

i) **Communication 304/2005 – FIDH, National Human Rights Organization (ONDH) and Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) / Senegal**

Summary of Facts

1. The Secretariat of the African Commission on Human and Peoples’ Rights (the Commission) received a Communication on 2 May 2005 from the above NGOs, which was submitted in accordance with the provisions of Article 55 of the African Charter on Human and Peoples’ Rights (the African Charter).
2. The Communication is submitted against the Republic of Senegal (State Party¹ to the African Charter and hereinafter referred to as Senegal) and alleges that legislation enacted by the Government of Senegal violates the Government’s obligations under the African Charter.
3. On 7 January 2005, the Senegalese Parliament adopted the “Ezzan” law. In Article 1, this law grants a complete amnesty for all crimes committed, in Senegal and abroad, relating to the general or local elections or committed with political motivations between 1 January 1983 and 31 December 2004, whether the authors have been judged or not.
4. Article 2 of the law was found unconstitutional by the Constitutional Court on 12 February 2005 and grants a similar amnesty for all crimes committed in relation to the death of Mr. Babacar Seye, judge of the Constitutional Court.

The Complaint:

5. The Communication alleges that the adoption of the “Ezzan” law violates Article 7.1(a) of the African Charter.
6. The complainants request that the African Commission examine the effects of this legislation and determine whether it is in conformity with the obligations assumed by the State under the Charter.

The Procedure:

7. The Secretariat registered the complaint as Communication 304/05-FIDH, Organisation Nationale des Droits de l’Homme (ONDH) AND Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) / Senegal. By letter ACHPR/COMM/304/05/SEN/IH of 4 October 2005, the Secretariat of the African Commission acknowledged receipt of the Communication to the complainants and stated that it would be put on the African Commission’s agenda for *prima facie* consideration at its 38th Ordinary Session, scheduled from 21st November to 5th December 2005 in Banjul, The Gambia.

¹ Senegal ratified the African Charter on 13th August 1982.

8. At its 38th Ordinary Session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission on Human and Peoples' Rights considered the communication and decided to be seized thereof.

9. By letter ACHPR /COMM/304/05/SEN/IH of 15 December 2005, the Commission kindly asked the parties if they could forward their arguments on admissibility in accordance with Article 56 of the African Charter within three (3) months from the date of this notification.

10. By letter ACHPR/COMM/304/05/SEN/IH of April 4th the Secretariat of the Commission reminded the parties its letter of the 15th of December and kindly asked the parties to submit their arguments on the admissibility.

11. On the 10th April 2006, the Secretariat acknowledged receipt of the Respondent State's correspondence transmitting its arguments on admissibility of Communication 304/05 FIDH & Others against the State of Senegal.

12. At its 39th Ordinary Session which was held from 11th to 25th May 2006 in Banjul, The Gambia, the African Commission considered Communication 304/05 FIDH and others against the State of Senegal and intended to take a decision on the admissibility of the Complaint at its 40th Ordinary Session so as to allow the Complainants time to submit their comments on admissibility.

13. By letter dated 17th July 2006, the Secretariat of the Commission informed the Parties of this decision of the 39th Session and requested the Complainants to convey their comments on the admissibility of this Communication not later than the 30th September 2006, to enable the Commission make a pronouncement thereon during its 40th Ordinary Session scheduled for the 15th to 29th November 2006.

14. On the 10th October 2006, the Secretariat of the Commission received the comments from the Complainants on the admissibility of Communication 304/05.

Law
Admissibility
Arguments of the Complainants

15. The FIDH and its member organizations in Senegal, in their request to institute proceedings, claim that their Communication is being brought against a State Party to the African Charter by NGOs which have Observer Status with the African Commission and that it is alleging the violation of a provision of the Charter, specifically Article 7 (1) which stipulates that::

“Every individual shall have the right to have his cause heard. This right includes:

The right to appeal to the competent national organs against acts violating his fundamental rights as recognized and guaranteed by Conventions, Laws, Regulations and Customs in force;”

16. The Complainants also claim that local remedies have been exhausted since the Constitutional Council which had been seized by some Members of the National Assembly had declared that the Law in question was in conformity with the Constitution with the exception of Article 2 which had been ruled unconstitutional by the Council. The Complainants recall that under the terms of the Senegalese Constitution, the decision of the Constitutional Council is “the last recourse”.

