AFRICAN UNION		UNION AFRICAINE
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

XYZ

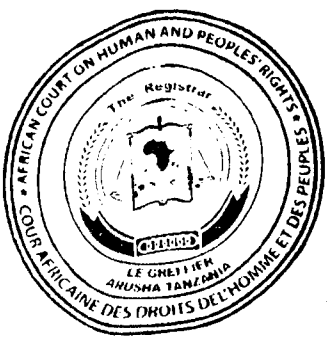
V.

REPUBLIC OF BENIN

APPLICATION NO. 010/2020

JUDGMENT

27 NOVEMBER 2020



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The Court composed of: Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Imani D. ABOUD - Judges; and Robert ENO, Registrar.

In the Matter of

XYZ

Self-represented.

Versus

REPUBLIC OF BENIN

Represented by Mr. Iréné ACOMBLESSI, Judicial Agent of The Treasury.

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. XYZ (hereinafter referred to as "the Applicant") is a national of Benin. He requested anonymity citing personal security reasons. He challenges Law No. 2019-40 of 1 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin claiming that it violates his fundamental rights.

2. The Application is brought 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 said 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 organisations. On 25 March 2020, the Respondent State deposited with 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 that it also has no effect on 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. It emerges from the initial Application filed on 12 November 2019 that on 30 October 2019, the Parliament of Benin passed Law No. 2019-40 to amend Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin. This law was found to be in conformity with the Constitution by Constitutional Court

[1] *Ingabire Victoire Umuhoza v. Republic of Rwanda,* (jurisdiction) (3 June 2016) 1 AfCLR 585, §69; *Houngue Eric Noudehouenou v. Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling of 05 May 2020 (provisional measures), §§ 4- 5 and *Corrigendum* of 29 July 2020.

Decision DCC 19-504 of 6 November 2019 and promulgated on 7 November 2019.

4. The Applicant submits that the Constitutional Court is a biased institution because its President is a close associate of the President of the Republic of Benin and he has defended, in his capacity as Minister of Justice, previous drafts prepared for the purpose of revising the Constitution which were declared unconstitutional by the Constitutional Court of Benin.

5. He further maintains that the impugned law was adopted in secret, without the involvement of all sections of the Beninese society, whereas international instruments to which the Respondent State has acceded oblige it to ensure that the process of amending or revising the constitution is based on national consensus.

6. Lastly, the Applicant submits that the constitutional revision that was adopted outside the rules of democracy, the rule of law and respect for human rights is a threat to the peace and security of the people of Benin.

B. Alleged violations

7. The Applicant alleges:

   i. Violation of the right to independence and impartiality of courts and tribunals under Articles 26 and 7 of the Charter;
   ii. Violation of the principle of national consensus protected by Article 10(2) of the African Charter on Democracy, Elections and Good Governance (ACDEG):
   iii. Violation of the right to information enshrined in Article 9(1) of the Charter;
   iv. Violation of the right to Economic, Social and Cultural Development protected by Article 22(1) of the Charter; and
   v. Violation of the right to peace and security enshrined in Article 23(1) of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was filed on 14 November 2019 together with a request for provisional measures, referred to as the "Additional Applications No 021/2019 and 022/2019.

9. At its 53rd Ordinary Session, the Court decided to grant the Applicant's request for anonymity and informed the Parties of its decision.

10. On 7 March 2020, the Registry informed the Applicant that the Court had decided to consider his Application as a separate application on the basis that the subject-matter and the facts were different from the Consolidated Applications 021/2019 and 022/2019.

11. The Application was served on the Respondent State on 13 March 2020.

12. On 3 April 2020, the Court dismissed the request for provisional measures to stay the application of Law No. 2019-40 of 07 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of Benin on the ground that he has not demonstrated the existence of extreme urgency or the risk of serious and irreparable harm The order was notified to the Parties on 03 April 2020.

13. The Parties filed their submissions on the merits and on reparations within the prescribed time-limits.

14. On 9 October 2020, pleadings were closed and parties were duly notified.

IV. PRAYERS OF THE PARTIES

15. The Applicant prays the Court to:

    i. Declare and rule that the Republic of Benin has violated Articles 1, 7, 9(1), 13(1), 20(1), 22(1), 23(1) and 26 of the Charter and Article 10(2) of ACDEG;
    ii. Adjudge and determine that the Republic of Benin has perpetrated the crime of unconstitutional revision of the Constitution by grabbing the powers of the legislative power and tinkering with the rules on the vacancy of power without any consensus and any recourse to referendum through the 9 members of the

committee of experts, the 10 parliamentarians who initiated the revision the Constitution and 4 judges of the Constitutional Court;

iii. Order the Republic of Benin to annul Decision DCC 2019-504 of 6 November 2019 and Law No. 2019-40 to revise Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all laws derived therefrom, and then urgently proceed to reinstate Law No.90-032 of 11 December 1990;

iv. Refer the situation to the Peace and Security Council of the African Union in liaison with the Chairperson of the Commission, so that appropriate sanctions are meted out against the Respondent State, the MPs who sponsored the bill and the 4 judges of the Constitutional Court.

v. Order the Respondent State to pay him the sum of 1,000,000,000 CFA francs as damages.

