of the National Assembly) reconsider their position remained with the “National Forum for National Reconciliation held from 9th October 2001 to 18th December 2001 in Abidjan”. And yet, the Forum, in its final resolutions, did not rule on a review of the Constitution.
37. The Complainant contends therefore that there is no possible domestic remedy in this particular case and asks the African Commission to draw the appropriate conclusions by declaring the Communication admissible.

Respondent State’s Submissions on admissibility

38. The Respondent State, in a memorandum conveyed to the African Commission on 10 November 2003 claims that as far as it is concerned, the Communication is “inadmissible and baseless”. The Respondent State maintains that there is indeed a local remedy “constituted by the imminent revision of Articles 124 and others of the Constitution”.
39. The Respondent State further notes that the Complainant has not submitted any evidence on the use and exhaustion of existing local remedies. The Respondent State which considers “local remedies” as any legal and lawful action undertaken to “ensure the cessation of the alleged violations” claims that the Complainant did not attempt anything of the sort.
40. Concerning the request of the Complainant relative to the revision of certain Articles of the Ivorian Constitution, the Respondent State intimates that the Ivorian people freely espoused this Constitution which in no way “either grossly or manifestly negates human dignity”. It concludes therefore that the request for revision of this Constitution by the Complainant is not “compatible with the provisions of the OAU Charter and the African Charter on Human and Peoples’ Rights” and that the Communication should therefore be declared inadmissible by the African Commission, because it is not in conformity with Article 56 (2) of the African Charter.

Decision of the Commission on admissibility

41. The admissibility of communications submitted to the African Commission pursuant to Article 55 is determined by seven requirements provided for under Article 56 of the African Charter. In **communications 147/95 and 149/96 – Sir Dawda K Jawara v The Gambia**, the Commission held that these requirements must all be satisfied for a communication to be declared admissible.
42. In the present communication, without making references to the other requirements, the complainant submits that local remedies are not available in his circumstance, as the remedy available could only be used by the President and the members of the National Assembly. He then concluded that for this reason, there are no remedies and the communication should be declared admissible. The state on the other hand avers that the communication is incompatible with the OAU Charter and the African Charter, and without specifying, also notes that the complainant has not attempted the remedies available to him. The state concludes that for the above reasons, the communication should be declared inadmissible.
43. In view of the foregoing, the African Commission notes that since the state did not raise objections on the other requirements under Article 56, it is presumed that they have been complied with by the complainant. The Commission will therefore pronounce on the two requirements in dispute, that is Article 56(2) incompatibility with the Charter, and Article 56 (5) exhaustion of local remedies.
44. Compatibility, according to the *Black's Law Dictionary* means 'in compliance' or 'in conformity with' or 'not contrary to' or 'against'. The African Commission has interpreted compatibility under Article 56 (2) of the Charter to mean the communication must reveal a prima facie violation of the Charter. In the present communication, the complainant alleges that the Cote d' Ivoire constitution of 2000 includes provisions which are discriminatory and do not provide citizens of the country equal opportunity to fully participate in the governance of their country. The complainant claims that in terms of Article 35 of the constitution "*The President of the Republicshould be of Ivorian origin, born of a Father and Mother of Ivorian origin.....*", Article 65 of the constitution stipulates that a Candidate to the Presidential elections or to the functions of Speaker or Deputy Speaker of the National Assembly "*should be of Ivorian origin, with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality*" and Article 132 according to the complainant accorded civil and criminal immunity to the members of the former National Committee for Public Security (CNSP), an executive military body which had directed the transition, and to the perpetrators of the events which brought about the change of Government following the Coup d'Etat of 24 December 1999.

These allegations in the opinion of the Commission do raise a *prima facie* violation of human rights. Based on this, the African Commission holds that the requirement of Article 56(2) of the African Charter has been sufficiently complied with.