17. The Complainants further specify that their challenge of the Law in question has not been brought before any other international judicial or quasi judicial body.

Arguments of the State

18. The State claims first of all that its statement of defense on admissibility submitted after the three months deadline extension granted by the Commission is admissible so long as the Commission has not arrived at a decision on admissibility, especially where the Rules of Procedure of the Commission do not provide for any sanction of a procedural nature in case of late submission of a statement.

19. The State then emphasizes that a communication submitted in accordance with the provisions of Article 55 of the Charter should be based on verified facts that have caused damage, with real identifiable victims thereby making possible the exhaustion of local remedies. As far as the State is concerned, the Communication submitted by the complainants is based on potential, even hypothetical violations since neither the authors of the communication, nor the Members of Parliament who had brought the case before the Constitutional Council were victims and that their action could hardly be interpreted as an attempt to exhaust local remedies.

20. The Senegalese State is also of the view that the communication is incompatible with the Charter in that the complainants made reference either to cases which have been conclusively dealt with by the law courts, or to events which, having taken place in 1993, fell under the hammer of the decennial prescription well before the promulgation of the law being challenged.

21. According to the State which, for this purpose, is basing its argument on the decision of the Constitutional Council on case No. 1-C-2005 of 12th February 2005, the provisions of the Law No. 2005-05 of 17th February 2005 are clear, without ambiguity and do not at all intend to prohibit recourse to the competent Courts. As far as the State is concerned, by seizing the Commission, the complainants have no other intention than to have the Commission interpret the provisions of a domestic law, competence which, in the State’s view, the Commission does not have.

22. The above-mentioned decision by the Constitutional Council had been made on the appeal submitted by Members of Parliament after adoption of the law by the National Assembly and prior to its promulgation by the President of the Republic. The Members of Parliament had requested the Constitutional Council to declare Articles 1, 2, 4 para. 2 and 10 of the law in question as being in conflict with some provisions of the Constitution, notably the preamble and Articles 1, 67, 76 and 88, as well as with some provisions of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights. Whilst it ruled that Article 2 of the law in question was in conflict with the Constitution, the Constitutional Council declared itself incompetent to pronounce on the conformity of the said law with the Treaties ratified by Senegal. The Council considered that:

“...Article 74 of the Constitution grants the Constitutional Council competence to pronounce solely on the conformity to the Constitution, of laws referred to it for consideration;

...under the terms of Article 98 of the Constitution, “the Conventions or Agreements lawfully ratified or approved have, from their date of publication, competence higher than that of the laws, subject to, for each Convention or Treaty, its application by the other Party”; that these provisions neither prescribe nor entail the checking of the conventionality of the laws within the framework of pronouncement on the conformity of laws with the Constitution as provided for in Article 74 of the said Constitution;

...that it is beyond the competence of the Constitutional Council to assess the conformity of the law with the provisions of an international Convention or Treaty;”

23. The Respondent State considers further that to claim, as the complainants have done, “that in promulgating the amnesty law “Ezzan” passed by National Representation on the 4th January 2005, the President of the Republic of Senegal had allowed the entry into force of a law which violates the above mentioned Article (of the Charter)” is insulting to the State of Senegal and to its democratic institutions.

24. In its oral submission before the Commission during the 40th Session, the Respondent State had re-affirmed that the law as promulgated by the President of the Republic after verification of its conformity with the Constitution had not been subjected to any jurisdictional appeal, and the absence of real and identifiable victims makes such an appeal improbable. The State also recalled that the ruling of the Constitutional Council does not prevent future victims from seizing the competent courts to demand redress for any damage they may have suffered.

25. Furthermore, the State clarified the procedure to be adopted before the Constitutional Council. The Council can be seized through action (before the

promulgation of a law) and by exception (after the promulgation of a law). Through action, only the President of the Republic and one tenth of the Members of the National Assembly can challenge a law adopted by the National Assembly before the Constitutional Council. Through exception, any citizen, during a proceedings to which he is a party before the National Council or the Appeals Court, can challenge the unconstitutionality of a law. In such as case, the National Council or the Appeals Court defers the judgment and seizes the Constitutional Council which first of all has to rule on the constitutionality of the said law.

26. The Respondent State further withdrew its submission on the use of insulting language by the complainants.

27. The State of Senegal prays the African Commission on Human and Peoples' Rights to declare Communication 304/05 inadmissible.

