

**African Commission on Human and Peoples' Rights**

**Communication 502/14:**

**S.A. (represented by REDRESS and Synergie pour l'assistance judiciaire aux-victimes de violation des Droits humains au Nord Kivu)**

**v.**

**Democratic Republic of Congo (DRC)**

**SUBMISSION ON ADMISSIBILITY**

**1 June 2015**

## A. INTRODUCTION

1. XXX (the ‘Applicant’), represented by The Redress Trust (REDRESS) and Synergie pour l’assistance judiciaire aux victimes de violation des Droits humains au Nord Kivu (SAJ) (together the ‘Authors’), submitted a complaint against the Government of DRC (‘Respondent State’) to the African Commission on Human and Peoples’ Rights (the ‘Commission’) on **21 November 2014** (the ‘Communication’).
2. The Communication asserts that the Respondent State violated a number of rights guaranteed by the African Charter on Human and People’s Rights (‘African Charter’)<sup>1</sup> and the Protocol to the Charter on the Rights of Women in Africa (‘Maputo Protocol’)<sup>2</sup> by failing to pay court-ordered compensation of XXXXX USD to the Applicant. On XXXXX, the Operational Military Tribunal XXXXXX (‘OMT’) had found the perpetrator and the Respondent State liable *in solidum* to pay this amount in damages for the rape and pillaging committed by a member of the Respondent State’s armed forces against the Applicant.
3. By letter dated **5 December 2014**, the Commission acknowledged receipt of the Communication. On **8 April 2015**, the secretariat of the Commission informed the Authors that it was seized of *Communication 502/14 – S.A. v. DRC* at its 17<sup>th</sup> Extraordinary Session and requested the Applicant to make a submission on the admissibility of the Communication within two months of notification.
4. The Applicant herewith makes her submission on admissibility in accordance with Rule 105(1) of the Rules of Procedure of the African Commission on Human and People’s Rights and incorporates all arguments made on admissibility in the original Communication.<sup>3</sup>
5. The Applicant reiterates her wish to withhold her identity from the public by referring to her as S.A. and redacting her name, address and any other information which might identify her from any publicly available documents, including the present submission.

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<sup>1</sup> Articles 2, 5, 7, 14 of the African Charter.

<sup>2</sup> Articles 2, 4, 8, 11, 25 of the Maputo Protocol.

<sup>3</sup> See Communication, para. 50-71.

## **B. SUBMISSION ON ADMISSIBILITY**

6. The Communication satisfies all admissibility criteria stipulated in Article 56 of the African Charter.

### **I. Identification of authors, African Charter Article 56(1)**

7. As required under Article 56(1) of the African Charter, the Communication identifies the authors representing the Applicant as REDRESS and SAJ. It also identifies the Applicant but requests the protection of her identity towards the public.

### **II. Compatibility with African Charter, African Charter Article 56(2)**

8. Article 56(2) of the African Charter requires communications to be compatible with the Charter of the Organization of African Unity or with the African Charter. According to the jurisprudence of the Commission, communications must show a *prima facie* violation of the African Charter; be directed against a State Party; be based on events occurred during the applicability of the African Charter and on the territory of the respective State Party.<sup>4</sup>
9. The Communication fulfils all of these criteria. The Communication was submitted against the Respondent State which ratified the Charter on 20 July 1987. The Communication sets out facts which evidence that serious violations of rights protected by the African Charter<sup>5</sup> and the Maputo Protocol<sup>6</sup> were committed on and after XXXXX on the territory of the Respondent State.
10. The Applicant is aware that the Maputo Protocol was deposited on 9 February 2009<sup>7</sup>, a few months prior to the judgment issued on XXXX. However, the Applicant makes the argument that the temporal applicability of the Maputo Protocol stems from the continued failure of the Respondent State to pay the court-ordered compensation. The Commission has made it clear that “violations that occurred prior to the entry into force of the Charter, in respect of a State Party, shall be deemed to be within the jurisdiction *rationae temporis* of the

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<sup>4</sup> African Commission, *Dabolorivhuwa Patriotic Front v. the Republic of South Africa*, Comm. No. 335/06, para. 72.

