Communication 274/03 and 282/03 – *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*

Rapporteur

54th Ordinary Session: Commissioner Soyata Maiga

Summary of the Facts

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received two Complaints on 10 January and 23 September 2003, lodged by The International Centre for the Legal Protection of Human Rights (Interights) and the Association Africaine de Défense des Droits de l'Homme (ASADHO) on the one hand, and by Madam Odette Disu et al, on the other, based on Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The Communications were submitted on behalf of military officers and other civilians, all of them Congolese nationals against the Democratic Republic of Congo (State Party to the African Charter, hereinafter referred to as the DRC).[1]

3. The Complainants submit that on 16 January 2001, Mr. Laurent-Desiré Kabila, then President of the Democratic Republic of Congo, was assassinated in his office, apparently by a non-commissioned officer in his guard. In the days following this assassination, several persons were arrested, both military and civilian, including officers and non-commissioned officers, State officials and ordinary citizens by military intelligence officers without any judicial warrants.

4. According to the Complainants, these persons were then detained for two months in a military cell called GLM, in Kinshasa, where they were tortured and/or subjected to other forms of cruel and inhuman treatments. On 1 March 2001, they were transferred to the Makala Central prison in Kinshasa and handed over to the Public Prosecutor's Office of the Military Court.

5. The Complainants further submit that during the thirteen (13) months of incarceration of the victims, they were secretly interrogated by military magistrates and military intelligence officers. The homes of some of the accused persons were visited in their absence by the same officers without

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

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any warrants. Some of them had their property, furniture and buildings confiscated. This is what happened, for instance, to houses belonging to Madam Rose Kamuanya and Madam. Masumbuko Mwali, who were both arrested instead of their husbands after the latter had escaped from prison on 28 February 2001.

6. The Complainants aver that it was only after a year's detention, that is 13 March 2002, that the public prosecutor at the military court announced that 135 persons, both military and civilian, had been charged for plotting to assassinate the Head of State, for breach of national security and Republican institutions and for criminal conspiracy.

7. The Complainants allege that on 15 March 2002, the 135 accused persons were for the first time brought before a military court. After ten 10 months of trial, the Court delivered its judgment on 7 January 2003 condemning thirty (30) of the accused to death, sixty (60) to terms of imprisonment from six (6) months to life imprisonment while forty-five (45) others were acquitted.

8. The Complainants state that the trial took place in a military court, a special court established by Presidential Decree on 23 August 1997, the organizational rules and functioning of which are not consistent with the relevant provisions of the African Charter in relation to fair trial.

9. For instance, the Complainants point out that:

    a. The members of the Military Court were selected by the Executive branch. Its presiding judge, a military magistrate, was assisted by four senior officers with no legal background appointed by the President of the Republic.

    b. The court can judge both civilians and military officers in line with Article 5 of Decree-Law N° 19 establishing the aforementioned court: « This Court shall be responsible for execution of sentences in the existing Code of Military Justice, and wherever necessary, the ordinary penal code. It shall enforce as much as possible, the rules of procedure set forth by the Code of Military Justice. Its decisions are neither subject to appeal nor opposition».

    c. This provision was invoked by the Court during the trial to justify all the shortcomings relating to fundamental safeguards of fair trial

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set out by ordinary Congolese laws and international conventions ratified by the DRC.

The Complaint

10. The Complainants allege that the Democratic Republic of Congo has violated Articles 2, 5, 7 and 18 of the African Charter.

THE PROCEDURE

11. In a letter dated 10 January 2003, Interrights and ASADHO, Non-Governmental Organizations with observer status at the Commission referred the first Complaint to the Secretariat. In the same correspondence, the Complainants also asked the Chairperson of the Commission to request the President of the Democratic Republic of Congo, in line with the provisions of Rule 111(3) of the Rules of Procedure of the Commission, to take all appropriate protective measures to stay the execution of the death sentences handed down to the victims by the Military Court on 7 January 2003.

12. On 14 January 2003, the Secretariat sent a petition by the Commission to the President of the Democratic Republic of Congo requesting the stay of execution of the sentences delivered while waiting for the Complaint to be considered.

13. The Secretariat further informed the Parties that the Complaint had been lodged under reference *Communication 274/03 Interights and ASADHO v. DRC* and it will be submitted to the Commission for seizure at the 33rd Ordinary Session scheduled to take place in May 2003 in Niamey, Niger. At the said Session, the Commission decided to defer the consideration of the Complaint to its 34th Ordinary Session. The Secretariat consequently informed the Parties of the said decision on 19 June 2003.