45. Secondly, the respondent State contends that the complainant has not attempted any domestic remedies. The complainant has stated clearly that the remedy available to secure a revision of the Constitution can be used only by the President and the members of parliament. It is not available to any other individual or citizen. The respondent state did not dispute this fact but instead indicated, without elaborating, that the complainant has not submitted any evidence on the use and exhaustion of existing local remedies, adding that “local remedies” include any legal and lawful action undertaken to “ensure the cessation of the alleged violations”.
46. In **Sir Dawda K. Jawara/The Gambia**, the African Commission made it clear that a local remedy is available if the Complainant is able to pursue it without any hindrance; the remedy is effective if it offers the Complainant the possibility of success and if this remedy is adequate and capable of providing reparation for the alleged violation⁴.
47. Where the complainant demonstrates to have exhausted all remedies, the burden shifts to the respondent state which has to show the remedies available and the extent to which the complainant could use them to remedy his/her claim. Making a general statement on the availability of local remedies without substantiating is not sufficient. This view is supported by the Human Rights Committee on **Albert Mukong v Republic of Cameroon**,⁵ where the Committee stated that the State party had merely listed *in abstracto* the existence of several remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the complainant’s case.
48. In the **Velasquez Case**⁶ the Inter-American Court on Human Rights, in interpreting Article 46 of the Inter-American Human Rights Convention (Article similar to Article 56 of the African Charter) on the matter of exhaustion of local remedies, declared that, for the necessary condition of the exhaustion of local remedies to apply, the local remedies of the State concerned should be available, adequate and effective so that they can be used and exhausted.

⁴ Communication 147/95 and 149/96 – Sir Dawda K. Jawara/The Gambia.

⁵ Communication No. 458/1991.

⁶ Velasquez Rodriguez Case, Judgment of the 29th July 1988, Inter-Am.Ct.H.R (Ser.C) No.4 (1988).

49. In the present case, the Complainant does not have the possibility of resorting to any judicial means to remedy the alleged violation as the mechanism provided for by Article 124 of the Constitution is not available to him. In effect, the Complainant does not have the necessary capacity to initiate the local remedy because this is reserved exclusively for the President of the Republic and for the members of the National Assembly. It can therefore be concluded that the remedy offered by Article 124 of the Constitution is neither adequate nor available to the Complainant.
50. The Respondent State is under obligation to provide all possible, effective and accessible remedies for its citizens by which means the latter can seek, at the national level, recognition and remedying of the alleged violations of their rights, even if it means resorting, should the need arise, to the international systems of protection of human rights like the African Commission for Human and Peoples' Rights.
51. In view of the foregoing, the African Commission considers that in the context of the present Communication, the domestic remedies are not available and as such the condition for exhausting them as envisaged by Article 56 of the African Charter cannot be invoked. The African Commission therefore concludes that the objections raised by the Respondent State in terms of Article 56 (2) and (5) are not substantiated, and thus holds that the present communication is **admissible**.

Decision on the merits

Complainant's submissions on the merits

52. The Complainant claims that the provisions of Articles 35 and 65 of the 2000 Constitution of the Republic of Cote d'Ivoire contravenes both articles 2 and 13 of the African Charter. Article 35 of the said Constitution stipulates that:

"The President of the Republicshould be of Ivorian origin, born of a Father and Mother who themselves must be Ivorian by birth....."

53. Article 65 of the Constitution stipulates that the candidate to the Presidential elections or to the posts of Speaker or Deputy Speaker of the National Assembly *"should be of Ivorian by birth, with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality"*.
54. The Complainant contends that in establishing the rules and conditions of access to the above-mentioned public offices, the Constitution makes a distinction between Ivorians on the basis of their places of origin and their

birth, and divides Ivorians into categories, applying different standards to different categories, something the complainant finds discriminatory and contrary to Article 2 of the African Charter.

55. In terms of Article 35 of the Constitution the following categories of citizens cannot be eligible to run for the office of President of the Republic, or to be elected as Speaker of the National Assembly or Deputy Speaker of the National Assembly:

- a) Ivorians who acquired Ivorian nationality other than by birth, that is, either through, marriage or naturalisation;
- b) Ivorians who although Ivorians by birth, were born of Ivorian parents, do, at some stage in their lives, hold another nationality; and
- c) Ivorians who had once renounced Ivorian nationality.

