

Summary of the Complaint

1. On 20 April 2005, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr Mamboleo Mughuba Itundamilamba, a Congolese citizen, a Communication submitted in accordance with Articles 55 and 56 of the African Charter on Human and Peoples' Rights (the African Charter).
2. The Communication was submitted against the Democratic Republic of Congo (State Party to the African Charter and hereafter referred to as the DRC).¹
3. The Complainant has been a member of the National Bar Association since 12 October 1965 and is a member of the Bar of the Bukavu Court of Appeal.
4. The Complainant alleges to have unsuccessfully sought from the Pharmakina Company, a public limited company, the payment of fees for services rendered in connection with the retrocession from the estate of the latter of several cinchona plantations that had, at the time, been transferred to Congolese nationals pursuant to presidential decisions of November 1973. Pharmakina Company acknowledges to have been rendered the said services, but alleges on the contrary to have already settled the Complainant's fees.
5. The Complainant further states that after the failure of negotiations for an amicable settlement, he brought the dispute before the Bar Council in Bukavu and to the National Bar Council in Kinshasa. The latter body rendered Arbitral Award No. 98/CNO/LH/006 of 1 April 1998 ordering Pharmakina Company to pay the Complainant the sum of 500,000 (five hundred thousand) U.S. dollars.
6. The Complainant further alleges that Pharmakina Company lodged an appeal for an annulment of the award with the Administrative Chamber of the Supreme Court of the DRC which, by Judgement No. 444/445/452 RA 2000 of 17 April 2000, annulled the above-mentioned Decision No. 98/CNO/LH/006 handed down by the National Bar Council.
7. The President of the Bar Association instituted third-party proceedings (filed under No. RA/667/2001), on behalf of the Complainant, before the

¹ The Democratic Republic of Congo ratified the African Charter on 20 July 1987.

Administrative Chamber of the Supreme Court on 24 April 2001, aimed at having this Court withdraw its Judgement No. RA/444/445/452.

8. The Complainant submits that up to 20 April 2005 when the case was brought before the African Commission, almost four years after the appeal was filed, the Congolese Supreme Court had still not made any ruling on the matter.

Prayers

9. The Complainant alleges that the facts set out above constitute a violation of Articles 3 and 7 (1) (a) and (c) of the African Charter and prays the African Commission to:
 1. Declare null and void Judgement No. RA444/445/452 of 17 April 2000 delivered by the Supreme Court of the DRC;
 2. Recognize the Complainant's right to subject Pharmakina Company to the legal obligation to comply with Judgment No. 98/CNO/LH006 of 1 April 1998 issued by the National Bar Council;
 3. Grant the Complainant a fair compensation for deprivation of enjoyment, from 1 April 1998, of the sum of 500,000 U.S. dollars awarded to him in respect of fees by the National Bar Council.

PROCEDURE

10. The complaint was received at the Secretariat of the African Commission on 20 April 2005.
11. On 10 June 2005, the Secretariat of the African Commission wrote a letter to the Complainant acknowledging receipt of the complaint and communicating to him the references. The Secretariat also informed the Complainant in the same letter that the complaint would be considered on seizure by the African Commission at its 38th Ordinary Session to be held in November/December 2005.
12. At its 38th Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

13. On 17 January 2006, the Secretariat of the African Commission informed the Respondent State of its decision, forwarding to it a copy of the complaint and requesting it to submit its arguments on Admissibility.
14. On the same date, the Complainant was informed of the decision of the African Commission and also requested to submit his arguments on Admissibility.
15. In the absence of any response from the parties, the Secretariat of the Commission sent them reminder letters on 23 March 2006. A copy of the complaint was especially attached to the note verbale sent to the Respondent State.
16. On 23 May 2006, the Secretariat of the Commission received from the Complainant a copy of his letter transmitting his arguments on Admissibility to the Respondent State. A copy of the same arguments on Admissibility was also sent to the Secretariat.
17. By note verbale dated 14 July 2006, the Secretariat forwarded to the Respondent State the Complainant's arguments on Admissibility. Moreover, after reminding the DRC of the note verbale dated 23 March 2006, the Secretariat again requested the Respondent State to submit its arguments on the Admissibility of the Communication within two months.
18. On 26 July 2006, the Secretariat wrote to the Complainant a letter acknowledging receipt of his arguments on Admissibility and informing him of the transmission of the said arguments to the Respondent State.
19. At its 40th Ordinary Session held in Banjul, The Gambia, from 15 to 29 November 2006, the African Commission deferred the matter to its 41st Ordinary Session to be held from 16 to 30 May 2007 in Accra, Ghana, in order to allow the Respondent State more time to respond to the Complainant's arguments on Admissibility.
20. On 30 January 2007, having received no response to the notes verbales of 23 March 2006 and 14 July 2006 sent to the Respondent State through the Ministry of Foreign Affairs, the Secretariat of the Commission sent a note verbale as a reminder, this time to the Ministry of Human Rights with a copy to the Ministry of Foreign Affairs. The Secretariat also indicated in this note verbale that if the DRC failed to submit its arguments on Admissibility within 30 days, the Commission may, at its 41st Ordinary Session, deliver its ruling on the Admissibility of the complaint in accordance with Rule 119 (4) of its Rules of Procedure.

21. On the same day, 30 January 2007, the Secretariat informed the Complainant of the deferral of the consideration of the complaint to the 41st Ordinary Session of the Commission and the transmission of the reminder note verbale to the Respondent State.
22. At its 41st Ordinary Session held in Accra, Ghana, from 16 to 30 May 2007, the African Commission again deferred the consideration of the complaint to its 42nd Ordinary Session scheduled to be held from 14 to 28 November 2007 in Brazzaville, Republic of Congo.
23. By letter dated 15 June 2007, the Secretariat informed the Complainant of the deferral of the consideration of the complaint to the 42nd Ordinary Session of the Commission.
24. By note verbale dated 15 June 2007, the Respondent State was informed of the deferral of the decision on Admissibility to the 42nd Ordinary Session.
25. At its 42nd Ordinary Session held from 14 to 28 November 2007 in Brazzaville, Republic of Congo, the African Commission deferred its decision on Admissibility to its 43rd Ordinary Session to be held from 7 to 22 May 2008 in Ezulwini, Swaziland, in order to consider the arguments of the Respondent State.
26. By note verbale and letter dated 20 March 2008, the Secretariat of the Commission informed the parties of the deferral of the Commission's decision to the 43rd Ordinary Session scheduled to be held from 7 to 22 May 2008 in Ezulwini, Swaziland.
27. At its 43rd Ordinary Session held from 7 to 22 May 2008 in Ezulwini, Swaziland, the African Commission declared the Communication admissible.
28. By note verbale and letter dated 28 May 2008, the parties were informed of the Commission's decision on Admissibility during its 43rd Ordinary Session held in Ezulwini, Swaziland, from 7 to 22 May 2008. The Secretariat also informed the parties of the holding, from 10 to 24 November 2008, in Abuja, Nigeria, of the 44th Ordinary Session of the Commission, and requested them to submit their observations on the merits of the case.
29. By note verbale and letter dated 29 September 2008, the Secretariat reminded the parties that the 44th Ordinary Session of the Commission would be held from 10 to 24 November 2008 in Abuja, Nigeria. They were also reminded to submit their arguments on the merits as soon as possible.

