

Communication 259/2002 - Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo

Rapporteurs

- 14th Extraordinary Session: Commissioner Reine Alapini-Gansou

Summary of the Facts

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 19 September 2002, against the Democratic Republic of Congo (DRC), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹ The Complaint was filed by a group of lawyers (Messrs Roger M. Buhereko, Emmanuel Nongera, Marcel Westh'Okonda, Sylvie Diulu and Kathy Byenda) belonging to the *Groupe de Travail sur les Dossiers Judiciaires Stratégiques* (Working Group on Strategic Legal Cases).
2. The above-mentioned lawyers are acting as legal counsels on behalf of the following seven (7) persons, the alleged victims of the Complaint:
 - a) Diyavanga Nkuyu;
 - b) Mbumba Ilunga;
 - c) Mwati Kabwe;
 - d) Bosey Jean Louis;
 - e) Banga Djunga;
 - f) Nanasi Kisala; and
 - g) Oscar Mwita (father of Joseph Kasongo).

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

3. The Complainants submit that pursuant to Article 5 of the Executive Order No. 019 of 23 August 1997 establishing the Military Court in the Democratic Republic of Congo, the following sentences were handed down to the individuals mentioned below :

- a) Diyavanga Nkuyu (born in March 1984): was sentenced to death on 6 February 1999 by the Matadi military court for “criminal conspiracy”.
- b) Mbumba Ilunga (born on 26 February 1984): was sentenced to death on 13 September 2000 by the Mbandaka military court for “voluntary manslaughter”.
- c) Mwati Kabwe (born on 15 May 1984): was sentenced to death on 13 September 2000 by the Mbandaka military court for “manslaughter”.
- d) Bosey Jean Louis (born on 25 May 1984): was sentenced to death on 5 June 1999 by the Mbandaka military court for “manslaughter”.
- e) Banga Djunga (born on 9 May 1984): was sentenced to death on 8 August 1999 by the Mbandaka military court for “weapons distribution”.
- f) Nanasi Kisala (born in 1984): was sentenced to death on 27 April 2001 by the Mbandaka military court.
- g) Joseph Kasongo (born in May 1986): was sentenced to death by the Military Court of Kinshasa for “criminal conspiracy and murder in time of war”.

4. All the persons thus convicted had their sentences commuted to life imprisonment except Joseph Kasongo, who is presumed to have been executed on 15 January 2002 immediately after the sentence was handed down.

The Complaint

5. The Complainants allege that the facts presented above are a violation of Articles 1, 3, 4, and 7 of the African Charter and therefore pray the Commission to condemn the Respondent State to :
 - a. Ensure that the ordinary Criminal Procedure Code is respected ;
 - b. Ensure that the Decree of 6 December 1950 on juvenile delinquency is enforced, particularly the Article 5 thereof ;
 - c. Put an end to all activities of the Military Court in its current form and institute a two-tier judicial system to guarantee the right of minors to a fair trial ;
 - d. Urge the Democratic Republic of Congo to pay compensation to the victims of the above-mentioned violations.

PROCEDURE

6. The Complaint was submitted to the Secretariat of the African Commission on Human and Peoples' Rights (the Commission) on 19 September 2002.
7. On 2 December 2002, the Secretariat of the Commission acknowledged receipt of the Communication and informed the Complainants that their Complaint would be submitted to the Commission for seizure at the 32nd Ordinary Session scheduled to be held in October 2002 in Banjul, The Gambia.

8. At the 32nd Ordinary Session, the Commission considered the Communication and decided to be seized of it. Per Note Verbale of 2 December 2002, the Secretariat notified the Respondent State by forwarding a copy of the Complaint to it and requested for its arguments on admissibility within three (3) months. The Complainants were also informed about this decision by letter dated 3 December 2002.
9. At the 33rd Ordinary Session held from 15 to 19 May 2003 in Niamey, Niger, as there was no response from the Respondent State, the Commission decided to defer the consideration of the Communication to its 34th Ordinary Session.
10. On 26 June 2003, the Secretariat sent a Note Verbale by DHL to the Respondent State informing it about the decision taken at the 33rd Ordinary Session of the Commission. By the same Note Verbale, the Secretariat transmitted a copy of the Complaint to the State by reminding it to submit its arguments on admissibility of the Communication. On the same day, the Complainants were informed of the decision of the Commission. On 23 September 2003, a new Note Verbale was sent as a reminder to the Respondent State.
11. At the 34th Ordinary Session held from 6 to 20 November 2003 in Banjul, The Gambia, the Commission examined the Communication. Based on the fact that the Respondent State had still not reacted to the series of correspondence sent to it, requesting for its arguments on admissibility, the Commission decided to postpone the Communication to its 35th Ordinary Session for a decision on admissibility. Furthermore, a copy of the Communication was delivered to the delegation which represented the Respondent State at the 34th Ordinary Session of the Commission
12. By electronic mail dated 29 October 2003, the Minister of Foreign Affairs of the Democratic Republic of Congo informed the Secretariat that he had not received all

the previous correspondence transmitted to him. The Secretariat therefore reacted to that request the same day. Additionally, a copy of the Communication was delivered by the Commission's delegation on a mission to the Democratic Republic of Congo at the beginning of 2004.² By letter dated 28 November 2003, the Secretariat also informed the Complainants about developments in the case.