16. The Respondent State prays the Court to:

i. Declare that the Court lacks jurisdiction;

ii. Declare the application inadmissible;

iii. Establish the impartiality of the Constitutional Court of Benin;

iv. Find that the constitutional revision was carried out in conformity with the 11 December 1990 Constitution of Benin;

v. Note that the law to amend the Constitution was consensually voted by the required majority of parliamentarians;

vi. Note the vacuity of the proceedings initiated against the Respondent State by the Applicant;

vii. Consequently, order the Applicant to pay to the Respondent State, by way of compensation, the sum of one billion (1,000,000,000) FCFA for all damages suffered and incurred.

V. JURISDICTION

17. The Court notes that 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.

18. According to n to Rule 49(1) of the Rules,[2] "The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules".

19. On the basis of the above-cited provisions, the Court must, in every application, preliminarily ascertain its jurisdiction and rule on the objections to its jurisdiction, if any.

20. The Court notes that the Respondent State raises an objection to its material jurisdiction.

A. Objection to material jurisdiction

21. The Respondent State asserts that the Applicant does not allege any human rights violations and thus, the Court lacks material jurisdiction to examine the Application.

22. The Applicant submits that Article 3(1) of the Protocol confers on the Court jurisdiction to entertain all cases and disputes before it concerning the interpretation and application of the Charter, the Protocol, and any other relevant human rights instruments ratified by the States concerned.

23. He contends that in his Application, he has expressly cited violations of its fundamental rights protected by the Charter and African Charter on Democracy Elections and Governance[3] (hereinafter referred to as "the ACDEG") and the Court has jurisdiction to consider his claims on the basis of Article 3 of the Protocol. Consequently, the Applicant argues that the objection raised by the Respondent in this regard should be dismissed.

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[2]Formerly Rule 39(1) of the Rules of 2 June 2010.
[3] The Respondent State became a party to the African Charter on Democracy, Elections and Governance on 11 July 2012.

24. The Court notes that, pursuant to Article 3(1) of the Protocol, it has jurisdiction over "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

25. The Court considers that in order for it to have material jurisdiction, it suffices that the rights which are alleged have been violated be protected by the Charter or by any other human rights instrument ratified by the State concerned.[4]

26. The Court notes in this case that the Application contains allegations of violations of rights protected by Articles 26, 7, 22(1) 23(1) of the Charter and Article 10(2) of ACDEG. With regard to ACDEG, specifically, the Court recalls its position that this Convention constitutes a human rights instrument and thus, the Court has the competence to examine applications alleging violations of its provisions.[5]

27. The Court accordingly concludes that it has material jurisdiction and therefore rejects the objection raised by the Respondent State.

B. Other aspects of jurisdiction

28. 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

[4] *Franck David Omary and others v.United Republic of Tanzania,* (ruling on 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.

[5] *Actions pour la Protection des Droits de l'Homme (APDH) v. Côte d'Ivoire* (merits and reparations) (28 November 2016) 1 AfCLR 668, §§ 57-65 ; *Suy Bi Gohoré Emile and others v. Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, (merits and reparations) (15 July 2020),§ 45.

made after the Application was filed before the Court.[6]

(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, in so far as the facts of the case and the alleged violations took place on the territory of the Respondent State.

29. Accordingly, the Court declares that it has jurisdiction to examine the instant Application.

VI. PRELIMINARY OBJECTIONS

30. The Respondent State raises three objections, namely the absence of a nexus between the present Application and Applications No 021/2019 and 022/2019, the Applicant's abuse of the right of standing, and the Applicant's lack of interest in bringing this Application.

31. The Court notes that even if these objections are not grounded in the Protocol and the Rules, as they raise issues of admissibility outside the domain of Article 56, the Court is required to examine them.

A. Objection based on the absence of a link between the present Application and Consolidated Applications No 021/2019 and 022/2019

32. The Respondent State asserts that an additional application is admissible only if it is sufficiently connected to the main application. In the absence of such a link, the additional application should be declared inadmissible.

33. In this regard, it alleges that the present Application relates to the law amending the Constitution while Consolidated Applications Nos. 021/2019 and 022/2019

[6]See paragraph 2 above.

concerning the Beninese Criminal Code and the annulment of Mr Lionel Zinsou's conviction. According to the Respondent State, there is no link between the instant Application and these Consolidated Applications, thus, the Application should be declared inadmissible.

34. The Applicant avers that the joinder of cases is at the Court's discretion and it can decide to join or not to join cases in the interest of justice. He therefore argues that this objection should be dismissed.

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35. The Court notes that the joinder of the applications brought before it is a matter for its discretionary assessment. It is not bound by the title of an application.

36. In the present case, having found that Applications No 021/2019 and 022/2019 and the present Application are unrelated, the Court applied its discretion and decided to treat the latter as an application in its own right and to register it as such.

37. Consequently, the Court dismisses the Respondent State's objection in this regard.

B. Objection based on the abuse of the right to file Application

38. The Respondent State submits that the Applicant has, under the cover of anonymity, filed several applications to the Court in the space of a few months using false documents and that all these proceedings were initiated solely with the aim of using the Court as a political forum. It therefore avers that the present Application is abusive and should be declared inadmissible.

39. The Applicant submits that neither the Charter, the Protocol nor the Court's Rules lay down a maximum number of applications which the Applicant is entitled to submit to the Court.

40. He asserts that the filing of several applications does not in itself constitute an abuse of procedure capable of justifying inadmissibility, in so far as the applications do not relate to the same facts and subject-matter.