30. At the 44th Ordinary Session held from 10 to 24 November 2008 in Abuja, Nigeria, the consideration of the Communication on the merits was deferred to the 45th Ordinary Session to enable the parties to submit their arguments on the merits of the case.
31. On 5 December 2008, the Secretariat received the arguments of the Democratic Republic of Congo on the merits of the Communication.
32. By note verbale of 19 December 2008, the Secretariat acknowledged receipt of the submission of the DRC and informed the latter of the holding, from 13 to 27 May 2009 in Banjul, The Gambia, of the 45th Ordinary Session of the Commission.
33. By letter dated 19 December 2008, and in compliance with the adversarial principle, the merits submission of the DRC was forwarded to the Complainant whom the Secretariat requested to submit, in turn, his arguments on the merits of the Communication
34. By note verbale and letter dated 27 April 2009, the Secretariat reminded the parties that the 45th Ordinary Session of the African Commission would be held from 13 to 27 May 2009 in Banjul, The Gambia. In the same letter, the Complainant was requested to transmit to the Secretariat his arguments on the merits within one month.
35. The final exchanges in writing between the parties were closed by the Secretariat of the Commission in December 2009.
36. Through appropriate channels and in accordance with its usual procedures, the Secretariat of the Commission kept the parties informed of the successive deferrals of the consideration of the Communication and the decision of the Commission on the merits.
37. The last deferral was notified to the parties by the Secretariat on 13 November 2012.

THE LAW

Admissibility

38. The Communication was submitted in accordance with Article 55 of the African Charter on Human and Peoples' Rights which empowers the

Commission to receive and consider “Communications other than those of State Parties.”

39. Under Article 56 of the African Charter, Communications received under Article 55 must meet the following seven conditions to be declared admissible:

1. Indicate their authors even if the latter request anonymity;
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter; and
7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

40. The issue that the Commission is called upon to settle at this stage is whether the Communication is admissible under Article 56 of the African Charter. In other words, the Commission is required to determine whether the conditions listed above have been met for the Communication to be declared admissible. The answer to this question will emerge from the analysis of the arguments made by both the Complainant and the Respondent State.

The Complainant's Arguments on Admissibility

41. The Complainant claims to have met all the above-listed admissibility conditions. He states, with regard to the exhaustion of local remedies, in particular, that there is no longer any remedy to be exhausted in respect of the third party proceedings pending before the Supreme Court.
42. The Complainant submits that remedies are unduly prolonged. He claims to have referred the matter firstly to the Council of the Bar Association in Bukavu and then to the National Bar Council in Kinshasa which, on 1 April 1998, issued Arbitral Award No. 98/CNO/LH/006 ordering Pharmakina

Company to pay him the sum of 500,000 U.S. dollars. The Complainant avers that the award was annulled by the Administrative Chamber of the Supreme Court following the appeal for annulment lodged by Pharmakina Company; and that to secure the retraction of this judgment delivered in the first and last instance in his disfavour, the President of the National Bar Association instituted third-party proceedings before the Supreme Court. The Complainant further contends that the Supreme Court has still not yet issued its decision four years after the institution of the third-party proceedings.

Arguments of the Respondent State on Admissibility

43. The DRC argues that the Communication brought against it by the Complainant, Mr Mamboleo, is inadmissible. The Respondent State bases its argument on Article 56 (5), claiming that the Complainant has not exhausted local remedies, since the action for annulment of the contested decision is still pending before the Administrative Chamber of the Supreme Court of the DRC.
44. As such, the DRC prays the Commission to declare the complaint inadmissible on the grounds of non-exhaustion of local remedies.

The Commission's Analysis on Admissibility

45. From the analysis of the arguments of both the Complainant and the Respondent State, it appears that the parties agree on most of the admissibility conditions. It is clear, after considering the arguments of the Complainant that the conditions under Article 55 (1), (2), (3), (4), (6) and (7) of the African Charter have been met.
46. However, the parties disagree on the point relating to the exhaustion of local remedies. Indeed, Article 56 (5) provides that Communications must be "sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".
47. The issue raised at this point of consideration of the complaint is as follows: were local remedies exhausted in this case or were they unduly prolonged?
48. The use of the rule of prior exhaustion of local remedies in litigations under international human rights law is derived from international law, in general, and specifically diplomatic law of essentially customary origin. This rule is based on the idea that a State should be given the opportunity to right the

wrong it is alleged to have caused using its own internal legal system prior to the case being brought before an international body. This rule makes it possible to respect the sovereignty of the State concerned and avoid the use of the international body as a court of first instance. The African Commission consistently adopts a jurisprudential stance on the issue².

49. In the Commission's understanding, exhausting local remedies means that the author of the Communication and not the victim³ obtains a final decision from the highest body in the court hierarchy of the judicial system of the Respondent State.⁴ The Commission gives preference to remedies sought from the judiciary as opposed to those sought from administrative authorities or executive bodies.⁵
50. On the basis of its jurisprudence, the Commission considers that to have been exhausted, local remedies should necessarily be available, sufficient and effective⁶; that a remedy is considered available if the petitioner can pursue it without impediment; that it is effective if it is capable of redressing the complaint; that it is sufficient if it offers a prospect of success.⁷
51. In this case, the Respondent State alleges the non-exhaustion of local remedies by the Complainant. It is therefore up to the Respondent State to prove that local remedies are available, sufficient and effective. The DRC argues that local remedies were not exhausted because the Complainant brought the matter before the Commission when the case was still pending before the Administrative Chamber of the Supreme Court of the DRC. It is true that in the cases *Kenya Human Rights Commission v. Kenya*⁸ and *Tsatsu*

²See in this regard *Free Legal Assistance Group and Others v. Zaïre* (2000) AHRLR 74 (ACHPR 1995); *Comité Nationale des Droits de l'Homme et des Libertés v. Chad* (2000) AHRLR 66 (ACHPR 1995); *Degli and Others v. Togo* (2000) AHRLR 317 (ACHPR 1995).

³ The Commission makes a distinction between the author of a Communication and the victim on whose behalf the Communication is submitted. The importance of this distinction lies in the identification of the person who has the obligation to exhaust local remedies. See in this regard its decision in the case of *Article 19 v. Eritrea* (2007) AHRLR 73 (ACHPR 2007) para. 64

⁴ Commission thus adopts the doctrinal position on the matter. See, for example, Desai Anuj, "The Iran-United States claims tribunal, first award of damages for a breach of the Algiers Declarations" 10 (1999) *Am. Rev. Int'l Arb.* 237.

