

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
<p>AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</p>		

THE MATTER OF

OUMAR MARIKO

v.

REPUBLIC OF MALI

APPLICATION NO. 029/2018

JUDGMENT

24 MARCH 2022



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The Court composed of: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice President, Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Marie Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA - Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court¹ (hereinafter referred to as "the Rules"), Judge Modibo SACKO, member of the Court and a national of Mali, did not hear the Application.

In the Matter of

Oumar MARIKO

Represented by

- i. Mr. Mariam DIAWARA and Mr. Issa K. COULIBALY, Advocates of the Bar of Mali;
- ii. Mr. Philippe ZADI

Versus

REPUBLIC OF MALI

Represented by Mr. Yacouba KONE, Director General of State Litigation

After deliberation,

Renders the following Judgment

¹ Rule 8(2) of the Rules of Court, 2 June 2010.

I. THE PARTIES

1. Mr. Oumar MARIKO, (hereinafter referred to as "the Applicant"), a Malian national, is a medical doctor and a member of the National Assembly of the Republic of Mali. He alleges a violation of human rights in connection with the Malian presidential elections of 29 July 2018, in which he was a candidate.
2. The Application is filed against the Republic of Mali (hereinafter "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986, and to the Protocol on 20 June 2000. On 19 February 2010, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter "the Declaration"), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations with observer status before the African Commission on Human and Peoples' Rights.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. The Applicant avers that the 29 July 2018 presidential election in which he was a candidate was irregular. According to him, the decisions of Malian courts issued in violation of his rights, the lack of independence and impartiality of the electoral bodies, as well as the Ministry of Territorial Administration's (hereinafter referred to as "MAT") control of the electoral process, contributed to his elimination in the first round of voting.

B. Alleged violations

4. The Applicant alleges the violation of the following rights:

- i. The right to have his cause heard, in particular, the right to be tried within a reasonable time and the right to be tried by an impartial court, protected by Article 7(1) (d) of the Charter, and the adversarial principle, protected by Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR");
- ii. The right to full equality before the law and equal protection of the law, protected by Article 3 of the Charter;
- iii. The right to vote and to be elected in periodic and transparent elections by universal and equal suffrage held by secret ballot, guaranteeing the free expression of the will of the electorate, protected by Article 25(2) of the ICCPR.

5. The Applicant also alleges that the Respondent State violated the following obligations:

- i. The obligation to guarantee the independence of courts, under Article 26 of the Charter;
- ii. The obligation to establish an independent and impartial electoral body, guaranteed by Article 17(1) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as "ACDEG") and Article 3 of the ECOWAS Protocol on Democracy and Good Governance (hereinafter referred to as "ECOWAS Protocol on Democracy");
- iii. The obligation to compile electoral lists in a transparent and reliable manner, with the participation of political parties and voters, guaranteed by Article 5 of the ECOWAS Protocol on Democracy;
- iv. The obligation to establish and strengthen national mechanisms that redress election related disputes in a timely manner, as guaranteed by Article 17(2) of the ACDEG and Article 7 of the ECOWAS Protocol on Democracy;

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application was received at the Registry on 17 November 2018. It was served on the Respondent State on 28 November 2018, with a request to file its Response within sixty (60) days, from the date of receipt.
7. On 22nd of January 2019, the Respondent State filed its response which was transmitted to the Applicant on the same date.
8. The parties filed their other pleadings within the time stipulated by the Court. Pleadings were closed on 15 September 2021 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

9. The Applicant prays the Court to find and order that the Respondent State has violated:
 - i. his right to an effective remedy and his right to be tried by an impartial court, by virtue of Judgment No. 2018-03/CC-EP issued on 8 August 2018 by the Constitutional Court of the Respondent State on the declaration of the final results of the first round (hereinafter referred to as "Constitutional Court judgment");
 - ii. his right to be judged within a reasonable time, by virtue of the lack of judgment on jurisdiction rendered on 9 August 2018 by the Supreme Court of the Respondent State (hereinafter referred to as "Supreme Court judgment");
 - iii. the obligation to establish independent and impartial electoral bodies, by virtue of Law 2016-048 of 17 October 2016 amended by Law 2018-014 of 23 April 2018 on the Electoral Law (hereinafter referred to as "Electoral Law");
 - iv. the obligation to establish and strengthen national mechanisms to settle election related disputes in a timely manner, by virtue of Article 92 of the Constitution, the Organic Law on the Constitutional Court, its composition and the procedure

followed before it² (hereinafter referred to as the "Organic Law on the Constitutional Court"), the Rules of Procedure of 28 August 2012 of the said Court and the Electoral Law.

10. The Applicant also prays the Court to order the Respondent State to:

- i. Amend the Organic Law on the Constitutional Court to provide a legal framework for the recusal of its members ruling on electoral disputes;
- ii. Amend Article 91 of the Constitution, the Organic Law on the Constitutional Court, and the Rules of Procedure of the said Court to bring them in line with Article 3 of the Charter, Article 17(2) of the ACDEG and Article 7 of the ECOWAS Protocol on Democracy;
- iii. Amend the Electoral Law to bring it in compliance with Articles 17(1) and 3 of the ECOWAS Protocol;
- iv. Order the Respondent State to refund the sum of twenty-five million (25,000,000) CFA francs paid as a deposit for the 29 July 2018 presidential election;
- v. Order the Respondent State to pay him the sum of one hundred million (100,000,000) CFA francs as damages for the harm suffered;
- vi. Take all other appropriate measures for the purpose of reparation.

11. For its part, the Respondent State prays the Court to:

- i. Rule on admissibility;
- ii. Dismiss the Application as unfounded.

V. JURISDICTION

12. The Court notes that Article 3 of the Protocol reads 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, the [...]

² Law 097-010 of 11 February 1997 pertaining to the organic law on the organization and functioning of the Constitutional Court as well as the procedure followed before it, amended by Law 02-011 of 5 March 2002.

Protocol and any other relevant human rights instrument ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

13. According to Rule 49(1) of the Rules of Court,³ "The Court shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these [...] Rules".

14. Based on the above provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.

15. The Court notes that the Respondent State has not raised any objections to its jurisdiction.

16. Having found that there is nothing in the record that shows it lacks jurisdiction, the Court concludes that it has:

- i) Material jurisdiction, insofar as the Applicant alleges the violation of human rights protected by the Charter, the ICCPR, the ACDEG⁴ and the ECOWAS Protocol on Democracy⁵, instruments⁶ ratified by the Respondent State;

³ Rule 39(1) of the Rules of 2 June 2010.

⁴ The Respondent State Became a party to the ICCPR on 23 March 1976, to the African Charter on Democracy, Elections and Governance on 2 September 2013, and to the ECOWAS Protocol on Democracy on 21 December 2001.

⁵ In the Judgment, *Action pour la protection des droits de l'homme v. Côte d'Ivoire*, Judgment (Merits) of 18 November 2016, 1 AfCLR 668, § 55 - 57, the Court recognized that the ACDEG and ECOWAS Protocol on Democracy are human rights instruments.

⁶ In the case of Application No. 001/2014, the Court held that "the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same". (1 AfCLR 668, § 65)

- ii) Personal jurisdiction, insofar 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 to the Court.
- iii) Temporal jurisdiction, insofar as the alleged violations were committed after the Respondent State became a party to the Charter and the Protocol.
- iv) Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.

17. Consequently, the Court finds that it has jurisdiction to hear the instant Application.

VI. ADMISSIBILITY

18. 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.

19. Pursuant to Rule 50(1) of the Rules of Court⁷ :

The Court shall ascertain the admissibility (...) in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules.

20. Rule 50(2), which restates in substance Article 56 of the Charter, reads as follows:

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

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;

⁷ Rule 39 of the Rules of 2 June 2010.

- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

21. The Court notes that the Respondent State has not raised any objection to admissibility. Nevertheless, the Court shall examine whether the requirements of the above-mentioned provision are met.

22. As regards the requirement specified under Rule 50(2)(a), the Court notes that the Applicant has clearly stated his identity.

