281/2003 - Marcel Wetsh'okonda Koso and others/Democratic Republic of Congo

Summary of Facts:

1. On 23rd September 2003, the Secretariat of the African Commission on Human and Peoples' Rights received from Barrister Marcel Wetsh' Okonda Koso, solicitor of the Kinshasa-Gombe Bench and of the NGO "Campagne pour les Droits de l' Homme au Congo[1], from Barrister Izua Kembo, solicitor of the Kinshasa- Gombe Bench and member of the NGO "comite' des Observateurs des Droits de l' Homme[2], and from Barrister Odette Disu, solicitor and member of the Kinshasa- Gombe Bench, and of the NGO "ASMEBOKEN"[3] a Communication, introduced on behalf of 5 persons as follows:
    - Ngimbi Nkiama Gaby, Contractor, born on 19.04.1958 in Kinshasa
    - Bukasa musenga, Trade Inspector, born on 25.09.1967 in Kinshasa
    - Duza kade willy, Soldier, born on 30.10.1963 in Lisala
    - Issa Yaba, Femala Soldier, born on 10.04.1958 in Irebu, and
    - Musalinsa Manoy, Soldier, born on 10.05.1958

2. The Communication is introduced against the Democratic Republic of Congo, (State signatory[4] to the African Charter, and hereinafter referred to as DRC in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

3. The Complainants allege that, on 23.07.1999, the said Ngimbo Nkiama placed an order for the supply of 3.5 cubic metres of petrol at ELF (a petroleum company) which he was supposed to collect on 26.06.1999 at SEP/Congo. But the said Ngimbi Nkiama was arrested by policemen who are said to have discovered a supply of 6 drums in surplus following his collection of 40 drums of fuel instead of the 34 drums of fuel he initially ordered for.

4. Besides, the Complainants maintain that on 04.08.1999 the said Ngimbi Nkiama was arrested and sent to the *Conseil National de Sécurite* quarters together with four jointly – accused persons, Bukasa Musenga, Duza Kade Willy, Issa Yaba, and Muzaliwa Manoy.

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[1] CDHC- Asbl, 18 Avenue Basoko, commune of Ngaliema, Telephone: 00243 98186937

[2] African Commission on Human and Peoples' Rights since October, 2001 (30th Ordinary Session).
CODHO, Kinshasa-Gombe, commune of Kalamu, Telephone: 00243 9947822

[3] Association Benjamin Moloise and Ken Saro Wiwa for the Defence of Human Rights and the Development of Africa, 4251, Avenue Kabasele Tshamala- Kinshasa Barumbu Telephone 0024398212201; Email: groupe strategique @ yahoo.co, disuodette @ yahoo. Fr

[4] The DRC ratified the African Charted on 20/07/1984)

5. According to the Complainants, on the 11.09.1999, the said Ngimbi Nkiama and the jointly – accused persons were arraigned before the Military Court of DRC for " partaking, during war time, in the committing of acts of sabotage "by the diversion of 70 drums of gas-oil and of 40 drums of gas-oil belonging to the Congolese Armed Forces".

6. And that the Military Court comprising 5 judges (among whom would be only one trained jurist) tried the said Ngimbi Nkiama and his jointly-accused accomplices for the evidence adduced against and sentenced them to a capital punishment, a "*decree on a ground without the least justification"* and the right to file an appeal against the decree; the decisions of the Military Court being not susceptible *either for a review or for an appeal* (decree No.091 of 23.08.1997 establishing the Military Court of *DRC).*

The Complaint:

7. The Complainants allege that the above-mentioned facts constitute a violation by the DRC of Articles 7 (a) and 26 of the African Charter and of paragraph 3 of the *Provision for the right to the means of an appeal and of a fair trial*, adopted by the African Commission during its 11th Ordinary Session held in Tunis, Tunisia from 2 to 9 March 1992.

8. Furthermore, the Complainants maintain that the aforementioned facts constitute a violation by the DRC of the Article 14(1) of International Covenant on Civil and Political Rights.