⁵ See *Ilesanmi v. Nigeria - Communication 268/03* (2005) AHRLR 48 (ACHPR 2005).

⁶ See among others, *Jawara v. The Gambia - Communication 147/95-149/96* (2000) RADH 107 (2000) para 31, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea- Communication 250/02* (2003) AHRLR 84 (ACHPR 2003). See also Judgment of the Inter-American Human Rights Commission on the *Velasquez Rodriguez Case* (29 July 1988) Series C, No. 4 (1988).

⁷ *Jawara v. The Gambia*, para 31; *Article 19 v. Eritrea* para 46.

⁸ (2000) AHRLR 133 (ACHPR 1995).

Tsikata v. Ghana,⁹ the Commission stated that for a matter to be brought before it, the matter should not be pending before a local court.

52. However, although the Commission finds that the case was actually pending at the time it was seized of it, the case was before the highest court whose decisions are final. The Commission finds that all remedies had therefore been exhausted, considering that, by the time the Complainant brought the matter before the Commission on 20 April 2005, the case had been pending before the Supreme Court for four years. It is as a result of this delay that the Complainant contends that local remedies were unduly prolonged, in which case his referral to the Commission meets the requirement of exhaustion of local remedies, pursuant to the above-mentioned Article 56 (5).
53. The argument submitted by the Complainant raises a preliminary question to which the Commission has to find a definite answer before deciding on the admissibility. The Commission must indeed establish the time from when proceedings pending before national courts should be considered unduly prolonged.
54. The same issue arose in the case of *Kenya Human Rights Commission v. Kenya*.¹⁰ In that case, the Commission was faced with the task of determining how long “unduly prolonged” may be in respect of proceedings pending before national courts. The question was whether to consider only the time lapse between the seizure of the local court (in that case, 23 December 1993) and seizure of the Commission (8 March 1994) or to consider the period between the seizure of the national courts and the date of the Commission’s decision (that is, October 1995).
55. Drawing inspiration from the position adopted by the Inter-American Commission on Human Rights, and in accordance with Article 61 of the African Charter, the Commission asserts that the arguments submitted by the Complainant are both sound and relevant. Indeed, the Inter-American Commission considers that the length of proceedings must be determined from the date the procedures were initiated internally. It concluded in the case of *Rodrigo Rojas DeNegri et al v. Chile*¹¹ that since the proceedings had remained pending for three years and six months, on the one hand, and 20

⁹ Communication 322/06 African Human Rights Case Law Analyser <http://caselaw.ihrda.org/acmhpr/search/?q=Tsatsu+Tsikata+c.+Ghana>.

¹⁰ *Kenya Human Rights Commission v. Kenya* (2000) AHRLR 133 (ACHPR 1995).

¹¹ Case No. 9755 (12 September 1988) Inter-American Human Rights Commission.

months on the other hand,¹² it was clearly obvious that the process had been unduly prolonged.

56. After examining the facts presented by the parties and their respective arguments on Admissibility, the Commission notes that from the date of initiation of the procedure before Congolese courts, that is from 24 August 2001, to the date of seizure of the Commission, that is, on 20 April 2005, a period of four years had elapsed. The Commission further notes that from the date it was seized of the matter up to the time it delivered its decision on the admissibility of the Communication, it received no information from the Respondent State regarding the outcome of the third-party proceedings, and that from that same date up to the day of its decision on admissibility, a further three-year period had elapsed.

Decision of the Commission on Admissibility

57. In the light of these findings, the Commission has no doubt that even if domestic remedies are available, the process is unduly prolonged. Such a delay does meet the requirements of efficiency and sufficiency of remedies established by the African Charter and that has become a tradition in the jurisprudence of the Commission.
58. As such, the Commission concludes that Communication 302/05 submitted by Mr Mamboleo Itundamilamba against the Democratic Republic of Congo meets the conditions under Article 56 of the African Charter and therefore declares the Communication admissible.

Merits

59. It follows from the consideration of the case file that, in accordance with Rule 108 of the Rules of Procedure of the African Commission, the parties exchanged their submissions on the merits of the case since June 2005, and that the information provided by the parties to the Communication is sufficient for the Commission to make a decision on the merits of the case.

The Complainant's Arguments on the Merits

60. The Complainant prays the African Commission to declare the Respondent State in violation of the relevant provisions of the African Charter, in particular Articles 3 and 7 (1) (a) and (c), and therefore liable for providing compensation for the damages suffered by the Complainant. Conversely, the

¹² *Fabricio Proana and Others v. Ecuador* Case No. 9641 (12 April 1989) Inter-American Human Rights Commission.

Respondent State prays that the Commission should consider the complaint unfounded, and that the case be dismissed accordingly.

61. In order to determine the validity of the claims made by the parties, the Commission is thus obliged to examine the alleged violations in light of the facts and the law.

Violation of Article 3

62. Article 3 of the African Charter provides that: "Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law."
63. The Complainant contends that the case before the Commission stems from the non-payment of the fees owed to him by his former client, Pharmakina Company, as remuneration for services rendered in connection with the retrocession from the estate of the latter of several cinchona plantations. According to the Complainant, the said plantations had been transferred to Congolese nationals in pursuance of presidential decisions of November 1973.
64. The Complainant also alleges that Pharmakina Company acknowledges to have been rendered the service, but claims, however, to have already paid the fees in question.
65. When the parties could not reach an agreement because of their diametrically opposed positions, the Complainant brought the dispute before the relevant bodies of the National Bar Association. On 1 April 1998, the National Bar Council issued in favour of the Complainant Arbitral Award No. 98/CNO/LH/006, ordering Pharmakina Company to pay the Complainant the sum of 500,000 (five hundred thousand) U.S. dollars, the amount of the fees in dispute.
66. On 10 August 1998, Pharmakina Company lodged with the Administrative Chamber of the Supreme Court two petitions for annulment under Nos. RA 444 and 445, notified to the Complainant respectively on 20 August 1998 and 19 September 1998. The Congolese Supreme Court granted the request of Pharmakina Company by annulling the decision of the National Bar Council by Judgement No. 444/445/452 of 17 April 2000.
67. Before the same Supreme Court, the President of the National Bar Association instituted third-party proceedings, filed under No. RA 667/2001, on behalf of the Complainant. The Complainant avers that by the date the Commission

was seized of the matter, the Supreme Court of the DRC had still not ruled on this last appeal.