14. On 22 October 2003, the Secretariat received a second Complaint from Madam Odette Disu et al and acknowledged receipt thereof. She informed the Complainants that their petition had been registered and referenced Communication *282/03 Madam Odette Disu et al v. DRC* and will be submitted to the Commission for seizure at the 34th Ordinary Session to be held from 6 to 20 November 2003 in Banjul, The Gambia.

15. At its 34th Ordinary Session, the Commission considered the two Complaints and decided to be seized of them. The Secretariat informed

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the Parties and requested the Parties to make their written submissions on Admissibility for consideration at the 35th Ordinary Session.

16. On 2 and 7 December 2003, the Secretariat informed the Complainants about the decision of the Commission and requested them to make their submissions on admissibility. The Secretariat further requested them to submit all their documents in relation to the Complaint, in particular the disputed decisions delivered by the Military Court. On the same date, the Secretariat also transmitted a copy of the Communication to the Respondent State requesting the latter to present its memorandum within three (3) months.

17. On 11 February 2004, the authors of Communication 282/03 forwarded to the Secretariat, the Decree on the establishment of the Military Court and indicated at the same time that the Court had not authorized them to make a copy of the Decree in contention, on the grounds that « Reasons have still not been assigned to the judgment ».

18. On 9 March 2004, the Secretariat sent a letter reminding the authors of Communication 274/03 and the Respondent State to make their submissions on admissibility. On 18 March 2004, the authors of Communication 274/03 forwarded their submissions on admissibility. The said submissions and the related documents were transmitted to the Respondent State.

19. At the 35th Ordinary Session, the Commission decided to merge Communications 274/03 *Interights and ASADHO v. DRC* and 282/03 *Madam Odette Disu(Esq) et al v. DRC*. The Commission justified its decision by stating that the two Complaints touch on similar facts and concern the same victims, i.e. the 135 persons tried by the Military Court as part of the case referred to as the « Kabila Trial ».

20. At the same Session, the Commission granted hearing to the Complainants and the Respondent State on admissibility and decided to defer its decision while awaiting the written submissions of the Parties. On 18 June 2004, the Secretariat informed the Parties about this decision.

21. On 16 September 2004, the Secretariat received the written submissions of the Respondent State on admissibility. These submissions were transmitted to the Complainants on 20 October 2004.

22. At its 36th Ordinary Session, the Commission considered the Communication and deferred its decision on admissibility to the 37th

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Ordinary Session. On 23 December 2004, the Secretariat informed the Parties about this decision.

23. At its 37th Ordinary Session, the Commission granted a hearing to the Complainants, and after considering the Communication, declared it admissible. On 28 June 2005, the Secretariat informed the Parties about the decision and requested them to make their submissions on the merits within three (3) months. A reminder was sent to the Parties on 10 October 2005.

24. At the 38th Ordinary Session, the Commission decided to defer its decision on the merits to the 39th Ordinary Session. On 15 December 2005, the Secretariat informed the Parties about the décision and reminded them to make their submissions on the merits within three (3) months. A new letter was sent as a reminder on 13 March 2006.

25. At the 39th Ordinary Session, the Commission considered the Communication and decided to defer its decision on the merits to the 40th Ordinary Session. On 30 October 2006, the Secretariat notified the Parties about the above-mentioned decision and requested them once again to present their memoranda on the merits in the shortest possible time.

26. Between its 40th Ordinary Session held between 15 and 29 November 2006 in Banjul, The Gambia, and 25 September 2012, the final date for the submission of the memoranda, the Commission considered the Communication at its successive sessions and deferred it at various times for failure to receive the written submissions of the Parties on the merits.

27. During this period, on 17 July 2007, the Complainants appealed to the Commission to intercede with the authorities of the Democratic Republic of Congo for the latter to provide a copy of the judgment of the Military Court as it was critical for the drafting of their submissions on the merits of the case. In this regard, the Secretariat acted on the said request in a Note Verbale, dated 17 September 2007. The Respondent State was reminded to forward its submissions on the merits.

28. On 20 August 2012, the Complainants forwarded their submissions on the merits to the Secretariat. On 25 September 2012, the Secretariat acknowledged receipt of the said submissions and forwarded a copy to the Respondent State by indicating a new deadline of sixty (60) days for the submission of its reply and to transmit a copy of the Military Court's judgment.

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29. As no response was received from the Respondent State, the Secretariat informed the Parties that the Commission had decided to give its decision on the merits of the case based on the facts in its possession, in case the Respondent State fails to send its response by 25 November 2012. On the said date, the DRC had still not submitted its memorandum on the merits of the Communication.

THE LAW

Admissibility

The Complainants' submissions on Admissibility

30. The Complainants allege that the Communication satisfies all the conditions set out in Article 56 of the African Charter. The submissions touch in particular on meeting the requirement of exhausting local remedies as laid down in Article 56 (5).