9. Consequently, the Complainants request the African Commission to:

   - Declare Decree No. 019 of 23.08.1997, establishing a court for military order and its Article 5, contrary to the international commitments of the DRC as far as fair trial is concerned as stipulated in the African Charter;
   - Declare that the sole fact of submitting a dispute case to a Court the majority of whose members have no legal qualification whatsoever, constitutes a flagrant violation of Article 26 of the African Charter;
   - Declare that the judicial decisions on a *simple ground without the least justification* grossly breach the right and liberties acknowledged by the African Charter and violate the provisions of Article 7 of this latter;
   - Direct the immediate release of the sentenced persons and the reparation for all the prejudices they have suffered;
   - Request the DRC to harmonise all her legislation with the commitments this State subscribed to at international level and namely the African Charter and to initiate reforms so as to prevent further human right violations.

The Procedure:

10. On 21.10.2003, the Secretariat of the African Commission acknowledged receipt of this Communication to the Complainants through a letter with reference No. ACHPR/COMM 281/ 2003.

11. During its 34th Ordinary Session held from the 6th to 19th November 2003 in Banjul, The Gambia, the African Commission examined this Communication and approved its seizure.

12. On the 14/12/2003, the African Commission notified the Respondent State of this decision by DHL, and at the same time conveyed to it a copy of the Complaint. The African Commission had also requested the Democratic Republic of Congo to provide it, in two months, with its reactions on this Complaint to enable it take a decision on its admissibility during its 35th Ordinary Session.

13. On the 12th February 2004 and in the absence of any reaction from the Respondent State, the African Commission sent a copy of the Complaint in question with an acknowledgement of receipt to the Ministry of Foreign Affairs, requesting its reaction as early as possible.

14. At its 35th Ordinary Session which was held from the 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered the Communication and deferred its decision on the admissibility of the case since the delegation of the Respondent State which had participated at the Session declared, contrary to all expectations, that the Complaint had not reached the DRC.

15. The Secretariat of the Commission prepared a complete dossier of all the pending Communications against the DRC, including Communication 281/2003, which it delivered in exchange for a receipt, to the DRC delegation.

16. By letter dated 21st June 2004, the Secretariat of the Commission informed the Parties to the Communication of the deferment of its decision on the admissibility of the Complaint to its 36th Session and requested them, once again, to provide it with their comments in this regard so as to allow the African Commission to rule on the admissibility during its 36th Session.

17. On the 16/09/2004, the Respondent State sent its comments on the admissibility of the Communication to the Secretariat of the Commission.

18. The Secretariat acknowledged receipt of it on the 11/10/2004, and sent the said comments to the Complainant requesting his reaction thereon as early as possible.

19. During the 36th Ordinary Session of the African Commission which was held in November/December 2004 in Dakar, Senegal, the Respondent State submitted its memorandum on the admissibility of the Complaint to the Secretariat of the African Commission.

20. On the 4th December 2004, the Secretariat of the African Commission acknowledged receipt of this memorandum and informed the Respondent State that the African Commission would take its decision on admissibility of the Complaint at its 37th Ordinary Session and would the arguments raised would be taken into account.

21. On the 23rd December 2004, the Secretariat of the African Commission conveyed the submission of the Respondent State on admissibility to the Complainant, and requested his reaction to the arguments submitted therein and further informed him that the African Commission would take its decision on the admissibility during its 37th Ordinary Session.

22. At its 37th Ordinary Session which took place from the 27th April to 11th May 2005 in Banjul, The Gambia, the African Commission heard the Complainant on the condition of the exhaustion of local remedies.

23. During this same Session, the African Commission declared the Communication admissible.

24. On the 6th June 2005, the Secretariat informed the Parties of this decision and requested them to transmit their arguments on the merits of the case.

25. On the 6th September 2005, the Complainant submitted his arguments on the merits of the Complaint.

26. The Secretariat conveyed these observations to the Respondent State on the 8th November 2005 at the same time requesting its own memorandum as early as possible.