23. The Application is also not in any way inconsistent with the Constitutive Act of the African Union and the Charter and thus, complies with Rule 50(2)(b), given that one of the objectives of the Constitutive Act of the African Union, as stated in its Article 3(h), is the promotion and protection of human and peoples' rights.

24. Furthermore, the Application does not contain any language that is disparaging or insulting to the Respondent State, its institutions or the African Union, as required under Rule 50(2)(c).

25. The Application is also not based exclusively on news disseminated through the mass media, and thus, complies with the requirement under Rule 50(2) (d).

26. Regarding exhaustion of local remedies, the Applicant contends that he has complied with this requirement by filing his case before the highest Court, the Constitutional Court, of the Respondent State.
27. The Court notes from the available records that the Applicant indeed filed an appeal with the Constitutional Court by application dated 4 August 2018, for the purpose of "annulling the presidential election of 4 July 2018 and challenging the composition" of the said Court. This remedy, which is the only one available in relation to presidential elections⁸, resulted in Judgment No. 2018-03/CC-EP of 8 August 2018 on the declaration of the final results of the first round of the presidential election of 29 July 2018.
28. It follows from Article 94 of the Constitution of the Respondent State that the decisions of the Constitutional Court are not subject to appeal. Accordingly, the Court finds that the Applicant exhausted local remedies.
29. With regard to the requirement of filing an Application within a reasonable time as required under Rule 50(2)(f), the Court starts reckoning time from 8 August 2018, which is the date when the Constitutional Court's rendered its decision. Between this date and the date the instant Application was filed with the Court, that is, 17 November 2018, three (3) months and nine (9) days elapsed. The Court considers that this period is reasonable and finds that, the Application has complied with this requirement.
30. Finally, the Court notes that in accordance with Rule 50(2)(g), there is no indication that the instant Application concerns a matter already settled by the parties in

⁸ Article 87 of the Constitution of Mali provides: 'The Constitutional Court is seized, in the event of a dispute over the validity of an election, by any candidate, any political party or the government delegate, under the conditions provided for by an organic law'; Article 31 paragraph 1 of organic law 097-10 of 11 February 1997 determining the rules of organisation and operation of the Constitutional Court as well as the procedure followed before it provides: 'All disputes relating to the election of the President of the Republic

accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the Charter.

31. In view of the foregoing, the Court declares the Application admissible.

VII. MERITS

32. The Applicant alleges that the Respondent State violated his right to have his cause heard (A), his rights to equality before the law and to equal protection of the law (B). He also alleges that the Respondent State violated the obligation to establish an independent and impartial electoral body (C), the obligation to establish electoral lists in a transparent and reliable manner (D), and the obligation to establish and strengthen domestic mechanisms to settle electoral disputes (E). Furthermore, the Applicant alleges the violation of his right to be elected in periodic, and transparent elections by universal and equal suffrage (F).

A. Alleged violation of the right to have one's cause heard

33. The Applicant alleges a violation of the right to have his cause heard, in particular, the right to be tried within a reasonable time, (i) the right to respect for the adversarial principle, (ii) the right to an effective remedy, (iii) the right to be tried by an impartial court, and the violation of the obligation to guarantee the independence of courts (iv).

i) Alleged violation of the right to be tried within a reasonable time

34. The Applicant contends that on 25 July 2018, he filed an application for provisional measures with the Supreme Court of the Respondent State for the purpose of obtaining payment of his arrears of parliamentary allowances and funding from the African Solidarity for Democracy and Independence (SADI) party, of which he was

the flagbearer in the presidential election of 29 July 2018. He alleges that the said Court only ruled on his application on 9 August 2018, that is, beyond the time limit of seventy-two (72) hours set under Article 241⁹ of Organic Law 2016-16 of September 23, 2016 on the organization, operating rules of the Supreme Court and the procedure followed before it (hereinafter referred to as the "Organic Law on the Supreme Court").

35. He explains that the said law establishes the right to be heard and judged, compatible with the urgency underlining summary proceedings. According to the Applicant, when the judge does not respect this time limit, even if it expires on a Saturday or holiday, he must indicate the reasons for this in the list of grounds for his ruling. However, the Supreme Court's judgment is silent on this point.

36. In its response, the Respondent State submits that the Seventy-two- (72) hour time limit expired on Saturday, 28 July 2018, which was a holiday, since the presidential election was to take place the following day. Thus, it argues that the Supreme Court cannot be faulted for having rendered its judgment beyond the time limit specified by the law.

37. The Respondent State further submits that the Supreme Court could not hear the Applicant's application because the dispute concerning the 29 July 2018 presidential election falls within the jurisdiction of the Constitutional Court.

⁹ This Article provides: "In all cases of urgency and unless the public interest prevents it, the president of the administrative division or the magistrate he delegates may, upon simple request, even in the absence of a prior administrative decision (...) order all measures necessary to safeguard a fundamental freedom which has been gravely and manifestly illegally infringed upon by a legal person governed by public law or by a private body entrusted with the management of a public service, in the exercise of one of its powers, the Division shall render its decision within seventy-two (72) hours from the registration of the application at the Court Registry, the defendant being summoned".

38. According to Article 7(1)(d) of the Charter, " Every individual shall have the right to have his cause heard. This comprises (...) the right to be tried within a reasonable time by an impartial court or tribunal".
39. The Court emphasises that the reasonableness of this time limit is, in principle, assessed taking into account the complexity of the case, the conduct of the Applicant and that of the domestic judicial authorities.¹⁰
40. The Court further points out that when the time limit within which the judicial decision must be taken is set by law, a violation is presumed in the event of non-compliance with that time limit. However, this presumption is rebuttable provided that there are reasonable grounds for the delay specified in the impugned decision.
41. In the instant case, the Court notes that with regard to the time limit set under Article 241 of the organic law on the Supreme Court, the *dies a quo* corresponds to the day following the registration of the Application at the Registry of the Supreme Court, that is, 26 July 2018, while the *dies ad quem* is 29 July 2018.
42. However, the Supreme Court rendered its judgment on 9 August 2018, that is, fourteen (14) days after the matter was brought before it. The judgment does not contain any justification for the noncompliance with the seventy-two- (72) hour timeline prescribed by the law.
43. In any case, by its nature, the summary procedure before the Supreme Court that the Applicant refers to entails the requirements of rapidity and urgency, and cannot be affected by public holidays.¹¹

¹⁰ *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania*, Judgment (Merits) (18 March 2016), 1 AfCLR 507, § 136; *Alex Thomas v. United Republic of Tanzania*, Judgment (Merits) (20 November 2015) 1 AfCLR 465, § 104; *Norbert Zongo v. Burkina Faso*, Judgment (Merits) (5 December 2014), 1 AfCLR 219, § 92 to 97.

¹¹ Article 492 of the Malian Code of Civil Procedure provides: "If, however, the case requires celerity, the judge of provisional measures may allow the summons to be issued at the time indicated, even on public holidays or non-working days, either at the hearing or at the defendant's home, with the doors open.

44. In view of the foregoing, the Court considers that the Respondent State has violated the Applicant's right to be tried within a reasonable time contrary to Article 7 (1) (d) of the Charter.

ii) Alleged violation of the principle of adversarial proceedings

45. The Applicant contends that in the proceedings that gave rise to Judgment No. 2018-03/CC-EP of 8 August 2018 on the proclamation of the results of the first round of the 29 July 2018 election of the President of the Republic (hereinafter referred to as the "Constitutional Court Judgment"), he filed a motion seeking the recusal of one of the members of the Respondent State's Constitutional Court. He states that one of the parties to these proceedings filed a motion praying the court to declare the request inadmissible. According to the Applicant, this counter motion was not served on him.

46. The Applicant further contends that the judge must not only respect, and cause to be respected the principle of adversarial proceedings, but also, in rendering his decision, may rely on the motions, explanations and documents produced by the parties only if the parties have examined them.

