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Communication 278/2003 - Promoting Justice for Women and Children (PROJUST NGO) vs. Democratic Republic of Congo

Summary of the facts

1. On 20 August 2003, the Secretariat of the African Commission on Human and Peoples' Rights received a Complaint from the NGO *Promoting Justice for Women and Children (*PROJUST NGO) (hereinafter referred to as PROJUST NGO or the Complainant)[1], a Communication lodged on behalf of the NGO by Lawyers Sylvie Diulu Tshiongo and Kathy Byenda Karubara, in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The Complaint is brought against the Democratic Republic of Congo[2] (hereinafter referred to as the DRC or the Respondent State), on behalf of Mrs. Masumbuko Mwali Anne Marie, Mrs. Chibalonza Balole Coco, Mrs. Kamwanya Beya Rose, Mrs. Fono Onokoko Péguy, Mrs. Nabintu Marcelline and Mrs. Atandjo Otshudi (the Victims), who are all Congolese citizens. The Complainant submits that these six women were arrested in lieu of their husbands, who had

[1] PROJUST NGO is an NGO based in the Democratic Republic of Congo. This NGO is involved in the promotion of human rights and more particularly in the rights of women and children. Address: BP 16225 Kinshasa 1, Telephone: 00243 815008856, E-mail: projust2002@yahoo.com .

[2] The Democratic Republic of Congo ratified the African Charter on July 20th, 1987.

fled from the country or were deceased. The latter were alleged to have participated in the assassination of President Laurent Désiré Kabila on 16 January 2001.

3. The Complainant further alleges that these Victims were first taken to a jail (the GLM, *Groupe Litho Moboti*), which does not fall under the authority of the Office of the Prosecutor, where they were tortured before being transferred to the Kinshasa Penitentiary and Re-education centre in March 2001. The Complainant alleges that some of the Victims were held there with their children and one of them, (Madam Coco Chibalonza), even delivered her second child in the Centre.

4. The Complainant submits that after a year of detention with no charges being brought against them, and with no possibility of communicating with their lawyers, the Victims were informed on 13 March 2002, of the decisions to bring them before the Military Court. The Complainant avers that the decisions of this Court cannot be appealed, and that the impartiality and independence of this Court is questionable. The Complainant submits that the Victims were accused of belonging to the so-called "Masasu" group, which is seeking to take over power. Further, the Complainant submits that Masumbuko Mwali and Kamwanya Beya were also accused of having helped their husbands escape from their place of detention.

5. The Complainant avers that after ten months of trial, all the accused were acquitted of the charges brought against them. Despite this acquittal, the Victims allege that all their property was confiscated and that as a result, they were now destitute.

The Complaint:

6. The Complainant claims that the facts outlined above constitute:
    - a violation of Articles 5, 7 and 14 of the African Charter, but also
    - Articles 10, 11 (1), and 17 of the Universal Declaration of Human Rights;
    - Articles 7, 9 (3), 14 (1), (2) (3) and (5) of the International Covenant on Civil and Political Rights.

7. The Complainant therefore requests the African Commission to:
    a. *Find the DRC in violation of Articles 5, 7 and 14 of the African Charter;*
    b. *Declare the DRC responsible for serious violations of the provisions of the African Charter as indicated above, to the detriment of the Victims;*
    c. *Request the DRC to make torture an offense in its national legislation;*
    d. *Declare that legal decisions taken simply on the basis of declarations without any legal grounds seriously infringe the rights and liberties recognised by the African Charter.*

8. The Complainant further requests the African Commission to:
    - *Ensure that the ordinary Criminal Procedure Code is complied with;*
    - *Restore all the movable and immovable property of the Victims;*
    - *Pay the Victims fair and equitable compensation, as damages and interest.*

The Procedure:

9. The Secretariat of the African Commission wrote to the Complainant, on 29 August 2003, acknowledging receipt of the Communication from PROJUST. The Secretariat further informed the Complainant that the Complaint would be considered on seizure by the Commission during its 34th Ordinary Session, scheduled for 6 to 20 November 2003 in Banjul, The Gambia.

10. During its 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized thereof.

11. On 2 December 2003, the Secretariat of the Commission wrote to the Complainant informing the latter that the Commission was seized of the communication. The Complainant was also asked whether besides the arguments on admissibility raised in the initial letter there were additional submissions on admissibility. It was also requested to submit a copy of the Decree establishing the Military Court and a copy of the decisions issued in respect of the Victims.

12. By Note Verbale sent on 15 December 2003, the Secretariat of the African Commission notified the Respondent State of its decision to be seized of the matter. A copy of the complaint was attached and the Respondent State was requested to submit its arguments on admissibility within 3 months.