27. During its 38th Ordinary Session, which was held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the complaint and, in the absence of the arguments of the Respondent State on the merits of the case, decided to differ its decision at this stage to its 39th Ordinary Session.

28. On 10/01/2006, the Secretariat of the African Commission informed the parties of this decision and requested the Respondent State to forward its arguments on the merits of the communication.

29. In the absence of reaction from the Respondent State, the Secretariat sent a reminder on 28/03/2006. A copy of the submission of the Complainant on merits of the case was enclosed.

30. In a note verbale dated July 12, 2006, the Secretariat urged DRC to provide with its observations on the merits by no later than 30 August 2006. The Secretariat further reminded DRC of previous notes verbale sent respectively on June 06, 2005, November 08, 2005 and January 10, 2006 all of which still with no reaction from respondent State.

31. At its 40th ordinary session held in Banjul, the Gambia from 15 to 29 November 2006, the Commission deferred its decision on the merits to its 41st ordinary session scheduled to be held in Ghana from 16 to 30 May 2007 owing to the absence of arguments on the merits from the respondent State.

32. On 15 January 2007, the Secretariat informed DRC of the decision of the Commission to differ the complaint to its 41st ordinary session and reminded DRC of previous notes verbales in which DRC was invited to send its observations on the merits. However, DRC was given the last chance to formulate and send its observations on the merits before the end of February 2007, failing to do so would result in the Commission having to act in accordance with article 119 (4) of its rules of procedure.

33. On 16 January 2007, the Secretariat informed the Complainants of the postponement of its decision on the merits to the 41st ordinary session scheduled to be held from 16 to 30 May 2007 in Ghana. The Secretariat informed also the Complainants that DRC was given a last chance to provide the Commission with its arguments on the merits failing of which, the Commission would be obliged to act in accordance with article 119 (4) of its rules of procedure.

34. In a note verbale dated June 14 2007, the Secretariat of the Commission informed the Defendant State that the communication was deferred to the 42nd ordinary scheduled from 14 to 28 November 2007 in Brazzaville, Congo. The State was also reminded of previous note verbales in which it was urged to submit it arguments as regard to the merit of the communication and that failing to do so may result in the application of rule 119 (4) of the rule of procedure.. The respondent State is still yet to respond to these note verbales.

35. A letter dated June 15, 2007 the Secretariat informed the Complainant of the deferment of the communication to the 42nd ordinary session scheduled from 14 to 28 November 2007 in Brazzaville, Congo

36. In a note verbale dated 17 September 2007 and a letter dated 17 September, 2007 the Secretariat of the Commission African also sent a reminder both to the Complainant and the Defendant State.

37. By Note Verbale dated 20 March, 2008 and a letter dated 19 December, 2007 respectively, the parties were informed of the deferment of the communication to the 43rd ordinary session scheduled in Ezulwini, Swaziland from 7th to 22nd May, 2008 for the Commission to take into consideration in its decision on the merits, the conclusions submitted by the DRC on the merits.

38. In a Note verbale dated 20 March, 2008, and a letter dated 19 March, 2008, reminders were sent to the parties to inform them of the deferment of the communication to the 43rd ordinary session.

The Law :
Admissibility :

39. The African Charter on Human and Peoples' Rights stipulates in its Article 56 that the Communications referred to in Article 55 should, if they are to be considered, necessarily be sent after exhaustion of local remedies, if they exist, unless the procedure of exhaustion of local remedies is unduly prolonged.

40. In this context, the Complainant contends that his Complaint is admissible because the sentences passed by the Military Tribunal with regard to the victims listed above cannot be subjected to any remedies. In effect Article 5 of Decree 019 of the 23rd August, 1997 establishing the Military Tribunal stipulates that its rulings "can neither be opposed nor appealed".

41. The Complainant further contends that an eventual recourse to cancellation of the judgment in question, although provided for by Article 272 of the Law of 23rd August 1972 instituting the Code of Military Justice, cannot be implemented due lack of "jurisdictional competence". The Complainant considers therefore the means of local remedies are not available in this case.