68. The Complainant alleges that he was not notified of the filing with the Administrative Registry of the notices issued by the Public Prosecutor in respect of the three cases numbered RA 444 and 445 for Pharmakina Company and 452 for the Complainant, in accordance with Rule 8 (2) of the Rules of Procedure of the Supreme Court which states that "Any petition, indictment or brief filed with the Registry in relation to any contentious matters should have previously been communicated to the party against whom the petition is directed."
69. The Complainant also alleges to have requested the Supreme Court to defer the case by four months to allow him to produce his case file that was in Bukavu, his place of residence, given that at the outbreak of the war in the East of the country, on 2 August 1998, he was in Kinshasa and could not, therefore, produce the aforementioned file against his client, the Pharmakina Company, which had produced its own.
70. The Complainant alleges that the case of force majeure invoked constituted by the war that erupted in the East of the country on 2 August 1998 was not taken into consideration. The Complainant thus submits that the Supreme Court ruled that "the intervening party - that is, the Complainant - having invoked force majeure in his petition, namely the impossibility for him to attach the case file to his petition as a result of the war, should have complied with Rule 83 of the same Rules of Procedure which stipulates that intervention may not delay the dispute resolution, and forwarded the petition after 30 September 1998, the date it was filed, instead of waiting for the end of the war on a date that no one can tell."
71. The Complainant submits that the Congolese Supreme Court did not examine the above-mentioned petition in accordance with the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which includes among essential elements the principle of: "equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military ... adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence..."¹³ In support of that plea, the Complainant, referring to the relevant provisions of Article 6 of the European Convention on Human Rights argues that the principle of equality of arms before the law is the idea

¹³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), Principles A(2)(a) and A(2)(e).

that each party to a procedure must be afforded an equal opportunity to present his or her case; that none shall enjoy a substantial advantage over his/her opponent and that each party should be given the opportunity to present his/her objections to the arguments of the other.

72. The Complainant concludes that the provisions of Article 3 of the African Charter were violated in that he was put in a position of inequality compared to his opponent, Pharmakina Company, by being denied a hearing since the exercise of his right to defence was based on a case file whose submission was made impossible by the Supreme Court.

Violation of Articles 7 (1) (a) and 7 (1) (c)

73. Article 7 (1) of the African Charter states: "Everyone has the right to have his cause heard. This comprises:

- a) the right to an appeal to competent national organs against acts of violation of his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) (...);
- c) the right to defence, including the right to be defended by counsel of his choice;
- d) (...)"

74. In support of his allegations of violation of Article 7 (1) (a) of the African Charter, the Complainant states that, given the civil nature of the fees litigation between him and his former client, Pharmakina Company, he had requested the Administrative Chamber of the Supreme Court to declare itself incompetent to hear the appeal brought by his opponent.

75. To challenge the jurisdiction of the Administrative Chamber of the Supreme Court, the Complainant states that he had invoked the provisions of Rule 16 (5) of the Framework Rules of Procedure of Congolese Bar Associations, interpreting Article 81 of the Organic Law on Bar Associations, which stipulates that "the National Bar Council shall be an arbitration tribunal ..." This implies, avers the Complainant, that a decision taken by the Bar Council, thus recognized as an arbitral award, can settle only civil cases such as the one of disputed fees.

76. According to the Complainant, para. 7 of the said Regulations reiterate Section 124 of the same law, misinterpreted by the Judgment No. RA

4444/445/452 as giving the Administrative Chamber the jurisdiction to annul an arbitral award issued by the National Bar Council.

77. In addition to the lack of jurisdiction by the Congolese Supreme Court, the Complainant alleges that this Court failed to rule on the admissibility of that appeal that should not have been entered by an applicant such as his former client, Pharmakina Company. The Complainant alleges in this case that the law gives the Prosecutor General, the President of the National Bar Association or any lawyer concerned the right to file this kind of appeal, subject to the following conditions: "The decision whose annulment is being sought must be tainted with abuse of power, be contrary to the law or have been improperly made."
78. Among other arguments submitted in support of his complaint to the Commission, the Complainant cites the relevant Congolese doctrine which, as far as Judgement No. RA 444/445/452 is concerned, has been violated by the fact that "the Supreme Court sitting in administrative matters granted itself jurisdiction to rule on a fee-related dispute by annulling a decision handed down by the National Bar Council which was, however, ruling in the first and last instance (...). This situation is a departure from precedent since the same Court had previously decided that fee disputes are civil matters and should be heard by the civil courts."
79. Reinforced by the Congolese doctrine and jurisprudential practice, the Complainant argues that this departure from precedent should have been effected in accordance with Article 20 (2) of the Judicial Organization Order No. 299/79 of 20 August 1979 relating to the Rules of Procedure of Courts, Tribunals and Prosecutor's Offices. This Order provides that the "joint assembly and closed meeting of all judges of the Supreme Court and the Prosecutor General's Office [be held], especially in cases where it is necessary to take a decision in principle, to make a departure from precedent and in cases where a decision has failed to bring judicial peace."
80. The Complainant submits that the initiative to depart from precedent is therefore not within the jurisdiction of any Chamber of the Supreme Court, much less within that of the body which issued Judgement No. RA 4444/445/452. Such an excess of jurisdiction, the Complainant maintains, is in blatant violation of his right to have his case heard by a competent national organ as provided for in Article 7 (1) (a) of the African Charter.
81. The Complainant also states, with regard to the provisions of Article 7 (1) (c) of the African Charter, that the circumstances surrounding the delivery of Judgment No. AR 444/445/452 are characterized by the occurrence of two

major events: the outbreak of war on 2 August 1998 and the introduction by Pharmakina Company of its two applications for annulment filed on 10 August 1998 and notified to the Complainant respectively on 20 August and 19 September 1998.

82. The Complainant alleges that he could not have known about these two events in late July 1998 when he was leaving Bukavu, his city of residence, on what was supposed to be a short mission to Kinshasa but which became prolonged until March 2004 because of the war. The Complainant states that as a result of this turn of events, he found himself physically unable to access his case file and thus could not submit the file during the Supreme Court proceedings. In the understanding of the Complainant, there was no obligation and therefore no need for him at that particular time to travel to Kinshasa along with his case file from Bukavu, and access to which was subsequently made difficult by the war.
83. The Complainant further alleges that faced with the imminent danger of having to defend himself without prior recourse to his file, he made efforts to draw the attention of the Supreme Court to the fact that he could by no means be held responsible for the force majeure brought about by the war. The Complainant submitted these arguments in support of his petition filed under No. RA 452, as the intervening party in the proceedings to which Pharmakina had him summoned.
84. The Complainant recalls that Rule 8 (2) of the Supreme Court Procedure stipulates that any petition, indictment or brief filed with the Registry in relation to any contentious matter should have previously been communicated to the party against whom the petition is directed.
85. The Complainant claims that this notification is mandatory, but surprisingly he received no notification of the filing with the Administrative Registry of the notices issued by the Public Prosecutor in respect of the three cases numbered RA 444/445 for the Pharmakina Company and 452 for the Complainant.
86. The Complainant also alleges that the request for access to his case file in Bukavu, rejected at the hearing of 3 April 2000, was renewed in order to notify the Supreme Court that he had never dropped the case. This led to an altercation between the Complainant and members of the Chamber, forcing them to interrupt the hearing. Upon resumption of the hearing, the refusal of the deferment request was upheld.

