The Progress in Establishing the Rule of Law in Côte d’Ivoire under Ouattara’s Presidency

Creating an autonomous and efficient judiciary represents an important and necessary step for the consolidation of democracy and reconciliation of a nation, divided by almost two decades of conflict over a contentious issue of Ivoirité. The aim of this paper is to evaluate the progress that has been made in the establishment of the rule of law in Côte d’Ivoire under the current president Alassane Ouattara, by comparing it to the periods of his predecessors Henri Konan Bédié, General Robert Gueï and Laurent Gbagbo. I argue that the judiciary is still struggling to establish its autonomy and that one of its main problems is its lack of impartiality. I examine possible reasons for the courts’ persistent weak accountability performance and discuss possible remedies.
I. Introduction

The third wave of democratization process that swept across sub-Saharan Africa during the 1990s brought with it, amongst other things, a renewed enthusiasm for constitutionalism and rule of law, which had remained dormant if not outright suppressed for decades following the initial optimism of the early post-colonial period. As Widner (2004, 19) puts it, rule of law is generally understood to mean that “(1) government officials and others act in accordance with the letter of the law, (2) people accused of crimes or civil infractions under the law receive due process, and, more controversially, (3) the laws themselves accord with some universal standards of justice, often captured in United Nations covenants.” Meierhenrich (2008, 23-5), by contrast, who focuses on the regulatory function of law, rejects the inclusion of such values as justice, human rights and equality under the concept of rule of law. He distinguishes law’s legality from its legitimacy and refutes the idea that rule of law is identical with democracy. O’Donnell (2004, 32-3) further argues that democracy requires not simply a rule of law in its historical, restrictive sense, but rather “a truly democratic rule of law that ensures political rights, civil liberties, and mechanisms of accountability”, which guarantee the political equality of all citizens and prevent abuses of state power. In this article, I refer to Widner’s broader meaning of rule of law or what O’Donnell defines as democratic rule of law.

While elections give citizens opportunity to punish politicians’ misbehavior or incompetence by removing them from office, the courts normally fulfill the role of keeping politicians accountable to the democratic rules and enforce the separation of
powers between the campaign periods (Widner 2004, 19). According to Gloppen (2004, 112), a judiciary’s capacity to impede abuses of political power is a prerequisite for good governance and consolidation of a democratic regime. After the Second World War and particularly in the last couple of decades, the courts have become important bastions for the protection of human rights (Shapiro 2004, 13-4).

According to Widner (2004: 19), judicial independence, meaning judges’ insulation from influence of political actors, effectiveness and public awareness are the three main factors, which enable the courts to execute their functions correctly. Gloppen (2004: 113) explains courts’ accountability performance or, in other words, their ability to effectively say ‘no’ to illegitimate use of political power, by focusing on the following three independent variables: the legal culture, the institutional structure and the courts’ social legitimacy. The legal culture refers to judges’ self-understanding of their professional role, including their relationship with the political power. The latter can span from predominantly deferential attitude to political power, advocating caution and self-restraint, to a more assertive attitude. The institutional structure includes the legal framework, regulations and organization of the judiciary, financial and professional resources available and other factors influencing the courts’ capacity and independence, such as judicial appointment procedures, judges’ security of tenure and terms of service, disciplinary mechanisms and budgetary autonomy (Gloppen 2004: 114). Finally, the social legitimacy of the judiciary refers to how significant social groups perceive judges, namely, whether they consider them competent, fair and independent or, by contrast, think they are corrupt, inefficient and irrelevant.
The broader meaning of rule of law entails not only the adequate performance of the courts, which will be the primary focus of this article, but also a legal system that is itself democratic and which regulates the behavior of all state institutions and is effectively applied over the totality of a country’s territory (O’Donnell 2004, 36-7). The democratic value of rule of law may therefore be compromised by discriminatory laws, discriminatory application of the law by state institutions (the government, the judiciary, bureaucracy), or uneven reach of the legal system across the geographical territory (O’Donnell 2004, 39-41).

A quick glance at the recent Côte d’Ivoire’s history demonstrates that the Ivorian courts fell short of fulfilling their stated functions, and that adopted laws often deviated considerably from what is considered to be ‘universal’ standards of justice and human rights principles. In fact, instead of preventing politicians from abusing their powers and keeping them accountable to democratic rules and principles, laws and courts were used by political power-holders to buttress and legitimize their authority. In this article, I evaluate the progress that has been made in the domain of the rule of law in Côte d’Ivoire in the past two decades. This period roughly coincides with Côte d’Ivoire’s transition from one-party-state to democracy. The article is divided in two parts. The first part is a quick historical overview of the functioning of the Ivorian judiciary and its relationship with the executive branch under the regimes of Henri Konan Bédié, General Robert Gueï and Laurent Gbagbo. This period is then compared to the period of the current president Alassane Ouattara. The article shows that the judiciary is still struggling to ensure its autonomy and that one of its main problems is its lack of impartiality. Finally, I examine
reasons for the courts’ persistent weak accountability performance and discuss possible remedies.

II. From Bédié to Gbagbo

One of the most illustrative instances of the abuse of law for the purposes of regime survival rather than the establishment of rule of law, which opened the Pandora box of Ivoirité, occurred when Bédié’s government in December 1994 pushed through the National Assembly a new Electoral Law changing the eligibility criteria for presidential candidates, tailored to bar Alassane Ouattara, the main opposition candidate of the Republican rally (Rassemblement des Républicains – RDR) from the 1995 presidential elections. The controversial law required that candidates and their both parents be Ivorians by birth. Moreover, candidates must have resided continuously in Côte d’Ivoire for the five years prior to the elections, and should have neither renounced the Ivorian nationality nor taken the nationality of another state (Crook 1997, 28). Ouattara’s father was allegedly from Burkina Faso.\(^1\) Moreover, Ouattara spent several years abroad while studying in the United States, and as an official of the IMF (1968-73; 1984-8; 1994-9) and the Central Bank of West African States (1973-84; 1988-90). He had also allegedly possessed a Burkina Faso passport at some point in the past (Toungara 2001; Akindès 2003, 15; Bah 2010, 602).