Comments by the complainants on the memorandum of the State on admissibility

28. The complainant NGOs first of all challenge the admissibility of the submission of the State on the grounds that it had not been submitted within the three months deadline given to the State by the Commission.

29. The complainants then go on to refute, one by one, the arguments of inadmissibility raised by the Respondent State. Thus, with regard to the compatibility with the Charter, they contend, using the jurisprudence of the African Commission as basis, notably its decision on communication *245/2002 Zimbabwe Human Rights NGO Forum vs. Zimbabwe*, that to be compatible with the Charter, the communication has only got to invoke the provisions of the law which are presumed to have been violated, and that from then on it is "up to the African Commission, after having considered all the facts at its disposal, to make a ruling on the rights which have been violated and to recommend the appropriate remedy to reconstitute the rights of the complainant". According to them, communication 304/05 attempts to denounce the impunity sanctioned by the amnesty law known as "Ezzan" by making it impossible for the perpetrators of crimes to be brought to justice in blatant violation of Article 7.1.a of the Charter.

30. The complainants also assert that the simple fact of declaring that a State Party has violated a provision of the Charter can hardly constitute, on its own, an "insulting" remark, and that "to admit that such an allegation is insulting would result in challenging the principle itself of resorting to the Commission for a remedy".

31. The complainant also denies having based its Communication on "potential or hypothetical" facts, or limiting itself "to simple declarations by re-echoing the artificial opinions of the Political Opposition", as is being claimed by the State in its submission. The facts which form the basis of the communication, it contends, have been verified. For the complainant NGOs, both the FIDH and its affiliates in Senegal and other international human rights protection institutions

such as the United Nations Human Rights Commission, had previously denounced the human rights violations committed in the context of the electoral process in Senegal.

32. With regard to the identification of the victims, the complainant NGOs recall that Article 56, paragraph 1 of the Charter simply requires that the identity of the authors of a communication be mentioned. They base their argument on the position of the Commission in its decision on communications 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Mme Sarr Diop, InterAfrican Human Rights Union and RADDHO, Widows and Entitled Persons Association, Mauritanian Human Rights Association vs. Mauritania* in which case the Commission had felt that the “authors do not necessarily have to be the victims or members of their family”. The NGOs also recall in their favour the decision of the Commission according to which Article 56, paragraph 1 does not require that the names “of all the victims of the alleged violations” be indicated (*Communication 159/96 InterAfrican Human Rights Union, International Federation of Human Rights Leagues, African Human Rights Group, National Human Rights Organization in Senegal and the Malian Human Rights Association vs. Angola*).

33. Concerning the exhaustion of local remedies, the complainants recall that according to the terms of the Constitution of the Republic of Senegal, the International Conventions have a supra-legislative value, that some of them, the African Charter included, having been cited in the preamble, even form an integral part of this constitutionality, and that the Constitutional Council is the sole competent body to rule on the constitutionality of a law. They also recall that the decisions of the Constitutional Council cannot be appealed and that only the President of the Republic, one tenth of the Members of the National Assembly, the National Council or the Court of Appeal are empowered, when an exception of unconstitutionality is brought before them, to seize the Constitutional Council. They therefore conclude that the decision of the Constitutional Council declaring that the disputed law is in conformity with the Constitution makes it impossible for anybody to challenge this law before the national courts.

34. The complainant NGOs recall in conclusion that their communication had been submitted within a reasonable time frame and that they had not instituted any other international legal proceedings.

35. In their oral submission before the African Commission during the 40th Session, the complainants recalled that the communication had not been drafted in abusive or insulting language. Furthermore, they re-affirm that the Constitutional Council had already made a ruling on the law in question, and that the decision of the Constitutional Council could not be subjected to any appeal. The complainants further contended that if remedies of a civil nature are guaranteed by the law being challenged, the amnesty law makes it impossible for any kind of criminal punishment to be meted out against the perpetrators of crimes, thereby supporting impunity in Senegal.