13. In January 2004, the Respondent State forwarded its submissions on admissibility of the Communication to the Secretariat. The Secretariat acknowledged receipt and transmitted same to the Complainants. On 1st June 2004, on the margins of the 35th Ordinary Session of the Commission, the Complainants submitted their response which was transmitted to the delegation representing the Respondent State at that session.
14. At the 35th Ordinary Session, the Commission examined the Communication and declared that it was admissible. On 13 August 2004, the Secretariat notified the parties about this decision and requested them to submit their arguments on merits of the Communication.
15. At the 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal, in the absence of a reaction from the parties, the Commission decided to defer its decision to the 37th Ordinary Session. On 20 December 2004, the Secretariat informed the parties about this decision and reminded them to submit their arguments on the merits of the Communication.
16. At the 37th Ordinary Session held from 27 April to 11 May 2005 in Banjul, The Gambia, the Commission considered the Communication. As the submissions of the parties on the merits had not been received, it decided to defer its decision to its 38th

² Promotion mission of Commissioners Andrew R. Chigovera and Sanji M. Monageng to the Democratic Republic of Congo from 12 to 24 January 2004.

Ordinary Session. By letters dated 24 June 2005, the Secretariat notified the parties about the decision and requested them to forward their submissions on the merits.

17. At the 38th Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the Commission decided once again to defer its decision as the parties had not yet presented their submissions. On 6 December 2005, the Secretariat notified the parties about this decision and requested them to present their memoranda on the merits.
18. On 28 February 2006, the Complainants submitted their arguments on the merits to the Secretariat. The Secretariat acknowledged receipt of the arguments on 20 March 2006 and transmitted a copy to the Respondent State on the same date, requesting it to make its submissions within three (3) months.
19. At its 39th Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the Commission decided to postpone its decision to the 40th Ordinary Session in the absence of arguments by the Respondent State on the merits. The parties were informed about the Commission's decision by letters dated 30 June 2006.
20. At its 40th Ordinary Session held from 15 to 29 November 2006 in Banjul, The Gambia, the Commission examined the Communication and decided to defer its decision on the merits to its 41st ordinary session. The parties were informed accordingly about the postponement on 7 December 2006 and 10 January 2007 respectively. The Respondent State was reminded to present its arguments on the merits.
21. At its 41st Ordinary Session held from 16 to 30 May 2007 in Accra, Ghana, the Commission examined the Communication and decided to postpone the merits of the case to the 42nd Ordinary Session. The decision on the postponement was

communicated to the parties by Note Verbale and by letter dated 20 June 2007. The Secretariat expressly reminded the Respondent State to submit its arguments on the merits.

22. On 17 September 2007, the Secretariat sent a new Note Verbale to the Respondent State reminding it that the Commission was still waiting for the submissions on the merits of the Communication, and that if it failed to react, the Commission would be compelled to take a decision on the basis of information provided by the Complainants.
23. At the 42nd Ordinary Session of the Commission held from 15 to 29 November 2007 in Brazzaville, Congo, the Secretariat received the submissions of the Respondent State on the merits of the Communication. At that Session, the Commission examined the Communication and decided to defer its decision on the merits to its 43rd Ordinary Session. By Note Verbale and Letter dated 19 December 2007, the Secretariat acknowledged receipt of the submissions on the merits of the Communication and transmitted a copy of these submissions to the Complainants.
24. At this consideration stage of the Communication, the Commission requested for additional information from the parties as to the national court whose decision constitutes the main source of information of the allegations of violation brought before the Commission. In the absence of a response from the parties, the Secretariat forwarded several reminders to the parties before notifying them that at its 50th Ordinary Session scheduled to be held from 24 October to 7 November 2011 in Banjul, The Gambia, it will examine the Communication without the aforesaid decision.
25. On 15 November 2011, the Secretariat informed the parties that the Commission examined the Communication at its 50th Ordinary Session but as a result of time

constraints, it had decided to defer the consideration of merits to its 51st Ordinary Session to be held from 18 April to 2 May 2012 in Banjul, The Gambia. On 31 May 2012, the decision to postpone it once again to the 52nd Ordinary Session was communicated to the parties.

26. At its 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire, the Commission examined the Communication and decided to postpone it again to enable the Secretariat to prepare a draft decision on the merits. The Secretariat informed the parties about the decision by letters dated 13 November 2012.

THE LAW

Admissibility

The Complainants' submissions on Admissibility

27. In their submissions on admissibility, the Complainants aver that the contents of the Communication are actually true and tangible facts: it concerns some minors who were sentenced by a Court, the rulings of which cannot be appealed against. According to them, it is not a Communication based on the collection of media reports but it presents tangible facts that have been proved on the basis of legal texts and rulings by authorities of the Respondent State.

28. With regard to the requirement for the exhaustion of local remedies, the Complainants contend that the sentences handed down by the Military Court to the victims cited above cannot be appealed against. Indeed, according to them, Article 5 of Decree No. 019 of 23 August 1997 establishing the Military Courts stipulates that

its rulings “can neither be opposed nor appealed against”. The Complainants believe that remedies are not available, and therefore the Communication must be declared admissible.

29. On the existence of alternative means of redress such as pardon set out in the provisions of Article 175 on the Executive Decision on the Organisation of the Judicial System establishing the Rules of Procedure of Courts, Tribunals and Public Prosecutors’ Offices, the Complainants believe that it is only a non jurisdictional and ineffective remedy at the discretion of public authorities. The Complainants refer to the decision in *Amnesty International and Others v. Sudan* by asserting that such remedies are not accepted by the Commission.³

30. On the argument of the Respondent State according to which the complaints lodged in this Communication are said to have been settled by Decree No. 084/2002 of 2 August 2002, the Complainants aver that the above Decree was issued in August 2002 whereas the sentences handed down to the victims identified in the Communication date as far back as February 1999 for previous cases and the most recent ones occurred in April 2001. This Decree, according to the Complainants, would address the situation of the victims without doing away the serious injury suffered by the victims for having been tried illegally and sentenced to death by a law and tribunal under the scope and competence of which they did not fall.