47. The Respondent State submits that the Constitutional Court rendered its decision in strict compliance with domestic and international standards. In this regard, the Respondent State avers that the decision was rendered in an adversarial manner, on the basis of the pleadings submitted by the Applicant's Counsel and electoral documents, in compliance with the applicable norms.

48. The Court notes that Article 7(1) of the Charter provides that "Every individual shall have the right to have his cause heard".

49. The Court also notes that Article 14 of the ICCPR provides: "[...] Everyone shall be entitled to a fair hearing...".
50. The Court observes that these texts enshrine the right to a fair trial, one of the components of which is the adversarial principle, closely linked to that of equality of arms.
51. The Court emphasises that the adversarial principle requires that parties to a case have the right to be cognizant of any document or observation presented to the judge with a view to influencing his decision¹² This principle, applicable to all stages of the proceedings and before all courts, is so fundamental that it cannot be sacrificed even for economy and speed of proceedings.¹³
52. The Court notes from the judgment of the Respondent State's Constitutional Court's that in its Response¹⁴, another party in the proceedings had objected to the Applicant's motion for the disqualification of certain members of the said Court. However, there is no mention in the judgment that the pleadings of the said party were served on the Applicant.
53. The Court considers that there is no provision in the laws governing the Respondent State's Constitutional Court that regulates service of documents and written submissions of the parties to a trial. In principle, this should be done either directly between the parties or through the intermediary of the Registry of the Court. In any event, the Respondent State, does not specifically dispute the Applicant's allegation that he was not served with all the pleadings filed before the same Court. In view of this, and in circumstances where the Applicant did not have the chance to examine pleadings concerning his case, the principle of adversarial proceedings cannot be said to have been respected.

¹² ECHR, *Kress v. France* (Application No. 39594/98), Judgment of 7 June 2001, § 74

¹³ ECHR, *Niderost-Hubert v. Switzerland* (Application No. 18990/91), Judgment of 18 February 1997, § 30.

¹⁴ Judgment n°2018-03/CC-EP of 08 August 2018 on the declaration of the final results of the first round of the presidential election (Poll of 29 July 2018), p. 27.

54. The Court therefore concludes that the Respondent State has violated the right to be heard guaranteed under Article 7(1) of the Charter and Article 14(1) of the ICCPR by failing to respect the adversarial principle.

iii) Alleged violation of the right to an effective remedy

55. The Applicant contends that his petition to the Respondent State's Constitutional Court to annul the 29 July, 2018 presidential election contained a motion for disqualification of certain members of that Court. According to him, this motion was declared inadmissible on the ground that the reasons for disqualification only apply to a case in which a member of the said Court is examining a dispute relating to a law in the drafting of which he actively participated, which is not the case in the instant Application.

56. He further submits that the decision was made in violation of Article 7 of the Charter, and Article 116 of the Malian Constitution¹⁵, the Respondent State's Constitutional Court is obligated to grant the motion for recusal.

57. On its part, the Respondent State submits that the case be dismissed, pointing out that all the arguments raised by the Applicant, including the one relating to the recusal of members of the Constitutional Court, have been examined by the Constitutional Court in accordance with the Preamble and Article 93 of the

¹⁵ This article states: "Treaties or agreements duly ratified or approved have, upon their publication, an authority equal to that of laws, subject to the application of each treaty or agreement by the other party

Constitution, Article 7 of the Charter, as well as Articles 3¹⁶, 8¹⁷ and 10¹⁸ of the Organic Law on the Constitutional Court.

58. The Court notes that Article 7(1)(a) of the Charter provides:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

59. The Court notes that this provision enshrines the right to an effective remedy, which guarantees everyone the right to bring before domestic courts an arguable complaint, that is, any alleged violation of an internationally protected right,¹⁹ whether substantive or procedural.²⁰

60. The Court notes that the finding of a violation of the right to effective remedy has no bearing on the violation of an arguable right or claim in support of the said remedy. The Court notes that the fact that a violation of the right to an effective remedy has been established has no bearing on the violation of an arguable right or claim invoked in support of the said remedy.

¹⁶ This article states: "The functions of the Constitutional Court are incompatible with any public or administrative functions or any private or professional activities

¹⁷ This article states: "The members of the Constitutional Court have the general obligation to refrain from anything that could compromise the independence and dignity of their functions. In particular, during their term of office, they are obliged not to hold any position of responsibility or leadership in political parties, even on an honorary basis, to keep the deliberations and votes secret, not to take any public position on matters that have been or may be decided by the Court, and not to give any consultation on matters falling within the competence of the Constitutional Court".

¹⁸ This article stipulates: "The Constitutional Court shall note, if necessary, the compulsory resignation of any of its members who have exercised an activity, a function or an elective mandate incompatible with their status as members of the Court, who no longer enjoy their civil and political rights or who have disregarded the general and particular obligations referred to in articles 3 and 8 above.

¹⁹ See in this sense, ECHR, *Kudla v. Poland*, Judgment of 26 October 2000, §§ 151-156.

²⁰ See in this sense, ECHR, *Powell and Rayner v. United Kingdom*, Judgment of 21 February 1990, §§ 31-33; HRC, *Kazantzis v. Cyprus*, inadmissibility decision of 7 August 2003, Communication n°972/2001, § 6.6 HRC, *Faure v. Australia*, Views of October 31, 2005, Communication n°1036/2001.

61. The Court further emphasises that recusal is "*the possibility by which a litigant request that a judge, arbitrator or expert refrain from sitting because he has reasons to suspect that he is biased against him for reasons determined by law, such as kinship or alliance, subordination, friendship or notorious enmity, conflict of interest...*".²¹

62. The Court notes that regulating the recusal procedure of courts is essential to the fairness of any trial, since it is consubstantial with the right to be tried by an impartial tribunal, a right protected by Article 7(1)(d) of the Charter.

63. In the instant case, the Court points out that the Constitutional Court of the Respondent State declared inadmissible the motion to disqualify some of its members on two grounds, on the one hand, because of the "*absence of provisions (...) for a procedure for the recusal of a member of the Court*"²² and on the other hand, because of the fact that "*it is generally accepted that the right of an applicant to request the recusal of a member of a constitutional court applies, in particular, in a case where the member of the said court finds himself or herself examining a dispute relating to a law which he or she actively participated in drafting prior to his or her accession to the said court, in States where the review of the constitutional court is possible a posteriori, which is not the case in the Republic of Mali*"²³.

64. It follows that the legislation governing the Constitutional Court of the Respondent State contain no specific provision on the recusal procedure.

65. The Court considers that the lack of a provision regulating the procedure for recusing the members of the Constitutional Court is an impediment to the effective exercise of the Applicant's individual right of a remedy, insofar as it has prevented the said Court from examining his complaint.

²¹ Lexique des termes juridiques 2017-2018, Serge Guinchard et Thierry Debard, Dalloz, p. 1568.

²² Ruling of the Constitutional Court of Mali of 08 August 2018 proclaiming the final results of the first round of the presidential election of 29 July 2018, pages 29 and 30.

²³ *Ibidem*.

66. The Court concludes that the Respondent State has violated the Applicant's right to an effective remedy protected under Article 7(1)(a) of the Charter.

iv) Alleged violation of the obligation to guarantee the independence and impartiality of the Constitutional Court

67. The Applicant alleges a violation of the right to be tried by an impartial court, which, in his view, is the logical consequence of the violation of the right to an effective remedy. In his view, the fact that the challenge of unconstitutionality? was ruled inadmissible meant that the objective impartiality of the members of the Constitutional Court could not be established.

68. He further contends that of the nine (9) judges of the Respondent State's Constitutional Court, the President of the Republic and the President of the National Assembly, each appoints three (3). He avers that this situation is an attack on the independence of the said Court and accounts for the automatic dismissal of petitions to annul the 29 July 2018 presidential election.

69. In response, the Respondent State submits that the case should be dismissed on the ground that the Applicant does not provide any evidence to support his allegations. According to the Respondent State, the judgment of the Respondent State's Constitutional Court was rendered in accordance with the applicable standards and demonstrates the independence and impartiality of the said Court.