13. On 12 February 2004, in the absence of any reaction from the Respondent State, the African Commission forwarded a copy of the Complaint to the Ministry of Foreign Affairs of the DRC, with a request for acknowledgement, and requesting its reaction at the earliest possible time.

14. Having received no response from the Respondent State, the Secretariat gave another copy of the Communication to the Congolese delegation at the 35th Ordinary Session, held from 21 May to 4 June 2004 in Banjul, The Gambia, and emphasized the fact that with or without the Respondent State's reaction, the African Commission would proceed with examination on admissibility of the Communication at its 36th Session.

15. The Secretariat wrote to the Complainant on 9 August 2004, and requested additional information on the admissibility case.

16. On 9 August 2004, the Secretariat sent a reminder to the Respondent State requesting its submissions on the Communication's admissibility.

17. On 16 August 2004, the Respondent State transmitted its submissions on admissibility to the Secretariat of the Commission.

18. The Secretariat acknowledged receipt of the submissions to the Respondent State on 11 October 2004 and transmitted them to the Complainant.

19. Having received no response from the Complainant, the Secretariat sent a reminder on 10 March 2005.

20. On 19 April 2005, the Complainant sent a document to the Secretariat, which stated that additional documents would be sent via email; however these documents were never received at the Secretariat.

21. At its 37th Ordinary Session, held from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission considered the Complaint and, pending the arrival of additional documents from the Complainant, decided to defer its decision on admissibility of the Complaint to its 38th Ordinary Session.

22. On 6 June 2005, the Secretariat wrote to the Complainant acknowledging receipt of its letter and attached documents, stressing the fact that the documents did not provide an answer to the question of exhaustion of local remedies, as challenged by the Respondent State. The letter further requested information on the documents which were to be sent by email but had not arrived, in addition to

requesting the Complainant's specific reaction to the arguments of the Respondent State on the admissibility of the Complaint.

23. On 8 September 2005, a reminder was sent to the Complainant requesting its response to the arguments put forward by the Respondent State on the admissibility of the case.

24. During its 38th Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the Complaint and in the absence of the Complainant's response to the Respondent State's submissions on admissibility , decided to defer its decision at this stage to its 39th Ordinary Session.

25. On 6 December 2005, the Parties to the Communication were informed of this decision. The Complainant was specifically requested to submit a response to the arguments of the Respondent State on the admissibility.

26. At its 39th Ordinary Session held from 9 to 23 May 2006 in Banjul, The Gambia, the Commission decided to defer its decision to its 40th Ordinary Session to give the Complainant one final chance to submit its arguments on admissibility. The Respondent State and the Complainant were informed of the Commission's decision by letter dated 1st July 2006.

27. At its 40th Ordinary Session held in Banjul, The Gambia, from 15 to 29 November 2006, the African Commission examined the Communication and decided to defer it to the 41st session for a decision on admissibility.

28. By letter dated 10 January 2007 and Note Verbale of 12 February 2007, the Secretariat informed both parties of the Commission's decision and reminded the Complainant to submit its arguments on admissibility.

29. At the 41st Ordinary Session of the African Commission, held in Accra, Ghana, from 16 to 30 May 2007, the Commission considered the Communication and decided to defer its decision on admissibility to the 42nd Ordinary Session, to give the Complainant a final opportunity to submit its arguments, specifically on the exhaustion of local remedies.

30. By Note Verbale and by letter dated 20 June 2007, the Secretariat informed the Parties of the Commission's decision and specifically reminded the Complainant to submit its arguments on the exhaustion of local remedies. Another reminder was sent to the Complainant by letter dated 17 September 2007.

31. At its 42nd Ordinary Session held in Brazzaville, Congo, from 15 to 29 November 2007, the African Commission considered the Communication and decided to defer its decision on admissibility to its 43rd Ordinary Session.

32. By Note Verbale and by letter both dated 19 December 2007, the Secretariat informed the Commission's decision to the parties and reminded the Complainant to submit its arguments on the exhaustion of local remedies.

33. By letters dated 17 March 2008, 17 April 2009, 3 October 2011 and 21 November 2011, the Secretariat sent further reminders to the Complainant regarding the exhaustion of local remedies. The Parties were informed that consideration of the Communication had been deferred for lack of a response from the Complainant on the arguments of the exhaustion of local remedies submitted by the Respondent State.

34. In view of the prolonged and unjustified lack of response from the Complainant, the African Commission feels compelled to make a pronouncement on the Communication on the basis of the elements at its disposal.

Decision on admissibility

Arguments from the Parties

The Complainant's Submissions on Admissibility

35. The Complainant avers that the Communication meets all the requirements laid down by Article 56 of the African Charter.