The Submissions of the Respondent State on Admissibility

31. In its submissions on admissibility, the Respondent State contends for its part that the Communication should be declared inadmissible on the grounds that it does not

³ See *Amnesty International and Others v. Sudan* Communications 48/90, 50/91, 52/91 and 89/93 (2000) RADH 323 (ACHPR 1999).

refer to actual facts but to a collection of media reports and that it deals with an issue which has already been settled.

32. The Respondent State is also of the opinion that the Communication contains inaccuracies in that the Complainants aver that the death sentences were commuted to life imprisonment whereas it was rather otherwise in view of the implementation of the above-mentioned Decree. Such a situation, according to the Respondent State, should lead to inadmissibility of the Communication.
33. On the point of exhaustion of local remedies, the Respondent State recognizes that the Orders of the Military Court cannot be appealed against but submits that a remedy was always available against its Orders. According to the Respondent State, the provisions of Article 175 of the Executive Decision on the Organization of the Judicial System establishing the Rules of Courts, Tribunals and Public Prosecutors' Offices⁴ provides for compulsory appeal for a pardon by the Officer of the Public Prosecutor's Office in case the death penalty is handed down as a last resort.
34. The Respondent State further contends that it is in pursuance of this provision that the Head of State issued a Decree on 2 August 2002 in relation to special measures of pardon for child soldiers and other minors sentenced to the death penalty and other repressive punishments. The Respondent State submits that Diyavanga Nkuyu and Bosey Jean Louis had their death penalty commuted to release for Government service while the capital punishment handed down to Mwati Kabwe, Mbumba Ilunga and Banga Djunga were commuted to imprisonment for 5 years. As for Nanasi Kisala, he is said to have obtained relief from the provisions of Articles 3 and 4 of the above-mentioned Decree by which the death penalty is commuted to time in a government reform school until the 21st birthday or five years in prison.

⁴ Order No 299/79 of 20 August 1979.

35. Finally, the Respondent State contends that Complaints for which the Communication was filed had already been resolved under Decree No. 084/2002 of 2 August 2002 which, as indicated above, had commuted the death sentences into measures for release for Government service or time-bound imprisonments. All these, according to the Respondent State should lead to inadmissibility of the Communication.

The Commission's analysis on Admissibility

36. This Communication was filed in accordance with Article 55 of the African Charter which stipulates that the Commission may receive and consider "Communications other than those of State Parties". Under Article 56 of the Charter, Communications received pursuant to Article 55 must meet the following conditions before they can be declared admissible:

1. Indicate the identity of their authors even if the latter request anonymity;
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Are not written in a disparaging or insulting language directed against the State concerned and its institutions or to the organization 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 to the Commission that this procedure for remedies 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 of the matter;
7. Do not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of the present Charter.

37. In this Communication, the parties agree that all the conditions prescribed in Article 56 have been met except the one which prohibits the use of information based

exclusively on the media, and the condition of the exhaustion of local remedies. Consequently, the Commission's consideration of the admissibility of the Communication will focus mainly on finding out if these two conditions have been met.

38. On the issue of respect for the provisions of Article 56(3) of the Charter, while the Complainants assert the Communication is based on actual facts, the Respondent State argues that the information presented is a collection of media reports.

39. In this regard, the Commission notes that the Complainants do not refer to media sources in their submissions. The requests put forward in their submissions are supported by legal texts and judicial rulings from authorities of the Respondent State. For instance, this applies to the capital punishments delivered by the Court Martial, the legality of which originates, among others, from Executive Order No 019 of 23 August 1997 establishing Military Courts and the Executive Decision on the Organization of the Judicial System establishing the Rules of Procedure of Courts, Tribunals and Public Prosecutors' Offices.

40. By examining the information in the submissions of the Complainants, the Commission is convinced that by presenting proof of the capital punishments handed down to the victims and the circumstances relating to their imposition, the Complainants did not limit themselves exclusively to information from media sources. If it had been otherwise, the claims of the Respondent State made on the basis of the same information as those of the Complainants would also not be received. By the way, the Commission notes that the Communication is consistent with the requirements of Article 56(3) of the Charter.

41. With regard to the respect for the provisions of Article 56(5) of the Charter, the Respondent State considers that the Communication should be declared

inadmissible as the Complainants have failed to exhaust an existing remedy. Furthermore, the State of Rwanda contends that the complaints lodged in the Communication had been settled by the national authorities.

42. The analysis of the arguments presented on this point shows the Commission that none of the parties disputes the fact that the persons identified in the Communication as victims were tried and sentenced by a judicial institution of the Respondent State (the Military Court) the rulings of which cannot be appealed against.
43. That such a fact has been established does not necessarily lead the Commission to set aside the submissions of the Respondent State according to which Article 175 of Decree 084/2002 of 2 August 2002 provides a remedy to the effect that the Public Prosecutor's Office has power to apply for pardon for convicted persons, in this case the victims in this Communication. However, the Commission considers that the remedy provided in this particular circumstance is not jurisdictional and that its implementation is dependent on the discretion of public authorities. Such remedies do not meet the requirements established by the Commission's jurisprudence which considers that remedies, the exhaustion of which is required of the Complainant, are mainly judicial or jurisdictional. The decision of the Commission in *Cudjoe v. Ghana* case clearly illustrates this position.⁵
44. On another aspect of the submission seeking to establish the non-exhaustion of local remedies to the Commission, the Respondent State argues about the existence of an alternative remedy, in this case a presidential pardon set out under an Executive Order 084/2002 issued by the Head of State. To tackle this issue, the Commission recalls that the local remedies, the exhaustion of which is required from the Complainant, must meet the criteria of being *available, effective and sufficient* as seen

⁵ See *Cudjoe v. Ghana* Communication 221/98 (2000) AHRLR 127 (ACHPR 1999) para 13.

in *Jawara v. The Gambia*.⁶ In this case, the Commission held that a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.⁷ The Commission considers that this is actually not the case in this particular Communication because the remedy set out in Article 175 of Executive Order No. 084/2002 of 2 August 2002 is not likely to resolve the alleged violation by the Complainants. Indeed, the Complainants allege that minors are presumed to have been tried and sentenced as a last resort by an institution under the competence of which they did not fall.

