



## International Covenant on Civil and Political Rights

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### Human Rights Committee

### Communication No. 1971/2010

#### Decision adopted by the Committee at its 113th session (16 March–2 April 2015)

<i>Submitted by:</i>	N.D.M.
<i>Alleged victim:</i>	The author
<i>State party:</i>	Democratic Republic of the Congo
<i>Date of communication:</i>	31 October 2008 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 August 2010 (not issued in document form)
<i>Date of decision:</i>	30 March 2015
<i>Subject matter:</i>	Enforced retirement of a judge
<i>Procedural issues:</i>	Lack of substantiation of claims; competence <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to effective remedy, right of equal access to the public service and prohibition of discrimination
<i>Articles of the Covenant:</i>	2; 3; 4, paragraph 3; 5; 6, paragraph 1; 10; 14; 25, subparagraph (c); and 26
<i>Article of the Optional Protocol:</i>	5, paragraph 2 (b)

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## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)**

concerning

#### **Communication No. 1971/2010\***

*Submitted by:* N.D.M.  
*Alleged victim:* The author  
*State party:* Democratic Republic of the Congo  
*Date of communication:* 31 October 2008 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting* on 30 March 2015,

*Having concluded* its consideration of communication No. 1971/2010, submitted by N.D.M. under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

#### **Decision on admissibility**

1. The author of the communication, dated 31 October 2008 and supplemented by submissions dated 8 December 2008, 23 March and 16 September 2009, is N.D.M., a national of the Democratic Republic of the Congo and former Advocate General of the Republic. Having been compelled to take retirement, he claims to be a victim of violations by the Democratic Republic of the Congo of articles 2; 3; 4, paragraph 3; 5; 6, paragraph 1; 10; 14; 25, subparagraph (c); and 26 of the International Covenant on Civil and Political Rights. The Democratic Republic of the Congo acceded to the Covenant on 1 November 1976. The author is not represented by counsel.

#### **The facts as submitted by the author**

2.1 Under Presidential Decrees Nos. 08/10, 08/11 and 08/12 of 9 February 2008, 115 judges and public prosecutors of the Supreme Court of Justice, the Court of Appeal, the

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Sarah Cleveland, Mr. Olivier de Frouville, Mr. Yuji Iwasawa, Ms. Ivana Jelić, Mr. Duncan Laki Muhumuza, Ms. Photini Pazartzis, Mr. Mauro Politi, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujall Seetulsingh, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Public Prosecutor's Office at the Supreme Court and the Prosecutor's Office at the Court of Appeal, including the author, were forced to retire. According to the Decrees, the decision was justified by the fact that all of the judges and public prosecutors concerned had "either reached 65 years of age or completed 35 years of uninterrupted service". As "the exceptional circumstances preclude[d] a meeting of the Supreme Council of Justice, which [wa]s not yet operational", and given the "necessity and urgency" of the situation, the Council of Ministers ordered their retirement "on the proposal of the Minister of Justice and Human Rights". The same day, other presidential orders were issued relating to the appointment and promotion of judges and public prosecutors, including to posts that had been occupied up to that time by some of the judges and public prosecutors forced into retirement.

2.2 The author challenges the legality of Presidential Decree No. 08/11, which relates to him. He states that he was not personally notified of the Decree and that he learned of his enforced retirement through the media. He adds that the law in force at the time<sup>1</sup> provided for the retirement of all judges at the age of 65, except for those working for the Supreme Court of Justice or the Public Prosecutor's Office at the Court, who could retire either at the age of 70 or after 35 years of uninterrupted service. The author points out that, having been born on 11 March 1944, he had not yet turned 65 when he was forced to retire. He further notes that he had also not completed 35 years of uninterrupted service as a judge, given that he joined the judiciary on 19 November 1970, was subsequently dismissed on 6 November 1998 and reinstated only on 12 February 2004, following a finding by the Human Rights Committee that the mass dismissal of 315 judges was in violation of the Covenant.<sup>2</sup>

2.3 The author claims that the Decree was issued by the President of the Republic on the proposal of the Minister of Justice and Human Rights, allegedly for reasons of necessity and urgency, despite the fact that only the Supreme Council of Justice was competent to propose such a measure. He states that there is no law authorizing the Minister of Justice to assume responsibility for managing judges' careers, even where the Supreme Council of Justice is unable to perform that duty. He also states that all the members of the Supreme Council of Justice were at a training seminar in Kinshasa on the day that the presidential decrees were adopted. The author considers that his enforced retirement is a result of the wrongful and unlawful influence of the executive branch over the judiciary, in violation of the principle of the separation of powers enshrined in the State party's Constitution.