<sup>5</sup> Articles 2, 5, 7, 14 of the African Charter.

<sup>6</sup> Articles 2, 4, 8, 11, 25 of the Maputo Protocol.

<sup>7</sup> Instrument of ratification deposited with the Chairperson of the Commission of the African Union on 9 February 2009.

Commission, if they continue, after the entry into force of the Charter”,<sup>8</sup> for example, in relation to cases of enforced disappearance,<sup>9</sup> and denial of nationality.<sup>10</sup>

11. Other international human rights bodies have ruled that the failure to provide redress and reparation constitute a continuing violation. In *Gerasimov v. Kazakhstan* the alleged torture occurred before the state party’s ratification, but the UN Committee Against Torture stated that its “failure to fulfil its obligations to investigate the complainant’s allegations and to provide him with redress continued after the State Party recognized the Committee’s competence under article 22 of the Convention” and considered that it was not precluded *rationae temporis* from considering the complaint in its entirety.<sup>11</sup> The European Court of Human Rights (ECHR) has also established that the failure to pay a reparation award made by the state’s courts against it “creates a continuing situation”.<sup>12</sup>
12. In the current case, the Respondent State has not yet paid the court-awarded compensation of XXXXX USD to the Applicant despite the fact that a number of procedural steps have been taken to try to enforce the judgment since XXXXX, including the notification of the judgment to the State by the Registrar on XXXXX, and a letter on behalf of the Applicant to the Provincial Governor of XXXXX on XXXX.<sup>13</sup> The failure to provide reparation to the Applicant therefore continued after the adoption of the Maputo Protocol in February 2009. In such a situation, the Commission has the jurisdiction to consider all of the alleged violations whose effects continue.
13. In addition, the Maputo Protocol enshrines *specific* continuing obligations which have not been complied with in this case in Article 4(2)(f), Article 2, and Article 8.

### III. No insulting language, African Charter Article 56(3)

14. The Communication is written in a respectful language and thus satisfies the requirement in Article 56(3) of the African Charter which prohibits disparaging or insulting language.

### IV. Not exclusively based on mass media reports, African Charter Article 56(4)

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<sup>8</sup> Adopted at the Commission's 55th Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola, available at <http://www.achpr.org/sessions/55th/resolutions/284>.

<sup>9</sup> African Commission, *JE Zitha & P/L Zitha v. Mozambique*, Comm. No. 361/08, para. 84.

<sup>10</sup> African Commission, *John K Modise v. Botswana*, Comm. No. 97/93.

<sup>11</sup> UN Committee Against Torture, *Gerasimov v. Kazakhstan*, Comm. No. 433/2001, 25 July 2012, para. 11.2.

<sup>12</sup> See e.g. ECHR, *Driza v. Albania* (2011), App. No. 10810/05, 15 March 2011, para. 60; ECHR, *Marini v Albania* (2007), App. No. 3738/02, 18 December 2007, para. 95, ECHR 2007-XIV (extracts).

<sup>13</sup> See Exhibit D (Notification Order of the Registrar of the Operational Military Tribunal XXXX in Case No. XXXXX, XXXXX) and Exhibit E (Letter addressed to Excellency XXXX, Governor of XXXXX, XXXXX) to the Communication.

15. In line with Article 56(4) of the African Charter, the Communication is not based exclusively on mass media reports. The Communication references reports issued by non-governmental organisations and the United Nations, and annexes the Applicant's statement, the letter addressed to the Provincial Governor of XXXX by the Applicant, the official judgment of the OMT of XXXX and the notification order issued by the Registrar of the OMT.