45. Rwanda for its part submits that the victims had their sentences commuted to lesser penalties thanks to the above-mentioned Executive Order and therefore the complaints referred to in the Communication lose their prospect and relevance. According to the Respondent State, the implementation of the Order in question should have provided an avenue for the settlement of the complaints lodged in the Communication and the Commission should have drawn conclusions from it by declaring the Communication inadmissible.

46. In this regard, the Commission is rather of the opinion that as the death penalties imposed unjustly on the victims as a measure of last resort had been commuted to various terms of imprisonment, it does not in any way settle the violation perpetrated against the child soldiers, even though it reduces the effects. In this instance, the principle governing the effectiveness of human rights remedies is that the violations must be remedied, and the Respondent State cannot be absolved from this obligation by adopting mitigating measures or alternative measures. The Commission adopts this principle in *Civil Liberties Organisation v. Nigeria* by deciding that “measures on acquittal or repeal of legislation do not in any way affect the

⁶ See *Sir Dawda K. Jawara v. Gambia* Communication 147/95-149/96 (2000) RADH 107 (2000) para 31.

⁷ See *Jawara* para 32. Emphasis by the Commission.

violations perpetrated, neither does it absolve governments of their obligations for the said violations".⁸ Though the presidential Decree was unable to resolve the violations perpetrated before its enforcement, the remedy offered by the said Decree could not constitute an effective and sufficient remedy under Article 56(5) of the Charter. The Commission concludes that the Communication complied with the requirement for exhaustion of local remedies.

47. The Commission notes that the Communication is not based exclusively on news disseminated through the mass media. The Commission also notes that the victims were sentenced to life imprisonment by a court whose decisions cannot be appealed before any other national court. The Commission further notes that as the subsequent measures taken to mitigate the sentences imposed could not resolve the alleged violations, they could not be considered effective and sufficient remedies likely to be exhausted by the Complainants. As such, the Commission concludes that the Communication meets the conditions under Article 56 of the African Charter.

Decision of the Commission on Admissibility

48. In view of the foregoing, the Commission declares the Communication admissible.

THE MERITS

The submissions of the Complainants on the Merits

49. The Complainants allege that Articles 1, 3, 4 and 7 of the African Charter have been violated. However, it must be noted that the submissions transmitted by the Complainants on the merits of the Communication do not directly address the provisions of the Charter. The Complainants rather attempt to demonstrate that the

⁸ *Civil Liberties Organisation v. Nigeria* Communication 129/94 (2000) RADH 190 (ACHPR 1995) para 17.

facts presented constitute violations of international legal instruments and the Congolese national legislation.

50. On international legal instruments, the Complainants allege the violation of children's rights to special judicial treatment guaranteed by Article 40(3) of the Convention on the Rights of the Child, set out in Articles 2(1) and 12(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and Article 5 of the Decree of 6 December 1950 on delinquent children. They further allege that the right of children to judicial assistance stipulated in Article 17(2)(c)(iii) of the African Charter on the Rights and Welfare of the Child and Article 40(2)(b)(ii) of the Convention on the Rights of the Child has been violated.

51. The Complainants, under the same instruments, also allege the violation of the prohibition of the application of juvenile death penalty under Article 6(5) of the International Covenant on Civil and Political Rights, Article 37(9) of the Convention on the Rights of the Child and Articles 6 and 8 of the Decree of 6 December 1950. Also alleged to have been violated are the right to the publicity of proceedings, the right of persons facing the death penalty to judicial assistance, the right to a second hearing guaranteed by Article 40(2)(b)(v) of the Convention on the Rights of the Child, Article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child and Article 19 of the Decree of 6 December 1950.

52. Concerning the issue raised on merits, the Complainants allege that while the DRC is duty-bound under the terms of Article 1 of the Charter to take all the necessary legislative measures for the implementation of the rights prescribed by the Charter, the State did not harmonize its domestic legislation with the international instruments to which it is a party. According to the Complainants, this failure provided the grounds for the enforcement of domestic laws that are inconsistent

with the provisions of the Charter and international human rights law. Such enforcement was the basis for the sentencing of the victims to capital punishment.

53. Concerning the violation of Article 3 of the Charter, the Complainants did not provide any submission in support of such an allegation. In respect of allegations of violation of Article 4 of the Charter, the Complainants contend that the international instruments, which the DRC is a party to, prohibit the imposition of the death penalty on persons below 18 years. According to the Complainants, the death penalty delivered by the Military Court violates the obligations of the Respondent State under the said instruments.

54. As far as the violation of Article 7 of the Charter is concerned, the Complainants fundamentally allege that the inability of the victims to appeal against the decision of the Military Tribunal is a violation of the right of access to remedies. Furthermore, the Complainants allege under international law and Congolese legislation, these juveniles should not have been tried by a Military Court which is not competent under the current circumstances to try the case. In conclusion, the Complainants also believe that as the victims did not receive judicial assistance in spite of their specific situation, it violates their right to a fair trial.

The submissions of the Respondent State on the merits

55. The Respondent State did not make any submissions on allegations of violation of Articles 1 and 3 of the Charter. In respect of Article 4, the State contends that the victims were child soldiers tried for more serious offences, in particularly criminal conspiracy, armed robbery and murder, all of which attract the death penalty under the national legislation. In addition, the DRC reports that the victims fell within the military jurisdiction. The key submission invoked by the Respondent State is that

the sentence handed down to them had never been enforced and that the sentences were commuted thanks to a presidential Decree.