41. The Applicant further submits that such abuse can only be established at the merits stage.

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42. The Court notes that an application is said to be abusive, among others, if it is manifestly frivolous or if it can be discerned therefrom 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, does not necessarily show a lack of good faith on the part of the applicant.

43. 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.

44. The Court therefore dismisses the respondent state's objection that the instant Application is abusive.

C. Objection based on lack of interest

45. The Respondent State alleges that it is a principle that legal action is conditioned by the capacity, standing and current, legitimate, personal interest to act. It submits that since the Applicant has failed to prove his interest in bringing proceedings, the Application should be declared inadmissible.

46. The Applicant states that the Application relates to the Beninese Constitution, in particular the right to vote of the citizens of that country. He considers that it is in his interest to act in his capacity as a national of that country.

***

47. 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...".

48. 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, especially in the case of public interest litigation. 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. This 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 applications to the Court on others' behalf without a need to demonstrate victimhood or a direct vested interest in the matter.[7]

49. In the instant case, the Applicant is contesting the manner and context under which the revision of the Beninese Constitution was carried out. In this regard, the Court observes that the amendment of laws such as the constitution, which is the supreme law of the land,[8] is of particular interest to all citizens as it has a direct or indirect bearing on their individual rights and the security and well-being of their society and country. Accordingly, considering that the Applicant himself is a citizen of the Respondent State and that the revised provisions of the Constitution have a potential impact on the right of every citizen to participate in the political affairs of his country, it is evident that he has a direct interest in the matter.

50. The Court therefore dismisses the Respondent State's objection on this point.

VII. ADMISSIBILITY

51. Article 6(2) of the Protocol provides that "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."

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[7] 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.
[8] See Article 3, Constitution of the People's Republic of Benin of 11 December 1990.

52. In accordance with Rule 50(1) of the Rules[9], "the 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".

53. Rule 50(2) of the Rules[10], which in essence restates 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) Be 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 to 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 the 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;
> g) Do not deal with cases which have already been settled by those States involved in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.

54. The Court notes that the compliance of the present Application with the conditions set out in Rule 50(2) of the Rules is not disputed by the Parties. However, the Court must examine whether these conditions are met.

i. The Court notes that the condition set out in Rule 50(2)(a) of the Rules has been met, as the Applicant has clearly indicated his identity even though the Court granted anonymity.
ii. The Court also finds that the Application is compatible with the Constitutive Act of the African Union and the Charter in so far as it relates to allegations of violations of human rights enshrined in the Charter and therefore complies with Rule 50(2) (b) of the Rules of Court.

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[9]Formerly Rule 40 of the Rules of 2 June 2010.
[10] Ibid.

iii. 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.

iv. 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.

v. The Court notes that the Application was filed before the Court after Law No. 2019-40 of 31 October 2019 revising the Constitution was enacted following decision DCC 2019-504 of 6 November 2019 of the Constitutional Court of the Respondent State in conformity with Article 114 of the Beninese Constitution[11] which is the highest jurisdiction of the State in constitutional matters. There is nothing in the file indicating that the Applicant had any other ordinary judicial remedy within the legal system of the Respondent State that he could have pursued to get redresses to his grievances. Consequently, the Court finds that the Applicant has exhausted local remedies and therefore the Application complies with Rule 50(2) (e) of the Rules.

vi. The Court further notes that following the decision DCC 2019-504 of the Constitutional Court dated 06 November 2019, the disputed law was promulgated on 7 November 2019 and published on 13 November 2019. The Application was filed before the Court on 14 November 2019, that is, eight (8) days after the Constitutional Court rendered its decision. The Court is of the view that there is no unreasonable delay on the part of the Applicant in this regard and thus, holds that the Application was filed within a reasonable time in accordance with Rule 50(2)(f) of the Rules.[12]

vii. 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

[11] Constitution of 11 December 1990.

[12] *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 105, § 52; *Norbert Zongo and others v. Republic of Burkina Faso*, (ruling on preliminary measures) (21 June 2013), 1 AfCLR 204, §121.

African Union. It therefore fulfils the condition set out in Rule 50(2)(g) of the Rules

55. In light of the foregoing, the Court concludes that the Application meets all the admissibility requirements set out in Article 56 of the Charter and Rule 50(2) of the Rules of Court.

56. The Court accordingly declares the Application admissible.

VIII. MERITS

57. The Applicant alleges the violations of (A) the right to independence of the constitutional court, (B) the right to impartial constitutional court, (C) principle of national consensus, (D) right to information, (E) the right to economic, social and cultural development, and the right to peace and security.

A. Alleged violation of the obligation to guarantee the independence of the Constitutional Court

58. The Applicant submits that the lack of independence of the Constitutional Court lies in the brevity and renewable nature of the judges' mandate and a lack of financial autonomy.

59. The Respondent State makes no observations on this point.

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60. Article 26 of the Charter provides that "State Parties to the present Charter shall have the duty to guarantee the independence of the courts (...)".

61. The Court notes that the independence of the judiciary is one of the fundamental pillars of a democratic society. The notion of judicial independence essentially

implies the ability of courts to discharge their functions free from external interference and without depending on any other government authority.[13]

62. It should be noted that judicial independence has two main limbs: institutional and individual. Whereas institutional independence connotes the status and relationship of the judiciary with the executive and legislative branches of the government, individual independence pertains to the personal independence of judges and their ability to perform their functions without fear of reprisal.[14] The obligation to guarantee the independence of courts in Article 26 of the Charter thus includes both institutional and individual aspects of independence.