#### **V. Exhaustion of domestic remedies, African Charter Article 56(5)**

16. According to Article 56(5) of the African Charter, communications are only admissible if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." This submission supplements the arguments on this point initially set out in the Communication,<sup>14</sup> and should be read in conjunction with paragraphs 33 to 43 of the Communication setting out the Respondent State's legal framework for the enforcement of compensation awards.

17. The Applicant has exhausted domestic remedies by obtaining and notifying a judgment awarding compensation to her (see section V.1. below). Apart from that, domestic remedies to enforce the judgment are unavailable, ineffective and insufficient (see section V.2. below).

#### **V.1. The Applicant has exhausted local remedies**

18. The Applicant constituted herself as a Civil Party in the criminal proceedings against XXXXX and obtained a judgment awarding compensation to her against XXXXX and the Respondent State.<sup>15</sup> This judgment was notified to the Respondent State.<sup>16</sup> Through her participation in the trial and the notification of the judgment, the Applicant has exhausted local remedies for the crimes committed against her by an agent of the Respondent State. She is under no obligation to take any further steps on the domestic level before filing a complaint to the Commission because the Respondent State is made aware of its responsibility and has an obligation to implement the compensation order made by its courts.

19. This was clearly established by the Commission in the case of *Bissangou v. Congo*<sup>17</sup> where the state's non-enforcement of a judgment delivered in favour of an individual lawyer was considered. The state party argued that domestic remedies had not been exhausted

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<sup>14</sup> See Communication, paras. 51-59.

<sup>15</sup> See Exhibit B to the Communication (Judgment of the Operational Military Tribunal XXXX in Case XXXX, XXXXX).

<sup>16</sup> See Exhibit D to the Communication (Notification Order of the Registrar of the Operational Military Tribunal XXXX in Case No. XXXX, XXXXX).

<sup>17</sup> African Commission, *Bissangou v. Congo*, Comm. No. 253/02.

because the complainant should have appealed against a Minister's decision not to pay the compensation, and because the complainant had not undertaken proceedings for seizure against the state under the Administrative Procedure Code. The Commission did not accept these arguments, finding that "it is unreasonable to require from a citizen who has won the case of a payable debt against the State at the end of a legal proceedings to institute procedures of seizure against it".<sup>18</sup> The complainant had notified the state party of the judgment, and as such, the Commission held that he had "exhausted all local remedies in endeavouring to assert his right to compensation for the prejudice suffered".<sup>19</sup>

20. This is consistent with the jurisprudence of the European Court of Human Rights which has dealt with multiple cases of non-enforcement of judgments against the state. As that European Court of Human Rights reiterated in the case of *Burdov*:

*A person who has obtained a judgment against the State may not be expected to bring separate enforcement proceedings (see Metaxas v. Greece, no. 8415/02, § 19, 27 May 2004). In such cases, the defendant State authority must be duly notified of the judgment and is thus well placed to take all necessary initiatives to comply with it or to transmit it to another competent State authority responsible for execution.*

*[...]The Court thus considers that the burden to ensure compliance with a judgment against the State lies primarily with the State authorities starting from the date on which the judgment becomes binding and enforceable.*<sup>20</sup>

21. In accordance with this jurisprudence, the judgment issued by the OMT of XXXXX and notified to the Respondent State by its Registrar was the final local remedy which the Applicant had to exhaust before seizing the Commission.
22. The European Court of Human Rights has acknowledged that the states can require individuals to complete a number of procedural steps in order to enforce a judgment against the state:

*A successful litigant may be required to undertake certain procedural steps in order to recover the judgment debt, be it during a voluntary execution of a judgment by the State or during its enforcement by compulsory means (see*

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<sup>18</sup> *Ibid.*, para. 59.

<sup>19</sup> *Ibid.*, para. 57.