56. On the violation of Article 7 of the Charter, the Respondent State asserts that the facts fell within the competence of a Military Court established by law. As for the non compliance with the principle of second hearing, the DRC believes that the sentences were not eventually enforced as the convicts enjoyed a pardon. On the issue of judicial assistance, the State contends that the victims received judicial assistance and called on the Complainants to prove the contrary.

The Commission's analysis on the Merits

57. On the issue of submissions alleging the violation of the national laws and international instruments referred to by the Complainants, the Commission would like to make two preliminary clarifications. Regarding the national laws, the Commission notes that it is not competent to decide if the actions of the Respondent State are consistent with its national laws. The Commission is only competent to verify if the national laws and the Respondent State's actions are consistent with the African Charter. Regarding international human rights instruments other than the African Charter, the Commission notes that States are sovereign entities under international law. That being the case, the convention of international obligations establishes that an obligation falls on a State in as far as the latter has acceded to it by becoming a party to the legal instrument or authorizing a specified entity to take up the burden of such obligation.

58. In the area of human rights, the sovereignty and subscription to such obligations often result in the adoption of conventions proclaiming rights and freedoms and determining their protection mechanism. These mechanisms are formalized by the establishment of international bodies with a mandate to establish the violation of

such rights and freedoms by State Parties and to indicate, where necessary, the measures to be taken to remedy such a violation. For instance, the International Covenant on Civil and Political Rights instituted a United Nations Human Rights Committee. Similarly, the African Charter on the Rights and Welfare of the Child established a Committee on the Rights and Welfare of the Child whereas the African Charter on Human and Peoples' Rights created this Commission.

59. Thus, the Commission was specifically established to ensure the promotion and protection of human and peoples' rights incorporated in the Charter. The fact still remains that pursuant to the provisions of Article 60 of the Charter, the Commission can draw inspiration from the principles of international human rights law, in particular the ones prescribed in other international conventions. However, the fact that the Commission is permitted to use these conventions does not provide it the mandate to ensure the monitoring of its implementation. The relevant provisions of the Charter must rather be interpreted as a possibility for the Commission to apply these principles to determine the content and the scope of the rights guaranteed by the Charter.
60. Consequently, the Commission will not take a decision on the alleged violations of the above-mentioned conventions and the Congolese legislation, as the follow-up of the implementation of these standards do not fall under its remit. Additionally, the Complainants have not established a link with the provisions of the said instruments and the rights guaranteed under the Charter. In fact, the Commission will determine whether Articles 1, 3, 4 and 7 of the Charter have been violated based on the facts and submissions made available by the parties.
61. Under Article 1 of the Charter, "The Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms

enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”.

62. These provisions impose a positive obligation on States Parties to define the legal framework for the enjoyment of the rights and freedoms contained in the Charter within the confines of their respective territories. They do not specifically establish rights and freedoms for individuals. However, the failure of a State to ensure the implementation of its obligation under Article 1 of the Charter can create an avenue for the violation of substantive rights or at least limit their enjoyment. The Commission, in *Jawara* declared that the violation of any right contained in the Charter is also a violation of Article 1 in that it shows the failure by a State Party to take the necessary measures for the enjoyment of this right.⁹ This means that any allegation of violation of this Article must be supported with evidence for disregard of another substantive right guaranteed by the Charter.
63. In the light of the foregoing, prior to the determination of a possible violation of Article 1, the Commission examines the alleged violation of substantive rights guaranteed by Articles 3, 4, and 7 of the Charter. The violation of Article 1 will therefore set off action for the substantive rights protected by each of the above-mentioned provisions on the assumption that the Commission will conclude that these rights have been violated.
64. While Article 3(1) of the Charter stipulates that every individual shall be equal before the law, Article 3(2) provides that every individual shall be entitled to equal protection of the law. The facts as submitted by the Complainants do not establish at any point that a law in the legal framework of the Respondent State treats individuals differently or protects other categories of citizens more or less better than others. In their submissions on the merits, the Complainants do not provide

⁹ See *Jawara v. The Gambia* Communication 147/95-149/96 (2000) RADH 107 (2000) para 46.

any evidence either of any statute or discriminatory treatment before the law. The Commission therefore notes that Article 3 of the African Charter was not violated.

65. Under Article 4 of the African Charter, “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”. A literal interpretation of these provisions suggests that the Charter establishes the sanctity of human life but prohibits only arbitrary infringements on the right to life and the physical and moral integrity of his person. It can be inferred that in extreme cases where such a breach is unavoidable, it must not be arbitrary; this means that it must be consistent with the law.
66. Even so, such an approach of the qualification of the right to life is both restrictive and non-objective. The Commission recalls that one of the peculiarities of the African Charter is that it does not include any general limitation clause. The spirit behind the absence of such a general limitation must be understood as the desire to avoid abusive restriction of rights, a restriction which will be applied only under very limited and legally circumscribed conditions. The proportionality and the necessity of the limitation are therefore recalled by the Commission, among others, in the decisions regarding *Media Rights Agenda and Others v. Nigeria*¹⁰ and *Amnesty International and Others v. Sudan*.¹¹
67. It is precisely in the light of this meaning to be ascribed to such a legal framework that the said restriction by the Charter must be understood in relation to the enjoyment of the right to life and other rights as well. Indeed, the Commission has recalled time and again that where the Charter prescribes the restriction of the enjoyment or limitation of a right in accordance with the law, the standard referred

¹⁰ Communications 105/93, 128/94, 130/94 and 152/96 (2000) RADH 202 (ACHPR 1998) paras 64-71.