42. In its memorandum on admissibility which it transmitted to the Secretariat of the Commission in December 2004, the Respondent State contends that as far as it is concerned the Communication should be declared inadmissible. In support of this position the Respondent State affirms that the Complainant "does not provide evidence of having lodged an appeal against

the ruling in dispute, whereas this means of recourse remains open, in conformity with Article 150, paragraph 3 of the Transitional Constitution in the Democratic Republic of Congo".

43. According to the Respondent State, it was possible, on the basis of Article 150 of the D.R. Congo's Transitional Constitution, to lodge an appeal before the Supreme Court of Justice, against all rulings by the Military Tribunal which are in dispute.

44. By not using this remedy, contends the Respondent State, the Complainant has not exhausted the available remedies and therefore, it requests the African Commission to declare the Communication inadmissible for non exhaustion of local remedies.

45. In a memorandum conveyed to the Secretariat of the African Commission on the 17th April 2005, the Complainant insisted on the non existence of remedies against the said ruling which was passed by the Military Tribunal.

46. Concerning the argument of the Respondent State according to which the Complainant "*does not provide evidence of having lodged an appeal against the disputed ruling whereas this remedy remains open in conformity with Article 150, paragraph 3 of the Transitional Constitution of the Democratic Republic of Congo*", whereas it was possible, according to this Article, to bring an appeal before the Supreme Court, against all the rulings passed by the Military Tribunal, the Complainant counters that the facts of this case date back to 1999 and could in no way be governed by the Transitional Constitution which had been adopted on the 4th April 2003, namely, four (4) years after.

47. The Complainant contends that the Transitional Constitution Decree of the 9th April 1994 (in force at the time of the events – 1999) stipulates in its Article 102 that: "*The Supreme Court of Justice knows……appeals lodged against rulings passed in the final jurisdiction by the Courts and Tribunals*".

48. At the 37th Ordinary Session of the African Commission which was held from the 27th April to 11th May 2005 in Banjul, The Gambia, the Complainant made an oral presentation before the African Commission in reiteration of these arguments.

Position of the African Commission:

49. The Respondent State considers that the Communication should be declared inadmissible as a local remedy exists which the Complainant did not use, namely, the lodging of an appeal before the Supreme Court of Justice, against the ruling which sentenced the alleged victims in the

Complaint, in conformity with Article 150, paragraph 3 of the Constitution of the Republic.

50. In effect, pleads the Respondent State, the Complainant has a remedy against the disputed rulings passed by the Military Tribunal: the lodging of an appeal before the Supreme Court of Justice.

51. The Respondent State contends that since the Complainant did not use this remedy, he did not exhaust all the local remedies and cannot therefore ask the African Commission to declare the Communication admissible.

52. Whereas the Complainant has proven that the remedy to which the Respondent State is referring did not exist at the time when the events of the Complaint took place. In effect, the events in question took place in 1999 whereas the 1994 Transitional Constitution was in force. That according to the provisions of Article 102 of the said Constitution, the Supreme Court of Justice could only know of "appeals lodged against rulings passed in final jurisdiction by the Courts and Tribunals".

53. From the foregoing arguments it would appear that the Complainant did not have, at the time the events took place, any remedies against the said rulings, since these remedies only came years later, with the help of the adoption of the Transitional Constitution of the 4th April 2003.

54. In consequence, the African Commission rules that local remedies were not available to the Complainant.

55. On these grounds, the African Commission declares the Communication admissible.

The Merits

56 In accordance with rule 120 of the Rules of Procedure of the African Commission, where a communication submitted in accordance with article 55 of the Charter has been declared admissible, the Commission "shall consider the Communication in the light of all the information that the individual and the State party concerned have submitted in writing, it shall make known its observation on this issue."

57 It is noteworthy that, in such cases, the conclusions brought to the dossier by the two parties both in terms of the procedure and on the merits of the case enables the Commission to make pronouncements through the presentation and analysis of the arguments of the parties to the suit.