36. The Complainants invite the Commission to declare the Communication admissible.

Decision of the Commission

37. The admissibility of communications presented in conformity with the terms of Article 55 of the Charter is governed by Article 56 of the African Charter which stipulates that:

“The Communications referred to in Article 55 received by the Commission and pertaining to human and peoples’ rights should necessarily, to be considered, fulfill the following conditions:

1. Indicate the identity of the author even if the latter requests the Commission to maintain his/her anonymity;
2. Should be compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Should not contain language which is abusive or insulting towards the implicated State, its institutions or the OAU;
4. Should not limit itself to gathering only the information broadcast by the mass media;
5. Should be subsequent to the exhaustion of local remedies, if any, unless it is clear to the Commission that the procedure of these remedies is unduly prolonged;
6. Should be submitted within a reasonable time frame starting from the exhaustion of local remedies or from the date stipulated by the Commission as being the beginning of the deadline to its own seizure.
7. Should not pertain to cases which have been settled in conformity with either the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of this Charter”.

38. The Commission recalls that the conditions outlined in Article 56 are cumulative and should all be adequately fulfilled for a communication submitted in conformity with the terms of Article 55 to be admissible. Consequently, non-respect of any one of these conditions is liable to render a communication inadmissible.

39. In this particular case, most of the conditions laid down by Article 56 appear, *prima facie* to have been respected by the authors of Communication 304/05: The Communication is not anonymous; it pleads the violation of a provision of the Charter; it is not exclusively based on information broadcast by the mass media; it is not the object of any international proceedings before another judicial or quasi- judicial body; it was submitted within a reasonable time frame, and the Commission did not find any abusive or insulting language in it.

The only condition which really poses a problem for both parties is Article 56(5) of the Charter which is the question of exhaustion of local remedies.

40. Before considering the condition relating to the exhaustion of local remedies, the Commission would like to address the matter of the identity of victims raised by the Respondent State in its argument. The Commission recalls, in this context, that the African Charter does not call for the identification of the victims of a Communication. According to the terms of Article 56(1), only the identification of the author or authors of the Communication is required. Besides it is not necessary for the author or authors to be present or the victims even where some link between the author and the victim exists. That had in fact been confirmed by the practice of the African Commission². The flexibility of Article 56 of the African Charter, which differs in this from the other international human rights protection instruments, is fully justified in the African context and “reflects sensitivity of the practical difficulties which individuals can be faced with in the countries where human rights are violated”.³

41. Concerning the exhaustion of local remedies, according to the provisions of Article 56(5):

“The Communications referred to in Article 55 received by the Commission and relative to human and peoples’ rights should, necessarily, to be considered, fulfill the following conditions:

“...Be sent after exhausting local remedies, if any, unless it is obvious to the Commission that the procedure of these remedies is unduly prolonged.”

42. It does not at all show from the facts at the disposal of the Commission that efforts had been made by the authors of the communication to exhaust the local remedies available against Law No. 2005-05 of 17th February 2005. The remedy used by some Members of the National Assembly cannot constitute, in the view of the Commission, an attempt to exhaust local remedies for two main reasons: First of all, this recourse had been initiated on the 12th and 13th January 2005 and the ruling of the Constitutional Council had been made on the 12th February 2005, that is to say before the entry into force of Law No. 2005-05 of 17th February 2005. The Commission is of the view that a law which has not yet entered into force cannot violate any right which is protected by the Charter.

43. Then, it would appear from the facts as presented by the two Parties, from the appeal by the Parliamentarians and from the ruling of the Constitutional Council which sanctioned it, that the victims had the opportunity to seize the competent Senegalese Courts or even the Constitutional Council through the method of challenge of constitutionality. The Commission observes that instead

² See notably the decision on Communications 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Mrs. Sarr Diop, InterAfrican Human Rights Union and RADDHO, Widows and Entitled Persons Association, Mauritanian Human Rights Association vs. Mauritania.*

³ *Idem*, paragraph 78.

of following this procedure, the Complainants approached it (the Commission) directly.

44. If the Parties agree to recognize that the decisions of the Constitutional Council cannot be appealed, there is no evidence to show that where the Constitutional Council declares itself incompetent to deal with a given issue (here it relates to the verification of the conformity of a law with a Convention, in this case the African Charter), no other legal body in Senegal is competent on the matter. The Commission is of the view that the local remedies to which Article 56(5) makes reference, cannot be limited to penal remedies. They include all the legal remedies, whether civil, penal or administrative.

45. On the basis of all of the above arguments, the Commission concludes that the complainants did not exhaust all the local remedies.

For this reason, the Commission declares the communication inadmissible.

Done at the 40th Ordinary Session of the African Commission held in Banjul, The Gambia, from 15 - 29 November, 2006