¹¹ Communications 48/90, 50/91, 52/91 and 89/93 (2000) RADH 323 (ACHPR 1999) paras 50, 80, 82.

to cannot exclusively be targeted at the domestic legislation of the State. Such a law is applicable to both domestic legislation and international standards, while bearing in mind that the domestic legislation itself must be consistent with the international obligations of the State concerned. Thus, the Commission decided in *Malawi African Association v. Mauritania* that the limitations imposed “within the context of the law” must be in accordance with the obligations under the Charter.¹² The Commission goes much further, among others, in its decision in *Amnesty International v. Zambia*, to explain that such limitations must not be at variance with the Constitution of the State nor international standards.¹³

68. With particular reference to the limitation of rights applied to the protection of the right to life in the spirit of the African Charter, the Commission is of the opinion that the approach to be adopted towards the effective protection of human rights must be an appropriate and objective one. Such an approach should be a liberal and proactive one. In fact, in addition to establishing the *inviolable*¹⁴ nature of the right to life in its Article 4, the text of the African Charter does not make any reference to the death penalty unlike other international instruments such as the International Covenant on Civil and Political Rights (ICCPR).

69. It can be inferred that the Charter does not allow the death penalty to be imposed with the exception of the right to life, the inviolability of which is declared. The Commission however confirms it by taking a position in *Interights and Others (on behalf of Bosch) v. Botswana*, that even though the respect for the rights to a fair trial is guaranteed in the procedure leading to the imposition of the death penalty, nobody

¹² *Malawi African Association v. Mauritania* Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000) RADH 148 (ACHPR 2000) paras 102, 104, 113. See also *Media Rights Agenda v. Nigeria* Communication 224/98 (2000) RADH 273 (ACHPR 2000) paras 74-75.

¹³ *Amnesty International v. Zambia* Communication 212/98 (2000) RADH 359 (ACHPR 1999) para 42. See also *Civil Liberties Organisation (on behalf of the Nigerian Bar Association) v. Nigeria* Communication 101/93 (2000) RADH 187 (ACHPR 1995) para 15.

¹⁴ Emphasis by the Commission.

can in contemporary times overlook the purely abolitionist trend of the States towards this punishment.¹⁵ The Commission, in its decision then, called on Botswana to take the necessary measures to comply with its Resolution requesting the Member States to consider suspending the death penalty.¹⁶ Significantly, the Commission based its recommendation for the suspension of the death penalty, among others, on the universal trend towards abolition, reflected in the adoption of the Second Optional Protocol to the ICCPR and the constant increase in the number countries that had become *de facto* abolitionists.

70. Whatever one may say, the legality of the violation of the right to life through the imposition of the death penalty cannot be considered as an absolute restriction. These are evidenced by the specific exceptions provided for on this matter by international standards. It is on this point that the African Commission can make a real difference as enjoined in Article 60 of its Charter to draw inspiration from the other international human rights instruments. In the circumstances of the case, the Commission deems it appropriate to have recourse to this source of inspiration particularly with regard to the instruments for the protection of the rights of the child.

71. In order to carry out this, the Commission notes that many international obligations, to which the Democratic Republic of Congo has committed itself, prohibit the imposition of the death penalty on children. We cannot refer to this subject without mentioning the fundamental standard on this matter which is Article 6(5) of the International Covenant on Civil and Political Rights expressed in the following terms “a death sentence *cannot* be imposed for crimes committed by individuals

¹⁵ *Interights and Others (on behalf of Bosch) v. Botswana* Communication 240/2001 (2003) RADH 57 (ACHPR 2003) paras 42-52.

¹⁶ See The African Commission on Human and Peoples’ Rights ‘Resolution requesting the States to consider suspending the death penalty’ adopted at the 26th Ordinary Session of the Commission held from 1st to 15 November 1999 in Kigali, Rwanda.

who are below 18 years". Even if it were to be assumed that the concept of arbitrariness would maintain an open window on the limitation of the right to life protected by Article 4 of the Charter, one actually realizes that the provisions of Article 6 of the Covenant, among others, exclude persons who are less than 18 years from the limitation of the right to life, even legally, from the imposition of the death penalty. A similar protection is guaranteed by Article 37(9) of the United Nations Convention on the Rights of the Child which stipulates that "Neither capital punishment nor life imprisonment without the possibility of release shall be handed down for offences committed by persons below 18 years". Needless to strive for the interpretation in order to observe that the very act of imposing such sentences against juveniles constitutes an arbitrary interference in the right to life and the integrity of these persons, an act which is prohibited by Article 4 of the African Charter.

72. In this particular instance, the State does not dispute the fact that the death penalty was actually handed down to the victims whereas they were juveniles. Even though the State shows proof that the capital punishments were subsequently commuted to lesser penalties, the fact is that this measure will not change the established reality of a violation of a right to life by the imposition of this penalty. As per the decision in *Civil Liberties Organisation v. Nigeria* cited above, the Commission recalls that the adoption of alternative measures sequel to the violation cannot be used as an excuse by the State. Based on these considerations, the Commission concludes that Article 4 of the Charter was violated, that is when a cross review is carried out in relation to Article 60 of the Charter.

73. Though the violation of the right to life has been noted, the parties still do not agree on the enforcement of the sentence in the case of Joseph Kasongo only a few minutes after the sentence was imposed. Though the Complainants do not provide any proof of its enforcement, the Respondent State could also not prove that having been

sentenced and the ruling commuted; Joseph Kasongo served his term in a State institution. The Commission however notes that this Communication mainly alleges the delivery of a death penalty against individuals below 18 years and not on the execution of the sentences handed down. There is no doubt that only the sentencing of Joseph Kasongo to capital punishment, which has not been contested by the Respondent State, is relevant in this case. The violation of Article 4 of the African Charter noted above consequently applies to Joseph Kasongo.