36. The Complainant contends that by stating the names of the Victims, the requirement under Article 56(1) is fulfilled.

37. Still according to the Complainant, there is no incompatibility between this Communication and the provisions of the African Charter.

38. The Complainant contends that the Communication contains neither disparaging nor insulting language against the Respondent State, and that the information contained therein is based on real accounts, thus is not based exclusively on news disseminated through the media.

39. The Complainant also contends that "all local remedies have been exhausted pursuant to the provisions of Decree No. 019 of 23/08/1997 establishing the Military Court, specifically in its Article 5 according to which the rulings of the Court can neither be appealed nor set aside."

40. The Complainant further states that its Communication has not been subjected to proceedings before another international organization. Moreover the Complainant states that all local remedies have been exhausted and that the Communication was presented to the African Commission within a reasonable time period, from the time the local remedies were exhausted.

The Respondent State's Submissions on Admissibility

41. The Respondent State submits that the Communication should be declared inadmissible on the grounds that the condition of exhaustion of local remedies has not been met and on submission of the Communication within a reasonable time period from the exhaustion of local remedies.

42. To support these claims, the Respondent State argues that Article 15 of the Congolese Constitution guarantees the right to fair trial and prohibits torture, and that Article 180 of Book II of 30 January 1940 of the Criminal Code severely sanctions the violations of the rights of individuals by public servants.

43. The Respondent State further submits that the Victims did not refer the case against the perpetrators of the alleged acts of torture, to any national Court to obtain redress or to seek the compensation for their movable and immovable property allegedly seized in application of the contested Court decisions.

44. The Respondent State furthermore conveyed to the African Commission documents intended to prove that the decisions of the Military Court of the DRC may be appealed before the Supreme Court, which could constitute a local remedy that the Victims did not exhaust.

45. The Respondent State contends that the Complainant "does not provide evidence of having submitted an appeal against the disputed Judgement, whereas this remedy remains open in conformity with Article 150, paragraph 3 of the Transitional Constitution in the Democratic Republic of Congo."

46. The Respondent State avers that it was possible for the Victims to file a petition for annulment and to refer the disputed ruling to the Supreme Court of Justice. Since they did not make use of this remedy, the Communication should be declared inadmissible for non exhaustion of local remedies.

The African Commission's Analysis on Admissibility

47. Article 56 of the African Charter stipulates seven conditions that generally must be met for a Communication to be declared admissible by the African Commission.

48. The admissibility of Communications received in accordance with Article 55 of the Charter is governed by Article 56 which states:

"Communications relating to Human and Peoples' Rights referred to in Article 55 received by the Commission, should necessarily, to be considered, meet all the following requirements:

1. Indicate the identity of their authors even if the latter requests the Commission to preserve its anonymity;

2. Be compatible with the Charter of the Organisation of African Unity or with the present Charter;

3. Not be written in disparaging or insulting language directed against the State concerned, its institutions or the OAU;

4. Not be based exclusively on news disseminated through the mass media;

5. Be sent after exhausting local remedies, if any, unless it is obvious to the Commission that this procedure is unduly prolonged;

6. Be submitted within a reasonable period with effect from the time local remedies are exhausted or from the date established by the Commission as being the start of the period of its seizure;

7. Not deal with cases which have been settled either in conformity with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter."

49. In the present Communication, the Complainant argues that the seven conditions have been fully met. The Communication provides the identity of its authors who are representing the Victims: Masumbuko Mwali Anne Marie, Chibalonza Balone Coco, Kamwanya Beya Rose, Fono Onokoko Péguy, Nabintu Marcelline, Atandjo Otshudi Charlotte, Congolese citizens represented by Lawyers Kathy Byenda Karubara and Sylvie Diulu Tshiongo, in accordance with Article 56(1).

50. The Complainant submits that paragraph 2 of Article 56 of the Charter has also been respected in the Complaint which alleges the violation of the provisions of the Charter (Articles 5, 7 and 14) by a State Party (the DRC).

51. Concerning paragraphs (3) and (4) of Article 56 of the Charter, the Complainant avers that the Complaint is not written in disparaging or insulting language against the State being challenged, its institutions or the African Union, and is not based on news disseminated through the mass media since the information provided constitutes concrete facts provided by the Victims.

52. The Complainant also argues that in accordance with Article 56 (5), local remedies were exhausted under the provisions of Article 5 of the Decree establishing the Military Court, which stipulates that its decisions cannot be appealed, nor set aside, and that the Communication was brought before the African Commission within a reasonable timeframe (Article 56(6)).