<sup>20</sup> ECHR, *Burdov v. Russia (No. 2)* (2011), App. No. 33509/04, 15 January 2009, paras. 68-70; see also ECHR, *Beshiri v. Albania* (2006), App. no. 7352/03, 22 August 2006, para. 54 ("In particular, as to the Government's argument relating to the applicants' failure to initiate enforcement proceedings, the Court reiterates that a person who has obtained an enforceable judgment against the State as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 89, ECTHR 2006; *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004; *Koltsov v. Russia*, no. 41304/02, § 16, 24 February 2005; and *Petrushko v. Russia*, no. 36494/02, § 18, 24 February 2005).").

*Shvedov v. Russia, no. 69306/01, § 29–37, 20 October 2005). Accordingly, it is not unreasonable that the authorities request the applicant to produce additional documents, such as bank details, to allow or speed up the execution of a judgment (see, mutatis mutandis, Kosmidis and Kosmidou v. Greece, no. 32141/04, § 24, 8 November 2007). The requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the European Convention on Human Rights to take timely action of their own motion, on the basis of the information available to them, with a view to honouring the judgment against the State (see Akashev, cited above, § 22).<sup>21</sup>*

23. In the current case, the procedural steps required go far beyond the absolute necessary and can even create insurmountable obstacles for individuals seeking enforcement of compensation awards. Therefore, the Applicant is allowed to resort to regional mechanisms once she has completed the basic procedural steps.

24. The Applicant has complied with the strictly necessary procedural steps to trigger the payment of the court-ordered compensation award and even gone beyond that. Following receipt of the judgment, the Provincial Governor is required to send a signed copy to the Ministry of Justice in Kinshasa. The Provincial Governor has not acted in accordance with the enforcement procedure. This is despite the Applicant diligently pursuing her entitlement to payment, as described in paragraphs 18 and 21 of the Communication. The Applicant repeatedly approached the Registrar of the OMT to demand payment<sup>22</sup> and sent a letter to the Provincial Governor of XXXXXX on XXXXX<sup>23</sup> in which she reiterated her right to entitlement under international law.<sup>24</sup> To date, the Applicant has not received a response. No further steps to pursue the payment of the compensation award can reasonably be expected of the Applicant.

## **V.2. Local remedies to enforce the judgment are unavailable, ineffective and insufficient**

25. Under the Respondent State's legal system, there are no available, effective and sufficient local remedies which would enable the Applicant to enforce the judgment and receive the payment awarded to her because the procedure for enforcing the judgment is administrative and discretionary in nature (see V.2.1. below), there are no judicial remedies

<sup>21</sup> ECHR, *Burdov v. Russia (No. 2)* (2011), App. No. 33509/04, 15 January 2009, para. 70.

<sup>22</sup> See Communication, para. 18.

<sup>23</sup> See Exhibit E to the Communication (Letter addressed to Excellency XXXXX, Governor of XXXX, XXXXX).

<sup>24</sup> See Communication, para. 21, and Exhibit E to the Communication (Letter addressed to Excellency XXXXX, Governor of XXXX, XXXXX).

available (see V.2.2. below), and the Respondent State failed to act despite ample notice of the Applicant's claim (see V.2.3. below).

### **V.2.1. Enforcement procedure is administrative and discretionary**

26. In accordance with the legal framework and practice of the Respondent State, any person who obtained a judgment awarding compensation against the state has to complete the following procedural steps:<sup>25</sup>

(1) The victim must obtain a copy of the judgment from the Court's Registrar or the Public Ministry against the payment of a fee.<sup>26</sup>

(2) According to Article 129 of the Code of Criminal Procedure and an Inter-ministerial Act dated 15 April 2013,<sup>27</sup> the victim has to pay "proportional fees" of 3% of the amount awarded. Article 117 of the Code of Criminal Procedure requires the payment to be made to the Registrar within 8 days of the final judgment, i.e. before the compensation is paid to the Civil Party. Alternatively, s/he can apply for a certificate of indigence from the Ministry of Social Affairs to prove their inability to bear the costs. For this purpose, the victim is required to travel to the provincial division of the Ministry of Social Affairs or another competent local authority for a personal interview followed by investigations on the financial status if necessary.<sup>28</sup> However, it has been reported that in practice, victims are often still required to pay the fee, even after being declared indigent.<sup>29</sup>

(3) Upon the victim's request and payment of an additional notification fee,<sup>30</sup> the Court's Registrar will notify the provincial governor about the judgment and the payment order and will furnish him or her with a copy of the judgment.