74. In respect of Articles 7(1)(a) and 7(1)(c) of the Charter, the violation of which is specifically alleged by the Complainants, their provisions stipulate that :

1. Every individual shall have his cause heard. This comprises:
 - (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulation and customs in force;
 - (c) The right to defence, including the right to be defended by counsel of his choice.

75. With regard to Article 7(1)(a), the Commission refers to its *Directives and Principles on the Right to a Fair Hearing in Africa* to recall that even though the principle of second hearing has not become an obligation under international law , the fact still remains that it is one's right to be given a fair hearing.¹⁷ Similarly, the gravity of the sentences handed down may render the availability of a second hearing necessary for an efficient administration of justice. This applies therefore to instances where the court judgment is the death penalty or life imprisonment.¹⁸

76. From established jurisprudence, the Commission considers the right of appeal against a judicial decision as a fundamental aspect of the rights to a fair trial. The

¹⁷ See The African Commission on Human and Peoples' Rights 'Directives and Principles on the Right to a Fair Trial and Judicial Assistance in Africa' (2001) point A(2)(j).

¹⁸ Op. cit. point C(10)(b).

Commission affirms such a position in *Women's Legal Aid Center (on behalf of Moto) v. Tanzania*¹⁹ but also more significantly in the famous decision in *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria* dealing specifically with arbitrary deprivation of an *inviolable* right to life enshrined in Article 4 of the African Charter.²⁰

77. The Commission is of the view that the established necessity by its jurisprudence of an indispensable guarantee of the right of appeal and second hearing is still more urgent in cases where international standards to which the State has an obligation exempt some categories of persons – particularly children and pregnant women – from the imposition or execution of these sentences. In the cases involving these categories of persons, it is necessary for them to be able to challenge the legality of such sentences when they are handed down by a national judicial organ which rules in first and last instance.

78. Furthermore, and from a more general perspective, the Commission notes that even if the Charter does not expressly provide for a right to remedy, such a right can be generated implicitly and automatically by the numerous rights protected by the Charter. It is obvious that an instrument cannot protect such a number of rights without providing a right to a remedy and appeal when established rights are violated. In the absence of the right to remedy and appeal, the other rights under the Charter would be sheer illusion and vain proclamations. The only requirement of exhaustion of existing, effective and satisfactory domestic remedies as a prerequisite for admissibility of the Complaints brought before the Commission is sufficient to convince oneself of the existence of a right to remedy and appeal in the Charter.

¹⁹ *Women's Legal Aid Center (on behalf of Moto) v. Tanzania* Communication 243/2001 (2004) RADH 120 (ACHPR 2004) para 47.

²⁰ *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria* Communications 137/94, 139/94, 154/96 et 161/97 (2000) RADH 217 (ACHPR 2000) paras 88, 91-93. Emphasis by the Commission

79. In this instance, the Commission has already concluded that the sentencing of minors to the capital punishment by a Military Court is a violation of their right to life guaranteed by Article 4 of the Charter in cross review with other international obligations binding the Democratic Republic of Congo. The Commission notes that the parties are in agreement on the right of appeal in this present Communication, and also on the fact that the decisions of the Military Court cannot be opposed nor appealed against. It is obvious that the victims did not have the opportunity to access an alternative remedy before the competent national courts whereas the provisions of Article 7(1)(a) of the Charter provide them such a right.
80. On this issue, the Respondent State reiterates the possibility of a presidential pardon. As indicated above, the Commission considers that this pardon cannot be viewed as a jurisdictional remedy as it depends on the goodwill of the President of the Republic. The Respondent State further submits that the Military Court was abolished by Law No. 023/2002 of 18 November 2002 and replaced by military jurisdictions that conform to the principle of second appeal. However, this abolition, from the perspective of the Commission, does not also make up for the past violations actually suffered by the victims. In the light of the foregoing, the Commission notes that the provisions of Article 7(1)(a) of the Charter were violated.
81. The Complainants also allege that the provisions of Article 7(1)(c) of the Charter have been violated as it specifies that any individual has « the right to defence , including the right to be defended by counsel of his choice ». The Commission recalls that the right to assistance by a counsel is fundamental to a transparent and fair trial. In its *Directives on the Right to a Fair Trial*, the Commission lays particular emphasis on the urgent need to guarantee the choice of counsel in cases where

accused persons face capital punishment.²¹ This need is one of the anchor points in the position taken in *Purohit and Moore v. The Gambia* where the Commission declared that, in circumstances where the decision has the potential of touching, among others, the life of persons concerned, the rights to be heard and to be represented become necessary.²²

82. However, such a representation before the court can be illusive in cases where the accused persons are not in a position to provide that. It is precisely under such circumstances that the mechanism of judicial assistance comes in at exactly the right time. The principle which underlines the mechanism of judicial assistance is that it is the responsibility of the State to provide a lawyer for the defense of persons who are incapable of paying for such services. In this regard, in its *Directives on the right to a fair trial*, the Commission places key emphasis on certain specific circumstances where judicial assistance is fundamental. The Directive H(c) which governs aid and judicial assistance prescribes that “the interest of justice *always*²³ requires that the accused person facing capital punishment be represented by a lawyer”.
83. The Complainants allege that during their trial before the Military Court, the victims did not receive judicial assistance from a counsel, and much less a counsel of their choice whereas the crimes for which they were being prosecuted were punishable by the death penalty. The Democratic Republic of Congo contests these facts, without providing any proof to the contrary. Additionally, the Respondent State does not provide any specific reference in respect of provisions on judicial assistance in its national legislation; neither does it provide any proof that the assistance is applicable before the Special Court which is the Military Court. Thus, failing to transmit to the Commission the Order for the automatic appointment of a counsel

²¹ Directives on the right to a fair trial, op. cit. point H(c).