~~31.~~ The Complainants submit that local remedies were exhausted, since under the provisions of Article 5 of Decree-Law No 19 indicated in the facts presented, the judgment of the Military Court « can neither be appealed against nor opposed ».

32. While recognizing that the Supreme Court was an existing remedy, the Complainants believe that such a remedy was not available at the time of the case because the transitional Constitution which provided for it only came into effect after the Commission was seized of the matter. Furthermore, they are of the opinion that even if the case had been referred to the Supreme Court, the latter could not have given a ruling on the merits of the case, and thus the remedy would not have been effective.

33. In the same vein, the Complainants allege that the Presidential pardon is not a legal remedy and therefore cannot become an obstacle to referring the matter to the Commission.

The Respondent State's submissions on Admissibility

34. In its written submissions, the Respondent State alleges that the Complainants have not proved that they lodged an appeal against the judgment in contention whereas this remedy was available pursuant to Article 150, paragraph 3 of the Transitional Constitution of the Democratic Republic of Congo.

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35. The State also submits that apart from the legal remedies, the Constitution of the Democratic Republic of Congo, in its Article 79, provides for the right of pardon to be exercised by the President of the Republic, since the latter can suspend, commute or mitigate the punishments. According to the State, though it is not a conventional legal remedy, the right to request for pardon or the commutation thereof is an established right of any person condemned to death by Article 6 (4) of the International Covenant on Civil and Political Rights.

36. In this regard, the State argues that the Prosecution and the counsels for the convicted persons immediately appealed for pardon by the President of the Republic and that the said remedy was still under consideration at the time the Commission was seized of the matter. The State therefore concludes that the local remedies were not exhausted.

The Commission's Analyses on Admissibility

37. This Communication was submitted in accordance with Article 55 of the African Charter which gives competence to the Commission to receive and consider « communications other than those from State Parties ». To be deemed admissible, the said Communications, must meet the requirements stipulated in Article 56 of the African Charter.

38. Considering the memoranda submitted by the Parties, it is obvious that they cover all the admissibility requirements except the one relating to exhaustion of local remedies. The Commission itself has noted that only the requirement on exhaustion of local remedies set out in Article 56(5) of the African Charter is the bone of contention. Under the terms of the aforementioned Article, a communication can only be declared admissible when the local remedies have been exhausted, unless it is obvious to the Commission that the said remedies have been unduly prolonged.

39. In its judgment in *Jawara v. Gambia*,[2] the Commission considered that when they exist, the domestic remedies must be *available, effective and sufficient*. A remedy is deemed to be available when it can be pursued by the Complainant without any impediment; it is effective if it offers some prospect of success and it is found sufficient if it is capable of remedying the alleged violation.[3]

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[2] *Sir Dawda K. Jawara v. Gambia* Communication 147/95 and 149/96 (2000) RADH 107 (2000) para 31.

[3] *Jawara* para 32. Emphases by the Commission.

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40. On the issue of exhausting local remedies, the Commission notes that the judgment contested by the Complainants was delivered by the Military Court of the DRC which is a court of last instance, as stipulated in Article 5 of the Decree establishing the afore-mentioned Court. Indeed, the Commission notes that it was first seized of the matter on 10 January 2003, i.e. three days after the sentences were delivered by the Military Court on 7 January 2003. It is undisputed that on this date, the Complainants had no means whatsoever to initiate a domestic judicial remedy as in the current case; the Decree did not contain any provisions for opposition nor an appeal against the judgment delivered by the Court.

41. The Commission notes that on 18 November 2002, i.e. ten (10) months after the conviction of the Complainants, the Respondent State passed a new Law on the military judicial Code providing for appeal and opposition against the judgments of the military court. However, the passage of this law does not redeem the objection to appeal imposed on the Complainants during the entire period of their preventive detention.

42. With regard to the possibility of appeal provided for by the transitional Constitution, the Commission notes that the said Constitution only had force of law on 1st April 2003, three months after this Communication was submitted. This Constitution could not have applied to judgments delivered in March 2002, much less to facts which date back to 2001. Furthermore, as an Appeal Court, the Supreme Court was not an effective remedy as it would only have considered compliance with the rules of procedure and not the substantive issue of the case. Therefore, it was not likely to remedy the alleged violations.

43. The Commission further notes that the Complainants could have pleaded for pardon from the President of the Republic, and in any case, they had filed such a related petition in January 2003. The Commission further notes that on 14 January 2003, in accordance with Rule 111(3) of its Rules of Procedure, it had requested the President of the Democratic Republic of Congo to take all appropriate measures to stay the execution of the death sentences pronounced by the military court.