63. The Court observes that institutional independence is determined by reference to factors such as: the statutory establishment of judiciary as a distinct organ from the executive and the legislative branches with exclusive jurisdiction on judicial matters, its administrative independence in running its day to day function without inappropriate and unwarranted interference, and provision of adequate resources to enable the judiciary to properly perform its functions.[15] On the other hand, individual independence is primarily reflected in the manner of appointment and tenure security of judges, specifically the existence of clear criteria of selection, appointment, duration of term of office, and the availability of adequate safeguards against external pressure. Individual Independence further requires that States must ensure that judges are not transferred or dismissed from their job at the whim or discretion of the executive or any other government authority[16] or private institutions.

64. The Court notes that the Constitutional Court in the Respondent State is created pursuant to Article 114 of the Constitution as a regulatory body of all other public institutions with the highest jurisdiction on constitutional matters.[17], Similar to

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[13] *Action pour la protection des droits de l'homme v. Côte d'Ivoire*, (merits and reparations) (18 November 2016) 1 AfCLR 697, § 117. See also Dictionary of international public Law, Jean Salmon, Brulyant, Bruxelles, 2001, p. 562 and 570.

[14] African Commission on Human and Peoples' Rights, *Guidelines and principles on the right to fair trial in Africa*, § 4 (h) (i)., See also Principles 1-7, UN Basic Principles on the Independence of the Judiciary, General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[15] Ibid.

[16] Ibid. See also ECHR, *Campbell and Fell,* §78, Judgment of 28 June 1984; *Incal v. Turkey*, Judgment of 9 June 1998, Reports 1998-IV, p. 1571, §65.

[17] Article 114 of the Constitution of Benin of 11 December 1990

countries with Francophone tradition, it is not part of the structure of regular courts but is placed outside a separate judicial institution distinct from the legislative and executive organs[18].

65. The Court further observes that in addition to the Constitution, the Respondent State's Law No. 91-009 of 4 March 1991 on the Organic Law on the Constitutional Court contains provisions that ensure administrative and financial autonomy of the Constitutional Court.[19]

66. As far as its institutional independence is concerned, it is thus not apparent either from the Constitution or from the organic law of the Constitutional Court that it may be subject to direct or indirect interference or that it is under the subordination of any power or parties when exercising its jurisdictional function.

67. Consequently, the institutional independence of the Constitutional Court of the Respondent State is guaranteed.

68. As regards individual independence, Article 115 of the Constitution of the Respondent State stipulates that the Constitutional Court shall be composed of seven judges appointed for a period of five (5) years renewable once, four of whom shall be appointed by the Office of the National Assembly and three by the President of the Republic. It requires that the Judges must have the required professional competence, good morality and great probity. The Constitution also stipulates that judges are irremovable for the duration of their term of office and may not be prosecuted or arrested without the authorization of the Constitutional Court itself and the Office of the Supreme Court sitting in joint session except in cases of flagrant offence.

69. The Court observes that while it is true that the prohibitions in Article 115 against removability and unwarranted prosecution and the requirements of professional and ethical qualifications of members of the Constitutional Court, to some extent, guarantee individual independence, the same cannot be said about the renewable

[18] L Favoreu *Les Cours constitutionnelles* (1986) Paris, PUF, Collection Que Sais-je? 18-19.
[19] Article 18 of the same law, for example, stipulates that: "On the proposal of the President of the Constitutional Court, the appropriations necessary for the functioning of the said Court shall be entered in the National Budget. The President of the Court shall be the Authorising Officer for expenditure".

nature of their term. This is exacerbated by the fact that there is no provision in Beninese law stipulating the criteria for renewal or refusal to renew the term of office of the judges of the Constitutional Court. The President and the Bureau of the National Assembly retain the discretion to renew their mandate.

70. Indeed, for judges who are appointed, the renewable nature of the term of office, which depends on the discretion of the President of the Republic and the Bureau of the National Assembly, does not guarantee their independence[20], especially as the President is empowered by law to refer cases to the Constitutional Court.[21]

71. In view of the foregoing, the Court is of the opinion that the renewable nature of the mandate of the Judges of the Constitutional Court of the Respondent State in the circumstances of this case, compromises their independence.

72. The Court concludes that the independence of the Constitutional Court is not guaranteed and, therefore, the Respondent State has violated Article 26 of the Charter.

B. Alleged violation of the Respondent State's obligation to guarantee the impartiality of the Constitutional Court

73. The Applicant states that the impartiality of a judicial body is essential for the parties. It must be free from personal bias or prejudice and offer sufficient guarantees of objectivity.

74. He alleges that the Constitutional Court is a biased institution because its President, Mr Joseph Djogbenou, is close to the President of the Republic of Benin, he participated in his capacity as Minister of Justice in previous attempts to draft revisions to the Constitution, explained the merits of these revisions and defended them before Parliament.

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[20]D. Rousseau, la Justice constitutionnelle en Europe, Paris, Montchrétien, 1992, "The non-renewable nature of a term of office is a guarantee of independence because the appointing authorities cannot exchange a good decision for appointments and the judges themselves have no interest in seeking favours from these authorities".

[21]Article 121 allows the President of the Republic refer cases to the Constitutional Court.

75. He further states that the President of the Constitutional Court wore the double hat of a rapporteur and presiding judge who declared the constitutional revision in conformity with the constitution.

