

247/2002 – Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) /Democratic Republic of Congo

Rapporteur:

31st Session: Commissioner Angela Melo

32nd Session: Commissioner Angela Melo

33rd Session: Commissioner Angela Melo

Summary of Facts:

1. The Complainant, Mr Jean Simbarakiye, is a national of Burundi currently a refugee in Lomé, Togo.
2. He is assisted by the Institute for Human Rights and Development in Africa, an NGO with observer status with the African Commission, with its head office at Banjul, Gambia, P.O. Box 1896, Tel. 220 962280/954131, Fax: 220 49 41 78, Email:info@africaninstitute.org; Website:WWW.AFRICANEINSTITUTE.ORG. Mr Jean Simbarakiye states that -:
3. He arrived in Zaire, now Democratic Republic of Congo, in 1974 where he obtained the status of political refugee granted and recognised by the Republic of Zaire and the United Nations High Commission for Refugees.
4. He did his University studies there up to 1984 and, in 1989, he was employed as a civil electrical engineer by Office National des Transports (ONATRA) for and on behalf of the State of Zaire.
5. In 1996, following the war between the Democratic Republic of Congo and Burundi, Uganda and Rwanda in the East of the country, the Haut Conseil de la République, i.e. the Transitional Parliament, during its session held on 31st October 1996, adopted Resolution No. 04/HCR6PT/96 by which it was decided to “terminate work contracts for all Rwandan, Burundian and Ugandan subjects...”
6. Pursuant to this decision, Mr. Jean Simbarakiye was dismissed on 3rd January 1997, without prior notice nor compensation, by ONATRA, for the sole reason of being of Burundi origin.
7. He has three children, and his wife is a Congolese (DRC) national.
8. The communication also alleges also that from January 1997, when he was dismissed without prior notice or compensation, to June 1997, when he left DRC, Mr Simbarakiye made numerous but unsuccessful attempts to obtain justice by approaching the Congolese Authorities.
9. Due to moral and material pressure, he was forced to leave DRC in June 1997 and took refuge in Lomé, Togo, where he continued enjoying the status of refugee, without having exhausted local remedies.

10. He continued his contacts with the Chargé d’Affaires of DRC in Lomé and, through him, sent a letter on 21st February 2000 to the Minister of Justice of DRC but, all in all, all his efforts, just like those of his wife after he left DRC in June 1997 till her own departure for Lomé in 2000, were not fruitful.

The Complaint

11. The communication alleges Resolution No. 4 of the Haut Conseil de la République, the Transitional Parliament of the Democratic Republic of Congo violates Articles 1, 2, 3, 7, 14, 15 and 18 of the African Charter.

Procedure

12. The communication was received by the Secretariat of the African Commission on 3rd April 2002, which acknowledged receipt of the same to Counsel of the Complainant, the Institute for Human Rights and Development on 4th April 2002.
13. At its 31st Ordinary Session held in Pretoria, South Africa, from 2nd to 16th May 2002, the African Commission decided to be seized of the communication and referred consideration of the admissibility of the case to its 32nd Ordinary Session.
14. The Secretariat informed the concerned parties through a Note Verbale and a letter dated 27th June 2002. In response, the Complainant, through his counsel, filed his submissions on the admissibility of the communication, which were received at the Secretariat of the African Commission on 12/8/2002.
15. The Government of DRC, through H.E. the Minister for Human Rights, acknowledged receipt of the correspondence from the Secretariat of the African Commission concerning the communication by a letter dated 20th July 2002 and referenced 737 and which was received at the Secretariat on 26th December 2002.
16. The DRC delegation to the 32nd Ordinary Session of the African Commission held in Banjul, The Gambia, from 17th to 23rd October 2002, handed to the Secretariat of the African Commission the submissions of the Government on the admissibility of Communication 247/2002.
17. The African Commission deferred consideration of the communication to its 33rd Ordinary Session scheduled for Niamey, Niger, from 15th to 29th May 2003.
18. By Note Verbale and a letter dated 2nd December 2002, the Secretariat of the African Commission informed the parties of the African Commission’s decision and forwarded the documents submitted by each of the parties.
19. On 31st January 2003, the Complainant sent to the Secretariat written submissions in reply to the submissions of the Government of DRC.
20. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