44. In any case, the Commission adopts its jurisprudential position that the remedies the Complainant is requested to exhaust are mainly of judicial nature.[4] The Presidential pardon is not judicial in nature and consequently its exhaustion cannot be insisted upon by the Complainant.

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[4] *Cudjoe v. Ghana* Communication 221/98 (2000) AHRLR 127 (ACHPR 1999) para 13.

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45. In the light of the foregoing, the Commission notes, generally, that in this particular case, local remedies did not exist. Even assuming the Complainants had the opportunity of seizing the Supreme Court of the matter, this remedy would not have been effective. The Commission therefore concludes that the local remedies were exhausted.

The Commission's decision on Admissibility

46. In view of the above, the African Commission on Human and Peoples' Rights declares this Communication Admissible in accordance with Article 56 of the African Charter.

Merits

The Complainants' submissions on the Merits

47. On the merits, the Complainants allege that some Articles in the provisions of the African Charter were violated. Furthermore, they submit that the Respondent State violated a number of provisions in respect of other international instruments and the domestic law. The alleged violations of the African Charter relate to 2, 5, 7 and 18.

48. Concerning Article 2 of the African Charter which protects the right to non-discrimination, the Complainants allege that, the fact that the military court declared a closed-door hearing by preventing the media from the trial with the exception of the military press corps subservient to the regime in power was an act of discrimination.

49. In its Article 5, the African Charter guarantees that every individual shall have the right not to be subjected to torture, cruel, inhuman or degrading treatments. To buttress the violation of this provision, the Complainants allege that being subjected to whipping by State security officers while in detention, and to sentences of life imprisonment, are acts of torture. In addition, they aver that such acts of torture extend to failure to publish the judgment on the sentences, since by this act some of them wallowed in the corridors of death for more than two years. Furthermore, they allege that depriving them of the right to get in touch with their families is an inhuman treatment.

50. Regarding Article 7 of the African Charter, the Complainants allege that several rights related to fair trial have been violated. Concerning Article 7(1) (a), the Complainants allege that their inability to question the legality and the duration of their preventive detention before a court is a violation

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of their right of access to justice. They submit that the same violation can be observed in their being denied their right of appeal arising from the provisions of Article 5 of the Decree-Law that established the military court. To buttress this assertion, the Complainants cite an error of judgment on the part of the military court and refusal of payment of compensation for unlawful detention.

51. Concerning allegations of violation of Article 7(1) (b), the Complainants contend that the non-compliance with rights protected under this provision is noticeable by the flagrant contradiction between the judgment of the military court and the judicial developments of the case. Thus, they submit that the military court concluded on the guilt whereas several grey areas persisted in the case of assassination of President Laurent Désiré Kabila and that the principal witness had been convicted and discharged.

52. Furthermore, the Complainants submit that the Prosecutor at the military court declared that the investigation of the case was on course. Even the President of the afore-mentioned court is said to have commented on the judgment in similar terms. Finally, the search warrants were said to have been issued with clear instructions to clarify the same facts for which the Complainants had been found guilty. The Complainants allege that all these facts prove that presumption of innocence which is of critical importance in a case involving capital punishment had been violated.

53. The provisions of Article 7(1)(c) of the African Charter protect the right to judicial assistance. To buttress the violation of the terms of this Article, the Complainants allege that the fact that they could not consult their counsels until the eve of their trial, i.e. on 15 March 2002, or after more than one year in preventive custody, constitutes a violation of their right to judicial assistance.

54. The Complainants further allege that their rights protected under Article 7(1) (d) of the African Charter have been violated, i.e. being tried within a reasonable time by an impartial court or tribunal. According to them, such a right has been violated as they were arrested on 15 January 2001 and were kept in detention for more than a year before being arraigned before the military court on 15 March 2002. They further submit that the court had competence to try them only during war time, but this was not the case, and additionally, the judges were not qualified.

55. According to the Complainants, the Respondent State also violated the rights guaranteed by Article 7(2) of the African Charter which establishes the principle of legality of punishments and offences. They allege, in this

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regard, that the promulgation of a law adopted in the course of this trial, setting out more lenient penalties, was delayed, and then finally authorized immediately after judgment was delivered by the military court. The Complainants further aver that as enforcement measures had been abrogated, the afore-mentioned sentences could no longer be passed without violating the provisions of Article 7(2) of the African Charter.

56. The Complainants further submit that the fact that they were deprived of contact with their families during the entire period of detention is a violation of the rights guaranteed by Article 18 (1) of the African Charter.