Ouattara’s exclusion from the elections prompted the establishment of a fragile opposition coalition Republican Front (Front républicain -FR) in 1995, comprising RDR, Ivorian Popular Front (Front populaire ivoirien – FPI) and Union of Democratic Forces
(Union des forces démocratiques - UDF). The coalition in the end ‘actively boycotted’ the presidential elections and thus allowed the incumbent Henri Konan Bédié to assume power uncontested. Bédié’s victory, however, hardly concealed the erosion of the support base of the ruling Democratic Party of Côte d’Ivoire (Parti démocratique de Côte d’Ivoire – PDCI) provoked by its divisive Ivoirité campaign. In fact, Ouattara’s political exclusion coincided with a much broader social, economic and political discrimination against a large portion of the Ivorian population, mostly Muslims of northern ethnic groups, who were denied land and citizenship rights because they were considered as ‘not pure Ivorians’ or even foreigners due to their cultural and religious similarities with immigrants from Burkina Faso and Mali (Konaté 2002). The nationality issue gradually affected other aspects of Ivorian society through the adoption of stricter rules for the acquisition of identity cards and residents’ cards for immigrants, the latter first introduced, ironically, by Ouattara in 1990 (Serhan 2002, 176-7). Moreover, the reform of the rural land tenure law in 1998, which provided for the redistribution of land according to criteria of autochthony, had disastrous effects in the coffee and cocoa regions where ‘strangers’ were in the majority (Bouquet 2003; Chauveau 2000; Chauveau 2003). These new restrictive measures tried to limit the immigration of “foreigners”, which due to a new economic slump began to be viewed as a particularly serious problem.

The full extent of the damage caused by Ivoirité would become clearer four years later, on 24 December 1999, when Bédié was overthrown and forced into exile. While the immediate cause of the coup was army discontent, it is widely considered that the underlying factor was socio-political tensions instigated by Ivoirité (Dozon 2000a). The
months preceding the bloodless military coup, the first in Ivorian history, were characterized by an extremely tense atmosphere: an international arrest warrant was issued for Ouattara, who was accused of forgery on the basis of doubts about his “mixed and uncertain” identity (Akindès 2004, 21). Moreover, many Muslim people of the north complained of humiliating acts by the police who harassed them and confiscated their identity cards, challenging their Ivorian nationality. In addition, following a mass protest on 28 October 1999, the principal RDR militants were arrested and imprisoned on charges of instigating tribalism and religious war (Kipré 2002, 85). The joy at the military junta leader General Gueï’s announcement of the end of Bédié’s regime was overwhelming and widespread. Ouattara and Gbagbo allegedly proclaimed that the coup was a revolutionary act rather than a simple military coup (N’Guessan 2002a, 60). General Gueï had become known overnight as “Santa Claus in fatigue” (Père Noël en treillis), who brought a Christmas present (coup) to the Ivorian population.

Nonetheless, the initial enthusiasm inspired by General Gueï’s promises to end with the divisive Ivoirité doctrine and prepare free and fair elections in which he would not participate, soon dissipated. 3 Not only did he file his candidature for the presidency, he also opportunistically changed the Constitution in such a way as to allow the exclusion of most of the candidates from the presidential race (Fotê 2005; Kotchy 2005; Seri 2005). Just before submitting the revised constitution to the referendum on 23 July 2000, General Gueï made a final and crucial change to Article 35 of the electoral code, which, contrary to the initial recommendations of the Consultative Constitutional and Electoral Commission (CCCE), now required both mother and father of the presidential candidate to be of Ivorian nationality (Ahouana 2005, 46; Kotchy 2005, 126). By this and the
referendum campaign he reignited the *Ivoirité* discourse. The contentious Article 35 states that:

The President of the Republic is elected for five years by universal direct suffrage. He is only re-eligible one time. The candidate to the presidential election must be forty years of age at least and sixty-five years at most. He must be Ivorian by birth, born of a father and of a mother themselves Ivorians by birth. He must never have renounced the Ivorian nationality. He must never have had [prévaloir] another nationality. He must have resided in Côte d’Ivoire continuously during the five years preceding the date of the elections and have totaled ten years of effective presence. The obligation of residence indicated in this article is not applicable to the members of diplomatic and consular representations and to the persons designated by the State to occupy a post or accomplish a mission abroad, to international functionaries and to political exiles. The candidate to the Presidency of the Republic must present a complete statement of his physical and mental well-being duly determined by a college of three physicians appointed by the Constitutional Council from a list proposed by the Council of the Order of Physicians. These three physicians must take an oath before the Constitutional Council. He must be of good morals and of grand probity. He must declare his assets and substantiate [en justifier] the origin of them. (US Embassy 2013)

Laurent Gbagbo openly conceded during the Forum for the National Reconciliation in late 2001 that clauses referring to Ivorian nationality, which in general reiterated provisions from the electoral law adopted in December 1994 under Bédié, primarily targeted Alassane Ouattara (N'Guessan 2002b, 327).4