87. The Complainant further submits that he had taken advantage of the interruption of the hearing to inform the Head of the Supreme Court and confirmed the contents of their discussion in his letter of 6 April 2000, copies of which were forwarded to the judges in question and the President of the National Bar Association. The letter was received by the judges concerned four days prior to the delivery of their decision.
88. On the basis of these arguments, the Complainant alleges a violation of Article 7 (1) (c) of the African Charter, given that he was put in a position of inequality and, as a result, was unable to have his case heard and to exercise his right to defence against his opponent, Pharmakina Company. This is the same argument the Complainant strives to establish before the Commission, namely the refusal by the Supreme Court as being the main decision that prevented him from producing his case file.

Arguments of the Respondent State

Violation of Article 3

89. Concerning the violation of the provisions of Article 3 alleged by the Complainant, the DRC responds by deploring the fact that the Complainant challenges a court decision, namely Judgment No RA 444/445/452, issued by the Supreme Court, without producing a copy of the said decision to allow the Respondent State to make an informed assessment of the objective or subjective motivation of the court being called into question.
90. Moreover, the Respondent State recalls that Information Sheet No. 2 on Guidelines for Submission of Communications requires that to establish the facts constituting violation, the party alleging a violation must explain in as much factual detail as possible what happened, specifying the place, time and date of the violation, if possible. The Respondent State avers that in this case, it is absolutely impossible to have a copy of the contested decision, since the records of the Supreme Court were burnt in 2006 following the unrests that occurred during the pre-election period. The Respondent State argues therefore that since the Complainant was unable to produce a copy of that decision, the Commission must dismiss this claim as unfounded.
91. Whereas the Complainant states that all his appeals to gain access to his case file were dismissed, the Respondent State, on the other hand, claims that after consideration of the application for intervention filed by the Complainant, the Supreme Court had ordered the joinder of the three applications on which it delivered Judgement No. RA 444/445/452. It is in this judgment, the

Respondent State further affirms, that the Congolese Supreme Court had declared the Complainant's application for intervention unfounded, and the application for annulment founded, leading to the annulment of Arbitral Award No. 98/CNO/CH/006 of 1 April 1998 issued by the National Bar Council in favour of the Complainant.

Violation of Articles 7 (1) (a) and 7 (1) (c)

92. In response to the allegations of violation of Articles 7 (1) (a) and 7 (1) (c) of the African Charter, the Respondent State reiterates the arguments submitted in relation to the allegations of violation of Article 3 of the Charter. The DRC maintains that by failing to produce a copy of the contested judgment, the Complainant made it impossible for the State to assess the arbitrary and subjective nature of the motivation of the Congolese Supreme Court so as to find justification for the dismissal of his application for a four-month deferment of the case to enable him to obtain his documents.
93. The Respondent State further argues that this situation raises serious doubts as to the alleged violation of the rights of the Complainant and therefore calls on the Commission to declare the second plea unfounded and to dismiss the Complaint.
94. Concerning the reasons for the contested judgement, the Complainant contends that no reasons were provided for the decision and that, in addition, the parties were denied copies by the authorities. The Respondent State, for its part, merely points out to the Commission that the Complainant has no evidence to substantiate this claim.

Analysis of the Commission on the Merits

Violation of Article 3

95. Article 3 of the African Charter provides that: "Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law."
96. Alleging a violation of Article 3 of the African Charter, the Complainant seeks to have the Commission note the non-compliance by the Supreme Court of the DRC with the fundamental principle of equality before the law. As adequately shown by the Complainant in his submission, this violation is evidenced in the position of inequality in which the court placed him by preventing him from presenting his case on the same basis as the opposing party.

97. The requirement of equality before the law is of fundamental importance to human rights, especially as it is a necessary condition for the enjoyment of a number of other related rights. It is therefore no surprise that the founding instruments of international human rights law guarantee the right to equality before the law. Thus, Article 1 of the Universal Declaration of Human Rights unequivocally proclaims that: "All human beings are born free and equal in dignity and rights." Article 6 of the same instrument stresses that "Everyone has the right to recognition everywhere as a person before the law." The International Covenant on Civil and Political Rights also provides for equality before the law as a preliminary, central and essential legal prerogative. Article 26 of the Covenant stipulates that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law".¹⁴
98. Included as a fundamental clause in most national constitutions, the general principle of equality before the law requires that people in a similar situation in some respects should be treated similarly.¹⁵
99. The principle of equality before the law is paramount since it entails the right, for a competent authority in a given dispute, to ensure that the parties in a dispute be placed on equal footing not only in the manner in which the law is formulated, but also, as in this case, the manner in which the implementation of that law is conducted. Thus, the practice, especially that of the Constitutional Court of South Africa, has enshrined equality before the law as a practice that goes beyond formal equality to substantive or achieved equality¹⁶. Furthermore, though authorized in specific cases, unequal treatment should always be justified.¹⁷
100. The Complainant's main contention in this case is that the Supreme Court failed to give him the same treatment as it did his adversary, Pharmakina Company, in the dispute between the two parties. Indeed, the rejection of his application for a four-month deferment and the prohibition imposed by the Congolese Supreme Court on the production of his case file placed the Complainant in a position of imbalance regarding the application of the right to equality before the law.
101. From an analysis of the submissions of the parties, it appears to the Commission that the Complainant did not have the same opportunity as his

¹⁴ This legal prerogative is enshrined in Article 14 of the European Convention on Human Rights.

¹⁵ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 230.

¹⁶ See, for example, *National Coalition for Gay & Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) para 62; *Minister of Finance v. Van Heerden* 2004 (6) SA 121 (CC) para 26.

¹⁷ Op cit.

opponent to present his arguments by enjoying equal consideration in accordance with the procedural requirements and standards provided for by the law and which were applied by the same domestic court in respect of Pharmakina Company. Indeed, the Supreme Court of the DRC has not challenged the fact that the outbreak of the war was a force majeure - that is, an unpredictable event, outside and beyond the control of the Complainant - which made the Complainant physically unable to produce his file. Instead, the domestic court, while admitting the force majeure constituted by the war, said it could not prolong the proceedings before it to await the termination of an event whose end was uncertain.