56. Such a distinction, according to the Complainant, would result in the exclusion of more than “40% of the Ivorian population...from submitting candidature to the above-mentioned public offices...”, and this would reduce the choice left to citizens to freely choose their fellow citizens to direct the affairs of their nation, contrary to Articles 13 (1) of the African Charter.

57. On the allegation that the Constitution violates Article 3 of the African Charter, the Complainant points out that the Constitution, in its Article 132, accords civil and criminal immunity to the members of the former National Committee for Public Security (CNSP), an executive military body which had directed the transition, and to the perpetrators of the events which brought about the change of Government following the *Coup d'Etat* of 24 December 1999.

58. According to the complainant, this immunity is “total and unlimited” in time and would prevent certain persons, victims of the acts perpetrated by those granted amnesty to bring their cases to court in order to obtain compensation for the wrongs done to them. According to the complainant, this constitutes unequal protection of the law contrary to Article 3 (2) of the Charter.

Respondent State’s submissions on the merits

59. The Respondent State, for its part, while disputing the assertion that the Constitutional provisions in question have excluded “more than 40% of the population” of Côte d’Ivoire from access to the said offices as argued by the Complainant, justifies instead the need of the said provisions by the

fact that the State has the right to legally determine the category of citizens to whom “the accomplishment of a specific act or the access to a specific situation” should be entrusted.

60. The Respondent State considers it legitimate to require “a certain level of loyalty from whoever aspires to preside over its highest offices in the land”, which is the case for the office of President of the Republic or that of Speaker of the National Assembly or that of Deputy Speaker of the National Assembly.
61. Moreover, the Respondent State refutes the notion of discrimination advanced by the Complainant in this case, and contends that the Ivorian Constitution rather makes a “distinction” between the different citizens of the same country. Whereas, argues the Respondent State, it is not discrimination “when the distinction between individuals placed under similar conditions is made on a “reasonable and objective” basis.
62. The Respondent State quotes the American, Algerian, *Beninoise*, Burkinabé and Gabonese examples where access to the office of President of the Republic is restricted by various criteria including, for instance, that of nationality.
63. The Respondent State further argues that the discrimination and exclusion denounced by the Complainant can no longer be put forward before the African Commission considering that within the context of the Pretoria Accord⁷, which the Parties had concluded under the aegis of the African Union, the President of the Republic of Côte d’Ivoire, making use of the exceptional powers vested in him by the Constitution (Article 48), had declared eligible all the candidates designated by the Parties in the Marcoussis Accord⁸.
64. For the Respondent State, “it appears from the terms of the Communication (currently under consideration) that its main objective is the candidature of all those who want it, notably that of Mr. Alassane Dramane Ouattara. Since this requirement has been satisfied in accordance with the principles of the African Union, article 56 (7) of the Charter can be applied.
65. On the allegation of unequal protection of the law, the Respondent State argues that the immunity granted to the perpetrators of the events which brought about the change of Government on 24 December 1999 is neither *total nor limitless* in time, and that it only covers “*the Members of the National Committee for Public Security (CNSP) and all the perpetrators of*

⁷ The Accord was concluded in April 2005 in Pretoria, South Africa.

⁸ This Accord was concluded at Marcoussis, France, in January 2003.

the events". Therefore, the other perpetrators of the looting, whether civilians or military, committed during the military transition period, are not covered by this immunity.

66. With regard to the possibility of the victims instituting legal proceedings in order to obtain compensation for the wrongs they have suffered, the Respondent State contends that there is no inequality as no victim can be allowed to institute proceedings against the people benefiting from the amnesty.

African Commission's decision on the merits

67. At its 41st Ordinary session held in Accra, Ghana in May 2007, the state informed the Commission that it was in the process of dealing with the civil crisis in the country, and the issues raised in the present communication would be dealt with. The Commission regrets the State Party's failure to provide any further information with regard to developments on the substance of the author's claims since then.