On 6 October 2000, the Supreme Court invalidated 14 out of 19 candidatures, including Ouattara’s for his “dubious nationality”, and those of Bédié and the PDCI’s official presidential nominee, Emile Constant Bombet, due to embezzlement allegations.5 It retained only candidatures of General Gueï, Laurent Gbagbo, and three minor
candidates, Théodore Mel Eg, Nicholas Dioulo and Francis Wodié (Le Pape 2002, 47). The Supreme Court was at the time presided over by Tia Koné, Gueï’s former personal legal advisor. He was subsequently nicknamed “black crow” for having compromised judiciary’s integrity by eliminating all but one (Gbago’s) serious challenger to the General’s candidature. The opposition disputed the Supreme Court’s decision, arguing that Gueï’s and Gbago’s candidacies should have been invalidated as well, Gueï’s on the ground of military law requiring him to resign from the military six months before the elections, and Gbago’s due to his state employee status (Cook 2011). A newspaper journalist, who raised the issue of Gueï’s problematic candidacy, was beaten by the presidential guard.

Bédié’s and Gueï’s regimes were a prelude to a sophisticated subversion of rule of law into rule by law of Gbago’s government, under which courts were systematically used as an instrument to entrench the regime. During this time, the three principles of ‘rule of law’ and the protection of human rights were routinely violated. Widespread impunity for grave human rights violations marked the Gbago regime from its beginning, since his victory in the “calamitous” presidential election in 2000. Gueï’s refusal to concede defeat prompted Gbago’s supporters to descend onto the streets and force the General out of office. The confrontation between the military junta and Gbago’s supporters, however, soon degenerated into violent clashes between the police and protesters supporting Gbago on one side, and Ouattara’s supporters on the other. Groups supporting Ouattara were demanding a new election from which their candidate would not be excluded (Akindès 2009). On 27 October, at least 57 people, mainly of northern ethnic groups, were found dead in a mass grave in Abidjan’s district of
Yopougon (HRW 2001). Several human rights organizations, including Human Rights Watch, *Reporters sans frontières*, the International Human Rights Federation and Amnesty International, held the gendarmerie stationed at the Abobo camp responsible for these crimes (Amnesty International 2003, 2). In July 2001, a United Nation international commission argued in its report that the involvement of the gendarmes in the massacre appeared to be “indisputable”. In August 2001, a military tribunal in Abidjan acquitted the eight gendarmes charged with the massacre for lack of evidence. The crime has remained unpunished to the present day. Despite the fact that security forces did enjoy some protection from prosecution under the previous governments of Houphouët-Boigny and Bédié as well, Amnesty International (2003, 3) nevertheless considers the Yopougon massacre “a milestone in the [country’s] history of the contravention of the law”. Almost two years later, on 6 October 2002, at Bouaké, members of the Patriotic Movement of Côte d’Ivoire (*Mouvement patriotique de Côte d’Ivoire* – MPCI), which took control of the country’s north following the failed military coup on 19 September 2002, imprisoned sixty gendarmes and fifty of their children, and killed and wounded dozens of them in the following couple of days. The perpetrators of this summary execution of gendarmes explicitly invoked the Yopougon massacre to justify their action (Amnesty International 2003, 2).

The outbreak of civil war following the failed military coup in September 2002 brought the impunity for atrocities and massacres committed by all involved parties to the unprecedented level in the Ivorian history. Among the high-profile figures killed during this period was General Gueï, whom the Gbagbo regime accused of organizing the military coup. Despite Gbagbo’s promises to open an investigation into Gueï’s
assassination, the case has been delayed until 11 September 2012, only a week from the expiry date of the ten-year statutory limitation period. On 1 October, a military court in Abidjan charged four senior officers under Gbagbo over General Gueï’s assassination, in particular Major Anselme Seka Yapo, also known as Seka Seka, the chief bodyguard of the former first lady Simone Gbagbo. Seka Yapo is also suspected of links to death squads and of being involved in the 2004 disappearance of a French-Canadian journalist, Guy André-Kieffer, who had investigated the embezzlement of the cocoa revenues by the Gbagbo regime. This is another case, which stalled until after Gbagbo’s departure due to the implication of his inner circle.

The most blatant case of judge’s connivance with the executive under the previous regime, which led to the tragic consequences, was the Constitutional Council’s (CC) invalidation of the Independent Electoral Commission’s (IEC) preliminary results proclaiming Ouattara the winner of the long-awaited and several times postponed 2010 presidential elections. Paul Yao N’Dré, the president of the CC and a close ally of President Gbagbo, cancelled about half million of votes from the seven departments in the north, all opposition strongholds, and proclaimed Gbagbo the winner. By doing this, the CC violated the electoral code, notably its Article 64 stating that:

If the Constitutional Council finds serious irregularities that vitiate the fairness of elections and affect the overall result, it annuls the election. The new election date is fixed by the Council of Ministers upon proposal by the Electoral Commission. The vote will take place no later than forty-five days from the date of the Constitutional Council’s decision. (OECD 2013)

However, the CC simply annulled more than half million votes and proclaimed
Gbagbo the winner of the elections. Moreover, it is quite unlikely that such grave irregularities impacting the final preliminary results existed, especially if one compares results of the second round with those of the first round, which were certified by both the IEC and the CC alike. Ouattara obtained more than 80% of the vote in five of the seven northern departments in question in the first round.\textsuperscript{11} It is highly implausible that the majority of people from these departments would then switch their vote in the second round.