102. The Commission is of the view that such reasoning is inconsistent with the spirit of the principle of equality before the law as guaranteed by international human rights instruments. International jurisprudence rather adopts the position that the failure to strictly enforce equality before the law must necessarily be justified. In *Aumeeruddy-Cziffra and Others v. Mauritius*, the Human Rights Committee of the United Nations considers that "sufficient justification for this difference has to be given."¹⁸
103. The Commission further considers that the same procedure that had already remained pending for several years would obviously not have been unduly prolonged merely by being deferred for four months. The proof is that the Supreme Court had still not deliberated on the Complainant's appeal at the time when the latter seized the Commission. This clearly means that the Supreme Court chose to prevent a four-month extension of the procedure to the detriment of the Complainant who was thus denied the right to benefit from the same principle of equality before the law as his opponent. The domestic court should have recognized the Complainant's inability to exercise his right to equality before the law by affording the Complainant the opportunity to take advantage of the requested four-month deferment to produce his file.
104. In similar instances, the Commission concluded not only that the domestic court had unduly prolonged the procedure, but also that failure to provide adequate reasons for differential treatment before the law had placed the Complainant in a position of inequality that may be tantamount to a denial of justice. This was the case with *Burkinabe Movement for Human and Peoples' Rights v. Burkina Faso*, where the African Commission held that the Supreme Court of Burkina Faso had not provided sufficient reason to justify the undue

¹⁸ *Aumeeruddy-Cziffra and Others v. Mauritius* (2000) AHRLR 3 (HRC 1981) para 9(2)

prolongation of the procedure, which in the Commission's view, led to a breach of equality before the law.¹⁹

105. In the present circumstances, the Commission finds that the Complainant has sufficiently proved his allegations of violation, to his disadvantage, of the principle of equality before the law in the case between him and Pharmakina Company. By denying the Complainant the same opportunity of presenting his arguments as was given to his opponent, the Supreme Court of the DRC placed the Complainant in a position of imbalance which violated the equality provided for in the domestic law and the provisions of the African Charter. In response to these allegations, the Respondent State failed to prove to the Commission that the imbalance suffered by the Complainant was justified by any necessity so compelling as to warrant the undermining of the Complainant's rights.

106. Moreover, the Commission concludes that the principle of equality before the law under the provisions of Article 3 of the African Charter has not been adhered to.

Violation of Articles 7 (1) (a) and 7 (1) (c)

107. Article 7 (1) of the African Charter states that: "Everyone has the right to have his cause heard. This comprises:

- a) the right to appeal to competent national organs against acts of violation of his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) (...);
- c) the right to defence, including the right to be defended by counsel of his choice;
- d) (...)".

108. A point of contention brought by the Complainant before the Commission relates to the jurisdiction of the Supreme Court of the DRC to hear the case between him and Pharmakina Company. The general idea of guaranteeing a fair trial, as laid out in the relevant provisions of Article 7 referred to above, highlights two kinds of requirements: a court that is accessible and appropriate, as well as a court that is competent and properly constituted.

¹⁹ Communication 204/97 (2001) AHRLR 51 (HRC 2001) para 40.

109. Concerning the arguments submitted by the parties, the Commission notes that Congolese law, jurisprudence and doctrine enshrine the civil nature of the dispute between the Complainant and his former client, Pharmakina Company. Such a civil nature is confirmed by the private status of Pharmakina, a public limited company (PLC),²⁰ involved in a dispute with an individual, in this case the Complainant. Under the Congolese law in force at the date the Commission was seized of the matter, the Administrative Chamber of the Supreme Court of the DRC could not have jurisdiction to entertain an action for annulment of the decision previously rendered in favour of the Complainant by a body recognized by law as having civil jurisdiction to hear that dispute in the last resort.
110. The Commission notes that in response to these arguments, the Respondent State has not sought to prove the contrary of the alleged facts, but has merely reiterated the pleas submitted in relation to the alleged violations of Article 3 of the African Charter. The State insists that the mere failure by the Complainant to produce the disputed Supreme Court decision should make the Commission deprive him of his rights under the Charter.
111. The Commission recalls that the Respondent State could not produce a copy of the decision and the mere fact of failing to comply with this request cannot lead to deprivation of any of the parties of the right to have their submissions examined by the Commission, nor prevent the latter from ruling on the alleged violations. In adopting the same position in the case of *Byagonza Christopher (represented by Dr. Curtis Doebbler and Ms. Margreet Wewerinke) v. Uganda*, the Commission regretted the fact that the Respondent State failed to produce the decision of the Supreme Court of Uganda and made its decision on the basis of the Complainant's submissions.²¹
112. The right to have one's case heard before a competent court is a universal requirement. Under Article 2 (3) (b) of the International Covenant on Civil and Political Rights, the States undertake to "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." Article 14 of the same insists that the case should be a "fair and public hearing by a competent tribunal". These standard requirements are developed by the Committee of Human Rights of the United Nations which states in its General Comment No. 13 that "the failure -

²⁰ See Osibouake 'Pharmakina : de la quinine aux anti-rétroviraux' <http://www.osibouake.org/?RDC-Pharmakina-a-Bukavu-fabrique> (consulté 24 mars 2013).

²¹ See *Byagonza Christopher (represented by Dr. Curtis Doebbler and Ms. Margreet Wewerinke) v. Uganda* Communication 365/08 paras 151-154, 168.

or misuse - of the jurisdictions is likely to seriously threaten fair, impartial and independent administration of justice".²²

113. In its jurisprudence, the African Commission also acknowledges the importance of the competence of courts in effectively achieving the right to a fair trial. Thus, focusing on the fact that courts need to be competent to guarantee a fair trial, the Commission defines such competence in the case of *Amnesty International and Others v. Sudan* as a sensitive concept "which encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate."²³
114. The Commission therefore considers that the effective exercise of the right to a fair trial - including defence - protected by Article 7 of the African Charter as a whole presupposes that the parties in the trial can each present their case in a fair manner. It further considers that this fairness is severely compromised when certain combined guarantees are not safeguarded: the rights of defence, equality of arms and respect of the adversarial principle.
115. If State Parties have a discretion as to the choice of using means peculiar to their judicial system to meet the requirements of Article 7 of the African Charter, compliance with this provision is determined in the light of the objectives of the Charter, namely taking all appropriate measures to ensure that justice is delivered by a *competent*, independent and impartial court or tribunal; that justice should be fair and adversarial.²⁴ This is an obligation to produce result, non-compliance with which cannot be justified by any reason whatsoever²⁵ and if the result is not achieved, the State is at fault. It is not enough for the State to prove its passivity in the occurrence of a situation which violates the provisions of Article 7 of the African Charter.
116. The Commission reaffirmed its commitment to guaranteeing such an obligation in its Resolution on the Right to a Fair Trial and Legal Assistance in Africa. The motivations of this Resolution were reinforced by the Guidelines on the Right to a Fair Trial as reflected in the jurisprudential practice of the Commission, particularly its decision in the case of *Ghazi Suleiman v. Sudan*.²⁶
117. With respect, in particular, to the guidelines on the right to a fair trial, they go to confirm how subtle and, perhaps, illusory it can be to make a clear-cut

²² Para 4.

