

262/02 : Mouvement ivoirien de droits de l'Homme (MIDH) / Cote d'Ivoire

Summary of Facts

1. On the 24th October 2002, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr Zoro Bi Ballo Epiphane, President of the Ivorian Human Rights Movement (MIDH) ¹, a communication presented on behalf of this NGO, in application of [Article 55](#) of the African Charter on Human and Peoples' Rights (the African Charter).

2. The communication is instituted against the Republic of Côte d'Ivoire (State Party ² to the African Charter and hereinafter referred to as Côte d'Ivoire) and the MIDH alleges that the current policy of denial of identity which has been in force for several years in Côte d'Ivoire and which some people call "Ivoirité", has led to the passing of laws by the State which are of an unprecedented discriminatory nature in the country.

3. Alluding to the [Constitution](#) currently in force in Côte d'Ivoire and which is said to prevent a certain category of Ivorians from acceding to certain public offices including that of President of the Republic, due to their origin as well as the law on the identification of Ivorians which in reality is said to be intended to deprive some Ivorians of their nationality for political reasons, the communication alleges specifically that the [Law No. 98-750 of 23rd December 1998](#) establishing the regulation of rural land ownership, in its [Article 26](#), paragraphs 1 and 2, is in contradiction with the relevant provisions of the African Charter on Human and Peoples' Rights.

Complaint

4. The MIDH contends that the Law No. 98-750 of the 23rd December 1998 establishing the regulation of rural land ownership, in its Article 26, paragraphs 1 and 2 is in contradiction with [Articles 14](#) and [2](#) of the African Charter on Human and Peoples' Rights.

5. The MIDH therefore requests the African Commission to recommend the review of the Law No. 98-750 of the 23rd December 1998 establishing the regulation of rural land ownership in its Article 26, paragraphs 1 and 2 to Côte d'Ivoire.

Procedure

6. By letter ACHPR/COMM 262/2002 of 30th October 2002, the Secretariat of the African Commission acknowledged receipt of the communication to the MIDH specifying that this communication would be recorded in the agenda of the Commission which would consider it for seizure at its 33rd Ordinary Session scheduled for the 5th to 19th May in Niamey, Niger.

7. During its 33rd Ordinary Session which took place from 15th to 29th May 2003 in Niamey, Niger, the Commission examined this communication and decided to be seized of it.

8. By Note Verbale ACHPR/COMM/262/2002 of the 11th June 2002, the Secretariat of the Commission wrote to the Respondent State informing it of the decision and requesting it to convey its arguments on the admissibility of the case to the Commission within three months. A copy of the complaint was attached to this memo. It is important to recall that the copy of this complaint was also handed to the delegate of the Respondent State during the 33rd Ordinary Session of the Commission which had taken place in May 2003 in Niamey, Niger.

9. By letter ACHPR/COMM/262/2002 of even date, the Secretariat of the Commission informed the Complainant of the Commission's decision and requesting it to convey to the latter its arguments on the admissibility of the case within three months.

10. During its 34th Ordinary Session which was held from 6th to 19th November 2003 in Banjul, The Gambia, the delegation from the Respondent State presented Côte d'Ivoire's reaction to the communication. The delegation further delivered to the African Commission a written memo in which figured the said observations and arguments pertaining to the admissibility of the communication.

11. At its 35th Ordinary Session which was held from 21st May to 4th June in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on the admissibility of the complaint to its 36th Ordinary Session.

12. By letters dated 21st June 2004 the Secretariat of the African Commission communicated this decision to all the parties to the communication and requested them to convey to the Commission, for all intents and purposes, any extra arguments they may have on admissibility.

13. On the 27th September 2004, the Secretariat of the African Commission received a letter from the Complainant in which it outlined its reaction to the arguments put forward by the Respondent State with regard to the admissibility of the complaint.

14. On the 11th October 2004, the Secretariat conveyed this memo to the Respondent State.

15. At its 36th Ordinary Session which took place from 23rd November to 7th December 2004 in Dakar, Senegal, the African Commission examined the complaint and declared it admissible.