70. The Court notes that according to Article 7(1)(d) of the Charter the right to have one's cause heard includes the right to be tried by an impartial tribunal.

71. Furthermore, Article 26 of the Charter provides:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the (...) Charter

72. The Court emphasises that although the Applicant has separately alleged the violation of the right to be tried by an impartial court, and the violation of the obligation to guarantee the independence of the courts, the Court will consider the said allegations in the same section not only because they relate to same Constitutional Court but also because there is a close link between the notions of independence and impartiality of the judiciary²⁴.

a. Independence of the Constitutional Court

73. The Court notes, in accordance with its jurisprudence, 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 authority²⁵. Judicial independence has two main aspects: institutional and individual. Whereas institutional independence connotes the status and relationship of the judiciary with the executive and legislative branches of government, individual independence pertains to the personal independence of judges and their ability to perform their functions without fear of reprisal²⁶.

74. In this respect, the Court will examine whether the independence of the Respondent State's Constitutional Court, both from an institutional and individual

²⁴ *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, ACtHPR, Application No. 062/2019, Judgment of 4 December 2019(Merits), § 176;

²⁵ *Ibid.* note 22 § 277.

²⁶ *Ibid.* note 22 § 278.

point of view, is guaranteed. This examination will be carried out both in the light of the texts governing it and in the light of the evidence produced by the Applicant in support of his allegations.

75. Regarding the institutional independence of the Respondent State's Constitutional Court, the Court notes that it is determined by factors such as its establishment as a body separate from the executive and legislative branches, its administrative independence in day-to-day management, its ability to function without inappropriate and unwarranted interference, and the availability of sufficient resources to enable it to perform its functions properly²⁷.

76. In the instant case, the Court notes that the Respondent State's Constitutional Court is established by the Constitution of the Respondent State. In Chapter IX, dealing with "The Constitutional Court", Article 85 of the Constitution provides that:

The Constitutional Court determines the constitutionality of laws and guarantees the fundamental rights of the human person and public freedoms. It is the body that regulates the functioning of institutions and the activity of public authorities.

77. Moreover, according to Article 15 of the Organic Law on the Constitutional Court²⁸, the said court "enjoys autonomy of management. The President of the Court is the spending officer of its budget (...)". This Organic Law also contains provisions that guarantee its administrative autonomy.²⁹

78. In the light of these provisions, the Court notes that the Constitutional Court is a body separate from the executive and legislative powers. Moreover, it enjoys

²⁷ Ibid. note 22 § 278

²⁸ Organic law No. 097 - 010 of 11 February 1997 setting the rules of organisation and functioning of the Constitutional Court as well as the procedure followed before it, amended by organic law 02 - 011 of 5 March 2002.

²⁹ Article 20 states: "The Constitutional Court is headed by a President elected by his peers by secret ballot", Article 23 states: "The President of the Constitutional Court is responsible for the administration and discipline of the Court".

administrative and financial autonomy. More importantly, the Applicant has not provided evidence that, from an institutional point of view, the Constitutional Court has been subject to inappropriate or undue interference, directly or indirectly.

79. It follows that the institutional independence of the Respondent State's Constitutional Court is guaranteed.

80. As for the personal independence of an individual judge, it is determined by the mode of appointment and security of tenure, in particular, the existence of clear criteria for selection, appointment, duration of tenure as well as adequate guarantees against external pressure.³⁰

81. The Court notes that Article 91 of the Constitution, the Constitutional Court is composed of nine (9) members each appointed for a term of seven (7) years. Three (3) members are appointed by the President of the Republic, three (3) by the President of the National Assembly and three (3) by the Superior Council of the Judiciary (hereinafter referred to as "CSM"). They are selected from among law professors, lawyers and magistrates with at least fifteen (15) years' experience, as well as personalities who have rendered service to the State.

82. The Court emphasises that this text is complemented by Article 1 paragraph 2 of the organic law relating to the Constitutional Court, which provides: "In addition to the criteria of experience and competence, the choice of members of the Constitutional Court also takes into account the moral and professional integrity of the persons concerned".

83. In any case, the Court notes that the term of office of the members of the Respondent State's Constitutional Court is renewable once, without any further specification. In other words, renewal remains within the discretion of the President

³⁰ Ibid. note 22 § 279.

of the Republic, the President of the National Assembly and the Superior Council of the Judiciary, presided over by the Head of State.

84. In this regard, the Court has consistently held that:

For judges who are appointed, the renewal 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, especially as the authorities, namely, the President of the Republic and the President of the National Assembly, are empowered³¹ by law to seize the Constitutional Court.³²

85. The Court considers that the absence of criteria for renewing the term of office of the members of the Constitutional Court is of a kind that undermines their independence, especially those members who wish to be reappointed³³. This is because the discretionary power of the appointing authority can lead to both wrongful non-renewal, and indulgent renewal of the said term.

86. In view of the foregoing, the Court considers that the absence of criteria for renewal of the mandate of the members of the Respondent State's Constitutional Court does not guarantee their independence.

87. The Court thus concludes that the Respondent State has violated Article 26 of the Charter.

³¹ Article 90 of the Constitution states: "The international commitments provided for in Articles 114 to 116 must be referred to the Constitutional Court either by the President of the Republic (...) or by the President of the National Assembly (...) before their ratification.

³² XYZ v. Republic of Benin, ACtHPR, Application No. 010/2020 Judgment of 27 November 2020 (Merits and reparations), § 70; Sébastien Marie Aïkoué Ajavon v. Republic of Benin, ACtHPR, Application No. 062/2019, Judgment 4 December 2020 (Merits and reparations) § 287.

³³ *Ibid.*

b. Impartiality of the Constitutional Court

88. The dictionary of international public law defines impartiality as the "absence of bias, prejudice and conflict of interest in a judge (...) in relation to the parties appearing before him³⁴".

89. The Court states that in line with its jurisprudence, the impartiality of a judge is presumed and that incontrovertible evidence is required to rebut this presumption³⁵.

90. The Court points out that in the instant case, the Applicant alleges a violation of the right to be tried by an impartial court, as a consequence of the violation of the right to an effective remedy.

91. The Court emphasises that it has held³⁶ in paragraph 60 of this judgment that the violation of the Applicant's right to an effective remedy has no bearing on the violation of an arguable right or claim in support of the said remedy.

92. The Court notes that the allegation of violation of the right to be tried by an impartial court is therefore autonomous. In this respect, it is up to the Applicant to provide the necessary arguments and evidence in support of his allegation that the Constitutional Court of the Respondent State is not impartial, which, in the instant case, has not been done.

93. The Court therefore considers that Respondent State has not violated Article 7(1)(d) of the Charter.

³⁴ Dictionnaire de droit international public, sous la direction de Jean Salmon, Bruylant, Bruxelles, 2001, p. 562.

³⁵ *Alfred Agbesi Woyome v. Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits and reparations), § 128; *XYZ v. Republic of Benin*, ACtHPR, Application 010/2020, Judgment of 27 November 2020 (Merits and reparations); § 82; *Sébastien Marie Aïkoué Ajavon v. Republic of Benin*, ACtHPR, Application No. 062/2019, Judgment of 4 December 2020 (Merits and reparations), § 293.

³⁶ Paragraph 60 of this judgment.

B. Alleged violation of the rights to equality before the law and to equal protection of the law

94. The Applicant alleges a violation of the right to equality before the law and to equal protection of the law. In support of this, he argues, on the one hand, that the President of the Republic, who was a candidate for his own succession, and the President of the National Assembly appoint six (6) of the nine (9) members of the Constitutional Court.

95. On the other hand, he further argues that the payment of the parliamentary allowances of opposition parliamentarians and the annual subsidy of his party, due under Articles 29, 32 and following of Law 05-047 of August 18, 2005 on the charter of political parties, was made late.

96. The Respondent State submits that that the Malian laws are the same for everyone and that there is no inequality before the law, as is shown by the participation of independent candidates in elections.