76. The Applicant argues that Mr Djogbenou's impartiality affects the Constitutional Court as a whole and that, consequently, the Constitutional Court could only issue a decision of conformity with this revision, the text of which violates his alleged fundamental rights.

77. The Applicant concludes that decision DCC 2019-504 of 6 November 2019 violates the principle of the impartiality of courts and tribunals enshrined in Articles 7(1) (d) of the Charter.

78. The Respondent State asserts that the integrity of the Constitutional Court of Benin does not suffer from any contention. It is composed of magistrates, professors and legal practitioners whose competence, experience and independence are recognised.

79. It further argues that constitutional review is carried out in collegial formation. Suspicions of bias as well as the statements of one member cannot prejudge the conduct of the Court as a whole. In any case, the Applicant does not prove bias.

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80. Article 7 of the Charter provides that:

> 1. Every individual shall have the right to have his cause heard. This right includes:
>
> ……
>
> d. the right to be tried within a reasonable time by an impartial court;

81. The Court observes that the concept of impartiality is an important component of the right to a fair trial. It signifies the absence of bias, or prejudice and requires that "judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[22]

[22] Human Rights Committee, Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN Doc. GAOR, A/48/40(vol. II), § 7.2.

82. The Court notes that a judicial authority must offer sufficient guarantees to exclude any legitimate doubt throughout the judicial process.[23] However, the Court recalls its previous decision on this point where it observed that:

> ...the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge" and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding.[24]

83. Accordingly, the Court notes that a mere allegation of impartiality of a judicial authority is not sufficient and any subjective perception by a party of the existence of bias on the part of a judge should be justified and substantiated by a credible evidence.

84. In the instant case, the Court notes the Applicant's allegation that Mr Djogbenou is a friend of the President of the Republic and that he had defended the revision of the Constitution while he was a Minister of Justice, a fact which in the Applicant's opinion, is sufficient to consider him partial and by extension, the Constitutional Court.

85. The Court further notes that Mr Djogbenou's friendship with the President of the Republic is not contested by the Respondent State. However, the Applicant has not proved that the statements and opinions made in 2017 by Mr Djogbenou in his capacity as a Minister of Justice concern the same points disputed in the context of the constitutional revision of 31 October 2019.

86. The Court understands that Mr Djogbenou's previous involvement in the revision of the Constitution, which is not disputed by the Respondent State, might have created the possibility of appearance of bias. This is particularly true considering that he was the one who drafted the majority decision. However, he was only one among other judges of the Court who sat on the Bench to consider the matter and

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[23] *Alfred Agbesi Woyome v. Republic of Ghana*, ACtHPR, Application No. 001/2017, (merits and reparations), (Judgment of 28 June 2019), § 128.
[24] Ibid.

his previous involvement in the revision process does not necessarily demonstrate the existence of preconceived bias on his part. In fact, the Applicant has not adduced any evidence to this effect or to prove that Mr Djogbenou had in any way, imposed his opinions on the other members of the Court.

87. In view of the above, the Court concludes that the Respondent State has not violated the Applicant's right to impartial tribunal, as required by Article 7(1)(d) of the Charter.

C. Alleged violation of the principle of national consensus

88. The Applicant asserts that the law revising the Constitution has not been supported by a significant part of the Beninese people and is therefore not consensual.

89. He argues that in fact, at the end of the crisis resulting from the legislative elections of 28 April 2019, the President of the Republic convened on 10, 11 and 12 October 2019, a meeting called "political dialogue" in the absence of the most significant opposition political parties.

90. At the end of this meeting, recommendations were adopted and submitted to the President of the Republic, including the organisation of early general elections in 2020 and 2021 preceded by the tidying up of the political parties' charter and the electoral code. As part of the implementation of these recommendations, a committee of experts was set up.

91. The report submitted by this committee to the President of the Republic presented several legislative proposals along the lines of the recommendations, excluding the revise of the constitution.

92. Further, he states that while the Beninese people were expecting corrections to the electoral code and the charter of political parties, a proposal to revise the constitution by ten (10) deputies was presented to Parliament under emergency procedure and adopted clandestinely on 1 November 2019 by a National Assembly composed solely of deputies from the President's party.

93. He argues that a national consensus cannot be reached in a one-party parliament, especially as it suffers from a crisis of legitimacy and lack of confidence on the part of the Beninese people.

94. The Applicant believes that, in accordance with human rights instruments and the case law of the Constitutional Court, the proposed revision should have been debated by the Beninese people and adopted after a national consensus, or at the very least put to a referendum, especially as it concerns 49 articles of the Constitution, some of which infringe on the fundamental rights of citizens and democratic change of government.

95. Finally, the Applicant states that the constitutional revision of 1 November 2019 is cyclical, unilateral and clandestine, and does not comply with the requirements of Article 10(2) of the ACDEG.

96. The Respondent State argues that the initiative for the constitutional revision belongs concurrently to the President of the Republic and the National Assembly. The Parliament of Benin has the right to intervene in all aspects of the constitution that it deems appropriate to revise within the limits of constitutional law and is not bound or limited by the scope or conclusions of a sitting.

97. It adds that a referendum is only one means of revision in the same way as a parliamentary vote. Since the National Assembly is the representation of the people, it follows that public debate has taken place between the people through their representatives.

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98. The Court emphasises that Article 10(2) of the ACDEG provides that: "State Parties must ensure that the process of amending or revising their Constitution is based on a national consensus including, where appropriate, recourse to a referendum.