16. By Note Verbale of the 20th December 2004, the Secretariat conveyed this decision to the Respondent State and invited it to submit its arguments on the merits within three months, to enable it examine the complaint at this stage during the 37th Ordinary Session.

17. On this same date a letter had been sent to the Complainant informing it of the African Commission's decision and requesting its arguments on the merits of the complaint.

18. During its 37th Ordinary Session which took place from the 27th April to 11th May 2005 in Banjul, The Gambia, the African Commission examined the complaint and, granting the request of the Respondent State, decided to defer its ruling on the merits of the communication to its 38th Ordinary Session.

19. This decision had been conveyed to the Parties to the complaint on the 30th June 2005. On this occasion, the Secretariat had notably reminded the Respondent State that its arguments on the merits of the case were still pending.

20. On the 12th September 2005, in the absence of any reaction from the Respondent State, a reminder letter had been sent to it.

21. On the 7th November 2005, the Respondent State conveyed its arguments on the merits of the communication to the Secretariat.

22. On the 10th November 2005, the Secretariat acknowledged receipt and conveyed the said arguments to the Complainant for its reaction.

23. During the 38th Ordinary Session which was held from 21st November to 5th December 2005 in Banjul, The Gambia, the African Commission examined the complaint and, in the absence of any reaction from the Complainant with regard to the supplementary arguments submitted by the Respondent State on the merits of the complaint, decided to defer the case to its 39th Session.

24. On the 10th January 2006, the Secretariat informed the parties of this decision.

25. On the 23rd March 2006, the Secretariat sent a reminder to the Complainant for its reaction to the memo from the Respondent State on the merits of the case. A copy of the document had been attached to the reminder letter, for all intents and purposes.

26. During its 39th Ordinary Session held in Banjul from 11th to 25th May 2006, the Commission decided to defer its decision on the merits to its 40th Ordinary Session and so informed the parties by letter ACHPR/LPROT/COMM262/2002/RK dated 30th June 2006.

27. On the 28th September 2006, the Secretariat of the African Commission wrote a letter ACHPR/LPROT/COMM 262/2002/VC to the Complainant reminding it that its reaction to the arguments of the Respondent State was still pending.

28. The Complainant has not reacted to the arguments submitted by the Respondent State on the merits of the complaint. Another reminder had again been sent to it in September 2006 and this also has remained without response. The African Commission gave a last chance to the Complainant to react to the arguments submitted by the Respondent State and deferred its consideration of the merits of the complaint to the 41st Ordinary Session.

29. The Complainant, by letter dated 17th November 2006 and sent to the Secretariat of the Commission on the 20th November 2006, indicated that it did not have any new arguments to submit following the Memorandum on the merits presented by the Ivorian Government.

30. During its 41st Ordinary Session held in Accra, in May 2007, the African Commission registered the request submitted by one of the Parties, notably the Ivorian State, which consisted in requesting the ACHPR to defer its decision on the merits on the grounds that the current reconciliation process in Côte d'Ivoire would take care of the subject of the dispute which opposed the MIDH and the Ivorian State in the context of an amicable settlement.

31. The African Commission, at its 41st Ordinary Session held in Accra, Ghana in May 2007, had decided to grant the request submitted by the Respondent State and had deferred its decision on the merits to the 42nd Ordinary Session scheduled to take place in Brazzaville, Congo, from 14th to 28th November 2007.

32. Since its decision on deferment taken at its 41st Ordinary Session in Accra, Ghana, up to the 42nd Session held in Brazzaville, Congo, the African Commission has not received any other comment or request from the two Parties, namely neither from the Complainant Party, the MIDH (IHRM), nor the Ivorian State.

33. However, during the 42nd Ordinary Session, in Brazzaville, Congo, the African Commission received a new letter from the Ivorian State which requested the ACHPR to defer again its decision on the merits on the grounds that the current reconciliation process in Ivory Coast [sic].

34. In this same letter received by the ACHPR during its 42nd Ordinary Session, the Ivorian State provided some annexes showing how the negotiations between the State and one association, specially the Association of Malians in Ivory Coast, were going and also promised to send further evidence of the negotiation process in Ivory Coast, especially between Open Society Justice and the MIDH.