97. The Respondent State further points out that the appointment of some members of the Constitutional Court by the President of the Republic and the President of the National Assembly is provided for in Article 91 of the Constitution. The Respondent State further contends that such as appointment does not in any way undermine equality before the law and equal protection of the law. According to the Respondent State, this provision was not made for the benefit of a particular President of the Republic but was drawn up by the National Conference in 1991.

98. The Respondent State further contends that the annual subsidy to political parties is not intended to finance the electoral campaign, since candidates contest elections in their personal capacity.

99. The Court notes that Article 3 of the Charter provides:

Every individual shall be equal before the law.

Every individual shall be entitled to equal protection of the law.

100. This provision enshrines the rights to equality before the law and to equal protection of the law, which are inseparable from the right to non-discrimination.

101. The Court emphasises that the right to full equality before the law means that "all persons shall be equal before the courts and tribunals"³⁷, that is, the authorities responsible for enforcing or applying the law must do so without discrimination in the situations in question.

102. As for the right to equal protection of the law, it means that

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁸

103. The Court notes that the Applicant bases the allegations of violations of these rights on three facts; first, the power to appoint three (3) of the nine judges of the Constitutional Court is conferred on the President of the Republic, second, the late payment of the Applicant's parliamentary allowances, and third, the late payment of the subsidy to the SADI party, for which the Applicant was the flagbearer in the 29 July 2018 presidential election.

104. With regard to the appointment of members of the Constitutional Court by the President of the Republic, the Court notes that this is a matter relating to the

³⁷ *Kijiji Isiaga v. Republic of Tanzania*, (Merits) (Judgment of 21 March 2018), § 85.

³⁸ *Ibid.* § 84 quoting Article 26 of ICCPR.

functioning of the Respondent State's institutions. The Applicant has not demonstrated that how conferring this power on the Head of State³⁹ constitutes inequality before the law.

105. With regard to the late payment of parliamentary allowances, the Applicant has not produced any evidence.

106. The Court notes that the same applies to the late payment of the subsidy due the SADI party. The Court observes that, except producing as exhibit statement of account of the said party with a credit balance of an amount of seventy-one million eight hundred and sixty-six thousand five hundred and seventeen (71,866,517) francs, the origin of which was not stated, the Applicant has not adduced any other evidence to demonstrate the late payment or the source of the said amount.

107. In any case, the Applicant cannot invoke this claim without having demonstrated that SADI party had met all requirements for receiving the said subsidy, pursuant to Article 30 of the Respondent State's Political Parties Charter.⁴⁰

108. In this case, the Court holds that the Applicant's allegation is unfounded. Accordingly, the Court finds that the Respondent State has not violated the Applicant's rights to equality before the law and to equal protection of the law.

³⁹ Article 91 paragraph 2 of the Constitution: "The nine (9) members of the Constitutional Court are designated as follows: three (3) appointed by the President of the Republic (...)."

⁴⁰ Article 29 of Law 05-047 of August 18, 2005, on the political parties' charter, states: "Political parties receive financial assistance from the State, which is included in the State budget (...): to justify the regular holding of the party's statutory bodies; to have a national headquarters exclusively intended for the party's activities, distinct from a private residence or office; to keep an annual inventory of movable and immovable property and to submit the annual accounts to the accounts section of the Supreme Court no later than 31 March of each year; to justify, under the conditions provided for in Article 27, an account whose veracity is established by the audit report of the Accounts Section of the Supreme Court; to justify the origin of its financial resources and their use; to have participated in the last legislative or municipal elections. Producing a false balance sheet by any political party entails the loss of the right to public financing for the following year, without prejudice to legal proceedings."

C. Alleged violation of the obligation to establish an independent and impartial electoral body

109. The Applicant argues that the Respondent State has violated its obligation to establish an independent and impartial electoral body on the grounds that the powers of the Independent National Electoral Commission (INEC), which is in charge of electoral operations, have been rendered meaningless by the dominant role of the General Delegation for Elections (DGE) and the Ministry of Territorial Administration (MAT).
110. He maintains that DGE is under the authority of MAT and is responsible for the actual management of the electoral roll, which it compiles and revises.
111. The Applicant further contends that MAT is involved in essential electoral tasks and that its substantial powers compromise the transparency of elections, given that the Minister is a member of the executive branch whose hierarchical head is the President of the Republic, who was running for a second term.
112. On its part, the Respondent State points out that the Electoral Law was the result of political dialogue between the Government and the political class in 1997. It points out that it was within the framework of this political dialogue that INEC was established by Law 97-008 of 14 January 1997. It further contends that the responsibility for organizing elections was subsequently decoupled.

113. The Court notes that Article 17 (1) of the ACDEG provides:

State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.

To this end, State Parties shall: establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.

114. The Court further notes that according to Article 3 of the ECOWAS Protocol on Democracy:

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

115. The Court emphasises that independence is the fact that a person or entity is not dependent on any authority other than its own or, at the very least, is not dependent on the State in whose territory it exercises its functions. Impartiality, on the other hand, is the absence of bias, prejudice and conflict of interest.⁴¹

116. The Court observes that the question it is called upon to decide is not whether INEC is intrinsically independent and impartial. Rather, it is to examine whether adding DGE⁴² and MAT⁴³ to INEC invalidates the latter's jurisdiction and, therefore, constitutes a violation of Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

117. The Court considers that such an examination must be based on an analysis of the jurisdictions of the various bodies and the relations between them.

118. The Court notes that in relation to the powers of the various organs, INEC⁴⁴ is "responsible for the supervision and monitoring of referendum operations, the

⁴¹ *Dictionnaire de Droit International Public, sous la direction de Jean Salmon, Bruylant, Bruxelles, 2001, pages 570 and 562.*

⁴² Article 27 of the Elections Law.

⁴³ Article 28 of the Elections Law.

⁴⁴ Article 3 to 26 of the Elections Law.

election of the president of the Republic, parliamentarians and councillors of the territorial communities⁴⁵.

119. As for DGE, its mission is "to compile the electoral list and to manage the public financing of political parties (...) It assists INEC at the latter's request".⁴⁶

120. As for MAT, it is responsible for "the technical and material preparation of all referenda and electoral operations, the material organization of all referenda and elections, the elaboration of procedures and acts relating to referendum electoral operations, the collation and declaration of provisional results of referenda and presidential and legislative elections, forwarding of the minutes of referendum, presidential and legislative polls, accompanied by the documents that must be annexed to them, to the Constitutional Court [...]".⁴⁷

121. The Court notes that the jurisdictions of these bodies overlap. On the one hand, with regard to the electoral list, which is common to all elections,⁴⁸ it is "compiled and managed" by INEC.⁴⁹ These overlaps with the mission "to compile and manage the electoral list, which overlaps with the mission of "compiling and managing the electoral roll"⁵⁰ entrusted to DGE. On the other hand, INEC's mission of "counting of ballots, enumeration of votes, transmission of reports, collation and declaration of results"⁵¹ is almost similar to that of "collation and declaration of provisional results [...] of presidential elections, [...] and of the transmission of the minutes of presidential [...] polls [...] accompanied by the

⁴⁵ Article 3 of the Elections Law.

⁴⁶ Article 27 of the Elections Law.

⁴⁷ Article 28 of the Elections Law.

⁴⁸ Article 40 of the Electoral Law states: "The electoral lists are permanent, and are compiled from the biometric database of civil status, which includes both photos and fingerprints. The National Identification Number (NINA) is the unique identification number assigned to each voter.

⁴⁹ Article 14 of the Elections Law.

⁵⁰ Article 27 of the Elections Law.

⁵¹ Article 27 of the Elections Law.

documents that must be attached to them to the Constitutional Court"⁵² devolved to the MAT.