68. Having received submissions on the merits from both parties, and in the absence of any indication that this matter has been or is being resolved by the parties amicably, the Commission will proceed to consider this communication on the merits.

69. In the case under consideration, the Complainant alleges violation by the respondent state of Articles 2, 3 and 13 of the African Charter. The African Commission has analysed these allegations in the light of the information at its disposal.

70. The Commission will deal with allegations regarding violation of Articles 2 and 13 together, and allegations regarding the violation of Article 3 separately.

Allegations on the violation of Articles 2 and 13 of the African Charter.

71. Articles 2 of the African Charter stipulates that:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any other status".

And Article 13 (1) of the Charter provides that:

“Every citizen shall have the right to participate freely in the Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

72. The African Commission considers that the restrictions which can be imposed on the enjoyment of the rights prescribed by the African Charter should only be applied, where the need arises, in the spirit of the conditions provided for by the Charter.
73. In **Civil Liberties Organisation (on behalf of the Nigerian Bar Association)/Nigeria**⁹ the Commission stated that “in regulating the exercise of this right [referring to the right to association] the competent authorities should not enact [legislation which would limit the right...”. In **Constitutional Rights Project and Civil Liberties Organisation/Nigeria**¹⁰, The Commission while restating the above statement added that ‘with these words, the Commission states a general principle that applies to all rights, not only freedom of association’. The Commission went further to state that “Governments should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law...”.
74. The Ivorian Constitution of 2000, in its Articles 35 and 65, as conditions of eligibility to certain high offices of State, imposed limitations which effectively disqualified a certain percentage of the Ivorian population from aspiring to these positions. The complainant puts the figure at 40%, and although the respondent state disputes this figure, it does not dispute the existence of the situation itself. According to the state, the disqualification clause is justified on the basis of exigencies of “the level of loyalty”. It added that the practice is also current in other countries.
75. Article 2 of the African Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction on any kind such as “...national or social origin, fortune, birth or other status”. Article 13 provides that “every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”.
76. Unlike Article 2 which talks of ‘*every individual*’, Article 13 is even clearer as it talks of ‘*every citizen*’. Under this Article therefore, every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2, and without unreasonable restrictions, to take part in the conduct of government of his country, directly or through freely

⁹ Communication 101/93.

¹⁰ Communication 102/93.

chosen representatives, which includes to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot.

77. The right to participate in government or in the political process of one's country, including the right to vote and to stand for election, is a fundamental civil liberty and human right, and should be enjoyed by citizens without discrimination. The reason for this lies in the fact that, as historical experience has shown, governments derived from the will of the people, expressed in free elections, are those that provide the soundest guarantee that the basic human rights will be observed and protected.
78. Several other international instruments guarantee the rights under Articles 2 and 13 of the African Charter, that is, non-discrimination and to participate in government. Article 5(c) of International Convention on the Elimination of Racial Discrimination (ICERD) states *inter alia* that: in compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: "... (c) Political rights, in particular the right to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service". Article 2 in the ICERD refers to the obligation to eliminate racial discrimination and 'to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.' Article 21 of the Universal Declaration on Human Rights on its part, provides that: "everyone has the right to take part in the government of his country, directly or through freely chosen representatives," and "has the right to equal access to public service." Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.
79. The most elaborate interpretation of the right to participate in government has been provided by the Human Rights Committee of the United Nations. In its General Comment No. 25 on participation in public affairs and the right to vote¹¹, the Committee stated *inter alia*, that: "the effective

¹¹ CCPR/C/21/Rev.1/Add.7, General Comment No. 25.. Adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy.¹²

80. In the present communication, could it be said that the conditions set out in Articles 35 and 65 of the Ivorian Constitution of 2000 are *justifiable on objective and reasonable criteria and reasonable and non-discriminatory*?