²³ *Amnesty International and Others v. Sudan* Communication 48/90, 50/91, 52/91, 89/93 (2000) ARHRL 297 (ACHPR 1999) para 62.

²⁴ Highlighted by the Commission

²⁵ *Colozza v. Italy* (ECHR, 12 February 1985) Series A No. 89.

²⁶ Communication 222/98-229/99 (2003) AHRLR 144 (ACHPR 2003).

distinction between the right to equality before the law, guaranteed by Article 3, and the right to a fair trial, including the right to defence, protected by Article 7 (1) (d) of the African Charter. Indeed, the trial would lose all its fairness if the parties were placed in a position of legal or procedural inequality. This means that no one could claim to have enjoyed the right to defend himself if he or she were not afforded the same opportunity as his opponent, under the same conditions, to present his or her case and produce evidence.

118. As one of the rights of a fair trial, the right to defence guaranteed by Article 7 (1) (d) of the African Charter is the base for the principle of equality of arms. Guidelines A (2) (a) and (e) confirm that a fair trial includes, among others, “equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military” and “adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence”.²⁷
119. As a corollary of a fair trial, the principle of equality of arms is rooted in a number of international instruments and extensively developed in jurisprudence, be it national or international. Even if it is not explicitly, normative guarantees of the right to equality of arms clearly emanate from the provisions of Article 10 of the Universal Declaration of Human Rights which state that “Everyone is entitled in full equality to a fair hearing by a tribunal”. Equality between the parties consequently entails equality before the law and respect for the rights of defence. In this sense, it is a delicate and subtle task to separate equality before the law, and by extension equality of arms, from the right to a fair trial. Article 14 (1) of the International Covenant on Civil and Political Rights has this to say about the need for equality: “All persons shall be equal before the courts and tribunals. All persons are equal before the law...”
120. Jurisprudence embraces the connection in various ways, but following a constantly convergent approach. In the case of *Szwabowicz v. Sweden*, one notices, for instance, that the European Commission of Human Rights enshrines the principle when it states that the right to a fair trial requires that a party to a civil action, and *a fortiori* to criminal proceedings, must be afforded a reasonable opportunity to present his case in court under conditions which do not place him at a significantly disadvantage vis-à-vis his opponent.²⁸

²⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), Principles A (2) (a) and (e)

²⁸ *Szwabowicz v. Sweden* (30 June 1959) Application No. 434/58

121. International criminal jurisprudence contains cases of the equality of arms in some major decisions. In the case of *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, the International Criminal Tribunal for Rwanda held that “the right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and the defence”. The Tribunal went on to recall the provisions of its Statute under which equality of arms includes, among others, “the right to have *adequate time and facilities* to prepare his or her defence”.²⁹ Moreover, in order to determine the scope of equality of arms, the Tribunal drew from the decision handed down in the case of *The Prosecutor v. Tadić* in which the International Criminal Tribunal for the Former Yugoslavia held that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case”.³⁰
122. The European Court of Human Rights case law follows the same path in the case of *Neumeister v. Austria*, where it refers to the equality of arms as part of a fair trial before an independent and impartial tribunal.³¹ Reiterating this principle the other way round, the European Court held in a subsequent decision, *Delcourt v. Belgium*, that “a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage.”³²
123. As for the scope of application of the equality of arms, the European Court takes the position that equality of arms applies to all proceedings involving rights or civil obligations, even if the content of the principle does not have the same implication in criminal and civil matters.³³ Although the European Court thus gives this principle a general scope, it did not intend to make it absolute. States are not required to establish strict procedural equality between the parties, but rather to ensure that the parties benefit from a reasonably egalitarian situation. It is also in the administration of evidence that the European Court assesses whether or not there is equality of arms, in terms of both the possibility of witnesses being heard³⁴ or on the judge's power to order or refuse an investigative measure.³⁵
124. The Human Rights Committee of the United Nations, for its part, takes equality of arms beyond the confines established by the European Court in the case of *Robinson v. Jamaica* to find out, beyond legal weapons, if indeed the

²⁹ Judgement *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (Appeal) para 67. Highlighted by the Commission.

³⁰ Judgement *The Prosecutor v. Tadić* (Appeal) para 48.

³¹ *Neumeister v. Austria* (27 June 1968) Series A No. 8 para 24.

³² *Delcourt v. Belgium* (17 January 1970) Series A No. 1 para 25.

³³ See *Dombo Beheer B.V. v. The Netherlands* (27 October 1993).

³⁴ *Dombo Beheer v. Netherlands* (27 October 1993).

³⁵ *H. v. France* (24 October 1989).

litigant had, in the actual judicial practice of the State concerned, *adequate facilities* to use, that is, (...) the *adequate time* to prepare his defence.³⁶

125. It is obvious that jurisprudence agrees on the need to provide opponents with equal arms in the duel of arguments between them. On a subject of such importance, the doctrine considers equality of arms to be the “cornerstone of the notion of a fair trial.”³⁷

126. Although the expression “equality of arms” does not appear in the African Charter, the Commission refers to it in order to stress the need for fairness, independence and impartiality not only as factors, but also as an independent component of a fair trial. The Commission also considers this requirement so crucial that it has adopted specific Guidelines on the meaning, substance and scope of fair trial. The Guidelines thus stipulate that:

“The essential elements of a fair hearing include:

- (a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military; (...);
- (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence (...).³⁸

127. In this Communication, the Complainant was deprived of the opportunity to produce his file. In addition to the fact that the Complainant’s right to defence was restricted, he was not notified of the filing with the Administrative Registry of the notices issued by the Public Prosecutor in respect of the three cases numbered RA 444 and 445 for Pharmakina Company and 452 for the Complainant, as required under Article 8 (2) of the Rules of Procedure of the Supreme Court of the DRC.

128. In response to the argument that the Supreme Court lacked jurisdiction and that the Complainant’s right to defence was violated, the Respondent State argues once again that the Complainant failed to produce the decision

³⁶ *Frank Robinson v. Jamaica* (30 March 1989) Communication No. 223/1987, U.N. Doc. CCPR/C/35/D/223/1987 (1989). Highlighted by the Commission.

³⁷ D Jean-Pierre & Mélin-Soucramanien “The Principle of Equality of Arms” (1993) *Journal of Legal Research*, cited by G Canivet in “Equal Access to the Supreme Court” http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2003_37/deuxieme_partie_tudes_documents_40/tudes_theme_egalite_42/cour_cassation_6249.html (accessed on 15 March 2013).

³⁸ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), Principles A (2) (a) and (e).

of the Supreme Court. The position of the Commission regarding the alleged violation of Article 3 of the Charter applies to the argument of the Respondent State.