Gbagbo’s refusal to step down, backed by CC’s decision, triggered post-election violence during which at least three thousand people were killed and one million were displaced. Scott Straus (2011) identified two central dynamics of violence: urban violence perpetrated primarily by pro-Gbagbo forces against demonstrators, northern Muslim Ivorians and Western African nationals; and rural violence, primarily between “autochthons” and “allogene” communities in the western region, which followed a spiraling pattern of retaliation and reprisal. In addition, in the north and some parts of Abidjan, pro-Ouattara forces employed political violence targeting Gbagbo’s supporters from the beginning of the crisis. For example, on 17 March, pro-Gbagbo forces launched a rocket attack on the pro-Ouattara part of Abidjan, in which at least 100 people were killed. On 28 March, Republican Forces of Côte d’Ivoire (\textit{Forces républicaines de Côte d’Ivoire} – FRCI), composed primarily of former rebel troops of New Forces and loyal to Ouattara, started a general military offensive. This time it was them who perpetrated grave atrocities against humanity by massacring, in a retaliation attack, hundreds of civilians in the western town of Duékoué.\textsuperscript{12} On 11 April, FRCI finally arrested Gbagbo, with a decisive help of the UNOCI and French \textit{Licorne} troops.
From Bédié to Gbagbo, therefore, law and courts, in particular the Constitutional Council, failed to ensure government officials’ respect for laws in accord to universal standards of justice. By contrast, throughout this period the executive used laws and courts as a means to exclude potential contenders for power and to entrench their regime. Courts also systematically failed to prosecute and punish individuals who committed grave human rights violations. Widespread impunity, which became the norm under Gbagbo and reflected the acute malfunctioning of the justice system, aggravated socio-political tensions and triggered the spiraling cycle of violence that the Ouattara regime was hoped to bring to an end.

III. Ouattara’s Regime and Progress so Far

Almost immediately after Gbagbo’s departure, President Ouattara called for reconciliation and designated the former interim prime minister and PDCI member Charles Konan Banny to preside over the Dialogue, Truth and Reconciliation Commission (Commission Dialogue, Vérité et Réconciliation - CDVR), formally established on 13 May 2011. The president also ordered the set up of a national commission of inquiry, tasked with identifying individuals who committed massive human rights violations during the post-election crisis, which began its work on 13 September 2011 (HRW 2012a). In addition to domestic efforts to bring justice for post-election violence, President Ouattara also reconfirmed the authority of the International Criminal Court (ICC) to investigate crimes under its jurisdiction. While Gbagbo accepted
ICC’s jurisdiction already in April 2003, Côte d’Ivoire ratified the Rome Statute only on 15 February 2013 (ICC 2013).

Despite these promising initial steps, one of the persistent and most serious weaknesses of the judiciary in Côte d’Ivoire remains its lack of impartiality. Human Rights Watch (2011) documented in its report, based on six field missions during the crisis, systematic human rights violations and identified thirteen high-level civilian and military leaders on both sides who were implicated in war crimes and crimes against humanity. Other organizations, such as Amnesty International, the International Federation of Human Rights, a UN Human Rights Council’s independent, international commission of inquiry (2011), United Nations Operation in Côte d’Ivoire (UNOCI) and national commission of inquiry reached similar conclusion about the responsibility of both camps. Nevertheless, so far only people from the Gbagbo camp have been arrested and brought to justice (Amnesty International 2013, 57).

The national justice system responsible to judge the crimes committed during the post-election violence include: the civil high-level court in Abidjan, headed by prosecutor Adou Richard Christophe; Daloa’s Court of Appeal is investigating crimes in the west; and the military tribunal, headed by “military prosecutor” Ange Kessi, appointed already under the former President Gbagbo. On 11 October, in the first big trial of those being involved in the post-election violence, the military tribunal in Abidjan sentenced General Brunot Dogbo Blé to fifteen years in prison for ordering the murder of Colonel-Major Adama Dosso in March 2011, while his four co-defendants were given sentences ranging from five to fifteen years. Dogbo Blé has also been charged with complicity in General Gueï’s assassination. By July 2011, the military tribunal completed inquiries into post-
election crimes and charged seventy-two former members of the security and defense forces (Forces de défense et de sécurité – FDS) loyal to Gbagbo, fifty of whom were already under arrest. By contrast, when asked why no FRCI member supporting Ouattara was charged so far, prosecutor Ange Kessi retorted that their prosecution was currently on hold because their military status and thus jurisdiction of the military tribunal over their crimes has not yet been established.17

Amnesty International’s (2012; 2013) latest reports point to illegal detentions and torture of more than 200 people, including several members of Gbagbo’s FPI. Some of them were held in illegal detention places, such as the Génie millitaire, a military barracks in Abidjan, where they had been held incommunicado for more than a month (Amnesty International 2012). Others have been transferred, allegedly for security reasons, to five towns in the country’s north and center, hundreds of kilometers from Abidjan: Gbagbo’s wife Simone is held in Odienné, their son Michel in Bouna, and some key figures of the former administration are detained in Boundiali, Katiola and Korhogo (Amnesty International 2013, 58-9). According to the organization, this distance hampers lawyers’ access to their clients and represents a serious obstacle to the detainees’ right to defense.

Amnesty International (2013, 59) further contends that a number of detainees had to wait almost half a year before being officially charged with such offences as threat to State security, economic crimes and murder. Eight people close to Gbagbo have been charged with genocide, including Simone Gbagbo, former Prime minister Gilbert Aké N’Gbo, former leader of the FPI Pascal Affi N’Guessan, former minister of foreign affairs Alcide Djédjé, former minister of the economy and finance Désiré Dallo, General
Brunot Dogbo Blé, leader of the pro-Gbagbo Women Patriots Généviève Bro Grébé and FPI’s former vice-president Abou Dramane Sangaré. In most cases an investigating judge heard the detainees only several months after they had been charged (Amnesty International 2013, 60). Simone Gbagbo, for example, waited until 13 November 2012 to be questioned by an Examining Magistrate in Odienné on charges of genocide, blood crimes, threat to State Security and economic crimes such as embezzlement and corruption.18

The Amnesty International delegation also visited the west and spoke with the displaced people who lived in the refugee camp of Nahibly, which was burnt to the ground in July 2012 by dozos,19 FRCI members and young Dioula20 from the neighborhood, in a reprisal attack for the death of four of their people. On this occasion, several people had been detained or extrajudicially executed (Amnesty International 2012). According to the prosecutor of Duékoué, the investigation into the Nahibly case has not progressed much due to the lack of financial and human resources and the continuing distrust of the survivors of the attack and their relatives (Amnesty International 2013, 70).