81. Article 35 of the said Constitution stipulates that *the President of the Republicshould be of Ivorian origin, born of a Father and Mother who themselves must be Ivorian by birth.....*. Article 65 stipulates that the Candidate to the Presidential elections or to the posts of Speaker or Deputy Speaker of the National Assembly *“should be Ivorian by birth, with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality”*.

82. Admittedly, the constitution places these restrictions only on the highest positions in the land. Many other countries, including European, American and African countries have similar provisions to determine those eligible to ascend to the highest offices. Most of these countries have the same justification given by the Ivorian government, that is, persons having these positions must have undoubted loyalty to the nation. It is doubtful though whether this is the only way to test loyalty or whether this is even the best way to test loyalty.

83. The Commission recognises the right of each State Party to the Charter to adopt appropriate legislation that would regulate the conduct of elections. It is also for the states to determine criteria for eligibility for those who can vote and those who can stand for elections to whatever positions. The exercise of adopting criteria to regulate those who can vote and those who can stand for elections is in itself not a violation of human rights norms. In every society, some positive measure/actions need to be taken to regulate human behaviour in certain areas. However, these criteria must be reasonable, objective and justifiable. They must not seek to take away the already accrued rights of the individual.

¹² Human Rights Committee, General Comment No. 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 15.

84. The African Commission is of the view that the right to vote as well as the right to stand for election are rights attributable and exercised by the individual. This is why voting, in democratic societies, is by secret ballot, to the extent that even the individual's father or mother may not know who the individual has voted for. By the same token, the exercise of the right to stand for elections is a personal and individual right which must not be tied to the status of some other individual or group of individuals. The right must be exercised by the individual simply because he/she is an individual, and not tied to the status of another individual. Distinctions must thus be made between the rights an individual can exercise on his own and the rights he/she can exercise as a member of a group or community.
85. Thus, to state that a citizen born in a country cannot stand for elections because his/her parents were not born in that country would be stretching the limit of objectivity and reasonableness too far. The Commission recognises the fact that the position of President, Speaker and Deputy Speaker, and indeed other similar positions are very crucial to the security of a country, and it would be unwise to put a *blank cheque* vis-à-vis accessibility to these positions. Placing restrictions on eligibility for these posts is in itself not a violation of human rights. However, where these restrictions are discriminatory, unreasonable and unjustifiable, the purpose they intended to serve will be overshadowed by their unreasonableness.
86. In the present instance, the rights to vote and to stand for elections is an individual right and conditions must be made to ensure that the individual exercises these rights without reference to his/her attachment to other individuals. The Commission thus finds the requirement that an individual can only exercise the right to stand for the post of a President not only if he/she is born in Cote d'Ivoire, but also that his parents must be born in Cote d'Ivoire unreasonable and unjustifiable, and find this an unnecessary restriction on the right to participate in government guaranteed under Article 13 of the African Charter. Article 35 is also discriminatory because it applies different standards to the same categories of persons, that is persons born in Cote' d'Ivoire are now treated based on the places of origin of their parents, a phenomenon which is contrary to the spirit of Article 2 of the African Charter.
87. This was also the Commission's position in **Legal Resources Foundation v/ Zambia**¹³, where the African Commission held that the right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or

¹³

Communication 211/98.

lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being and equal and proud citizen. He may vote for others but has limitations when it comes to standing for office. In other words, the country may be deprived of the leadership and resourcefulness such a person may bring to national life".

88. The Complainant also alleges the violation by the Respondent State of Article 3 of the African Charter which stipulates:

*"1 – Every individual shall be equal before the law
2 – Every individual shall be entitled to equal protection of the law".*

89. The Respondent State argues that the immunity granted to the perpetrators of the events which brought about the change of Government on 24 December 1999 is neither *total nor limitless* in time, and that it only covers *"the Members of the National Committee for Public Security (CNSP) and all the perpetrators of the events"*. Therefore, the other perpetrators of the looting, whether civilians or military, committed during the military transition period, are not covered by this immunity. With regard to the possibility of the victims instituting legal proceedings in order to obtain compensation for the wrongs they have suffered, the Respondent State contends that there is no inequality as no victim can be allowed to institute proceedings against the people benefiting from the amnesty.