99. The Court notes that prior to the ratification of the African Charter on Democracy, the Respondent State had established national consensus as a principle of

constitutional value through the decision of the Constitutional Court DCC 06 - 74 of 08 July 2006, in the following terms:

> Even if the Constitution has provided for the modalities of its own revision, the determination of the Beninese people to create a state based on the rule of law and pluralist democracy, the safeguarding of legal security and national cohesion require that any revision take into account the ideals that presided over the adoption of the Constitution of 11 December 1990, particularly the national consensus, a principle with constitutional value.

100. Furthermore, the same Constitutional Court has given a precise definition of the term "consensus" through its decisions DCC 10 - 049 of 05 April 2010 and DCC 10 - 117 of 08 September 2010. It states that:

> Consensus, a principle with constitutional value, as affirmed by Decision DCC 06 - 074 of 08 July 2006 (...) far from signifying unanimity, is first and foremost a process of choice or decision without going through a vote; (...) it allows, on a given question, to find, through an appropriate path, the solution that satisfies the greatest number of people.

101. The Court observes that the expression "greatest number of people" associated with the concept of "national consensus" requires that the Beninese people be consulted either directly or through opinion makers and stakeholders including the representatives of the people if they truly represent the various forces or sections of the society. This is however not the case in the instant Application, since all the deputies of the National Assembly belong to the presidential camp.

102. From the record, it is apparent that Law No. 2019-40 of 7 November 2019 on constitutional revision was adopted under summary procedure. A consensual revision could only have been achieved if it had been preceded by a consultation of all actors and different opinions with a view to reaching national consensus or followed, if need be, by a referendum.

103. The fact that this law was adopted unanimously cannot overshadow the need for national consensus driven by "the ideals that prevailed when the Constitution of

11 December 1990[25] was adopted" and as provided under Article 10(2) of the ACDEG.

104. Therefore, the constitutional revision[26] was adopted in violation of the principle of national consensus.

105. Consequently, the Court declares that the constitutional revision, which is the subject of Law No. 2019-40 of 7 November 2019, is contrary to the principle of consensus as set out in Article 10(2) of the ACDEG.

106. The Court therefore concludes that the Respondent state violated Article 10(2) of the ACDEG.

D. Alleged violation of the right to information

107. The Applicant submits that the State is obliged, through its various structures and institutions to guarantee to everyone access to sources of information, particularly public ones. The State services responsible for this task undertake to provide any information, to communicate any document and to ensure that, if necessary, a press kit is compiled and made available to professionals on any subject of legitimate public interest.

108. The Applicant asserts that the amending law was not disclosed before its adoption by the national representation. Even after the examination of its conformity with the Constitution and several days after its promulgation, it was not on the official government website, which prevented the people from appealing against the said law to the Constitutional Court.

109. He submits that the Respondent State consequently violated the right to information guaranteed by Article 9(1) of the Charter.

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[25]These include the dawn of an era of democratic renewal, the determination to create a rule of law and a democracy in the defence of human rights, as mentioned in the preamble to the constitution.

[26] The following articles have been deleted: 46 and 47. The following articles have been modified or created: 5, 15, 26, 41, 42, 43, 44, 45, 48, 49, 50, 52, 53, 54, 54-1, 56, 62, 62-1, 62-3, 62-4, 80, 81, 82, 92, 99, 11, 117, 119, 131, 132, 134-1, 134-2, 134-3, 134-4, 134-5, 134-6, 143, 145, 151, 151-1, 153-1, 153-2, 153-3, 157-1, 157-2, 157-3, Title VI(I-1 and I-2) have been modified or created.

110. The Respondent State alleges that the right to information was not violated insofar as the disputed law was promulgated in the Official Gazette of the Republic of Benin.

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111. The Court notes that Article 9(1) of the Charter provides that: "Everyone has the right to information."

112. The Court also notes that Article 9(1) of the Charter enshrines the right to receive information in relation to the right to disseminate and disseminate one's opinions within the framework of laws and regulations.[27]

113. The Court concurs with the Applicant that every citizen in a democratic country has the right to access information held by the State. This right is considered necessary to ensure the respect for the principle of transparent government, which requires that the public has access to information to engage productive public debate on the conduct of government business.

114. In the instant case, the issue before the Court for decision is whether under the domestic legislation of Benin citizens had access to information about the proposed revision of the constitution, from the parliamentary debates before its adoption and promulgation.

115. The Court notes in this case that pursuant to Article 86 of the Constitution of Benin, the full record of the debates of the National Assembly must be published in the Official Gazette of the Republic of Benin.[28]

116. In addition, pursuant to Article 57 of the said Constitution, the President of the Republic shall ensure the promulgation of laws within fifteen days of their transmission to him by the President of the National Assembly[29].

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[27] *Alex Thomas v. United Republic of Tanzania*, (merits) (20 November 2015) 1 AfCLR 482, § 154.

[28] Art. 86: Assembly sessions are only valid when they are held in the normal venue for sessions except in exceptional cases enshrined in the constitution. The entire minutes of deliberations of the National Assembly shall be published in the National Gazette.

[29] Article 57: The President of the Republic at the behest of current laws and the members of the National Assembly. He is charged with promulgating laws within 15 days after they are tabled before

117. The Court notes that the domestic legislation of the Respondent State guarantees the right to information. The question in these circumstances is who bears the burden of proof when the Applicant claims that the Respondent State has violated his right to information.