57. Finally, the Complainants cite, among other allegations, the provisions of Article 9 (2) of the International Covenant on Civil and Political Rights, to buttress the argument that, since they were not informed about the reasons for their arrest and the charges brought against them, their rights have been violated. Similarly, they denounce the decision of the judicial authorities to keep them in detention as arbitrary in spite of the amnesty law which clearly applied to their case.

The Commission's analyses on the merits

58. Prior to considering the submissions on the merits, the Commission notes that between 25 June 2005 and 25 November 2012, to be precise, for seven (7) years, it gave the Respondent State several opportunities to respond to the allegations of the Complainants. As no response was forthcoming from the State, the Commission decided to take this decision based on the facts in its possession in line with the Commission's practice.[5]

59. Regarding reference to the provisions of other international conventions and domestic law of the Respondent State by the Complainants, the Commission notes that the control of the Respondent State's actions in terms of compliance with those standards is not within its purview. The related submissions will therefore not be considered as part of the merits. However, where necessary, the Commission will automatically refer to the relevant and corresponding provisions of the African Charter in case the alleged violations are substantiated.

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[5] *Institute for Human Rights and Development in Africa v. Angola* Communication 292/04 (2008) AHRLR 43 (ACHPR 2008) para 34. *Social and Economic Rights Action Center, Center for Economic and Social Rights v. Federal Republic of Nigeria* Communication 155/96 (2001) AHRLR 60 (ACHPR 2001) and *Union Interafricaine des Droits de l'Homme et al v. Angola* Communication 159/96 (2000) RADH 20 (ACHPR 1997).

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60. Concerning Article 2 of the African Charter, the Commission notes that the Complainants allege that their right to non-discrimination has been violated without however explaining how, in this particular circumstance, the said closed–door session violates the rights referred to. The Commission must therefore reject this submission as being a violation of this provision of the Charter.

61. With regard to Article 5 of the Charter, the Commission takes inspiration from *Banda* where ordeals such as « whipping and beatings with sticks » were viewed rather as inhuman and degrading treatment and not acts of torture.[6] By contrast, the fact that the Complainants were said to have been « whipped » is an inhuman and degrading treatment. The same situation applies to depriving them from having contact with their families which is also inhuman treatment.

62. In the case of torture also alleged by the Complainants, the Commission refers to its jurisprudence in the case *Sudan Human Rights Organisation and Another v. Sudan* to recall that the facts alluded to must be imputed to an authority or a State official, and that the purpose is to punish the victim, and the punishment suffered must be physical, moral or psychological.[7]

63. In this case, it is undisputed that the reported treatments meted out by the State security officials was a means of punishing the Complainants for their presumed responsibility in the assassination of the President of the Republic. It is also undeniable that some of the Complainants were sentenced to death and remained in the corridors of death for more than two years. Such a situation, to say the least, is likely to bring about agony and a psychological pain which, in the opinion of the Commission, is torture. Hence, the Commission concludes that Article 5 of the African Charter has been violated.

64. The Complainants, among others, invoke the provisions of Article 9(2) of the International Covenant on Civil and Political Rights to support the assertion that the lack of information as to the reasons for their arrest is a violation of their rights. Furthermore, they allege that their detention was arbitrary because it was prolonged in spite of an Amnesty Law which should have gone in their favor.

65. These allegations obviously point to the right not to be detained illegally and arbitrarily, which is protected by Article 6 of the African Charter. By

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[6] *Banda v. The State* (2002) RADH 118 (HCZa 1999) paras 1, 10-12.

[7] Communication 279/03 (2009) AHRLR 153 (ACHPR 2009) paras 155-157. Also *Ben Salem v. Tunisia* Communication 269/2005 (2007) AHRLR 54 (CAT 2007) paras 16.4, 16.5.

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referring to its *Principles and Guidelines on the Right to a Fair Trial*, the Commission notes that Article 6 includes the right of the individual to be informed about the reasons for his arrest and charges preferred against him at the time of the individual's arrest.[8] The Commission applied the afore-mentioned Principles in its decision in *Law Office of Ghazi Suleiman v. Sudan*, where the arrest and detention lacked legal basis.[9] In this case, the facts alleged by the Complainants are a violation of their rights to liberty and to the security of their persons.

66. Regarding Article 7(1)(a), the Commission recalls that the possibility of a detained person to question the legality and the duration of his detention before a court is fundamental to the enjoyment of the right to a fair trial. This possibility is established by the Commission in its decision *Purohit and another v. The Gambia*.[10] It emerges from the consideration of the facts of the case, that during the entire period of their preventive detention, the Complainants did not have the opportunity to refer the matter to a judge to contest the legality and the duration of the afore-mentioned detention.