90. It appears therefore that *"the Members of the National Committee for Public Security (CNSP)"* had total and complete immunity, and no action could be brought against them by any body for whatever reason.

91. Over the years, the strict interpretation of Clemency powers or pardons have been the subject of considerable scrutiny by international human rights bodies and legal scholars. There has been consistent international jurisprudence suggesting that the adoption of amnesties leading to impunity for serious human rights has become a rule of customary international law. In a report entitled *"Question of the impunity of perpetrators of human rights violations (civil and political)"*, prepared by Mr. Louis Joinet for the Sub-commission on Prevention of Discrimination and Protection of Minorities, pursuant to Sub-commission decision 1996/119, it was noted that "amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy" and that "the right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them".¹⁴

¹⁴ See E/CN.4/Sub.2/1997/20/Rev.1, paras. 32 and 27.

92. The Report went on to state that "even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within certain bounds, namely: (a) the perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such atrocities."¹⁵
93. In its General Comment No. 20 on Article 7 of the ICCPR, the UN Human Rights Committee noted that "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".¹⁶ In the case of **Hugo Rodríguez v. Uruguay**,¹⁷ the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the State party under the Covenant and expressed concern that in adopting the amnesty law in question, the State party contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations.
94. The African Commission has also held amnesty laws to be incompatible with a State's human rights obligations.¹⁸ Guideline No. 16 of the Robben Island Guidelines adopted by the African Commission during its 32nd session in October 2002 further states that 'in order to combat impunity States should: a) ensure that those responsible for acts of torture or ill-

¹⁵ Ibid. Principles 18 and 25.

¹⁶ See Human Rights Committee General Comment No. 20 (44) on Article 7, para. 15 at www.unhcr.ch/tbs/doc.nsf/view40?SearchView.

¹⁷ Rodríguez v. Uruguay, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

¹⁸ See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98 and Jean Yokovi Degli on behalf of Corporal N. Bikagni, Union Interfricaine des Droits de l'Homme, Commission Internationale de Juristes v Togo Communications 83/92, 88/93, 91/93.

treatment are subject to legal process; and b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law'.¹⁹

95. **In Malawi African Association and Others v. Mauritania,**²⁰ “the Commission held that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations”. The Commission went further to note that its role consists precisely in “pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having the force of law ...cannot shield that country from fulfilling its international obligations under the Charter.

96. **In Zimbabwe Human Rights NGO Forum/Zimbabwe**²¹ this Commission reiterated its position on amnesty laws by holding that “by passing the Clemency Order No. 1 of 2000, prohibiting prosecution and setting free perpetrators of “politically motivated crimes”,...the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation. This act of the state constituted a violation of the victims’ right to judicial protection and to have their cause heard under Article 7 (1) of the African Charter”.

97. If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard. Adopting laws that would grant immunity from prosecution of human rights violators and prevent victims from seeking compensation render the victims helpless and deprives them of justice.

98. In light of the above, the African Commission holds that by granting total and complete immunity from prosecution which foreclosed access to any

¹⁹ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples’ Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98.

²⁰ Communications. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98.

²¹ Communication 245/2002.

remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the Respondent State did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of Articles 1 and 7 (1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.²²

For these reasons, the African Commission:

- a) Finds that the Respondent State is in violation of Articles 1, 2, 3(2), 7 and 13 of the African Charter and requests it to take the appropriate measures to remedy the situation.
- b) Requests both parties to inform the Commission on the progress made in reviewing the discriminatory provisions in the Constitution.
- c) Offers its Good Offices in case it is needed to assist.

Adopted at the 5th Extraordinary Session of the African Commission on Human and Peoples' Rights, 21 – 29 July 2008, Banjul, The Gambia.

²²

See the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para C(d).