The arguments of the Complainants

58 The Complainants submit the violation of the African Charter in its article 7(a) (b) and (d) and article 24. The Complainants contest the ruling against the victims by the Military Court in view of its mode of establishment, competence, and illegal procedure which contravenes the African Charter on Human and Peoples' Rights to which the Respondent State is a party.

59 Regarding the establishment of the Military Court, the Complainant avers that this establishment contravenes article 96 (1) of the Transitional Constitution which stipulates that "courts, tribunals and war councils shall only be established by the Law. No special commissions or tribunals shall be set up in any form whatsoever."

60 The Complainant contends the incompetence of the said court due to its membership whose partiality was manifested by the inclusion of members of the military corps, what with their legendary regimentation and discipline, exacerbated by the fact that the later lacked the qualities of a magistrate. To support these assertions, the Complainant recalled the decision of Communication 218/98[5] in which the African Commission decided that the "Military tribunal" should be bound by the norms of equity, transparency, justice, independent rules and respect for the legal process of other courts"

61 The Complainant also avers that the procedural situation was exacerbated by the excessive powers of the members of the court who purportedly, followed a very arbitrary procedure in violation of article 137 of the Military Code of Justice, dated 25 September, according to which, "the procedure before military jurisdictions shall be that in force before the common law jurisdictions, in conformity with the provisions of the normal Criminal Code which are not incompatible with those of the present code."

62 According to the Complainants, there is no possible redress allowing them to contest the decision of the court which sentenced the plaintiffs to death: according to article 5 of the decree-law establishing the said court, neither can the decisions be appealed against nor opposed. The Complainants contend that the sentencing of the plaintiffs to death without the possibility of appeal constitutes a violation of article 6 of the Guarantees for the Protection of persons sentenced to death. Article 6 stipulates that "any individual sentenced to death is entitled to file an appeal with a higher court, and measures should be taken to ensure that the appeals are mandatory."

[5] Civil liberties organisation, legal defense center, legal defense and assistance project c. Nigeria

63 The Complainants also recalled the ruling of the Human Rights Committee in the case of **Arutynyam vs Uzbekistan** which states "sentencing to death following a trial during which the provisions of the Convention were not respected constitutes a violation of article 6 of the Convention where no further appeal can be brought against the verdict[6]. The Complainant further avers that the said ruling of the court was not reasoned considering that the authorities refused to convey to the plaintiffs the ruling pronouncing their sentence despite all the attempts to that effect.

64 Consequently, the Complainants call for the immediate release of the plaintiffs and prays the African Commission to call on the Government of the Democratic Republic of Congo to grant each victim the sum of 10, 000, 000 Congolese Francs as damages.

The arguments of the Respondent State

65 The State refutes all the allegations of the Complainants. The State submits that all the said allegations are unfounded.

66 Pertaining to the establishment of the Military Court whose impartiality, independence and competence are being challenged by the Complainant, the DR Congolese State responded that the decision to establish a Military Court was in conformity with article 156 (2) of the Constitution which empowers the Head of State to suspend Common Law Courts in the some or all parts of the territory, and to replace them by Military Courts in times of war. As the Congolese state was engaged in an armed conflict situation following the armed aggression led by its neighbours, the State was merely implementing the said provisions of the Constitution.

67 The Respondent State observes that it is under these special circumstances that the plaintiffs were tried and sentenced in all legality and avers that the latter have not adduced any proof of their assertion that the ruling as passed was not reasoned.

68 Regarding the complaint brought by the Complainants pertaining to article 5 of the decree – law establishing the Military Court, the State Respondent alleges that the Complainants could have lodged an appeal to bring to the fore their allegations, in accordance with article 150 of the Transitional Constitution, which recognizes the competence of the Supreme Court to sit on decisions made by the lowest and highest courts.

69 The Respondent State concludes that there is no room for compensation as the plaintiffs were found guilty, and eventually released from custody.

[6] Report of the Human Rights Committee, vol.I, A/59/40 (voll),Nations Unies ,New York,2004 p.111

The Congolese State further alleges that it has subsequently harmonized its laws with its international commitments.