122. Regarding the relations between the three (3) bodies, the Court emphasises that, according to the Electoral Law, the DGE "shall assist the INEC at its request"⁵³. However, the Electoral Law does not determine the scope and conditions of such assistance.
123. On the other hand, the Electoral Law is silent on the relationship between INEC and MAT. The Court further notes that MAT is part of the executive branch of the Respondent State and as such, cannot provide the guarantees of independence expected of an electoral body.
124. In conclusion, the Court considers that the overlapping jurisdictions of the various bodies provided for in the Electoral Law, and the lack of transparency in their relations, have a negative impact on the independence and impartiality of the INEC, which, as an electoral body, already has sufficiently clear attributions.
125. The Court holds that the devolution of powers to DGE and MAT, as analysed in the preceding paragraphs, does not contribute to the proper performance by the Respondent State of its obligation to establish and strengthen CENI as an electoral body.
126. Consequently, the Court finds that the Respondent State has violated its obligation to establish and strengthen electoral bodies, as provided for in Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

⁵² Article 28 of the Elections Law.

⁵³ Article 27 paragraph 2 of the Elections Law.

D. Alleged violation of the obligation to establish mechanisms to settle electoral disputes

127. The Applicant asserts that the Respondent State has not established a mechanism for settling electoral disputes. He contends that the legal framework is at variance with the composition and functioning of the bodies responsible for settling disputes. According to him, the President of the Republic and the President of the National Assembly, who are of the same political party, each appoints three (3) members out of the nine (9) members of the Constitutional Court, and this does not guarantee any credibility in the management of electoral disputes.

128. He contends that the President of the Constitutional Court showed a lack of neutrality in the electoral process by publicly giving a personal opinion on the preparatory acts for the electoral operations and by sending emissaries to supervise voting operations.

129. In response, the Respondent State argues that electoral disputes are governed by Article 87 of the Constitution,⁵⁴ Article 32 of the Organic Law on the Constitutional Court⁵⁵ and Article 169 of the Electoral Law⁵⁶.

130. It further submits that the fact that the members of the Constitutional Court are appointed by the President of the Republic and the President of the National

⁵⁴ Article 87 of the Constitution states: "The validity of an election may be challenged before the Constitutional Court by any candidate, any political party or the delegate of the Government, under the conditions laid down by an Organic Law.

⁵⁵ Article 32 of the Organic Law on the Constitutional Court stipulates: "The Constitutional Court, within the five days following the date of the ballot, may be seized of any challenge to the election of the President of the Republic or the deputies (...)". Within forty-eight (48) hours following the declaration of the provisional results of the first and second rounds of the election of the President of the Republic or of the deputies, any candidate may contest the validity of the election of a candidate before the Constitutional Court".

⁵⁶ Article 169 of the Electoral Law states: "Litigation relating to the election of the President of the Republic and the deputies to the National Assembly is the responsibility of the Constitutional Court in accordance with the Organic Law determining the rules of organization and operation of the Constitutional Court and the procedure followed before it.

Assembly does not compromise their independence or impartiality since they do not receive orders or instructions from any public or administrative authority.

131. The Court notes that Article 17 (2) of ACDEG reads:

State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall: (2) establish and strengthen national mechanisms that redress election-related disputes in a timely manner.

132. The Court further notes that under Article 7 of the ECOWAS Protocol on Democracy: "Adequate arrangements shall be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results".

133. The Court notes that, the above-mentioned provisions constitute the source of the obligation for State Parties to these instruments to set up a mechanism which will be in charge of electoral disputes.

134. In this respect, the Court emphasises that in the instant case, Articles 87⁵⁷ of the Constitution, Articles 31⁵⁸ and 32⁵⁹ of the organic law on the Constitutional Court and Article 169 of the Electoral Law⁶⁰ place the election dispute arising out of the presidential election under the jurisdiction of the said Court.

⁵⁷ See note 54.

⁵⁸ This Article states: "All disputes relating to the election of the President of the Republic (...) fall within the jurisdiction of the Constitutional Court

⁵⁹ This article states: "The Constitutional Court, during the five (5) days following the date of the ballot, may be seized of any challenge to the election of the President of the Republic (...) Within forty-eight (48) hours of the proclamation of the provisional results of the first and second rounds of the election of the President of the Republic (...) any candidate, any party may challenge the validity of the election of a candidate before the Constitutional Court.

⁶⁰ This text provides: "Litigation relating to the referendum for the election of the President of the Republic (...) is the responsibility of the Constitutional Court in accordance with the organic law on the rules of organisation and functioning of the Constitutional Court as well as the procedure followed before it"

135. The Court notes that based on the provisions earlier referred to, the Respondent State's Constitutional Court exercises this jurisdiction in three stages.
136. Firstly, the Constitutional Court hears all objections in relation to the registration of candidacies or the validity of candidacies received. It rules in a timely manner and, in any event, before the beginning of the electoral campaign.
137. Secondly, in the five (5) days following the date of voting, any objection can be brought before the Constitutional Court in respect of the presidential election.
138. Finally, in the forty-eight (48) hours following the provisional declaration of the results of the first and second rounds of the presidential elections, any objection can be brought before the Constitutional Court in respect of the presidential election.
139. In view of the foregoing, the Court considers that the Respondent State has established an electoral dispute resolution mechanism.
140. In this regard, the Court notes that the Applicant's allegations relate to the independence and impartiality of the Respondent State's Constitutional Court.
141. The Court recalls that it has ruled on this point, from paragraph 70 to 93 of this judgment.
142. In view of the foregoing, the Court considers that the alleged violation of Article 17(2) of ACDEG and Article 7 of the ECOWAS Protocol on Democracy is moot.

E. Alleged violation of the obligation to establish electoral lists in a transparent manner

143. The Applicant maintains that the electoral list for the 29 July 2018 presidential election was not compiled in compliance with international standards and was discredited by the reports of domestic and international experts, which confirm his complaints and those of the other candidates regarding the lack of transparency and reliability of the said list.

144. He notes that despite the diligence he had carried out, particularly by seizing the Supreme Court, the situation remained the same. The Applicant further contends that the culpable inertia of the CENI, the Supreme Court, the Constitutional Court and MAT is a serious breach of Article 5 of the ECOWAS Protocol on Democracy.

145. The Respondent State contends that electoral lists are compiled in each commune, embassy or consulate by an administrative commission.

146. It maintains that electoral lists are revised annually and that, for the purpose of the said revision, political parties are invited to communicate the names of their representatives at the latest fifteen (15) days before the start of operations. The Respondent State specifies that after a new census, new lists are compiled and that, if necessary, an exceptional revision of electoral lists may be carried out.

147. The Court notes that Article 5 of the ECOWAS Protocol on Democracy states that:

The voters' lists shall be prepared in a transparent and reliable manner, with the collaboration of the political parties and voters who may have access to them whenever the need arises.

148. It follows from this provision that in order to be reliable, the electoral lists must be compiled in an inclusive manner; political parties and voters must participate in the process and be able to consult them when necessary.
149. In fact, it follows from Article 41 of the Electoral Law that electoral lists are compiled and revised by an administrative commission, in each commune, embassy or consulate, composed of members designated by the administration and the political parties.
150. In addition, any voter may file a complaint with the Administrative Commission regarding the lists, and the decision may be appealed before a civil court and subsequently before the Court of Appeals.⁶¹
151. The Court notes that it is for the Applicant to prove that the electoral list is not reliable and was not compiled in a transparent manner.
152. The Court notes that the Applicant's allegation is vague and imprecise. Moreover, the only evidence he provides in support of his claim is an election observation report which states that "the electoral register remains perfectible", but which at the same time refers to "an audit including representatives of the opposition which judged (the said register) to be sufficiently reliable for the organization of the election".

⁶¹ Article 55 of the Electoral Law states: "In case of rejection by the Administrative Commission of a registration request, this decision shall be notified by the representative of the State in the district, the district and the ambassador or the consul to the interested party within five (05) days, in writing or by any other means. The notice of notification shall specify the reasons for the decision, the date of publication of the electoral list or the corrective table and shall inform the interested party that he or she may, within ten (10) days of the notification, contest the decision of refusal before the civil judge. A note of this notification and its date shall be made in the register provided for this purpose. Article 56 of the aforementioned law states: "The judge must rule within ten (10) days, without costs. He must give notice of the decision within seven (7) days. The judge's decision may be appealed within ten (10) days of notification to the interested party. The Court of Appeals shall rule within fifteen (15) days.