(4) The copy of the judgment must be signed by the provincial governor and delivered to the Ministry of Justice in Kinshasa.

(5) The Enforcement Office at the Ministry of Justice must include the requested amount in the next budget. This inclusion must be approved by the Director of Litigation

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<sup>25</sup> See procedure described in Physicians for Human Rights, *Barriers to Justice: Implementing Reparations for Sexual Violence in the DRC*, May 2013, p.28; and FIDH, *DRC Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation*, August 2013, available at [http://www.fidh.org/IMG/pdf/rapport\\_rdc\\_.pdf](http://www.fidh.org/IMG/pdf/rapport_rdc_.pdf), p.60f.

<sup>26</sup> On the amount of fees see Article 126(13) Code of Criminal Procedure and Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

<sup>27</sup> Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

<sup>28</sup> Avocats Sans Frontières, *Etude sur l'aide légale en République démocratique du Congo*, January 2014, p. 59.

<sup>29</sup> International Center for Transitional Justice, *Judgment Denied: The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo*, May 2012, available at <http://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf>, p. 3.

<sup>30</sup> On the amount of fees see Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

or the Secretary General of the Ministry of Justice and by the Minister of Justice. However, they can suspend enforcement without giving any justification.

(6) The amount awarded must be transferred to the Ministry of Finance which makes the payment according to the expenditure plan.

(7) The victim must present all documents to the presiding judge who dispenses the amount.

27. These enforcement procedures are not of a judicial nature, rather they are administrative, and presided over exclusively by executive bodies, including the Court's Registry which informs the relevant parties on the judgment through the notification process, the Ministry of Social Affairs which decides whether an applicant qualifies as indigent, the Provincial Governor who must sign and deliver the award to the Ministry of Justice, the Enforcement Office at the Ministry of Justice which must include the award amount in the next budget, the Director of Litigation or Secretary General at the Ministry of Justice who must approve the budget change, and the Ministry of Finance which makes the payment according to the budget. None of these bodies are judicial in nature, nor do they carry out judicial functions with regard to the enforcement process. The Respondent State's courts are only involved during the issuance of the judgment itself, whereas the execution thereof is a purely administrative matter to be dealt with by the Provincial Governor of XXXX and the respective ministries.

28. Such *de facto* procedures, over which administrative and executive bodies have exclusive authority, do not constitute 'local remedies' under Article 56(5). The Commission has consistently interpreted the 'local remedies' requirement of Article 56(5) to refer exclusively to remedies of a judicial nature and not to encompass administrative or executive remedies.<sup>31</sup> Additionally, it is established in the jurisprudence of the Commission that the remedies required to be exhausted must not be discretionary.<sup>32</sup> In *Interights et al. v. Mauritania*, the Commission stated that

*[...] the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.*<sup>33</sup>

<sup>31</sup> African Commission, *Kenneth Good v. Republic of Botswana*, Comm. No. 313/05, para. 88; African Commission, *Ilesanmi v. Nigeria*, Comm. No. 268/03, para. 42; African Commission, *Priscilla Njeri Echaria v. Kenya*, Comm. No. 375/09, para. 53.

<sup>32</sup> African Commission, *Kenneth Good v. Republic of Botswana*, Comm. No. 313/05, para. 88.

<sup>33</sup> African Commission, *Interights, the Institute for Human Rights and Development in Africa, and the Association mauritanienne des droits de l'Homme v. Mauritania*, Comm. No. 242/01, para. 27.