Law

Admissibility

35. The African Charter on Human and Peoples' Rights stipulates in its [Article 56](#) that communications referred to in [Article 55](#), to be considered, should necessarily be sent after exhaustion of local remedies, if any, unless the procedure of exhaustion of local remedies is unduly prolonged. It is important to examine the applicability of the conditions governing the exhaustion of local remedies in the present communication.

36. In this case, the Complainant indicates that *"In Côte d'Ivoire, remedies against laws should be brought before the Constitutional Council. Whereas according to [Article 77](#) of the Ivorian Constitution laws can only be brought before the Constitutional Council before they are promulgated"*. It concludes therefore that *"the law in question can no longer be brought before the Ivorian Constitutional Council as it has already been promulgated, indeed as well as all of its decrees of application"*.

37. The Complainant further contends that it could not have had recourse to a local remedy in this case as Article 77 of the Constitution of Côte d'Ivoire stipulates that laws can only be brought before the Constitutional Council by the Speaker of the National Assembly, or by at least one tenth of the National Assembly Members, or by Parliamentary Groups, or by the Human Rights Defender Associations which are legally established and only where it is a question of laws which relate to public liberties where the said Associations are concerned; which is obviously not the case of the contentious law currently being called into question.

38. The MIDH concludes therefore that the obligation for the exhaustion of local remedies beforehand is not, as a result, applicable to the present complaint.

39. In its memorandum conveyed to the African Commission in November 2003, the Respondent State argues that, for its part, the communication is inadmissible due to the "non-exhaustion of local remedies and to the disparaging and insulting nature of the said communication".

40. The Respondent State points out that pertaining to the non-exhaustion of local remedies, contrary to the affirmation of the Complainant, there is, by virtue of the provisions of [Article 96](#) of the Ivorian Constitution, the possibility for any Complainant to invoke a plea on the unconstitutionality of a law, since the modalities for the implementation of this remedy are governed by law. The fact that the

Complainant did not use this remedy, contends the Respondent State, shows that it has not exhausted local remedies and that the communication should therefore be declared inadmissible.

41. Reacting to this argument in a counter memorandum addressed to the African Commission in September 2004, the Complainant argues that no local remedy had been available in this case, even if other parties had access to such a remedy. The Complainant further observed that before the African Commission, the condition for the exhaustion of local remedies should be assessed in relation to the plaintiff (in this case the MIDH) and to the plaintiff alone, and not in relation to third parties who may be entitled to complain about the alleged violation.

42. Thus, the Complainant argues that the recourse to a plea of unconstitutionality invoked by the Respondent State to say that a final remedy exists locally is not available to it as it is only possible to invoke a plea of the unconstitutionality of a law during a hearing. Whereas the MIDH, a legal entity which does not own property in the domain of rural land ownership, cannot be the object of a suit of expropriation or dispute, making possible the application of the law in question and where the possibility of the remedy alluded to by the Respondent State could be implemented. The very fact that the MIDH cannot initiate the remedy of a plea of unconstitutionality shows, argues the Complainant, that this remedy is not available to it.

43. Furthermore, concludes the Complainant, the implementation of the recourse to a plea of unconstitutionality by foreign individuals, owners of land in the rural real estate is "illusory" given the context which currently prevails in Côte d'Ivoire where "any questioning of decisions by the public authorities is seen as an act of belligerence".

44. With regard to the "disparaging and insulting nature" of the communication, the Respondent State indicates that the Complainant referred to Côte d'Ivoire as "*a xenophobic and exclusionist country*" and where "*foreigners are called invaders*", the nationals as "*Ivorians of extraction*" and "*appropriate Ivorians*" in the name of a "*policy of denial of identity*". The Respondent State considers, in particular, that the use of these terms is insulting towards Côte d'Ivoire which has more than 26% of foreigners within its entire population.

45. Moreover, the Respondent State contends that the use of the words like "*xenophobia*" and "*exclusionist*" to qualify Cote d'Ivoire or to lead people to believe that this country is trying to establish a policy of "*denial of identity*" is an insult. The Respondent State concludes that the communication, for the abovementioned reasons, should be declared inadmissible.