Observations of the Commission.

70 In the light of the observations of the Parties, it transpires that the main issue here relates to the guarantee mechanism, as provided for under articles 7 (1) and 26 of the Charter.

71 **Article 7**

"Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by the conventions, laws, regulations, and customs in force;
b) The right to be presumed innocent until proven guilty by a competent court or tribunal;
c) The right to defence, including the right to be defended by counsel of his choice;
d) The right to be tried within a reasonable time by an impartial court or tribunal."

72 Article 26
"State Parties to the present charter shall have the duty to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

73 The general contents of the guarantee of sound justice which is the subject of articles 7 and 26 brings two sorts of obligations to bear. The obligation of having an accessible and appropriate court and the obligation of a fair trial (the right to have one's cause heard fairly). In its decision in the **Civil Liberties Organization Vs Nigeria** Communication, the Commission made a clear distinction between these terms: "while article 7 focuses on the individual's right to be heard, article 26 speaks of the Institutions which are essential to give meaning and content to that right. This article clearly envisions the protection of the rights of the individual against the abuses of state power."

74 The obligation of having an established court implies that the court exists and that it is accessible to all persons subject to trial. For this right of access to a competent court to be effective, there shall be no let or hindrance to the beneficiary's enjoyment of the same. In the

abovementioned decision, the Commission also ruled that the usurpation of the powers of the common law courts to hear any cases whatsoever constitutes an aggression of untold proportions on the article of the Charter which protects the right to effective remedy before national courts.

75 Mere accessibility of the competent court is not enough, the latter should be adequate, that is to say independent, impartial, established by the law and capable of ruling.

76 According to the African Commission, the independence of a court refers to the independence of the court vis a vis the Executive. This implies the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes "justice must not only be done: it must be seen to be done" [7].

77 The obligation to be independent is one and the same as the obligation to be impartial. Impartiality may be perceived in a subjective and objective manner. In a subjective manner, the impartiality of a judge is gauged by his internal inclinations. Since it is impossible to infer from this inclination objectively, it was simpler to conclude that subjective impartiality be assumed until proven otherwise[8].

78 However, appearances cannot be ignored while gauging the impartiality of a jurisdiction[9].

79 The obligation of having a jurisdiction established by the law, capable of passing a judgement cannot be clearly disassociated from the above. The ability of a court to rule depends on the competence of the Court to hear a case, and also depends on the calibre of its members. In the case of **Amnesty International Versus Sudan**, the Commission decided **that the definition of the word, " competence" is particularly sensitive since ……. depriving courts of qualified staff to guarantee their impartiality, infringes on the right to have one's cause heard by competent organs …….. constitutes a violation of articles 7(1) (d) and 26 of the Charter".**

80 The requirement of a fair trial presupposes that the parties to the suit are able to present their respective cases without prejudice to either party. The flaws of a trial can be detected where a certain number of elements

[7] Media Rights Agenda c. Nigeria, para.60,61; Amnesty International and Others c. Soudan, para 68,69; Malawi African Association and Others c. Mauritanie para. 98; Law Office of Ghazi Suleiman c. Soudan para 61-64.
[8] European Court for Hman Rights, Van Leuren and Meyere
[9] CEDH, Delcourt c. Belgique, Decree if the 17th January 1970, A,N 11 para31; also cf the relevant jurisprudence of the Commission:Law office of Ghazi Suleiman c. Soudan (para 63,64), International Pen and Others c. Nigeria para86 ; Constitutional Rights Projects c. Nigeria, para.14

combined together have not been respected viz. the right to equality of means and the need for dissenting views. The requirements of a fair trial also pre supposes that the courts are able to allow persons subject to trial to review the ruling passed. The principle of a two-tier court system is not always recognized by legal systems. A state may have a single tier jurisdiction. However, should it choose to establish several, all the courts should be governed by the criteria of good justice.