A. LAW

Admissibility

21. The Complainant alleges that he did not exhaust local remedies because he was subjected to moral and material pressure.
22. The Government of DRC submitted that he did not provide proof of the impracticability to exhaust local remedies while he was in the DRC and in Lomé, Togo, in June 1997.
23. In fact, the Government of DRC explains that local remedies exist and are available and that even in Togo, the Complainant had the possibility of taking legal action before bringing the matter before the African Commission.
24. Article 56(5) of the African Charter on Human and Peoples' Rights requires that communications sent to the African Commission shall be considered if they ".... are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."
25. Article 56 aims thus at enabling, among others, the Respondent Government to be aware of the harmful effects of its actions on human rights and look into the possibility of taking corrective measures before being sued to an international court.
26. As far as the African Commission is concerned, the existence of a local remedy should be both theoretical and practical, a condition without which the local remedy in question would be neither available nor effective.
27. Such is the case when, for objective reasons, the Complainant cannot take his case to the courts of the Respondent State in conditions that guarantee him a fair trial.
28. The African Commission has indeed never admitted that the condition of exhaustion of local remedies apply ipso facto for receiving a communication, when it finds it illogical to require the exhaustion of local remedies.
29. To support his allegations relating to the impossibility for him to exhaust local remedies, the Complainant exhaustively referred to the African Commission's previous decisions through the following communications -:
 - Communication 39/90: Annette Pagnoule on behalf of Abdoulaye Mazou/Cameroun¹;
 - Communication 103/93: Alhassan Abubakar/Ghana²
 - Communications No. 147/95 and 149/96³;
 - Communications (consolidated) 25/89, 47/90, 56/91, 100/94⁴ - Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Internationale des Droits de l'Homme, Les Témoins de Jéhovah/Zaire;

¹ **Communication 39/90: Annette Pagnoule on behalf of Abdoulaye Mazou/Cameroon.** The Complainant had taken numerous legal actions both non contentious and contentious without any success. The Commission felt then that local remedies had been exhausted.

² **Communication 103/93: - Alhassane Aboubacar/Ghana:** the Complainant was sentenced and sent to prison. Following his escape from prison, he took refuge abroad and seized the African Commission. The African Commission felt that it was not logical to ask him to return and exhaust local remedies in Ghana.

³ **Communication 147/95 and 149/96 – Dawda Jawara/The Gambia** The Complainant was a Head of State who had been toppled and sentenced in absentia. The African Commission felt that local remedies were not available and that in such conditions, it was not logical to ask him to return to The Gambia to exhaust local remedies.

- Communication 71/92⁵: Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia ; and
 - Communication 74/92⁶ - Commission Nationale des Droits de l'Homme et des Libertés/Chad.
30. The African Commission feels that none of these communications are identical with the communication brought by the Complainant who, moreover did not attempt to exhaust local remedies prior to bringing the matter before the African Commission in 2002.
31. Considering that he left DRC in June 1997, there is no indication that he attempted to exhaust local remedies whilst in Togo nor did his wife (who remained in DRC until November 2002) attempt to take any action to exhaust local remedies.
32. Furthermore, the Complainant does not provide evidence showing the moral and material constraints alleged to have prevented him from exhausting local remedies available under the laws of DRC.
33. For these reasons, and in accordance with Article 56(5) of the African Charter, the African Commission,

Declares this communication inadmissible for non-exhaustion of local remedies.

*Done at the 33rd Ordinary Session held in Niamey, Niger,
from 15th to 29th May 2003*

⁴ **Communications (consolidated) 25/89, 47/90, 56/91, 100/94:** Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Internationale des Droits de l'Homme, Les Témoins de Jéhovah/Zaire. Considering that the condition of exhaustion of local remedies was not applicable to the letter when it is neither practical nor desirable that the Complainant seizes the courts for each violation, the African Commission declared the consolidated communications admissible due to the nature of the violations which were serious and massive violations of human rights.

⁵ **Communication 71/92 – Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia:** The Commission felt that the condition of exhaustion of local remedies does not mean that Complainants must exhaust local remedies when, in practical terms, these are neither available nor practical.

⁶ **Communication No. 71/92 – Commission Nationale des Droits de l'Homme et des Libertés/Chad.** The African Commission felt that it could not be asked of the Complainant to exhaust local remedies when he would not be in a position to seize the national courts.