Those responsible for committing the greatest crimes are investigated by the international justice system, the International Criminal Court (ICC). Immediately after the arrest in April 2011, Laurent Gbagbo was detained in Korhogo in the north of Côte d’Ivoire. Between 27 June and 4 July 2011, an ICC mission visited Côte d’Ivoire for a preliminary investigation. On 30 September, the ICC judges authorized the prosecutor to investigate the crimes committed during the post-election violence. On 29 November, the ICC charged Gbagbo with four accounts of crimes against humanity, including murder,
rape and other sexual violence, persecution and other inhumane acts stemming from post-election violence, and transferred him to Hague, where he is awaiting trial. A year later, on 22 November 2012, an arrest warrant was unsealed against his wife Simone. However, she remains under house arrest in Odienné, awaiting the Ivorian government’s decision on whether to allow the ICC to transfer her to Hague.

Most of Gbagbo’s moderate supporters, who had criticized the persistent justice deficit at the national level, had hoped the ICC would rectify these politicized judiciary practices (HRW 2012b). However, several early ICC’s decisions failed to fulfill their expectations. For example, the timing of Gbagbo’s transfer to Hague, less than two weeks before the legislative elections of 11 December 2011, clearly benefitted Ouattara and the RDR. Ultimately, parties supporting the former President, including the FPI, decided to boycott the elections to protest against the ICC’s decision. This further marginalized and weakened the political opposition. The ICC’s actions raised suspicions that the current president may have used the ICC as a tool against his political opponents, especially as the ICC initially also agreed to Ouattara’s demand to limit its investigation of crimes committed after 28 November 2010. Matt Wells of the Human Rights Watch points to ICC’s “unfortunate early decision to ‘sequence’ its investigation”, by looking first only at the crimes committed by the Gbagbo side (HRW 2012b). Some of the ICC’s earliest decisions that had been criticized as favoring the victor’s rather than impartial justice have been remedied since then. On 22 February 2012, for example, the ICC decided to extend the temporary scope of its investigation to the period between 19 September 2002 and 28 November 2010 (ICC 2012). It remains to be seen, however, whether the ICC
would issue warrant for the arrest of former rebels integrated into the FRCI and whether the Ivorian government will cooperate with it.

To summarize, the judiciary under Ouattara made some progress in addressing widespread impunity by finally opening investigations into crimes and grave human rights violations, like the assassination of General Gueï or the killings committed by the former defense and security forces (FDS) during the post-election violence. However, so far only Gbagbo supporters have been prosecuted, which attests to the acute partiality of the Ivorian judiciary.

IV. Reasons for Persistent Deficiencies of the Ivorian Courts’ Accountability Performance

The partiality of the Ivorian judiciary doubtlessly played its part in the wave of violent attacks in last quarter of 2012 targeting security forces, organized largely by pro-Gbagbo elements. In August 2012, for example, at least ten FRCI soldiers died in armed attacks on several military compounds in and near Abidjan. On 21 September, at least another ten people were killed in attacks against police and army positions in Abidjan and Noé, a town near the Ghanaian border, which prompted the Ivorian government to close its land and maritime borders with Ghana until 8 October. On 7 October, the UN Group of Experts revealed in an interim report that Gbagbo’s supporters had hired mercenaries and established training camps in neighboring Ghana and Liberia with the goal to overthrow the Ivorian government. These attacks and the subsequent repressive actions of the Ouattara government, including intimidation and (arbitrary) arrests of Gbagbo
supporters, have impaired the already stumbling peace process. Given the detrimental impact that the courts’ partiality had on the reconciliation process, it is necessary to analyze the reasons behind such behavior.

During the democratization process of the 1990s, most Francophone countries in sub-Saharan Africa have established separate constitutional courts or councils to assume the role of an independent arbiter of political competition, by granting them jurisdiction over election-related disputes, eligibility criteria for public office and constitutionality of laws or acts of government (Fomunyoh 2001, 44). One of the most often cited Francophone countries in which the constitutional court on several occasions successfully affirmed its autonomy vis-à-vis the executive branch is Benin (Bourgi 2002; Fomunyoh 2001; Magnusson 2001). In October 1994, for example, the court upheld the national assembly’s deadline limiting the validity of the president Nicéphore Soglo’s emergency powers (Magnusson 2001, 225). In 1996, it ruled that President Mathieu Kérékou had to retake the oath of office for having omitted a phrase that he considered offensive to his religious beliefs as a born-again Christian (Fomunyoh 2001, 44). In Mali, the Constitutional Court annulled the results of the first round of legislative elections in 1997 on the request of opposition parties. In Gabon, the Constitutional Court invalidated a presidential decree appointing all members of the Economic and Social Council, which violated the constitutional provision requiring 85% of its members to be elected by their peers (Fomunyoh 2001, 44).

