

## HUMAN RIGHTS COMMITTEE

### Adrien Mundy Busyo, Thomas Osthudi Wongodi, Ren Sibum Matubuka et al. v. Democratic Republic of the Congo

Communication No. 933/2000\*\*

31 July 2003

CCPR/C/78/D/933/2000\*

## VIEWS

*Submitted by: Adrien Mundy Busyo, Thomas Osthudi Wongodi, Ren Sibum Matubuka et al.*

*Victims: Adrien Mundy Busyo, Thomas Osthudi Wongodi, Ren Sibum Matubuka et al.*

*State party: Democratic Republic of the Congo*

*Date of communication: 17 December 1999*

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

Meeting on 31 July 2003,

Having concluded its consideration of communication No. 933/2000, submitted by Adrien Mundy Busyo, Thomas Osthudi, Ren Sibum Matubuka et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The authors are Adrien Mundy Busyo, Thomas Osthudi Wongodi and Ren Sibum Matubuka, citizens of the Democratic Republic of the Congo, acting on their own behalf and on behalf of 68 judges who were subjected to a dismissal measure. They claim to be the victims of a violation by the Democratic Republic of the Congo of articles 9, 14, 19, 20 and 21 of the International Covenant on

Civil and Political Rights. The communication also appears to raise questions under article 25 (c) of the Covenant.

The facts as submitted by the authors

2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

The President of the Republic;

Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;

Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;

Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;

Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;

Having regard to urgency, necessity and appropriateness;

On the proposals of the Minister of Justice;

Hereby decrees:

Article 1:

The following individuals are dismissed from their functions as judges .

2.2 Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance No. 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report (1) by the Public Prosecutor's Office until 19 September 2000 in order to block the appeal. Moreover the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree No. 144 was an act of Government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the State. The Supreme Court consequently decided that the actions taken by the President

of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

2.3 On 27 and 29 January 1999, the authors, who formed an organization called the Group of the 315 illegally dismissed judges, known as the G.315, submitted their application to the Minister for Human Rights, without results.

2.4 The authors also refer to various coercive measures used by the authorities to prevent them from pressing their claims. They mention two warrants for the arrest of Judges Ren Sibou Matubuka and Ntumba Katshinga (2). They explain that, following a meeting on the decree in question which was held between the G.315 and the Minister of Justice on 23 November 1998, the Minister withdrew the two warrants. The authors add that, further to their follow-up letter to the Minister of Justice concerning the lack of action taken following their meeting on the decree, Judges Ren Sibou Matubuka and Beno t Malu Malu were arrested and detained from 18 to 22 December 1998 in an illegal detention centre in the GLM (Groupe Litho Moboti) building belonging to the Task Force for Presidential Security. They were heard by persons who had neither been sworn in nor authorized by the Attorney-General of the Republic, as required by law.

### The complaint

3.1 The authors claim, first of all, to be the victims of dismissal measures that they regard as clearly illegal.

3.2 They maintain that Presidential Decree No. 144 is contrary to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of the Congo and Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges.

3.3 According to the authors, while the above-mentioned legislation stipulates that the President of the Republic can dismiss a civilian judge only on the proposal of the Supreme Council of the Judiciary (CSM), (3) the dismissals in question were decided on the proposal of the Minister of Justice, who is a member of the executive and thus took the place of the only body with jurisdiction in this regard, namely, the CSM. According to the authors, the law does not confer discretionary power, despite the circumstances described in Presidential Decree No. 144, i.e. urgency, necessity and appropriateness, which cannot be grounds for dismissal.

3.4 The authors also claim that the authorities failed to fulfil their obligation to respect the adversarial principle and its corollaries (which include the presumption of innocence) at all times when dealing with disciplinary matters. In fact, the authors received no warning or notification from any authority, body or commission and were, incidentally, never heard either by the inspecting magistrate or by the CSM, as required by law.

3.5 The authors maintain that, in violation of the obligation to justify any decision to dismiss a government official, Presidential Decree No. 144 cites only vague, imprecise and impersonal grounds, namely, immorality, desertion and recognized incompetence - and this, in their opinion, amounts in Congolese law to a lack of grounds. With regard to the claims of immorality and incompetence, the authors state that their personal files in the CSM secretariat prove the contrary. As to the claim of

desertion, the authors assert that their departure from the places to which they were assigned was the result of war-related insecurity and that their registration with the CSM secretariat in Kinshasa, the city where they took refuge, attested to their availability as judges. They say that the CSM secretariat accorded them the treatment enjoyed by persons displaced by war.

3.6 The authors refer to the reports which were submitted to the Commission on Human Rights by the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo (4) and the Special Rapporteur on the independence of judges and lawyers (5) and in which they express concern about Presidential Decree No. 144 calling for the dismissal of the 315 judges and demonstrating that the judiciary is under the control of the executive. They also mention a statement by the head of the Office of the United Nations High Commissioner for Human Rights in the Democratic Republic of the Congo calling for the reinstatement of the dismissed judges.