118. The Court notes that it is the responsibility of the Respondent State to ensure publication of the debates in the National Assembly relating to a proposal or draft law and its promulgation in the official gazette. Thus, in this circumstance, the burden of proof on whether or not citizens have enjoyed their right to information lies with the State.

119. The Court observes that the Respondent State does not dispute the allegation that the draft revision of the Basic Law has not been disseminated among the population in order to enable it to form an opinion and participate in the debate on the proposed amendments.

120. The Court further notes that the Respondent State does not adduce evidence to show that the debates were published in the Official Gazette.

121. The Court therefore concludes that the Respondent State violated the Applicant's right to information guaranteed under Article 9 of the Charter.

E. Allegation violation of the right to economic, social and cultural development

122. The Applicant maintains that the Respondent State violates the right to economic, social and cultural development enshrined in Article 23 (1) of the Charter by adopting a non-consensual constitutional revision which unbalances and divides the Benin society. He alleges that this situation is likely to disrupt the fundamentals of the economic, social and cultural development of his country that the people of Benin have toiled to put in place since the establishment of democracy in 1990.

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him by the Speaker of the National Assembly. This dateline is reduced to 5 days in cases of emergencies declared by the National Assembly.

123. The Respondent State did not comment on this point.

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124. Article 22 (1) of the Charter provides:

> 1. All peoples have the right to their economic, social and cultural development, with strict respect for their freedom and identity, and to the equal enjoyment of the common heritage of humanity.

125. The Court notes that the right to development is an inalienable human right by virtue of which every human person and all peoples have the right to participate in and to contribute to economic, social and cultural development in which the political development is a part[30];

126. In the instant case, the Court found that the Respondent State violated fundamental human rights, in particular a constitutional revision outside the process of national consensus which was prevailing during the adoption of the constitution of Benin in 1990.

127. The Court is of the opinion that this situation may constitute a major disruption of the economic, social and cultural development of Benin.

128. The Court therefore concludes that the Respondent State has violated the right to economic, social and cultural development, protected by Article 22 (1) of the Charter.

F. Alleged violation of the right to peace and national security

129. The Applicant argues that the constitutional revision adopted outside of democratic rules, the rule of law and respect for human rights, threatens the peace of the people of Benin.

[30]UN General Assembly, Declaration on the right to the development 41/128.

130. The Applicant therefore considers that the Respondent State violated the right to peace and national security protected by Article 23 (1) of the Charter.

131. The Respondent State did not comment on this point.

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132. Article 23 (1) of the Charter states that "Peoples have the right to peace and security, both nationally and internationally".

133. The Court observes that peace symbolizes the absence of worry, turmoil, conflict or violence. Its symbiosis with security contributes to social well-being. Indeed, the assurance of living without danger, without the risk of being affected in its physical integrity and its heritage gives citizens the confidence of national stability.

134. When considering respect for human rights as a tool for preventing the right to peace, it is necessary to take into account the full range of rights, not just civil and political rights. Discrimination and inequality can lead to significant human rights violations and thus pose a direct threat to peace.[31]

135. In the present case, the Court has already concluded that the Respondent State has violated Article 10 (2) of ACDEG by presenting and adopting a revision of the fundamental law of Benin without a national consensus, thus putting aside a large segment of the population of Benin who may not identify with the said law.

136. This context thus poses a threat to the peace and stability of Benin and the security of Benin citizens.

137. The Court concludes that the respondent State violated the right to peace and security protected by Article 23 (1) of the Charter.

IX. REPARATIONS

138. Article 27(1) of the Protocol provides that:

[31]Report of the UN High Commission for Human Rights, "Early warning and economic, Social and Cultural rights, 13 May 2016, E/2016/58, available at https://digitallibrary.un.org/record/833331/files/E_2016_58-FR.pdf

If 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.

139. The Court recalls its previous judgments on reparation[32] and reaffirms that, in considering claims for compensation for damage resulting from human rights violations, it takes into account the principle that the State found to be the author of an internationally wrongful act is under an obligation to make full reparation for the consequences so as to cover all the damage suffered by the victim.

140. The Court also takes into account the principle that there must be a causal link between the violation and the alleged harm and that the burden of proof rests with the Applicant, who must provide the information to justify his or her claim[33].

141. The Court also established that "reparation must, as far as possible, erase all the consequences of the unlawful act and re-establish the state that would probably have existed had the unlawful act not been committed". In addition, reparation measures must, depending on the particular circumstances of each case, include restitution, compensation, rehabilitation of the victim and measures to ensure that the violations are not repeated, taking into account the circumstances of each case[34].

142. Furthermore, the Court reiterates that it has already established that reparation measures for harm resulting from human rights violations must take into account the circumstances of each case and the Court's assessment is made on a case-by-case basis[35].

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[32] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v. Burkina Faso*, (reparations) (5 June 2015) 1 AfCLR 265, § 22; *Lohé Issa Konaté v. Burkina Faso*, (reparations) (3 June 2016) 1 AfCLR 359, § 15.

[33] *Reverend Christopher Mtikila v. Tanzania*, (reparations) (13 June 2014) 1 AfCLR 74, § 31.

[34] *Ingabire Victoire Umuhoza v. Republic of Rwanda*, (reparations) (7 December 2018) 2 AfCLR 202, § 20.

[35] Ibid, §22.