In Côte d’Ivoire, such independence of the Constitutional Council is lacking. Both the elimination of the majority of candidates from the 2000 presidential elections and the annulment of the CEI’s second round results of the 2010 presidential elections, suggest
an overwhelming influence of the executive over the judiciary. This may partly be attributed to the appointment procedure. As Gloppen (2004, 123) puts it, the appointment procedure, namely the question of who appoints the judges and the procedure and criteria for selecting them, is widely regarded as important for their autonomy. According to the Ivorian constitution, Article 90, “the President of the Constitutional Council is appointed by the President of the Republic for a term of six years, non-renewable, from among persons recognized for their competence in juridical or administrative matters.” In Benin and Gabon, by contrast, the president of the Constitutional Court is elected by his peers among the magistrates and the jurists members of the Court.\(^24\) This suggests that the Ivorian constitution allows for a greater interference of the executive in the matters of the Constitutional Council than the constitutions of Benin and Gabon. As shown earlier, political allegiance more than competence seemed to guide General Gueï and Gbagbo in their appointments of the respective CC’s Presidents. President Ouattara dismissed Paul Yao N’Dré by a presidential decree on 25 July 2011, and replaced him with Francis Wodié, a professor of law and human rights activist but also a political figure who had led the Ivorian Worker’s Party (\textit{Parti ivoirien des travailleurs} - PIT) from 1990 to 2011.

To this factor should be added direct political and military pressures on the judiciary. According to the Ivorian newspaper \textit{L’expression}, Tia Koné recently admitted he was constrained, under the threat of force, to reject Ouattara’s and Bédié’s candidacies for the 2000 presidential elections. He also stated he was sure Paul Yao N’Dré was similarly pressured to read the CC’s results proclaiming Gbagbo the winner of the 2010 elections.\(^25\) Moreover, in one of its latest reports International Crisis Group blames the current structure of the security forces for hampering the establishment of an impartial
justice system (ICG 2011b, 12). This refers in particular to an overwhelming presence of the all-powerful former rebel zone commanders in the FRCI, which makes it extremely difficult for the Ivorian justice system to investigate their crimes and persecute them. In fact, as several human rights organizations have pointed out, not only none of the former rebels was brought to the court, some of them were even promoted (HRW 2011; HRW 2012c). For example, on 3 August 2011, President Ouattara promoted Chérif Ousmane, ex-commander of FN zone of Bouaké, to the rank of second-in-command of presidential security guard (*Groupe de sécurité de la présidence de la République*), while Issiaka Ouattara, also known as ‘Wattao’, ex-commander of the FN zone of Séguéla, became second-in-command of the Republican guard (HRW 2011, 107). Martin Fofié Kouakou, ex-commander of the zone of Korhogo, who is since 2006 on the UN sanctions list for extrajudicial executions, became commander of the Territorial company of Korhogo (*Compagnie territorial de la ville*). The former rebel-leader Guillaume Soro, who was prime minister of Gbagbo’s interim government between March 2007 and December 2010 and prime and defense minister of Ouattara’s government from December 2011 to March 2012, assumed the post of the President of the National Assembly in March 2012.

This extremely delicate and overly intimate relationship between the President and security forces, which hinders the autonomous functioning of the judicial system, should partly be attributed to the fact that, although Ouattara won through ballot, it was thanks to the FRCI that he could finally assume the presidential post. This raises the question of how political and military actors and supporters of both camps understand Ouattara’s access to power: as chiefly the result of his electoral victory or rather as Gbagbo’s military defeat by FRCI and with help of UN and French troops. The latter
interpretation may induce FRCI members to think that their overwhelming authority over the President and the entire peace process is legitimate. On the other hand, it delegitimizes Ouattara’s authority among Gbagbo’s supporters, which heightens the polarization of the two camps and their mutual distrust. In the case of Benin, Magnusson (2004, 225-6) wrote that compliance with the Constitutional Court was partly due to the political elite’s will to avoid a constant threat of a military intervention by unpredictable officer corps. In Côte d’Ivoire, by contrast, due to the recent civil war and the incomplete disarmament, demobilization and re-integration (DDR) of ex-combatants, the army remains disorganized and unchecked (ICG 2012, 2-5).

The Independent Expert on the situation of human rights in Côte d’Ivoire claimed in his report to the Human Rights Council that human rights violations resulted “less from the State’s complicity than from its failure to prevent them, especially because of the difficulty of reforming the security sector and re-establishing the Government’s authority over the country’s entire territory” (HRC 2012, 2). On 13 March 2012, in a cabinet reshuffle President Ouattara named himself defense minister, signaling his intention to assume firmer control over the army. Moreover, at the beginning of November, FRCI itself was subject to a massive internal reshuffle affecting above all former members of New Forces. For example, Zacharia Koné, the commander of the government’s military police unit, who had been criticized by human rights organizations, and Gaoussou Koné, chief of tactic unit 9 in Abobo, were transferred to a regular unit in Akouédo. While the Ivorian government officially stated that the reshuffle was part of the long planned reform of the army and not the sanctioning of the former
“comzones”, the impression remains that the move aimed at sidelining the contentious ex-FN members.27

Concerning the Government’s authority over the country’s entire territory, during the eight years following the failed military coup in September 2002, there were no courts in the country’s north under the rebels’ control. Moreover, in the southern government zone, where justice system was still in place, judges were often appointed on the basis of their ethnicity or political allegiance (ICG 2011a, 11). In addition, in one of its latest reports on the situation in Côte d’Ivoire, the United Nations Security Council points to several challenges hampering justice system in general and criminal justice in particular, such as insufficient capacity of its personnel, insufficient number of prisons and poor functioning of the judicial police and underscores the need for a long-term structural reform of the judicial system (UNSC 2012a, §26). For example, Amnesty International (2013, 69) contends that a vast majority of suspects of state security crimes have been arrested by armed forces and not the judicial police as provided by the Code of Criminal Procedure. The organization also points to the inadequate definitions of several human rights violations such as torture, rape and forced disappearances in the Ivorian legislation, which prevent Ivorian courts to properly investigate and prosecute such offences (Amnesty International 2013, 67).