53. The Complainant alleges that the condition under Article 56(7) of the Charter has also been met since the case was not subjected to any other international proceedings.

54. Among the conditions set out in Article 56, only the conditions relating to the exhaustion of local remedies (Article 56(5) and the need to submit the Communication within a reasonable time frame with effect from the date of exhaustion of local remedies (Article 56(6) have been challenged by the Respondent State.

55. Concerning the five conditions which the Respondent State has not specifically challenged, the African Commission concurs with the Complainant that they have been met. Having studied the Complainant's submissions, the African Commission sees no reason to hold an opposing view, and is therefore of the opinion that the requirements under Articles 56(1), (2), (3), (4) and (7) of the Charter have been met. In light of this, only the contested Articles, that is 56(5) and 56(6) of the Charter, will be subjected to analysis.

56. In the present Communication, it should be noted that several letters were sent to the Complainant by the Secretariat requesting supplementary observations on the argument presented by the Respondent State on the non exhaustion of local remedies by the Victims.

57. Following the lack of reaction from the Complainant to the Respondent State's arguments on the exhaustion of local remedies, the African Commission has no other choice but to proceed with the examination of the admissibility of the Communication solely on the basis of the information it has been provided.

58. Article 56(5) of the Charter requires that the Communication should be submitted after the exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure is unduly prolonged.

59. The Commission in its jurisprudence recalls that the objective of the condition of exhaustion of local remedies is to allow the State to remedy, in conformity with its local legislation, the alleged human rights violation before it is brought before an international body. This prevents the Commission from acting as a court of first instance rather than a body of last resort. [3]

60. The justification for the exhaustion of local remedies therefore is for the State to have the possibility of resolving the issue before it is brought before an international body. In the African system the Commission has confirmed its position in its decisions in *Free Legal Assistance Group and Others vs. Zaire*[4] and *Rencontre africaine pour la défense des droits de l'homme vs. Zambia*[5]. The Commission stated that the condition concerning local remedies is based on the principle according to which a Government needs to be informed about the human rights violations to give it the opportunity to resolve it before being called before an international body.

61. The requirement of exhaustion of local remedies also emanates from the principle of complementarity on the basis of which international or regional mechanisms cannot and should not replace the national courts. It is only where the national courts are unable to deliver justice that the international or regional bodies have competence

[3] Decisions of the Commission on Communications 147/95 and 149/96, *Sir Dawda K. Jawara vs. Gambia*, para 31; 73/92 *Mohamed Lamine Diakité vs. Gabon*, para 16; 74/92 *National Human Rights and Liberties Commission vs. Chad*, para 27; 48/90 *Amnesty International vs. Sudan*, 50/91 *Loosli Bachelard Committee vs. Sudan*, 52/91 *Lawyers Committee for Human Rights vs. Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa vs. Sudan*, para 32.

[4] Communication 25/89, 47/90, 56/91, 100/93 – Free Legal Assistance Group and Others vs. Zaire (1993) parag. 36

[5] Communication 71/92 – Rencontre africaine pour la défense des droits de l'homme vs. Zambia, parag. 10.

to hear these cases. For this reason the African Commission strictly applies the rule governing the exhaustion of local remedies and it has only waived this condition in the few circumstances that justify it.

62. The Complainant asserts that it fulfilled this requirement on the exhaustion of local remedies before seizing the Commission because it had no possibility of instituting legal proceedings locally given that Article 5 of the Decree Law establishing the Military Court made no provision for either opposition or appeal against the judgements delivered by this Court, an argument which has been refuted by the Respondent State.

63. The African Commission has clearly indicated that when a Government "argues that the Communication should be declared inadmissible because local remedies have not been exhausted, this Government has the responsibility of proving the existence of such remedies."[6] The Respondent State makes reference to the legal instruments made available to the Commission, which illustrate that the rulings of the Military Court can be appealed.

64. Thus, according to the Respondent State, the Complainant can, in effect, submit an appeal before the Supreme Court of Justice against the Military Court's ruling, a remedy which the Victims did not explore in order to obtain redress for the violations they suffered.

65. At the end of a trial which lasted ten months, the Victims were acquitted and released by the Military Court. On the basis of this acquittal, the African Commission is of the view that the Respondent State in question had the opportunity, by its own means and within the framework of its own legal system, to remedy the wrongs caused to the Victims as a result of imprisoning them for

[6] Rencontre africaine pour la défense des droits de l'homme vs. Zambia, Communication 71/92, parag. 12.

crimes allegedly committed by their husbands. For this reason, it was not worthwhile to lodge an appeal with the Supreme Court against the ruling of the Military Court given that the latter had ordered the release of the Victims.