81 For its part, the International Convention on Civil and Political Rights stipulates in article 14 (5) as follows. "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law. The Human Rights Committee corroborated these provisions in its ruling in the case of **Salgar de Mantego versus Columbia** [10] ''the right to a review of a conviction or sentence provided in article 14(5) does not leave the existence of the right to review to be regulated by domestic law, but the modalities of the review ''[11].

82 Whereas the State parties enjoy considerable latitude in the choice of resources within their legal system to fulfil the requirements of article 7 and 26 of the Charter, conformity with these articles should be sought in the attainment of the objectives of the Charter. Every measure should be taken to ensure justice is served by a competent, independent and impartial tribunal and that justice is fair and adversarial. Here States are expected to come up with results and shall have no excuse for shying away from their responsibility. Failing to fulfil these requirement shall not be justified for any reason whatsoever[12]. Where the expected outcome has not been attained, the State shall be held responsible; it is not enough for the latter to feign passivity should a situation which runs counter to article 7 of the Charter occur.

83 In the present case, the Military Court was established by a decree-law in accordance with article 158(2) of the Constitution of Congo which authorizes the President of the Republic to suspend the Common Law courts and replace them with Military Tribunals, in times of war. Its competence includes knowing of the deeds of civilians. The said court prosecuted and condemned two civil and three soldiers to death for allegedly stealing seven drums of gas oil.

84 To reaffirm its commitment to guaranteeing independent and impartial courts, the Commission made recommendations in its decision on the right to a free trial and legal aid in Africa which were replicated in the ruling on the Ghazi Suleiman versus Sudan case, as follows:

[10] 64/79
[11] Judicial Colloquium in Bangalore 24-26 Feb.1988 p.17
[12] CEDH Decree Colozza of 12february. 1985,A N 89

"Military Courts or specialized courts … should in no case try civilians, military courts should not deal with offences which are under the preview of ordinary courts"

85 In the **Forum of Conscience versus Sierra Leone** case, the Commission quoted the preceding Resolution as follows: **"In many African countries, Military Tribunals and Special Courts co-exist with ordinary legal institutions. The objective of the military tribunals is to adjudicate on offences of a purely military nature perpetrated by military personnel. In the dispatch of these duties, the military tribunals should abide by the norms governing a fair trial**".

86 Furthermore, in its ruling on the **Media Rights Agenda versus Nigeria** case, the Commission decided as follows: **"the appearance, sentencing and conviction of Malaolu, a civilian, by a special military court, presided over by military officers in active duty is nothing short of a violation of the fundamental tenets of free trial as stipulated under article 7 of the Charter."**

87 Consequently, in this particular case, the fact that civilians and soldiers accused of civilian offences are tried by a Military Court presided over by military officers for the theft of drums of gas oil is a flagrant violation of the above-mentioned requirements of good justice.

88 The Complainant opines that the said court was comprised of persons belonging to the Armed Forces, devoid of the qualities of magistrates. By its very composition it was not independent and therefore likely to pass a partial sentence, and the fact that the latter were devoid of the qualities of a magistrate constitutes an infringement of their right of access to a competent court.

The Respondent State does not challenge these arguments in its statement of defence. In the absence of any facts to the contrary, the Commission cannot but invalidate the above conclusions. In its decision on the case of **Media Rights Agenda versus Nigeria**, the Commission considered that: **"the selection of military officers in active duty, devoid of any legal training, to sit as magistrates, constitutes a violation of paragraph 10 of the fundamental principles of independence of the Bench. Said paragraph stipulates that: individuals selected to fulfil the duties of Magistrates shall be men of integrity, be competent and must have adequate legal training and qualifications."**

89 The Commission therefore finds that the verdict of the Military Court which consisted solely of Army Officers with no qualities of a Magistrate, did not offer the guarantees of independence, impartiality and equity.

90 The Complainants allege that the verdict of the military court against the plaintiffs was not reasoned and that to compound matters, the authorities refused to serve them with a copy of the judgement. The Respondent State begs to differ and avers that the Complainant has no proof to back this allegation. In this case, the burden of proof is on the Defendant to show that the allegations of the Complainants are unfounded by providing the Commission with the said judgement, which proof is yet to be provided. The Commission has always deplored lack or inadequacy of motives for a legal decisions as a violation of the right to a fair trial.