During the post-election violence, seventeen of thirty-four courthouses and twenty-two of thirty-three prisons had been damaged or looted (HRC 2012, §29). By January 2012, all but two jurisdictions have become operational, thanks to the UNOCI efforts and donor support, although most of the courthouses had not yet been properly equipped. By this time, six prisons have been renovated, which has brought the number
of working prisons to ten (HRC 2012, §30). However, several prison outbreaks, including forty-five prisoners from the Korhogo prison on 21 April 2012, ninety-nine from the Agboville prison on 1 May and fifty-two from the main prison in Abidjan, the *Maison d’arrêt et de correction d’Abidjan* or shortly MACA on 4 May 2012, attest to the persistent deficiencies of the prison system. Of course, these deficiencies of the Ivorian justice/criminal system may explain its ineffectiveness and the persistent impunity of certain crimes, but cannot in any way account for its partiality.

In April 2012, the Ivorian government adopted a national justice sector strategy for the period from 2012 to 2015, as part of its judicial reform process, that was developed by the Ministry of Justice in close partnership with the UNOCI, EU and other stakeholders (UNSC 2012a, §27). The strategy comprises the national prison administration reform program for the re-establishment of prison facilities, the development of prisoner databases and the building of national prison staff’s capacity. It also envisages collaboration, with help of UNOCI and EU, between national and European schools for magistrates, court clerks, correction officers and prison youth workers (UNSC 2012a, §29). Moreover, as part of the government’s strategy to fight corruption and restore Ivorians’ confidence in the judiciary, eight judges have been subject to disciplinary proceedings for abuse of power, corruption, desertion of post and extortion of funds (UNSC 2012b, §32).²⁸

To conclude, the main weakness of the judiciary under Ouattara is its ongoing partiality, which in great part stems from a delicate relationship between the executive and the army established during the post-election violence. Other problems undermining the autonomy and effectiveness of the courts include appointment procedure giving
overwhelming power to the executive, insufficient capacity of the personnel (magistrates and prison staff), poor court and prison facilities, especially in the north, as well as corruption and non-transparency of the judicial system.

V. Conclusion

The aim of this article was to evaluate the progress in re-establishing the rule of law under the Ouattara government. It has been shown that under the previous three leaders, Bédié, General Gueï and Gbagbo, law and courts used to be widely abused for political purposes of the regime in power. Moreover, in particular under Gbagbo, human rights were systematically violated and courts failed to prosecute their violators, which created a climate of impunity and triggered a spiraling pattern of retaliation and reprisal.

At his accession to power, Ouattara called for reconciliation and promised to re-establish the rule of law. The project, however, has been hampered by persistent weaknesses of the judicial system. First, courts are ineffective and lack social legitimacy due to the insufficient capacity of the personnel (magistrates and prison’s staff), poor court and prison facilities, especially in the north, as well as the corruption and non-transparency of the judicial system. Some of these problems have been addressed in the national justice sector strategy for the period from 2012 to 2015, which is part of the government’s judicial reform process.

Even greater problem is the partiality of the Ivorian judiciary, which continues to undermine the peace and reconciliation process. So far none of the FRCI members loyal to Ouattara has been prosecuted for crimes against humanity committed during the post-
electoral crisis. This contributes to the political polarization by reinforcing the belief among the FPI opposition and Gbagbo’s voters that the Ouattara government is imposing “victor’s justice” (ICG 2012, 14). This flaw in courts’ accountability performance should partly be read against the background of a problematic relationship between the executive and the army established during the post-election violence. The pivotal role the FRCI elements played in Gbagbo’s removal from power has given them an overwhelming influence over President Ouattara and has weakened the president’s legitimacy among Gbagbo’s voters. Recent reforms of armed forces and cabinet reshuffles, suggest that the president is aware of the situation and that he has made some attempts to address the problem. However, a thorough reform of the security sector still needs to be formulated and implemented. According to the International Crisis Group (2012, 2-5) this includes: the reorganization of the armed forces to achieve a greater balance between FRCI and former members of the FDS, in particular at senior level positions; the deployment of the gendarmerie and police force throughout the national territory as well as their adequate equipment to fight against crime and conduct judicial investigations; the completion of the disarmament, demobilization and reintegration of ex-combatants. These are necessary steps to eliminate possible implicit and explicit pressures of armed elements on the judiciary and to ensure that the rule of law supplants the rule of force. This is not a small task, however, given the persistent atmosphere of mutual distrust, exacerbated by recent violent attacks, which pushed the security forces to further repressive actions, including illegal detentions and torture.

Teitel (1997, 2028-9) contends that in periods of great political upheavals, when national law is caught between the past and the future, between a response to injustices of
the previous regime and a legitimation of the future (more liberal) regime, international law helps mediate the transition by offering a source of normative transcendence. International Criminal Court, given its mandate to prosecute serious violations of international humanitarian law, is considered to be able to go beyond domestic law and politics and rectify victor’s justice. However, as Peskin (2005, 213) shows in the case of International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), victor’s regimes and their powerful international allies “can significantly limit a tribunal’s ability to realize justice in a fair and even-handed manner.” So far, the ICC charged only the Gbagbo couple for crimes against humanity and announced to extend the investigation to crimes committed by both sides between 2002 and 2010. It remains to be seen whether and to what extent the Ouattara government will collaborate with the ICC when the court charges men from his camp. In fact, Ouattara may well welcome such decision as it can partly remedy the much-criticized partiality of the domestic judiciary and restrain FRCI elements.