46. The Complainant reacts to these arguments by saying that the words quoted are not used to qualify the State or its Institutions but simply to describe a situation which is "*much sadder* where large-scale assassinations of individuals had been perpetrated "just because of their nationality or presumed nationality of origin".

The disparaging and insulting nature of the words used in the communication

47. The Respondent State contends that the words used by the Complainant in the communication are disparaging and insulting to Cote d'Ivoire. Indeed, words like "*xenophobia*", "*exclusionist*", "*discriminatory*", are used in the communication but the African Commission considers that these words are not used in an insulting and disparaging context for the Respondent State but rather have been used to describe a situation which has been condemned and it would be difficult to describe it differently.

48. The African Commission therefore does not accept the argument that the words used in the communication are disparaging and insulting to the Respondent State.

Non-exhaustion of local remedies

49. According to the arguments submitted by the parties to this complaint the African Commission observes that local remedies exist against the law being challenged but it would appear that the Complainant does not have the necessary qualifications to exercise this remedy.

50. In effect, the remedy consisting in bringing the disputed law before the Constitutional Council is only available for a certain category of citizens, in this case, the President of the Republic of Côte d'Ivoire and the Members of Parliament.

51. With regard to the remedy of a plea of unconstitutionality of the law in question, if it does exist, it is clear that the Complainant cannot use it. Not being a land owner in the rural real estate domain, the Complainant is indeed hardly likely to be a party to an eventual suit linked to the implementation of the law being challenged.

52. As a legal entity, the Complainant is well placed to question a legal provision of a State Party to the African Charter which is said to violate the said Charter without prejudice to the facility reserved to third parties to institute proceedings against the provision in question before the national courts.

53. Now, under the terms of [Article 19](#) of the [Law No. 2001-303](#) of the 5th June 2004 determining the organisation and functioning of the Constitutional Council the proceedings for a plea of unconstitutionality take place during a hearing. Therefore it logically follows that the recourse to a plea of unconstitutionality is not available to the Complainant.

54. The African Commission accepts that remedies against the law in question exist locally but also notes that the Complainant cannot use them as it does not have the qualification/possibility to do so. Whereas the African Commission feels that the assessment of the capacity to use and exhaust local remedies is done in relation to the Complainant and to him alone.

55. In this context it is important to recall the jurisprudence of the African Commission pertaining to the condition of exhaustion of local remedies. In effect, the African Commission considers that local remedies should be available (for the Complainant), effective and sufficient. Thus, the African Commission considers that a local remedy is available if the plaintiff can institute a lawsuit without any obstacle; the remedy is effective if it offers the plaintiff a prospect of success and if this remedy is sufficient and capable of rectifying the alleged violation ³.

56. Since in this particular case it appears clearly that the Complainant does not have the qualification/possibility to use the available local remedies, the African Commission considers that it is as if there is no local remedy available for the Complainant.

For these reasons, the African Commission declares the communication admissible.

Merits

57. The Respondent Party, in its arguments on the merits, challenges the MIDH's assertion that the law on rural land ownership is one of the major reasons for the civil war which is tearing Côte d'Ivoire apart.

58. The Respondent Party considers this assertion as serious and inaccurate. Serious because it insinuates that it is the foreigners, the only ones concerned by Article 26 of the Law being questioned, who have taken up arms against the State of Côte d'Ivoire. Inaccurate because this is not the cause being invoked by those who have taken up arms, and that besides, "112 persons are concerned by the effects of Article 26 out of which 40 are companies and 112 [*sic*] are physical persons". The Respondent Party notes that the communications from the Complainant are only stories of the undertaking, preparation and justification of violence.

59. After its preliminary observations on what it calls the "real reasons" of the Complainant, the Respondent Party was particularly anxious to send a copy of the *Official Gazette* of the Republic of Côte d'Ivoire containing the promulgation decree signed by the President of the Republic, of the new [Law No. 2004-412](#) of the 14th August 2004 amending Article 26 of the Law No. 98-750 of 23rd December 1998 relating to rural land ownership to the African Commission.

60. On the basis of this new Law No. 2004-412 which modifies the provisions of Article 26 of the former Law No. 98-750 on which the Complainant has based its communication, the Ivorian Government requests the African Commission to declare the *communication 262/2002* of the MIDH as groundless and to close this case by applying the principle of topicality which requires that all administrative or legal bodies assess the facts of the case in the condition in which they are on the day of ruling.