2.4 On 17 February 2008, the author applied to the President of the Republic for reconsideration of his enforced retirement. On 10 March 2008, having received no response, he lodged another appeal with the Permanent Secretary of the Supreme Council of Justice, but again no action was taken. On 10 December 2008, following the entry into force of Organic Act No. 08/13 of 5 August 2008 on the organization and functioning of the Supreme Council of Justice, the author lodged a second appeal with the Permanent Secretary, with the same result. On 11 July 2008, the author appealed to the Supreme Court of Justice to rule Presidential Decree No. 08/11 invalid.

<sup>1</sup> Organic Act No. 06/020 of 10 October 2006 on the status of judges, art. 70.

<sup>2</sup> Communication No. 933/2000, *Adrien Mundayo Busyo, Thomas Osthudi Wongodi, René Sibumatubuka et al. v. Democratic Republic of the Congo*, Views adopted on 31 July 2003, in which the Committee found that the State party had violated article 14, paragraph 1, read in conjunction with article 25, subparagraph (c), in dismissing 315 judges under Presidential Decree No. 144 of 6 November 1998. The Decree stated that the 315 judges were "immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions". The Committee had observed that the established procedures and safeguards relating to disciplinary penalties such as the dismissal of judges had not been respected and were not in conformity with the principle of fairness or the adversarial principle. It had therefore concluded that the authors were entitled to be reinstated in their posts and to receive compensation.

2.5 At the same time, on 11 February 2008, the author and other judges who had been forced to retire by the presidential decrees applied collectively to the President of the Republic for reconsideration. On 18 February 2008, the group also lodged a petition with the Supreme Court of Justice to have the decrees declared unconstitutional. On 19 June 2009, the group sent a follow-up letter to the First President of the Supreme Court of Justice, who was acting chairperson of the Supreme Council of Justice. According to the information provided by the author, the appeals were all unsuccessful.

### **The complaint**

3.1 The author claims that the decrees in question are unlawful, discriminatory and arbitrary. None of the judges who were forced to retire met the requirements under article 70 of Organic Act No. 06/020 of 10 October 2006 on the status of judges (being over 65 or having completed 35 years of uninterrupted service), while some judges who did fulfil those criteria were confirmed in office or even promoted. According to the author, the enforced retirement of the judges, which was not justified by any particular urgency and seems at odds with the acknowledged shortage of judges in the Democratic Republic of the Congo, is attributable solely to the Government's desire to remove judges that it deems a nuisance. The author contends that, by forcing him to retire in order to promote individuals with close ties to the authorities, the State party violated articles 25 and 26, read in conjunction with article 2, of the Covenant.

3.2 The author further claims that the decrees were issued in violation of the procedures established by the State party's Constitution and its statutory regime relating to the retirement and dismissal of judges. Under articles 82, 149 and 152 of the Constitution, the President of the Republic may appoint judges and prosecutors, relieve them of their duties and, where appropriate, order their dismissal on the proposal of the Supreme Council of Justice, but not on the proposal of the Minister of Justice. The author requests the Committee to declare the presidential decrees in question unconstitutional and unlawful.

3.3 The author claims that his enforced retirement was in violation of article 3 of the Covenant, since the State party did not allow him to enjoy the civil and political rights enshrined in the Covenant on an equal footing with other citizens. He states that he was replaced by young judges who, in his view, rose to the rank of advocate general prematurely and undeservedly. He was also denied the opportunity to be granted the emeritus and honorary status and associated privileges reserved for judges and public prosecutors of the Supreme Court of Justice and the Public Prosecutor's Office at the Court at the end of their careers.