67. Article 7(1) (a) of the Charter also includes the right to an appeal against a judicial decision. The Commission has ample jurisprudence on the right to appeal, in particular, concerning cases involving military courts and/or where the death penalty is enforced. The consistent principle adopted is that the military courts do not enjoy any exception regarding rights to a fair trial.[11] The right to appeal, particularly in the event of the death penalty being invoked, is also established by the Commission in the *Principles and Guidelines on the Right to a Fair Trial*.[12] In the case in point, the provisions of Article 5 of the Decree-Law establishing the military court did not provide for any such appeal or opposition.

68. Still on the issue of violation of Article 7(1)(a), the Commission is of the opinion that the right protected by this provision makes it mandatory for the courts to assign reasons for their judgments. Such an obligation is clearly highlighted in the *Principles and Guidelines on the Right to a Fair*

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[8] African Commission 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2001) Principles M(2)(a).
[9] Op. cit. para 49.
[10] Communication 241/01 (2003) RADH 98 (CADHP 2003) para 72. See also, *Zegveld and another v. Eritrea* Communication 250/02 (2003) RADH 85 (CADHP 2003) para 56.
[11] *Law Office of Ghazi Suleiman v. Sudan* Communication 222/98 and 229/99 (2003) RADH 142 (ACHPR 2003) para 53 ; *Women's Legal Aid Centre (on behalf of Moto) v. Tanzania* Communication 243/01 (2004) RADH 120 ACHPR 2004) para 47 ; *Civil Liberties Organisations and others v. Nigeria* (2001) RADH 80 (ACHPR 2001) para 32-34.
[12] Principles A(2)(j), N(10).

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Trial.[13] In the case in point, the Commission notes that the Complainants allege a complete failure to produce the judgment of the military court. In the case of *Byagonza v. Uganda*[14] and *Mamboleo v. DRC*,[15] the Commission laid the blame on the State for failure by the domestic courts to produce the judgments and took its decisions based on information submitted by the Complainant. In this particular instance, the judgment of the court has never been made available to the Complainants.

69. On the last point relating to allegations of violation of Article 7(1)(a), the Commission recalls that the African Charter guarantees the right to legal redress in spite of the express lack of a provision to that effect. The Commission spells out the content of such a right in the *Principles and Guidelines on the Right to a Fair Trial*.[16] The doctrine also recognizes the existence of a right to legal redress under the African Charter.[17] Better still, the Commission has a wealth of jurisprudence in that regard[18] and other regional human rights protection bodies make an extensive use of it.

70. For instance, in a very significant way, in implementing the African Charter, the ECOWAS Court of Justice adopts an approach derived from the right to legal redress in the case *Manneh v. The Gambia* regarding illegal detention. The adopted principle is that in terms of human rights, it would be more of a punitive redress than a just reparation. Thus, the Court was of the opinion that since such a detention had inflicted, inter alia, physical, psychological and moral pain on the Complainant, the latter had a right to compensation.[19]

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[13] Principles A(2)(i).

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

[15] *Maître Mamboleo M. Itundamilamba v. the Democratic Republic of Congo* Communication 302/05 ACHPR (2013) paras 110-111.

[16] Principles C(a), C(b)(2).

[17] 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 *Droits de l'homme et justice constitutionnelle en Afrique : le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* Paris : L'Harmattan (2011) 58-72.

[18] For instance, *Institute for Human Rights and Development in Africa v. Angola* Communication 292/04 (2008) AHRLR 43 (ACHPR 2008) paras 86-87 ; *Wetsh'okonda Kosso and others v. RDC* Communication 281/03 (2008) AHRLR 93 (ACHPR 2008) para 93 ; Antoine Bissangou v. Congo Communication 253/02 (2006) AHRLR 80 (ACHPR 2006) ; *Kenneth Good v. Botswana* Communication 313/05 (2010) AHRLR 43 (ACHPR 2010) para 245.

[19] *Chief Ebrimah Manneh v. The Gambia* (2008) AHRLR 171 (ECOWAS 2008) paras 29-40 where the Court awarded the Complainant compensatory damages in the sum of 100 000 dollars. Also in *Kadijatou Mani Koraou v. Niger* (2008) AHRLR 182 (ECOWAS 2008) paras 92-96 where the ECOWAS Court of Justice considers that nine years of servitude have caused a psychological and moral pain to the Complainant and awards him compensatory damages in the sum of 20 000 dollars.

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71. In this Communication, the illegal detention of the Complainants has already been established above. They received no compensation as reparation for such a detention.

72. In the light of the above, the Commission notes that the Complainants did not have the opportunity to seek redress for their detention and much less to appeal against the decision to sentence them. Furthermore, no reasons were assigned for the said judgment and neither were the Complainants compensated for their illegal detention. The Commission therefore concludes that the provisions of Article 7(1)(a) of the African Charter were violated as far as the rights listed above are concerned.