Several authors have pointed to the negative effects of the international community on weak African states (Jackson & Rosberg 1982; Jackson 1990; Reno 1997; Englebert, 2009). For example, the international community’s recognition of the “juridical statehood” or “negative sovereignty” enables a weak state to survive even though its regime lacks legitimacy and effective control of the national territory. Moreover, linkages with the external world (i.e. with multinational firms, private security companies) can insulate weak leaders from domestic popular demands for good governance, welfare state and respect for rule of law. Other authors, by contrast, argue that the international community and regional and international organizations (i.e. UN,
AU, ECOWAS) have had positive effect on conflict reduction and containment on the African continent since the end of the Cold War (Fortna 2008; Straus 2012). Widner (2004, 20) also argues that “regional and international bodies can be helpful in providing protection or surveillance of reform-minded courts, in the short run.” The European Union and UNOCI already help the Ivorian government with the implementation of the national justice sector reform, in particular on the level of technical capacity-building (UNSC 2012b). However, the international community should be firmer in demanding the impartiality of the Ivorian courts.

Other issues that need to be addressed in order to bring lasting peace and rule of law to Côte d’Ivoire, such as contentious land and citizenship laws, the appointment procedure of the CC’s president and the eligibility criteria for presidential candidates, are especially sensitive. They are related to the difficult issues of identity and sovereignty and will generate much heated debate before being resolved. These issues are discussed in other papers of this special edition.
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Notes:

1 According to Kipré (2002: 87) it is a pro-FPI journalist Raphaël Lakpé who first expressed his doubt in Ouattara’s nationality in 1992. See Akindès (2004: 36-42) for a detailed explanation of the problematic construction of Ouattara’s identity, which also includes Ouattara’s defense of his nationality.

2 Before that, the Ivorian state did not develop a concise juridical framework for land ownership, yet neither did it recognize customary, communal or hereditary land rights (Boone 2003: 218-21). State agents (prefects, sous-préfets and forestry agents) simply allocated to immigrants the rights to use the land, not to properly own it, meaning that the land could not be automatically transmitted to an heir. The land disputes were treated in an informal, ad hoc manner. This institutional (juridical) void and the fact that most of the land was cultivated by immigrants explain why land rights became such an explosive issue over time.

3 Extracts from General Gueï’s speech are included in the propaganda movie made by Gbagbo’s supporter Sidiki Bakaba (2005).

4 However, on the same occasion he also insisted that the ultimate authority for determining Ouattara’s nationality was the Constitutional Council. The latter delivered Ouattara his national certificate as late as 28 June 2002, only after his RDR supporters gave an ultimatum to Seydou Diarra, the convener of the Forum (Bouquet 2005: 98).

5 Apart from these three prominent figures, the Supreme Court also invalidated candidatures of Lamine Fadiga and other PDCI candidates (Le Pape 2002: 47).


11 In Boundiali Ouattara won 82 % of the vote, Ferkessedougou 91.7 %, Korhogo 84.4 %, Dabakala 84.5 % and in Seguela 87.9 %. The exceptions were Bouaké and Katiola, where he nevertheless still won 50.6 % and 65.7 % of the vote respectively.

12 According to UNOCI, at least 500 civilians were killed in Duékoué at the end of March. The first wave of violence was perpetrated against the northerners by Liberian mercenaries and pro-Gbagbo militia groups. This was followed by an FRCI offensive targeting the Guéré ethnic group. See ‘Crise en Côte d’Ivoire: l’ONU réagit aux accusations d’Amnesty International’ RFI, 26 May 2011.

13 In Gbagbo camp: former president Laurent Gbagbo, Charles Blé Goudé (head of Young Patriots), General Philippe Mangou (head of the armed forces under Gbagbo), General Guiai Bi Poin (head of the security force unit Centre de commandement des opérations de sécurité - CECOS), General Bruno Dogbo Blé (head of the Republican guard), ‘Bob Marley’ (a Liberian mercenary commander who fought for Gbagbo in the west), Pierre Brou Amessan (Director General of the state-controlled Radiodiffusion
Télévision Ivoirienne – RTI) and Denis Maho Glofché (head of pro-Gbagbo militia groups in the west). In Ouattara camp: Captain Eddie Médi (the commander of the Republican Forces March offensive from Toulepleu to Guiglio), Commander Fofana Losséni (Médi’s boss and overall commander of the Republican Forces March offensive in the west), Commander Chérif Ousmane (long-time commander of rebel Forces Nouvelles in Bouaké and the head of the Republican Forces operations in Yopougon during the final battle for Abidjan), Commander Ousmane Coulibaly also known as ‘Ben Laden’ or ‘Ben le sage’ (longtime New Forces zone commander in Odienné, he oversaw Republican Forces soldiers implicated in torture and extrajudicial killings in Yopougon) (HRW 2011: 103-7).


17 ‘Situation militaire post-crise électorale, Ange-Kessi: voice pourquoi les Frçi ne sont pas poursuivies’, Soir Info, 7 July 2011.


19 Dozos are traditional hunters of northern origin who fought against Gbagbo and his supporters during the conflict. They acquired considerable power since Ouattara’s accession to power, although links between them and the current Ivorian government is not clearly established.

20 Dioula is the name of a language similar to Bambara and spoken by people from the north (Dozon 2000b, 57).


24 See articles 116 and 89 of the constitutions of Benin and Gabon respectively (UNHCR 2013; ALP 2013).