3.4 The author asserts that the State party is seeking to justify Presidential Decree No. 08/11 of 9 February 2008 by citing exceptional and urgent circumstances that have never been defined by the authorities and that have not been communicated by the State party, contrary to the requirement set forth under article 4, paragraph 3, of the Covenant. According to the author, this constitutes a violation of article 5 of the Covenant.

3.5 The author also submits that his enforced retirement, which has deprived him of a substantial part of his income at a time when the country is in crisis, is a violation of articles 6 and 10 of the Covenant.<sup>3</sup>

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<sup>3</sup> The author simply states that, by forcing him to retire, the State party has "taken away his life" and failed to respect the inherent dignity of the human person.

### The State party's failure to cooperate

4.1 Despite the requests and reminders the Committee sent to the State party on 28 June 2011, 2 November 2011 and 19 April 2012 asking for a reply to the author's allegations, the Committee has received no response.

4.2 The Committee notes that, under article 4, paragraph 2, of the Optional Protocol, a State party is under an obligation to cooperate by submitting to the Committee all the information at its disposal in good faith and within the established deadline, so as to enable the Committee to consider the communication in the light of all the evidence in the case and the arguments of both parties. The Committee finds it regrettable that the State party has failed to honour its obligation under the Optional Protocol.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 The Committee notes that the author has challenged his enforced retirement with the competent authorities on a number of occasions, but that the State party has not acted on any of those appeals. The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

5.4 The Committee considers, however, that the author's complaint that the facts as submitted constitute a violation of articles 3, 4, 5, 6, 10 and 14 of the Covenant has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.5 Moreover, the Committee recalls that it is not competent to verify the conformity of national legislation with the legislative or constitutional provisions of a State party's domestic law. Thus, in the present case, the Committee is not competent *ratione materiae* to verify the conformity of the Presidential Decree ordering the author's retirement with the legislative or constitutional provisions of the domestic law of the Democratic Republic of the Congo.

5.6 As to the alleged violation of articles 25, subparagraph (c), and 26, read in conjunction with article 2, of the Covenant, the Committee observes that article 25, subparagraph (c), confers a right of access, on general terms of equality, to public service, especially in the case of existing employees,<sup>4</sup> which means that, in principle, this complaint falls within its scope. The Committee notes, however, that the author has failed to provide any detailed evidence to substantiate his claim that his enforced retirement is attributable solely to the Government's desire to remove judges that it deems a nuisance and to promote individuals with close ties to the authorities.<sup>5</sup> Similarly, the Committee notes the absence of information concerning any prohibited ground of discrimination on the basis of which the

<sup>4</sup> See communications Nos. 422/1990, 423/1990 and 424/1990, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, Views adopted on 12 July 1996, para. 7.5.

<sup>5</sup> See communication No. 972/2001, *George Kazantzis v. Cyprus*, inadmissibility decision adopted on 7 August 2003, para. 6.4.

author was compelled to retire.<sup>6</sup> The Committee notes that the author has not substantiated these allegations for the purposes of admissibility. It thus concludes that his claims under articles 25, subparagraph (c), and 26 of the Covenant are inadmissible pursuant to article 2 of the Optional Protocol.

5.7 The Committee recalls its jurisprudence to the effect that article 2 of the Covenant can be invoked only in conjunction with claims of a violation of another substantive right protected by the Covenant.<sup>7</sup> The Committee also recalls that this article provides protection to alleged victims only if their claims are sufficiently well-founded to be arguable under the Covenant.<sup>8</sup> Considering that the author of the present communication has failed to substantiate, for the purposes of admissibility, his claims under articles 25, subparagraph (c), and 26, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
  - (b) That this decision shall be transmitted to the author and to the State party.
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<sup>6</sup> See communication No. 1182/2003, *Savvas Karatsis v. Cyprus*, inadmissibility decision adopted on 25 July 2005, para. 6.2.

<sup>7</sup> See communication No. 1062/2002, *Stanislav Šmídek v. Czech Republic*, inadmissibility decision adopted on 25 July 2006, para. 11.6.

<sup>8</sup> *Idem*.