29. Furthermore, the success of the enforcement procedures is at the absolute discretion of the Respondent State's executive bodies. For example, the Ministry of Social Affairs has discretion over whether the applicant receives indigent status and the Ministry of Justice can suspend enforcement without giving any justification. Therefore, the enforcement procedure as described above does not qualify as a local remedy under Article 56(5) and the Applicant had no obligation to complete all the steps before filing a complaint to the Commission.

### **V.2.2. Judicial local remedies for enforcement are unavailable and insufficient**

30. The Commission has found that only sufficient, effective and available local remedies need to be exhausted.<sup>34</sup> A remedy is available if it can be pursued without impediment, it is effective when there is a prospect of success and it is sufficient when it is capable of redressing the complaint.<sup>35</sup> In the current case, other local remedies to enforce a court-ordered compensation award, aside from the administrative and discretionary enforcement procedure described above, are not available, ineffective or insufficient.

31. Under the legal system of the Respondent State, enforcement of judgments against the state through compulsory means is prohibited.<sup>36</sup> Thus, the Applicant cannot seize domestic courts to obtain the payment by, for example, an order to seize state property, rendering this kind of local remedy unavailable.

32. Under Article 162 of the Constitution of the Democratic Republic of the Congo (2005), individuals may complain to the Constitutional Court claiming the unconstitutionality of a legislative or regulatory act. Despite the constitutional complaint being a judicial remedy and therefore prima facie within the purview of a local remedy, it cannot be considered to be sufficient in redressing the violation.

33. The Applicant is seeking payment from the Respondent State of court-ordered compensation. Even if the Applicant had obtained a decision from the Constitutional Court, such a decision would merely have confirmed the requirement that the Respondent State pay the compensation. The Applicant would then face the same challenges with enforcement that she has faced thus far in respect of the final court judgment obtained, which necessitated the present Communication to the Commission. Therefore, even if the

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<sup>34</sup> African Commission, *Sir Dawda K. Jawara v. The Gambia*, Comm. No. 147/95-149/96, para. 31.

<sup>35</sup> *Ibid.*, para. 32.

<sup>36</sup> REDRESS, Submission to the Committee on the Elimination of Discrimination against Women for Consideration of the Combined 6<sup>th</sup> and 7<sup>th</sup> Report of the Democratic Republic of the Congo, available at <http://www.redress.org/downloads/publications/REDRESS%20Final%20DRAFT%20Submission%20to%20CEDAW%20on%20DRC%2020%20June%202013.pdf>, para. 22.

Applicant had overcome the practical hurdles to bring a case before the Constitutional Court, the Applicant would be in no better position to obtain the payment of the award. The Commission employed similar reasoning in *Bissangou v. Congo*:

*Even a ruling by the Supreme Court [...] would have given the Complainant the power to demand the execution of his judgment without however providing him with any means to enforce this ruling.*<sup>37</sup>

### **V.2.3. The Respondent State failed to act despite ample notice**

34. The rationale for the requirement to exhaust local remedies is based on the notion that State Parties should be given the opportunity to remedy a violation through domestic means.<sup>38</sup> Where a state has had ample notice of a violation and has been given time to remedy the situation but has failed to do so, the Commission has previously determined that local remedies are either not available or not effective or sufficient to redress the violations alleged.<sup>39</sup>
35. The Respondent State has been aware of its obligation to pay compensation to the Applicant for almost XXXXX years. The Respondent State’s own courts issued the order for compensation on XXXXX which put the Respondent State on notice of its obligations. The latest possible date on which the Respondent State could claim to be notified of the judgment, and therefore its obligation to make payment to the Applicant, was XXXXX, the date on which the Registrar of the OMT of XXXX notified the Provincial Governor of XXXXX of the obligation to pay the damages awarded to the Applicant.<sup>40</sup> The Respondent State was thus aware of the violation and the redress sought by the Applicant and had the opportunity to grant the Applicant the compensation to which she is entitled but has failed to do so and failed to respond to the Applicant’s claims for her entitlement in any manner.