73. Article 7(1)(b) of the African Charter protects the right to be presumed innocent. The respect for this protected right is all the more significant where the death sentence comes into play.[20] As recalled in the case *Law Office of Ghazi Suleiman v. Sudan*, the Commission believes that, the fact that an accused person is declared guilty even before finally determining such culpability is a violation of presumption of innocence.[21]

74. In the current case, both the Prosecutor at the military court and the President of the afore-mentioned Court agreed on this fact; that following the sentencing of the Complainants, the investigation continued in the case relating to the assassination attempt that cost the life of President Laurent Désiré Kabila. The proof is that, a search warrant issued after the Complainants were sentenced, contains clear instructions seeking proof to clarify the matter. In such circumstances, the sentencing of the Complainants seems to be a presumption of guilt. The Commission concludes from this that the provisions of Article 7(1)(b) of the African Charter have not been complied with.

75. The provisions of Article 7(1)(c) of the Charter protect the right of judicial assistance. The Commission stretches the scope of such a right in its *Principles and Guidelines on the Right to a Fair Trial*.[22] In its decision *Article 19 v. Eritrea*, it lays particular emphasis on the right to have access to a counsel especially during investigations.[23] The Commission notes that during the whole year of their preventive detention, the Complainants could not get in touch with their counsels. They were not allowed to do so

[20] Principles N(6)(e).
[21] Op. cit. paras 54-56.
[22] Principles G(b).
[23] Communication 275/03 (2007) AHRLR 73 (ACHPR 2007) para 103.

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until the eve of the trial. Such a state of affairs is obviously a violation of the right to judicial assistance.

76. Article 7(1)(d) of the African Charter establishes the right to be tried within a reasonable time by an impartial court or tribunal. In respect of the right to be tried within a reasonable time, the Commission highlights it in its *Resolution on the Right to Remedy and a Fair Trial*.[24] The Commission also refers to it in its decision *Article 19 v. Eritrea* to lay particular emphasis on the fact that the circumstances of the Complainant must be taken into consideration and that the seriousness of the alleged acts cannot be a justification for the reasonable time.[25] In this case, the Commission has already noted that the preventive detention of the Complainants was unduly prolonged and without trial.

77. The *Principles and Guidelines on the Right to a Fair Trial* clarifies the meaning of the right to be tried by an impartial court by determining as a relevant fact; the fact that the judicial officer may « have expressed an opinion which would influence the decision-making » or that he may consult a higher authority before rendering a decision.[26] As the Commission indicates in the case *Civil Liberties Organisations v. Nigeria*, impartiality means that the judicial organization does not depend on the exclusive power of the Executive but of the Legislature and that military courts are no exception to impartiality.[27]

78. In this Communication, the members of the military court were mostly military or serving police officers. The discretionary power of appointment by the President of the Republic in respect of these judges establishes or is likely to establish a hierarchical relationship with higher authority. In these circumstances, the Court would not meet the required standards of an impartial court. As the Complainants were not tried within a reasonable time and by an impartial court, the Commission concludes that the provisions of Article 7(1)(d) were violated.

79. Concerning Article 7(2) of the African Charter which guarantees the right to be sentenced only for actions or omissions previously provided for by

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[24] African Commission 'Resolution on the procedure on the right to redress and fair trial' (1992) para 2(c).
[25] Op. cit. paras 96-100.
[26] Principles A(5)(c)(2) et A(5)(e).
[27] *Civil Liberties Organisations and others v. Nigeria* op. cit. para 27.

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the law, the Commission has a rich stock of case laws on such a right.[28] However, in addition to the general prohibition of retroactivity is the exception by which the accused person must enjoy more lenient criminal laws. Though the provisions of Article 7(2) of the African Charter do not expressly provide for the enforcement of more lenient criminal laws, such a principle is established by the International Covenant on Civil and Political Rights to which the Respondent State is a Party.[29] In any case, the Commission recognizes such a principle in its *Principles and Guidelines on the Right to a Fair Trial*.[30]

80. In the case of the Complainants, the death penalty was pronounced against them whereas the law on enforcement measures of the aforementioned law had been abrogated. Furthermore, a law adopted during their trial, provided for less severe measures. However, the said law was never put into effect until after the military court had announced its judgment. In such circumstances, the Commission concludes that the provisions of Article 7(2) of the African Charter were not complied with.

81. Article 18(1) of the African Charter states that: « the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health ». In the opinion of the Commission, the spirit underlying this provision of the Charter is that persons in detention must as a matter of course enjoy material and psychological support of their close relations. This is of paramount importance in view of the particularly insecure detention conditions in Africa.