²² See *Purohit and Moore v. Gambia* Communication 241/01 paras 71-72. See also *Constitutional Rights Project (concerning Zamani Lakwot and six others) v. Nigeria* Communication 87/93 para 12.

²³ Emphasis by the Commission.

by the President of the Court which tried the case, the Respondent State simply kept on placing the burden of proof on the Complainants. The Commission is of the opinion that having automatically appointed a counsel, the burden of proof now lies with the State.

84. Even assuming that these provisions are available, their accessibility alone cannot guarantee that the victims in this particular Communication actually received judicial assistance. On this issue, the Commission recalls that where the burden of proof lies with the State to discharge an obligation, it is not enough to indicate the measures taken to that effect. The issue is to show the relevance of such measures and to prove in what manner they satisfied the specific requirement of the Complainant, namely the right of accused persons to judicial assistance. The United Nations Human Rights Committee adopted the same position in *Sankara v. Burkina Faso*.²⁴ In this case, the Respondent State could not prove that the persons identified as victims of this Communication did actually receive judicial assistance. In these circumstances, the Commission notes that the provisions of Article 7(1)(c) of the Charter have not been complied with.

85. As indicated above, the violation of Article 1 of the Charter cannot be established except under the condition of the violation of substantive rights and for the provisions for which the violation has been noted. As a result of the violations of substantive rights thus established, the Commission also notes the violation of Article 1 of the Charter, at least in respect of rights protected under Articles 4, 7(1)(a) and 7(1)(c) of the Charter, the violation of which has been established.

Prayers of the Complainants

²⁴ *Sankara v. Burkina Faso* Communication 1159/2003 (2006) AHRLR 23 (HRC 2006) para 6.5.

86. In their submissions on the merits, the Complainants pray the Commission to request the State to:

1. Ensure that the ordinary criminal procedure Code is complied with ;
2. Ensure that the Decree of 6 December 1950 on delinquent children is put into effect, particularly its Article 5 thereof; and
3. Put an end to the activities of the Military Court in its current form and institute a two-tier judicial system to ensure that juveniles are given a fair trial.

The Complainants also pray the Commission to urge the Democratic Republic of Congo to pay compensation to the victims of the alleged violations.

87. The Commission notes that the Complainants are not contesting the fact that the Military Court has been abolished by Law No. 023/2002 of 18 November 2002 and replaced with military courts that are consistent with the two-tier judicial system. As this request has been satisfied, the Commission must set it aside from the consideration of the prayers of the Complainants.

88. Having concluded on the violation of the provisions of Articles 1, 4, 7(1)(a) and 7(1)(c) of the Charter, the Commission granted the requests of the Complainants. It is obvious that action must be taken on the various requests, including reparation. The Commission recognizes the intangible principle of the right to reparation for the harm suffered as a result of a violation of the provisions of the Charter.²⁵ The Commission also recognized the need to pay monetary compensation to the victims should they request for it in this case.²⁶ Nevertheless, it is clear that the assessment

²⁵ See *Abubakar v. Ghana* Communication 103/93 (2000) RADH 116 (ACHPR 1996) para 17 ; *Pagnouille (on behalf of Mazou) v. Cameroon* Communication 39/90 (2000) RADH 61 (ACHPR 1997) para 31.

²⁶ See *Embga Mekongo Louis v. Cameroon* Communication 59/91 (2000) RADH 60 (ACHPR 1995) para 2 ; *Antoine Bissangou v. Congo* Communication 253/02 (2006) AHRLR 80 (ACHPR 2006).

of the *quantum* of such compensation is at the discretion of the courts and national authorities of the Respondent State.²⁷

89. Considering the evaluation of damages suffered by the victims of this case, the Commission notes the unduly long procedures both before the domestic courts and the Commission. Altogether, about ten years have elapsed since the seizure of the Commission. Moreover, the lack of communication of evidence and due process on the part of the Respondent State, prolonged the procedure. The Commission further notes that the victims were minors at the time of the events and commencement of the procedure before the Commission. Furthermore, the victims were child soldiers. Finally, these children had the privilege of being represented by a group of lawyers who have formed a non-governmental organization in a procedure for which expenses have been incurred.

90. The Commission notes that under the provisions of Article 112(2) of its Rules of Procedure, when a decision is awarded against a Respondent State, the parties must within a period of one hundred and eighty (180) days with effect from the notification of the decision, inform the Commission in writing about all the measures taken or which are in the process of being taken by the Respondent State to give effect to the decision.

Decision of the Commission on the Merits

**The Commission,
For these reasons,**

91. Declares that Article 3 of the African Charter was not violated.

²⁷ See *Kenneth Good v. Botswana* Communication 313/05 (2010) AHRLR 43 (ACHPR 2010) para 245.

92. Declares that the Democratic Republic of Congo violated the provisions of Articles 1, 4 and 7(1)(a) as well as 7(1)(c) of the African Charter. Consequently, the Commission:

- i. Strongly recommends to the Democratic Republic of Congo to harmonize its legislation with its international human rights obligations.
- ii. Recommends specifically to the Democratic Republic of Congo to ensure the enforcement of the ordinary Criminal Procedure Code and all other legislative and regulatory texts in line with the African Charter and other international human rights instruments to which it is a party.
- iii. Urgently recommends to the Democratic Republic of Congo to pay compensation to the victims, the amount involved to be calculated according to Congolese legislation by taking into consideration the injury suffered, the duration of the procedure and the expenses incurred.
- iv. Finally, requests the Democratic Republic of Congo to provide a written report within one hundred and eighty (180) days of notification of this decision on measures taken to implement these recommendations.

Adopted at the 14th Extraordinary Session of the African Commission on Human and peoples' Rights, held from 20 to 24 July 2011, Nairobi, Kenya