66. The Respondent State further argues that, regarding allegations of torture and the confiscation of property, the Victims can settle the matter in the Congolese legal system. The Respondent State submits that torture is prohibited under Article 15 of the Transitional Constitution of the Republic of Congo and that Article 180 of the 1940 Criminal Code, as presently amended (amended on 30 November 2004 and later amended by Law No. 06/018 of 20 July 2006 modifying and complementing the Decree of 30 January 1940 establishing the Congolese Criminal Code), sanctions the violations of the rights guaranteed to individuals by public servants.

67. The African Commission observes that in relation to the acts of torture alleged by the Complainant, they are supposed to have taken place during the period of detention which preceded the trial before the Military Court and are clearly not the result of this Court's disputed judgement.

68. Thus, the victims had the opportunity after their release to bring the perpetrators of these acts before the local courts, which was not done. The same is true for the allegation of confiscation of the Victims' property.

69. The African Commission observes that the Complainant needs to provide *prima facie* evidence of an attempt to exhaust local remedies.[7] In the ***Communication 307/5 - Obert Chinhamo vs. Zimbabwe,***[8] the African Commission noted the conclusions of the United Nations Human Rights Committee according to which the simple fact that a local remedy is untimely or unappealing, or does not culminate in a result favourable to the Plaintiff does not in itself prove the non-

[7] Zimbabwe: Chinhamo vs. Zimbabwe (2007) AHRLR 96 (ACHPR 2007), Paragraph 84
[8] Zimbabwe: Chinhamo vs. Zimbabwe (2007) AHRLR 96 (ACHPR 2007)

exhaustion of all effective local remedies.[9] In the same case, the Commission also makes reference to a ruling of the European Human Rights Court which argues that even where the Complainants have reasons to believe that the available local remedies and the possible appeals are likely to be ineffective, they should still seek these remedies considering that, "it is generally up to the victim to provide the national courts with the opportunity to exercise the existing rights for interpretation purposes". In the instant case, the Victims did not prove that a lawsuit was brought before the competent local courts in order to obtain redress for the alleged acts of torture, which the Respondent State avers is criminalized in the Criminal Code.

70. The African Commission observes that in this particular case, the Victims did not provide evidence of having seized the competent courts, to have the perpetrators of these acts of torture convicted and their seized movable and immovable property restored.

71. The African Commission further observes that in failing to seize the local courts, for the purpose of having the perpetrators of these acts of torture brought to justice, and for the restoration of their property, the Victims did not provide the local courts the opportunity to adjudicate on the matter.

72. Furthermore, in ***Article 19 versus Eritrea,*** [10] the African Commission was of the opinion that "it was incumbent on the Complainant to take all necessary measures to exhaust or, at least, to attempt to exhaust local remedies."

73. The Commission therefore concurs with the Respondent State that the national courts did not have the opportunity to find a remedy for the violations which are

[9] Ibid, paragraph 84

[10] Communication 275/03: Article 19 vs. Eritrea, para. 65

alleged to have occurred. As indicated earlier, the requirement of the exhaustion of local remedies is intended to give the State the opportunity to correct the human rights violations committed. To assess whether the State has had this opportunity, it is of paramount importance that it be informed of all the details of the complaint. It is incumbent on the State to ensure that the national regulations are properly adhered to. In the case in question, there is no evidence that the Victims took any steps to bring the case before the local courts.

74. From the foregoing, the Commission therefore concludes that the Complainant has not exhausted the local remedies in relation to the alleged violations of torture and confiscation of property.

75. The second point of contention in the present Communication is the condition under Article 56(6) of the African Charter which stipulates that the Communication shall be considered if it is submitted within a reasonable time period from the time local remedies are exhausted or from the date the Commission is seized of the matter. It is not worthwhile to analyse the condition under Article 56(6) given that Article 56(5) was not complied with.

76. This requirement is tied to the requirement of exhaustion of local remedies so much so that the point of departure of the reasonable time is from the date of exhaustion of local remedies. The African Commission having ruled that local remedies have not been exhausted, it automatically follows that the requirement under Article 56(6) of the Charter is not met.

Decision of the African Commission on Admissibility

77. In view of the foregoing, the African Commission decides to:

1) Declare the Communication inadmissible because it does not meet the requirements under Article 56(5) and 56(6) of the African Charter;
2) Notify this decision to the Parties in conformity with Article 107(3) of the African Commission's Rules of Procedure; and
3) Attach thereto its 32nd Activity Report

Done in Banjul, The Gambia, during the 11th Extraordinary Session of the African Commission on Human and Peoples Rights, held from 21 February to 1 March 2012.