129. In particular, the Commission is of the opinion that the burden of proof rests primarily with the alleging party, but that in this case it is shifted to the Respondent State, or is at least equally shared between the parties, since the Commission subsequently requested the State to produce the copy of the judgment in dispute. Consequently, to demonstrate the unfounded nature of the claims of the Complainant, the Respondent State should have produced contrary proof of the allegations of the latter by submitting the documents required by the Commission, which it failed to do despite numerous requests.
130. In any event, considering the instances of violation of procedural rights that occurred in the process leading up to the contested decision - which violations have been established by the Commission - the terms of that decision would not have changed the course of the Commission's findings. Moreover, the decision would not have derived any validity from the process which itself does not comply with the principles upheld by the African Charter.
131. Under these circumstances, it cannot be said that the Complainant's rights to have his case heard by a competent court and to have the opportunity to defend himself were respected. The Commission therefore concludes that the provisions of Articles 7 (1) (a) and 7 (1) (c) of the African Charter were violated.

Prayers of the Complainant

132. In order to receive reparation for the violations alleged, the Complainant prays the Commission to:
1. Declare null and void Judgement No. RA444/445/452 of 17 April 2000 by the Supreme Court of the DRC;
 2. Grant a fair compensation to the Complainant for being deprived of the enjoyment of his rights with effect from 1 April 1998 of the amount of 500,000 U.S. dollars, awarded to him in respect of fees by the National Bar Council; and
 3. Recognize the Complainant's right to claim against Pharmakina Company in respect of the latter's legal obligation to comply with the

Arbitral Award No. 98/CNO/LH/006 of 1 April 1998 issued by the National Bar Council.

133. Having found that the rights protected under Articles 3, 7 (1) (a) and 7 (1) (c) of the African Charter have been violated, the Commission responded to Complainant's allegations. The Commission remains committed to the fundamental principle of compensation on the basis that the series of rights guaranteed by the African Charter would be an empty proclamation if it was not backed by the guarantee of a right to restitution or compensation in the event of violation. Although in the past the Commission has moved cautiously when it came to the rights to remedy and reparation, it has progressively built a jurisprudence which, in practice, has grown ever stronger. The doctrine also recognizes jurisprudential developments subsequent to the Commission as an acceptance of the principle of restitution and compensatory damages.³⁹ The edicts of the Commission on the issue of rights remedy and reparation are also many and varied, and include such simple recommendations as: "take steps to remedy the harm suffered",⁴⁰ "release detainees",⁴¹ and "restore the victim's right."⁴²
134. Regarding the specific issue of monetary compensation, the decisions of the Commission in the cases of *Embga Mekongo Louis v. Cameroon*⁴³ and *Antoine Bissangou v. Congo*⁴⁴ seem to be closest to the present Communication. Such recognition of the right to reparation, including monetary compensation, should not overshadow the consistent position that the role of the Commission is not to act as a court of first instance or national court. The Commission is not a court of appeal vis-à-vis national courts whose decisions it would be called upon to annul, revise or revoke. However, the Commission is established by the African Charter as a quasi-judicial body for overseeing the conformity of the national practices of States and their internal organs, with their obligations under the African Charter.
135. Such a position did not prevent the Commission from specifying the form and content of compensation in cases where the Complainant's request was

³⁹ See G Naldi "Reparations in the Practice of the African Commission on Human and Peoples' Rights" (2001) *Leiden Journal of International Law* 686-688 and H Adjolohoun *Human rights and Constitutional Justice in Africa: The Beninois Model in Light of the African Charter on Human and Peoples' Rights*, Paris: Harmattan (2011) 58-72.

⁴⁰ *Abubakar v. Ghana* Communication 103/93 (2000) RADH 116 (CADHP 1996) para 17.

⁴¹ *Constitutional Rights Project and Civil Liberties v. Nigeria* Communication 143//95, 150/96 (2000) RADH 234 (CHPR 1999) para 56.

⁴² *Pagnoulle (on behalf of Mazou) v. Cameroon* Communication 39/90 (2000) RADH 61 (CADHP 1997) para 31.

⁴³ Communication 59/91 (2000) RADH 60 (CADHP 1995) para 2.

⁴⁴ Communication 253/02 (2006) AHRLR 80 (ACHPR 2006).

sufficiently specified. This was the case in the decision in the case of *Kenneth Good v. Botswana*, where the Commission stated that “The compensation should include but not be limited to remuneration and benefits he lost ... and legal costs he incurred during litigation in domestic courts and before the African Commission.”⁴⁵ It is also clear that the *quantum* of monetary compensation is left to the domestic courts.⁴⁶

136. The facts allow the Commission to observe that the domestic procedures lasted more than four years before the Commission was seized in May 2005. In all, at the date of this decision by the Commission, 10 years have elapsed, during which period the Complainant must have invested significant resources in the process, including procedural expenses. This is evidenced by the fact that the Complainant has been represented by a lawyer throughout the proceedings both in his country and before the Commission.

137. Under Rule 112 (2) of the Commission’s Rules of Procedure, in the event of a decision against a State Party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days, of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission.

Decision of the Commission

The Commission, For these reasons,

138. Declares that the Democratic Republic of Congo has violated the provisions of Articles 3, 7 (1) (a) and 7 (1) (c) of the African Charter. As such, the Commission:

- a) Urges the Democratic Republic of Congo to recognize or cause to be recognized the Complainant’s right to claim against Pharmakina in respect of the latter’s legal obligation to comply with Arbitral Award No. 98/CNO/LH/006 of 1 April 1998, issued by the National Bar Council of the DRC, which grants the Complainant the sum of 500,000 (five hundred thousand) U.S. Dollars as fees owed to him for services rendered to Pharmakina Company.

⁴⁵ *Kenneth Good v. Botswana* Communication 313/05 (2010) AHRLR 43 (ACHPR 2010) para 245.

⁴⁶ See *Mekongo Louis v. Cameroon, Bissangou v. Congo* op cit; *Association of Victims of Post Electoral Violence and Interights v. Cameroon* Communication 272/03 (2009) AHRLR 47 (ACHPR 2009).

- b) Requests the Democratic Republic of Congo to take or cause to be taken the necessary measures aimed at granting the Complainant a fair compensation as damages for harm arising from the prolonged non-enforcement of the decision. The amount of the compensation will be determined in accordance with Congolese law.
- c) Also requests the Democratic Republic of Congo to grant the Complainant compensation for the costs of the procedure which will also be determined in accordance with Congolese law.
- d) Lastly, requests the Democratic Republic of Congo to report in writing within one hundred and eighty (180) days of being informed of this decision, all measures that it has taken to implement these recommendations.

Adopted at the 53rd Ordinary Session of the African Commission on Human and Peoples' Rights held from 9 to 23 April 2013 in Banjul, The Gambia

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