3.7 Secondly, the authors are of the view that the illegal arrest, detention and interrogation of three members of their organization are abuses of power (see paragraph 2.4).

3.8 Lastly, the authors consider that they have exhausted domestic remedies. Recalling the failure of their appeals to the President of the Republic, the Minister for Human Rights and the Minister of Justice, and the ruling of the Supreme Court of Justice, of 26 September 2001, they emphasize that the independence of the judges responsible for making the ruling was not guaranteed inasmuch as the Senior President of the Supreme Court, the Attorney-General of the Republic and other senior members of the judiciary were appointed by the new regime in power, without regard for the law stipulating that such appointments must be made on the proposal of the Supreme Council of the Judiciary. They add that, when these members of the judiciary were sworn in by the President of the Republic, the Senior President of the Supreme Court disregarded his obligation of discretion and made a statement on the lawfulness of the dismissal decree. Moreover, the authors consider that the Supreme Court, in its ruling of 26 September 2001, wrongly decided that their appeal was inadmissible and thus deprived them of any remedy.

3.9 Despite the request and the reminders (notes verbales of 7 December 2000, 12 July 2001 and 15 May 2003) the Committee sent to the State party asking for a reply to the authors' allegations, the Committee has received no response.

#### The Committee's admissibility decision

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

4.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same question is not being examined under another procedure of international investigation or settlement.

4.3 The Committee considers that the authors' complaint that the facts as they described them constitute a violation of articles 19, 20 and 21 has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the

## Optional Protocol.

4.4 The Committee considers that, in the absence of any information from the State party, the complaint submitted in relation to Presidential Decree No. 144 calling for the dismissal of 315 judges, including the authors of this communication, and to the arrest and detention of Judges Ren Sibou Matubuka and Beno t Malu Malu may raise questions under article 9, article 14, paragraph 1, and article 25 (c) of the Covenant which should be examined as to the merits.

### Examination of the merits

5.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4, paragraph 2, of the Optional Protocol, a State party is under an obligation to cooperate by submitting to it written explanations or statements clarifying the matter and the measures, if any, that may have been taken to remedy the situation. As the State party has failed to cooperate in that regard, the Committee had no choice but to give the authors' allegations their full weight inasmuch as they were adequately substantiated.

5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999 (see paragraph 3.8), and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 (see note 1), recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence (6), the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place (see paragraph 3.8) thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect

the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25, paragraph (c), read in conjunction with article 14, paragraph 1, on the independence of the judiciary, and of article 2, paragraph 1, of the Covenant.

5.3 Having regard to the complaint of a violation of article 9 of the Covenant, the Committee notes that Judges Ren Sibou Matubuka and Benoît Malu Malu were arbitrarily arrested and detained from 18 to 22 December 1998 in an illegal detention centre belonging to the Task Force for Presidential Security. In the absence of a reply from the State party, the Committee notes that there has been an arbitrary violation of the right to liberty of the person under article 9 of the Covenant.

6.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has committed a violation of article 25 (c), article 14, paragraph 1, article 9 and article 2, paragraph 1, of the Covenant.

6.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should include, inter alia: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;<sup>(7)</sup> and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.<sup>(8)</sup> The State party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

6.3 The Committee recalls that, by becoming a State party to the Optional Protocol, the Democratic Republic of the Congo recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Consequently, the Committee wishes to receive from the State party, within 90 days of the transmission of these findings, information about the measures taken to give effect to its views. The State party is also requested to make these findings public.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

\* Made public by decision of the Human Rights Committee.

\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Gili Ahanhanzo, Mr. Walter Kulin, Mr.

Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hip lito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

## Notes

1. The authors transmitted a copy of the report by the Public Prosecutor's Office. In the report, the Office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree No. 144 is an act of Government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree No. 144 in response to a crisis situation characterized by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.
2. Dates of arrest warrants not specified.
3. The CSM acts as a disciplinary court to enforce a penalty, which may either be disciplinary (dismissal) or criminal (imprisonment for more than three months).
4. Document E/CN. 4/1999/31 of 8 February 1999.
5. Document E/CN. 4/2000/61 of 21 February 2000.
6. Communication No. 422/1990 *Adimayo M. Aduayom T. Diasso and Yawo S. Dobou v. Togo*; general comment No. 25 on article 25 (fiftieth session - 1996).
7. Communications No. 630/1995 *Abdoulaye Mazou v. Cameroon*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.
8. Communications Nos. 422/1990, 423/1990 and 424/1990 *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*; No. 641/1995 *Gedumbe v. Democratic Republic of the Congo*; and No. 906/2000 *Felix Enrique Chira Vargas-Machuca v. Peru*.