153. The Court finds that at no point in the report is it stated that the electoral lists are unreliable. Moreover, the Applicant has not adduced any other evidence in support of his allegations which should be corroborated by irrefutable proof

154. In this regard, the Court notes that, the Respondent State has a legal framework that is consistent with Article 5 of the ECOWAS Protocol on Democracy and that evidence of non-implementation of this legal framework or of the violation of any obligation whatsoever has not been provided in the instant case.

155. Consequently, the Court finds that the Respondent State has not violated its obligation to compile electoral lists in a transparent manner under Article 5 of the ECOWAS Protocol on Democracy.

F. Alleged violation of the right to vote and to be voted for at periodic and, free and fair elections

156. The Applicant asserts that in the 29 July 2018 presidential election, he was the victim of unfair procedures. In support of this allegation, he argues that the non-payment of the subsidy due to the SADI party of which he was the flagbearer, the late examination by the Supreme Court of measures to guarantee his electoral rights, the unreliability of the electoral lists are elements that prove the violation of his right to elect and be elected.

157. On its part, the Respondent State submits that the legal regime for presidential elections was set out in Articles 30 to 33⁶², 86⁶³, 87⁶⁴ and 94⁶⁵ of the Constitution, the Organic Law relating to the Supreme Court and the law on elections.

158. The Respondent State contends that the Applicant's candidacy in the presidential election was unimpeded and that he enjoyed all the guarantees offered by legal provisions.

159. The Court notes that Article 25 of the ICCPR provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions (...):

(b) 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, guaranteeing the free expression of the will of the electors;

⁶² Article 30 of the Constitution states: "The President of the Republic is elected for five (5) years by direct universal suffrage and a majority vote in two rounds. He may be re-elected only once", Article 31 of the Constitution states: "All candidates for the office of President of the Republic must be of Malian nationality and enjoy all their civic and political rights". Article 32 of the Constitution states: "Presidential election shall be held not earlier than twenty-one (21) days and no later than forty (40) days to the end of the incumbent President's term of office"; Article 33 of the Constitution states: "The law determines the procedure, the conditions of eligibility and presentation of candidacies for the presidential elections, the conduct of the ballot, the counting and the proclamation of the results. It shall provide for all the provisions required to ensure that the elections are free and fair. The President of the Republic is elected by a majority of the votes cast (...). The Constitutional Court controls the regularity of these operations, rules on the complaints and proclaims the election.

⁶³ Article 86 of the Constitution states: "The Constitutional Court must rule on the regularity of presidential elections and declare the results".

⁶⁴ Idem, footnote 50.

⁶⁵ Article 94 of the Constitution states: "The decisions of the Constitutional Court are not subject to appeal. They are binding on the public authorities, on all administrative and jurisdictional authorities and on all natural and legal persons. The rules of organization and functioning of the Constitutional Court, as well as the procedure followed before it, are determined by an Organic Law."

160. Article 2 of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

161. The Court observes that this provision enshrines the right to free elections, which are part of the right to participate in the conduct of public affairs. The right to free elections has two aspects, namely, the right to elect and be elected. This does not include the right to necessarily win elections, which must be periodic, fair, universal, equal, and conducted in a secret ballot. These rights may not be infringed upon by any discriminatory or arbitrary restrictions whatsoever.

162. The Court notes that the right to vote or elect is enshrined in the Respondent State's Constitution⁶⁶ and its electoral law.⁶⁷ The Applicant has not demonstrated that by law or any procedure whatsoever, the Respondent State has violated his right to vote in the 29 July 2018 presidential election.

163. With regard to the right to be elected, that is, the right to stand as a presidential candidate, the Court notes that this right is also enshrined in the Respondent State's Constitution⁶⁸ and Electoral Law.⁶⁹ The Court notes that through its laws, the Respondent State regulates the conditions for its exercise.

164. The Court considers that none of the complaints raised by the Applicant constitutes a violation of the right to elect and be elected. Indeed, the Applicant

⁶⁶Article 27 of the Constitution states: "All citizens of voting age who enjoy their civic and political rights are eligible to vote under the conditions determined by law.

⁶⁷ Articles 29 et seq. of the Electoral Law are devoted to the right to vote, the requirements to be a voter and the exercise of the right to vote.

⁶⁸ Article 33 of the Constitution states: "The law determines (...) the conditions of eligibility and submission of candidacies for presidential elections (...)".

⁶⁹ See Note 26.

has not demonstrated the existence of any impediment to these rights, especially since his candidacy for the 29 July 2018 presidential election was cleared by the Constitutional Court by Judgment No. 2018-02/CC-EP of 4 July 2018 on the final list of candidates for the 29 July 2018 presidential election.

165. With regard to the characteristics of the presidential election, as set out in paragraph 161 of this judgment, the Constitution and the Electoral Law provide that, presidential elections must be periodic⁷⁰ and must be conducted under genuine conditions and⁷¹ additionally, by universal⁷² and secret⁷³ suffrage.

166. The Applicant has not demonstrated that these criteria were not met in the 29 July 2018 presidential election.

167. In view of the foregoing, the Court considers that the Respondent State has not violated the Applicant's right to elect and be elected in periodic and fair elections, by universal and equal suffrage and by secret ballot.

VIII. REPARATIONS

168. The Applicant seeks the refund of the sum of Twenty-Five Million (25,000,000) CFA francs paid as a deposit for the 29 July 2018 presidential election as well as the payment of the sum of one hundred million (100,000,000) CFA francs for all other causes of prejudice, including moral prejudice.

⁷⁰ Article 30 paragraph 1 of the Constitution states: "The President of the Republic is elected for (5) years (...)", Article 32 of the Constitution states: "Presidential elections shall be held at least twenty-one days and not more than forty days before the expiration of the term of office of the incumbent President.

⁷¹ Article 33 states: "...the law shall make all necessary provisions for free and fair elections

⁷² Article 27 of the Constitution states: "The vote is universal, equal (...)", Article 2 para. 1 of the Electoral Law contains the same terms.

⁷³ Article 27 of the Constitution states: "The ballot shall be ... secret. Article 2 of the Electoral Law contains the same words.

169. The Applicant further requests the Court to issue any measure to ensure that the violations do not recur, taking into account the circumstances of the case.

170. In particular, the Applicant requests the Court to order the Respondent State to amend Article 91 of the Malian Constitution and the Organic Law on the Constitutional Court to provide a framework for the recusal of its members and to make it independent and impartial, and to amend the Electoral Law to make it compliant with Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

171. On its part, the Respondent State submits that the Applicant's request for reparations be dismissed.

172. The Court notes that Article 27(1) of the Protocol provides that:

If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of the fair compensation or reparation.

173. The Court has consistently held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is determined and a causal link is established between the wrongful act and the alleged harm.⁷⁴

174. The Court emphasises that the burden of proof of the causal link lies, in principle, with the Applicant, who must provide the elements on which the claim is based⁷⁵.

⁷⁴ *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, Application 062/2019, Judgment (Merits and Reparations), 4 December 2020, § 139; *Houngue Eric Noudehouenou v. Republic of Benin*, Application No. 003/2020, Judgment (Merits and Reparations), 4 December 2020, § 117

⁷⁵*Ibid.* § 140.

175. The Court further emphasises that it cannot order reparation measures based on allegations for which no human rights violation has been found.

176. The Court recalls that it found a violation by the Respondent State of the following rights: the right to be tried within a reasonable time, the right to an effective remedy, and the right to have the adversarial principle respected. In addition, the Court found a violation of the obligation to guarantee the independence of the Constitutional Court and to establish and strengthen independent and impartial electoral bodies.

177. The Court also recalls that the Applicant claims that he suffered harm as a result of the Respondent State's violation of his rights. He seeks (A) pecuniary reparation and (B) non-pecuniary reparation.