## **VI. Reasonable time period requirement, African Charter Article 56(6)**

36. Article 56(6) of the African Charter stipulates that communications must be submitted within “a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter.” As the African Charter does not stipulate what

<sup>37</sup> African Commission, *Antonie Bissangou v. Congo*, Comm. No. 253/02, para. 61.

<sup>38</sup> African Commission, *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, Comm. No. 368/09, para. 44.

<sup>39</sup> African Commission, *Article 19 v. Eritrea*, Comm. No. 275/03, para. 77.

<sup>40</sup> See Exhibit D to the Communication (Registrar of the Operational Military Tribunal XXXX, Notification Order in Case No. XXXX, XXXX).

constitutes a reasonable time period, the Commission treats each case according to its own merits under consideration of the context and characteristics.<sup>41</sup>

37. This submission complements the points raised in the Communication, namely that the reasonable time period requirement is not applicable in this case (see VI.1. below), and that that even if it was applicable, the Communication was filed within the required time limit (see VI.2. below).

### **VI. 1. The reasonable time period requirement is not applicable in this case**

38. According to the plain text of the first limb of Article 56(6) of the African Charter, the reasonable time period starts when local remedies are exhausted. As set out above, the Applicant exhausted the local remedies by obtaining the judgment on XXXX and its notification on XXXXX. However, in light of the specific violation raised by the Applicant in the Communication, the Applicant argues that this limb of the provision of Article 56(6) is not applicable and, as a result, there was no reasonable time period for the submission of the Communication.
39. The rationale for the requirement to submit a communication within a reasonable time period after the exhaustion of local remedies as provided in the first limb of Article 56(6) is to prevent challenges to domestic decisions long after they have been delivered, in the interests of legal stability and certainty. However, when a final judgment has been delivered by domestic courts, and the onus is on the State to provide compensation awarded to repair a serious violation of human rights, a continuing situation arises. In such cases of a continued violation, the European Court of Human Rights has held that an analogous six-month time limit for bringing complaints under the European Convention on Human Rights has no application to a failure to enforce domestic judgments.<sup>42</sup>
40. This exception is in line with the rationale of the first limb of Article 56(6). After a judgment is issued and notified, claimants are in a stage of uncertainty about whether the judgment will be enforced by the state. At that stage, the question of whether or not the state will comply with its obligation and pay the compensation is not yet settled. Therefore, the first limb of Article 56(6) is ill-suited to deal with cases of continued violation by non-enforcement of judgments.

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<sup>41</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Comm. No. 409/12, para. 106.

<sup>42</sup> See e.g. ECHR, *Driza v. Albania* (2011), App. No. 10810/05, 15 March 2011, para. 60; and ECHR, *Marini v. Albania* (2007), App. No. 3738/02, 18 December 2007, para. 95, ECHR 2007-XIV (extracts).

41. Where the first limb of Article 56(6) is not applicable, the second limb of Article 56(6) which stipulates that the reasonable time period starts “from the date the Commission is seized with the matter” needs to be assessed. On the meaning of seizure as used in the second limb of Article 56(6), the Commission has stated that:

*In this regard, the Commission notes that while the term “seized” or “seizure” has acquired a technical meaning in its Communications handling procedure, meaning “the decision by the Commission to consider a Communication” [See Article 55(1)&(2) of the Charter. See also Comm. 65/92 - Ligue Camerounaise des Droit de l’Homme vs. Cameroon (1997) ACHPR, para 10.], this technical meaning of seizure is clearly not what is contemplated under the second limb of Article 56(6). This is because, for a seizure to technically occur, the Communication must have first been submitted to the Commission, while on the other hand Article 56(6) contemplates that a Communication must be submitted “after” and within a timeline “from the date the Commission is seized with the matter”.*

*In the Commission’s view, the jurisdiction of the Commission began in relation to the facts of the present Communication on the date on which the alleged cause of action under the African Charter arose.<sup>43</sup>*

42. In cases of continued violations such as the current case, the “alleged cause of action under the African Charter” arises afresh every day as long as the violation is on-going, in other words with each day the Respondent State fails to pay the court-ordered compensation to the Applicant. Consequently, the reasonable time period would start anew every day until the payment is made. This effectively means that the Applicant can submit a communication to the Commission without obeying a time limit.