91 In the judgement on the **Pinkey versus Canada** case, the Human Rights Committee ruled: "the exercise of an appellant's right of appeal had been prejudiced because the transcript of the lower court's proceedings had taken two-and-a-half years to be produced."

92 The Complainants allege that the decree-law on the establishment of the Court stipulates in article 5 thereof that appeals shall not be brought against the decisions of the said Court or the latter contested. The Complainants contend that article 5 violates their right of an effective appeal. The Respondent State contends that article 150 of the Transitional Constitution stipulates the avenues of redress before the Supreme Court which knows the verdicts and judgements made at the lowest and highest echelons by the civil and military courts and tribunals.

93 It is important to note that the Complainants skew the doctrinal meaning of the expression "effective redress". This expression "effective redress" is clearly referred to in article 13 of the European Convention on Human Rights. **"Redress" should not be considered as "the process whereby a new decision is obtained in a dispute where an authority has already given a ruling. The word redress shall comprise of all processes through which a constitutive act or an alleged violation of the Convention is brought before a qualified body to seek, as the case maybe, suspension of the act, its annulment, amendment or compensation.** [13] The Complainants understandably refers to article 14 (5) of the International Covenant on Civil and Political rights which stipulates that "any person found guilty of an offence shall have the right to have the verdict examined by a higher court, in accordance with the law".

[13] PETTITI Louis-Edmond, DECAUX Emmanuel, IMBERT Pierre-Henri (directed by), The European Convention for Human Rights, observations, article by article, Paris,Economica, 1999 P.467

94. Hence we may conclude directly from the allegations of the Respondent that the Complainants should have filed an appeal. However for us to carefully examine this case we would have to elucidate the principle of the two-tier jurisdiction. This principle entitles persons subject to trial to file their case with another judge where the original ruling was deemed flawed in the eyes of the Law. The appeal is for the reversal of a judgment and consists in inviting a court of law (other than the original one) hierarchically higher to try the entire case anew. However opposition is an avenue for redress (retraction) which is not based on the principle of a two-tier jurisdiction. It is based on the rule that any person subject to trial has the right to have his cause heard. The cassation is not a third level of the jurisdiction. It is a special avenue for redress. It is applicable to judgements passed by the lowest and highest courts, judgements against which appeals cannot be lodged and rulings passed by the Appeal's Court. The cassation covers different reasons for opening a case, mainly: breach of the law, incompetence and abuse of power; lack or inadequacy of grounds[14].

95. In the present case, the Supreme Court was the only avenue for redress available against the decisions passed at the lowest and highest levels by the Military Court. And since the Complainants have raised the issue of the incompetence of the said military court, the violation of the Law, and the lack of motive of the judgement passed by the latter, they would have been better of lodging an appeal for the case to be re-opened - but then they were been denied access to the ruling of the court in question. The Respondent's allegation that the Complainant's submission is inadmissible, on the grounds of the latter's failure to exhaust all local remedies cannot not stand.

On these grounds, the Commission,

96. Consequently, declares, the Democratic Republic of Congo has violated the relevant provisions of the African Charter on Human and Peoples' Rights, namely articles 7 (a) (b) (d) and 26.

97. Finds that the establishment of a Military Court, albeit legally, whose competence extends to hearing civil acts perpetrated by civilians is a flagrant ignorance of the recommendations adopted by the African Commission in its Resolution on the Right to a fair trial and legal assistance in Africa, in line with the spirit of the African Charter.

98. Strongly recommends that the Government of the Republic of Congo guarantees the independence of the tribunals and improves on the appropriate national institutions charged with the promotion and protection

[14] These observation are taken from the book by 'AUBERT Jean-Luc, Introduction to Law and the fundamental themes of Civil Law , Paris, Armand Colin, 1995 PP.144-145

of the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights.

99. Urges the Government of the DRC to grant the victims a fair and equitable amount as compensation for the moral wrong suffered.