61. The Complainant considers it needless to submit fresh arguments since on the one hand the admissibility of the communication has not been questioned, and on the other, because the Law No. 98-750 of 2nd December 1998, identified as being in violation of the provisions of [Articles 2](#) and [14](#) of

the African Charter on Human and Peoples' Rights has been judged prejudicial to fundamental human rights by numerous courts whose competence and respectability have been unanimously recognised.

62. Furthermore, the Complainant observes that the various peace negotiations on the Ivorian crisis have, after the MIDH, tackled the issue and recommended the modification of Article 26 of the Law 98-750 of 23rd December 1998. The same is true for the [Marcoussis Accords](#) of 24th January 2003, in their Item IV – land property system, [paragraph 2](#) .

63. The Complainant all the same accepts that, like the Government of Côte d'Ivoire, following the Marcoussis Accords, the National Assembly of Côte d'Ivoire had passed a new Law No. 2004-412 dated 14th August 2004 on the amendment of Article 26 of the Law No. 98-750 of 23rd December 1998 and relative to rural land ownership.

64. The Complainant thus feels that it has scored a victory and requests the African Commission to mention this credit in its decision on the merits.

Debate on the need to pursue consideration of the merits or otherwise

65. The Commission takes note of the request from the Respondent Party to declare the communication submitted by the MIDH as groundless, due to the fact that the provisions of Article 26 of the Law 98-750 being challenged by the Complainant had been modified by the new Law 2004-412 and that in consequence this modification gives the plaintiff satisfaction.

66. The Commission notes with interest the arguments raised by the Ivorian State to justify its request for declaring the communication groundless and for closing the case, notably the principle of topicality which requires that all judicial or administrative bodies assess the facts of a case in the state in which they are on the day of its ruling.

67. The Commission further notes that the Ivorian State, in its arguments on the merits, alludes to the former jurisprudence of the Commission (notably [66/92 Lawyers Committee for Human Rights vs. Tanzania](#), [22/88 International Pen vs. Burkina Faso](#) and [16/88 Cultural Committee for Democracy in Benin vs. Benin](#)). The Commission observes that the Respondent Party relies mainly on this said jurisprudence to base its request for the communication to be pronounced groundless and for the closure of the case.

68. The Commission considers, furthermore, that the Complainant, in spite of the fact that it does not bring any new arguments following the conclusions drawn on the merits by the Ivorian Government, does not for all that renounce its suit before the Commission and does not withdraw its Complaint. Better still, the Complainant is asking the Commission to recognise, on making its decision, its credit for having been the first organisation to have drawn attention on the prejudicial nature of the Article 26 of the Law 98-750 on rural landownership to human rights.

69. The Commission moreover notes the concern expressed by the Complainant to ensure the effective implementation of the provisions of the Law 2004-412 amending Article 26 of the Law, and above all, acquisition of help in obtaining compensation for the prejudices suffered by numerous populations for six (6) years during which the Law No. 98-750 of the 23rd December had remained in force.

70. From the preceding arguments submitted by the two parties, the Commission considers it its responsibility to determine whether or not to pursue the consideration of the merits of the present communication.

View of the Commission on the need to pursue consideration of the merits or otherwise

71. The Commission considers that the communications [66/92](#), [22/88](#) and [16/88](#) invoked by the Respondent Party to justify its request to the Commission to declare the communication groundless and to close the case, should be assessed on a case by case basis and can in no way constitute a constant jurisprudence of the Commission.

72. Relying on its jurisprudence, the Commission has always dealt with the communications by ruling on the alleged facts at the time of the presentation of the communication (see [27/89](#), [46/91](#), [49/91](#), [99/93: Organisation mondiale contre la torture and Association internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme / Rwanda](#)). This

jurisprudence had been confirmed by the more recent decisions relating to [222/98 and 229/98 Law Office of Ghazi Suleiman / Sudan](#).