82. The Commission recalls such a need in various decisions, by highlighting the trauma that a person in detention may suffer from as a result of his inability to have access to his family.[31] The Commission has already noted that the fact that the Complainants were deprived of getting in touch with their family is an inhuman treatment. Such a treatment does not guarantee neither the protection of the family, nor its physical and moral health. Consequently, the provisions of Article 18(1) of the African Charter were not complied with.

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[28] Refer among others to *Jawara v. The Gambia* Communication 147/95 et 149/96 (2000) RADH 98 (ACHPR 2000) para 63 ; *Amnesty International v. Zambia* Communication 212/98 (2000) RADH 359 (ACHPR 1999) para 36.

[29] The Commission uses the provisions of Article 61 of the African Charter to make reference to the express provisions of the Covenant.

[30] Principles N(7)(b) and (c).

[31] For instance, *Article 19 v. Eritrea* op. cit. para 103 ; *Constitutional Rights Project v. Nigeria* Communication 143/95 and 150/96 (2000) RADH 243 (ACHPR 1999) para 29 ; *Civil Liberties Organisations v. Nigeria* op. cit. para 27.

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The Complainants' prayers

83. As a remedy for the alleged violations, the Complainants pray the Commission to :

    1. Recognize that the Democratic Republic of Congo has violated Articles 2, 5, 7 and 18 of the African Charter.

    2. Declare the Decree-Law No. 019 of 23 August 1997 on the establishment of a military court to be contrary to the international commitments subscribed to by the Democratic Republic of Congo in relation to fair trial.

    3. Order the Democratic Republic of Congo to re-open the case and review it by adhering strictly to human rights.

    4. Request the Democratic Republic of Congo to compensate the Complainants for all the different types of injury they suffered through human rights violations they were subjected to.

84. Having concluded the violation of the rights protected by Articles 5, 6, 7 and 18(1) of the African Charter, the Commission followed up on the allegations of the Complainants. As indicated in its analyses, the Commission recognizes the principle of redress, including monetary compensation for violation of rights protected by the African Charter.

85. However, the Commission adopted its consistent position according to which it cannot take the place of national authorities in practice, when it comes to redress of injuries suffered. Consequently, it has referred the Complainants to the said authorities for the assessment of the *quantum* of compensation,[32] unless the request has been indicated precisely in the Communication like in the case *Kenneth Good v. Botswana*.[33] In this case, the Complainants did not quantify the injuries suffered.

86. The Commission notes therefore that the trial of the Complainants was ongoing, the Respondent State passed Law No. 023 of 18 November 2002 on the military justice Code and its Article 276 provides for opposition

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[32] Cases such as 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).

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

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and appeal against the judgments delivered by the military courts. However, such a reform only partially settles the non-compliance with the Congolese criminal law and the African Charter, the violation of which has been noted in this Communication. Furthermore, the above-mentioned law does not obviate nor does it remedy the injuries suffered by the Complainants, some of whom languished in the corridor of death for a decade.

87. Under the provisions of Rule 112(2) of the Rules of Procedure of the Commission, when a decision is taken against the Respondent State, the parties must, within a period of one hundred and eighty (180) days, with effect from the date of notification of the decision, inform the Commission in writing about all measures taken or in the process of being taken by the Respondent State to give effect to the decision..

Decision of the Commission

The Commission,
For these reasons,

88. Declares that the Democratic Republic of Congo has not violated the provisions of Article 2 of the African Charter.

89. Declares on the other hand that the Democratic Republic of Congo has violated the provisions of Articles 5, 6, 7 and 18(1) of the African Charter. Consequently, it :

    a) Requests the Democratic Republic of Congo to align the provisions of Decree-Law No. 019 of 23 August 1997 establishing a military court with the standards of fair trial prescribed by the African Charter.

    b) Urgently requests the Democratic Republic of Congo to re-open and review the case in strict compliance with human rights standards at least for persons still in detention

    c) Requests the Democratic Republic of Congo to maintain its moratorium on capital punishment in accordance with the *Resolution of the Commission requesting States to envisage suspending the death penalty (1999)*.

    d) Further requests the Democratic Republic of Congo to compensate the Complainants fairly for the injuries suffered as a result of the

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violation of their human rights noted in this case. The cases of confiscation of property shall be resolved through restitution or complementary compensation. The amount of compensation shall be determined in accordance with Congolese domestic law.

e) Finally, requests the Democratic Republic of Congo to send a written report to the Commission within one hundred and eighty (180) days of notification of this decision regarding measures taken towards the implementation of these recommendations.

Adopted at the 54th Ordinary Session of the African Commission on Human and Peoples' Rights, held from 22 October to 5 November 2013 in Banjul, The Gambia.

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