## **VI.2. The Communication was submitted within a reasonable time period**

43. Even if the Applicant was bound by a time limit for her complaint to the Commission, such a time period could only have started when she was aware and certain that the Respondent State would not fulfil its obligation and pay the court-awarded compensation. It was only in XXXXX that the Applicant realised with certainty that, despite all efforts, she would not obtain the court-awarded compensation, and the Communication was therefore filed within a reasonable time limit.
44. Where local remedies are considered unavailable, ineffective or insufficient, the Commission has ruled that the reasonable time period begins with the claimant’s notice of

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<sup>43</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Comm. No. 409/12, para. 108-109.

the unwillingness of the state party to remedy the alleged violation.<sup>44</sup> This is the logical consequence of a situation where the claimant is uncertain whether the state will eventually remedy the alleged violation. Once this uncertainty is resolved, the claimant must file the communication within a reasonable time period.

45. In the current case, as set out above there are no available, effective and sufficient local remedies which the Applicant can resort to. Such a situation calls for the reasonable time period, if applicable, to only start when the Applicant was aware and certain that the Respondent State would not enforce the judgment. In addition, the Applicant is facing a continued violation which should be treated in the same manner as unavailable, ineffective or insufficient local remedies because the Applicant finds herself in a similar situation of uncertainty. As long as the violation continues and is not remedied, the Applicant needs time to ascertain whether or not the Respondent State eventually will pay the court-ordered compensation. Thus, the Applicant cannot be expected to act before she has certainty about the Respondent State's intentions.
46. Under this premise, the Applicant has filed the Communication within a reasonable time period from the moment she became aware and certain of the unwillingness of the Respondent State to comply with the judgment. Upon the granting of compensation in the judgment on XXXX, the Applicant made several attempts to contact the court's Registrar for payment. The judgment was notified to the Executive by the Registrar of the OMT of XXXX on XXXXXX after the Applicant, with the support of the authors, was able to secure the necessary means to pay for the notification fees. Having seen no progress by the Respondent State, the Applicant demanded payment of the compensation by letter dated XXXX and the Respondent State confirmed its receipt of this letter on XXXXX.<sup>45</sup> In this letter, the Applicant set a time limit of one month for actions to be taken by the Respondent State which expired on XXXXX. Only after the Applicant received no payment or even a response to her letter, despite acknowledgement by the Respondent State that it had received her requests, did she realize that despite all the efforts the Respondent State would not comply with the judgment and it is from this date that any reasonable time period, if it applied, would have to be judged.
47. The Commission acknowledged receipt of the Communication on 5 December 2015, approximately XXXXX months after the Applicant became fully aware of the unwillingness of the Respondent State to provide the court-ordered compensation. This lapse of time can be

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<sup>44</sup> African Commission, *Tsatsu Tsikata v. Ghana*, Comm. No. 322/06, para. 37.

<sup>45</sup> See Exhibit E to the Communication (Letter addressed to Excellency XXXXX, Governor of XXXX, XXXXX).

considered reasonable in light of the necessary preparations for a complaint to the Commission.

**VII. No submission to other bodies, African Charter Article 56(7)**

48. The Communication has not been submitted to any other procedure of investigation or settlement in accordance with Article 56(7) of the African Charter.

**C. REQUEST**

49. In light of the foregoing, the Applicant and the Authors request the African Commission to find this Communication admissible and proceed to the decision on the merits.

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Carla Ferstman  
Director  
REDRESS