73. The Commission takes good note of the amendments to the Article 26 introduced by the new Law 2004-412 and which are geared towards better guaranteeing the right to property, but wishes to clarify that these new legislative provisions do not wipe out the violations caused by the application of the former Law 98-750 which produced effects for six (6) years, and therefore it was beholden, by virtue of its mandate of protection, to rule on *Communication 262/2002*.

74. The Commission thereby concludes that, even if the law had been amended since then, this change does not automatically draw a decision from the Commission to close the case. In consequence, the Commission decides to pursue consideration of the merits of Communication 262/2002 submitted by the MIDH against the Republic of Côte d'Ivoire.

Consideration of the Merits: Provisions of the Charter alleged to have been violated

75. The Complainant alleges the violation of [Article 2](#) of the African Charter on Human and Peoples' Rights which stipulates that: [# "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status". #]

76. The Complainant also alleges the violation of [14](#) of the African Charter on Human and Peoples' Rights which stipulates that:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and this in accordance with the provisions of appropriate laws"

77. The Commission notes that in its observations on the merits, the Government of Côte d'Ivoire does not dispute the violations of [Articles 2](#) and [14](#) of the African Charter by the Article 26 of the Law 98-750 on rural land ownership. On the contrary, it simply observes that its effects are limited as "the number of individuals concerned is from 112 of which 40 are companies and 112 physical persons, and that among these, there is a very small minority of Africans".

78. As a result, the Commission considers that the provisions of Article 26 of the Law 98-750 are in violation of [Articles 2](#) and [14](#) of the African Charter on Human and Peoples' Rights and notes that the argument that its effects are said to be limited to a certain number of persons and only concerns a very small minority of Africans is irrelevant from the legal point of view and therefore cannot stand. On the other hand, such an interpretation confirms the violation of [Article 2](#) of the African Charter which guarantees the enjoyment of rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status. Furthermore, the Commission considers that the application of Article 26, paragraphs 1 and 2 of the Law 98-750 would give rise to the expropriation of their land from a category of the population, on the sole basis of their origin; whereas, it observes that the Ivorian Government, in its remarks on the merits, does not advance any argument linked to the "public need" or to "the general interest of the community" which could exceptionally justify a violation to the right to property as guaranteed by the Charter, specifically in its [Article 14](#).

Holding

For these reasons, the African Commission

Observes that the Republic of Côte d'Ivoire is in violation of the provisions of [Articles 2](#) and [14](#) of the African Charter on Human and Peoples' Rights.

Observes that, even if Article 26 of the Law 98-750 of 23rd December 1998 had been amended by the Law 2004-412 of the 14th August 2004, it has already shown its effects during the six (6) years of its application;

Takes note of the current reconciliation process and of the ongoing negotiations in Cote d'Ivoire;

Recommends to the Government of Côte d'Ivoire to ensure the effective application of the provisions

of the new Law 2004-412 of 14th August 2004 amending Article 26 of the Law 98-750 of the 14th August 2004 *[sic]*;

Recommends to the Government of Côte d'Ivoire to ensure, if this has not already been done, that all landowners who may have been deprived of their land by virtue of the application of the former provisions of Article 26 of the Law 98-750 are restored in their rights;

Urges the Government of Côte d'Ivoire, within the framework of the current drive to achieve national reconciliation, to evaluate, if this has not already been done, the damages that the victims may have suffered by virtue of the application of the provisions of Article 26 of the Law 98-750, and to pay, if need be, fair and equitable compensation on their behalf; Strongly urges the Ivorian State to pursue, within the framework of the current national reconciliation process, the amicable settlement of all the disputes arising out of the application of the former discriminatory laws and to scrupulously ascertain that the principle of equality before the law, as stipulated in the African Charter, notably in its [Article 2](#), is respected under all circumstances.

Done at the 43rd Ordinary Session held in Ezulwini, Kingdom of Swaziland, from 7th to 22nd May 2008

Footnotes

1. The MIDH is an NGO based in Côte d'Ivoire and which enjoys Observer Status with the African Commission on Human and Peoples' Rights since October 2001 (30th Ordinary Session).
2. Côte d'Ivoire ratified the African Charter on the 6th January 1992.
3. Grouped Communications [147/95 and 149/96 Sir Dawda K. Jawara/The Gambia](#).