A. Reparations requested by the Applicant

143. The Applicant submits that the violations of his rights by the Respondent State caused him moral suffering insofar as he was prevented from standing as an independent candidate in the local elections of 2020 as a result of the non-consensual revision of the constitution which prohibits the participation of independent candidates in local and parliamentary elections.

144. He seeks an order that the Respondent State pay him the sum of one billion (1,000,000,000) CFA francs as damages.

145. The Respondent State did not make any observations on this point.

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146. The Court recalls its case-law according to which there is a presumption of moral damage suffered by an applicant once the Court has found a violation of his rights, so that it is no longer necessary to seek evidence to establish the link between the violation and the damage. The Court has also held that the assessment of the amounts to be awarded as compensation for non-pecuniary damage should be made on the basis of equity, taking into account the circumstances of each case.[36]

147. The Court observes that the amount in respect of reparation to be awarded to the Applicant in the present case must be assessed in light of the degree of moral prejudice he must have suffered by not participating in the elections as an independent candidate.

148. In the present case, the Court finds that the non-pecuniary damage suffered by the Applicant results from the violation of Articles 9(1), 22(1) and 23(1) of the Charter and Article 10(2) of the ACDEG by Law No. 2019-40 of 7 November 2019 revising the Constitution of Benin.

[36] Ibid; *Beneficiaries of late Norbert Zongo and others v. Burkina Faso* § 61.

149. The Court has also held that "the finding of the above-mentioned violations by the Respondent State is in itself already a form of reparation for the non-pecuniary damage suffered by the Applicant."[37]

150. In view of all these considerations the Court exercising its discretion, awards the Applicant compensation for the non-pecuniary damage he personally suffered a token amount of one (1) CFA franc.

B. Respondent State's counter-claim

151. The Respondent State contends that the proceedings brought by the Applicant before the Court in this case are abusive, lacking any serious grounds. It contends that the Applicant brought the proceedings before the Court with the sole aim of harming it. Accordingly, it prays the Court to order the Applicant to pay it the sum of one billion (1,000,000,000) CFA francs by way of damages.

152. The Applicant contests the Respondent State's claim for reparations. He contends that the proceedings which he brought against the latter before the Court are justified and prays the Court to dismiss the Respondent State's counterclaim.

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153. The Court observes that the record shows that the Respondent State's counterclaim is based on the allegation that the Applicant abused his right of referral to the Court.

154. The Court notes, however, that it has not established that the Application lacks merit as the Respondent State asserts. Indeed, it found violations of the Applicant's rights. Moreover, the Court observes that the Respondent State has not submitted any evidence for it to uphold its counterclaim. Furthermore, 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

[37] *Zongo and Others v. Burkina Faso*, (reparations) (5 June 2015) 1 AfCLR 265, §66.

Respondent State to make a counterclaim. The Court therefore finds that the Applicant did not abuse his right to institute legal proceedings.

155. Consequently, the Court concludes that this claim is unfounded and dismisses it.

X. COSTS

156. Neither party made submissions on costs.

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157. Rule 32(2) of the Rules[38] provides that "Unless the Court decides otherwise, each party shall bear its own costs".

158. In light of the above provisions, the Court decides that each Party shall bear its own costs.

XI. OPERATIVE PART

159. For these reasons,

THE COURT,

Unanimously,

On jurisdiction

i. *Dismisses* the objections to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

[38]Formerly Rule 30(2) of the Rules of 2 June 2010.

On preliminary objections

iii. *Dismisses* the preliminary objections ;

iv. *Declares* the Application admissible.

On admissibility

v. *Declares* the Application admissible.

On merits

vi. *Finds* that the Respondent state has violated the obligation to guarantee the independence of the courts provided for in Article 26 of the Charter;

vii. *Holds* that the Respondent State has violated the obligation to ensure that the process of amendment or revision of its constitution reposes on national consensus, as set forth in Article 10(2) of the ACDEG;

viii. *Declares* that the Respondent State has violated the right to information enshrined in Article 9(1) of the Charter;

ix. *Holds* that the Respondent State violated the right to peace and the right to economic, social and cultural development protected by Articles 22(1) and 23(1) of the Charter;

x. *Finds* that the right to an impartial tribunal guaranteed under Article 7(1) has not been violated.

On reparations

On pecuniary reparations

xi. *Orders* the Respondent State to pay the Applicant the sum of one (1) CFA franc as a token amount for the moral damage he has suffered;

xii. *Dismisses* the Respondent State's counterclaim for reparation.

On non pecuniary reparations

xiii. *Orders* the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, in particular with regard to the process for the renewal of their term of office;

xiv. *Orders* the Respondent State to take all measures to repeal Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, in particular Law 2019-43 of 15 November 2019 on the Electoral Code, and to comply with the principle of national consensus set forth in Article 10(2) of the ACDEG for all other constitutional revisions;

xv. *Orders* that these measures be undertaken before any election.

On implementation and reporting

xvi. *Orders* the Respondent State to submit to the Court, within three (3) months of the date of notification of this Judgment, a report on the implementation of paragraphs xi to xv of this operative part.

On costs

xvii. *Decides* that each Party shall bear its own costs.

Signed by:

Sylvain ORE, President;

Ben KIOKO, Vice-President;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Imani D. ABOUD, Judge;

and Robert ENO, Registrar.

Done at Arusha, this Twenty Seventh Day of November in the Year Two Thousand and Twenty, in English and French, the French text being authentic.