A. Pecuniary reparations

178. The Court notes that the Applicant has requested the award of sums of money as compensation for material harm (i) and moral harm (ii).

i) Material prejudice

179. With regard to the request for return of the Twenty-Five Million (25,000,000) CFA francs deposit paid for the Applicant's candidacy in the 29 July 2018 presidential election, the Court notes that according to Article 150 of the electoral law, it is refundable up to fifty percent (50%) for candidates who obtained, at least, five percent (5%) of the votes cast in the first round.

180. In the instant case, the Applicant obtained 2.33% of votes. However, the Applicant has not shown how he is entitled to a refund, having obtained only 2.33% of the votes.

181. Accordingly, the Court dismisses the request.

182. With regard to the payment of the sum of one hundred million (100,000,000) CFA francs, the Court notes that the Applicant has not provided any material proof. In any event, the violations found played no part in the Applicant's loss of the 29 July 2018 presidential election, given that the Applicant came 23rd out of the 24 candidates.

183. Consequently, the Court dismisses the request.

ii) Moral prejudice

184. The Court recalls its jurisprudence according to which, in the event of a violation of human rights, moral harm is presumed⁷⁶. It may be considered as an automatic consequence of the violation, without the need to establish it by any other means.⁷⁷

185. The Court also emphasises that the amount to be awarded for moral harm is determined on the basis of equity, taking into account the specific circumstances of each case.⁷⁸

186. In the instant case, the Court considers that an amount of One Million (1,000,000) CFA francs is sufficient to redress the moral harm suffered by the Applicant.

187. It is appropriate to award it to him and to order the Respondent State to pay him the said amount within six (6) months from the date of notification of this Judgment,

⁷⁶ *Armand Guehi v. United Republic of Tanzania* (Merits and Reparations), § 55; *Lohé Issa Konaté v. Burkina Faso* Judgment, (Merits), (5 December 2014), 1 AfCLR 314 § 41 *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, 168;

⁷⁷ *Beneficiaries of Norbert Zongo and Others v. Burkina Faso* (Reparations),

⁷⁸ *Zongo v. Burkina Faso*, Judgment (Merits), § 55

at the expiration of which it shall pay interest on the arrears calculated on the basis of the applicable rate of the Central Bank of West African States.

B. Non-pecuniary reparations

188. The Court notes that certain measures requested by the Applicant constitute a deterrence to future violations. In order to remedy certain violations that have been found, non-pecuniary reparations including guarantees of non-repetition are the most appropriate in the instant case.

189. For this reason, by way of reparation for the violation of the principle of adversarial proceedings, the Court orders the Respondent State to amend the laws governing the Constitutional Court to include provisions that ensure respect for this principle.

190. Furthermore, as reparation for the violation of the obligation to guarantee the independence of the Respondent State's Constitutional Court, the Court orders the Respondent State to take all necessary measures to guarantee the independence of the said Court, in accordance with international human rights protection standard, within three (3) years.

191. Furthermore, as a remedy for the violation of the obligation to establish and strengthen independent and impartial electoral bodies, the Court orders the Respondent State to repeal Sections 27 and 28 of the Electoral Law within three (3) years from the notification of this judgement.

IX. COSTS

192. The Applicant requests that the Respondent State be ordered to pay costs.

193. On its part, the Respondent State submits that the request be dismissed.

194. The Court notes that under Rule 32(2) "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

195. The Court considers that, in the instant case, there is no reason to depart from the principle laid down in that text. Consequently, each party shall bear its own costs.

X. OPERATIVE PART

196. For these reasons,

THE COURT

Unanimously

Jurisdiction

- i. *Declares* that it has jurisdiction;

Admissibility

- ii. *Declares* the Application admissible;

Merits

- iii. *Finds* that the Respondent State has not violated the Applicant's right to be tried by an impartial tribunal, protected under Article 7(1)(d) of the Charter;

- iv. *Finds* that the Respondent State has not violated the Applicant's rights to full equality before the law and equal protection of the law, protected under Article 3 of the Charter;
- v. *Finds* that the Respondent State has not violated the Applicant's right to elect and to be elected at free and fair periodic elections held on the basis of universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electorate, protected under Article 25(2) of the International Covenant on Civil and Political Rights;
- vi. *Finds* that the Respondent State has not violated the obligation to establish electoral lists in a transparent and reliable manner, with the participation of political parties and voters, guaranteed under Article 5 of the ECOWAS Protocol on Democracy;
- vii. *Finds* that the allegation of the obligation to establish and strengthen domestic mechanisms to resolve electoral disputes in a timely manner, as guaranteed by Article 17(2) of the African Charter on Democracy, Elections and Governance and Article 7 of the ECOWAS Protocol on Democracy and Good Governance is moot;
- viii. *Finds* that the Respondent State has violated the right of the Applicant to be tried within a reasonable time, protected under Article 7(1)(d) of the Charter;
- ix. Finds that the Respondent State has violated the Applicant's right to be heard protected under Article 7(1)(d) of the Charter and Article 14(1) of the International Covenant on Civil and Political Rights by failing to respect the adversarial principle;
- x. *Finds* that the Respondent State has violated its obligation to guarantee the independence of the Constitutional Court, under Article 26 of the Charter;

- xi. *Finds* that the Respondent State has violated its obligation to establish and strengthen an independent and impartial electoral body, guaranteed under Article 17(1) of the African Charter on Democracy, Elections and Governance and Article 3 of the ECOWAS Protocol on Democracy and Good Governance;

Reparations

Pecuniary reparations

- xii. Dismisses the Applicant's request for reparation for material prejudice;
- xiii. *Awards* the Applicant the sum of One Million (1,000,000) CFA francs for moral prejudice;
- xiv. *Orders* the Respondent State to pay the said sum free from tax within six (6) months from the date of notification of this Judgement, at the expiration of which it shall pay interest on the arrears calculated on the basis of the applicable rate of the Central Bank of West African States;

Non-pecuniary reparations

- xv. *Orders* the Respondent State to amend the laws governing the Constitutional Court to include provisions that ensure respect for the principle of adversarial proceedings, within three (3) years from the notification of this judgement;
- xvi. *Orders* the Respondent State to amend the laws governing the Constitutional Court to include provisions on the procedure for recusal of judges within three (3) years from the notification of this judgement;
- xvii. *Orders* the Respondent State to take all necessary measures to fully fulfil its obligation to guarantee the independence of the Constitutional Court, within three (3) years from the notification of this judgement;

- xviii. Orders the Respondent State to take all necessary measures, in any case before any election, to repeal Sections 27 and 28 of the Electoral Law, within three (3) years from the notification of this judgement;
- xix. Orders the Respondent State to take all necessary measures to fully fulfil its obligation to establish and strengthen independent and impartial electoral bodies, within three (3) years from the notification of this judgement;


Implementation and reporting

- xx. Orders the Respondent State to submit to the Court a first report on the status of implementation of this judgement and thereafter, every six (6) months until the full implementation thereof;


Costs


- xxi. Orders each party to bear its own costs.


Signed:

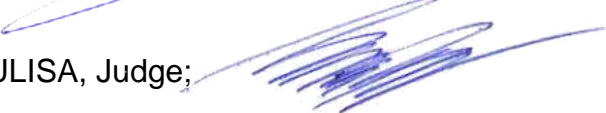
Imani D. ABOUD, President; 


Blaise TCHIKAYA, Vice-President; 


Ben KIOKO, Judge; 


Rafaâ BEN ACHOUR, Judge; 


Suzanne MENGUE, Judge; 


M. Thérèse MUKAMULISA, Judge; 

Tujilane R. CHIZUMILA, Judge; 

Chafika BENSAOULA, Judge; 

Stella I. ANUKAM, Judge; 

Dumisa B. NTSEBEZA, Judge; 

and Robert ENO, Registrar. 

Done at Arusha, this Twenty-Fourth Day of March in the year Two Thousand and Twenty-two, in the English and French languages, the French text being authentic.

