

27 April-11 May 2005
Communication No. 264/200

Thirty-Seventh Ordinary Session
27 April-11 May 2005

ASSOCIATION QUE CHOISIR BENIN v.
BENIN

DECISION

BEFORE: CHAIRPERSON: Salamata Sawadogo
VICE CHAIRPERSON: Yassir S.A. El Hassan
COMMISSIONERS: Mohamed A. Ould Babana, Kamel Rezag Bara,
Andrew R. Chigovera, Vera M. Chirwa, Emmanuel V.O. Dankwa,
Jainaba John, Angela Melo, Sanji Mmasenono Monageng, Bahame
Tom Mukirya Nyanduga

Citation: Ass'n Que Choisir Benin v. Benin, Comm. 264/2002, 18th ACHPR
AAR Annex III (2004-2005)
Publications: Documents of the African Commission on Human and Peoples'
Rights, Vol. 2, at 722 (Malcolm D. Evans & Rachel Murray eds.,
2009); (2005) AHRLR 43 (ACHPR 2005)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

RAPPORTEUR

33rd Ordinary Session: Commissioner Salamata Sawadogo

34th Ordinary Session: Commissioner Salamata Sawadogo

35th Ordinary Session: Commissioner Salamata Sawadogo

36th Ordinary Session: Commissioner Salamata Sawadogo

37th Ordinary Session: Commissioner Salamata Sawadogo

SUMMARY OF FACTS

1. On the 6th November 2002, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr. Dossou Dossa Bernard, Chairperson of the NGO Que Choisir Benin [FN1], a Communication submitted on behalf of Beninese magistrates, in accordance with the provisions of Articles 55 and 56 of the African Charter on Human and Peoples' Rights (the African Charter).

[FN1] Que Choisir Benin is an NGO based in Benin and has had Observer Status with the African Commission On Human and Peoples' Rights since May 2001 (29th Ordinary Session).

2. The Communication was instituted against the Republic of Benin (State party[FN2] to the African Charter and hereinafter referred to as Benin) and in it the NGO Que Choisir Benin alleges that the report prepared by a Commission of Inquiry of the Ministry of Finance of Benin) set up to investigate disbursements effected between 1996 and 2000 concluded that " all sorts of irregularities and fraudulent dealings in the collection and issue of taxes and memoranda falling under the jurisdiction of magistrates", had been committed and as a result several magistrates, court clerks and tax collectors of the Beninese Treasury were brought before the judicial chamber of the Supreme Court accused of falsification of public accounts, complicity in embezzlement, fraud, ...

[FN2] Benin ratified the African Charter on 20th January 1986

3. Que Choisir Benin furthermore declares that the Constitutional Court of Benin, by its Ruling DCC 02-097, dismissed, on unconstitutional grounds, the appeal lodged by the magistrates imprisoned since December 2001.

THE COMPLAINT

4. The NGO Que Choisir Benin contends that the provisions of Articles 547, 548 and 549 of the Ruling No 25/PR/MJL of 07/08/67 governing the criminal procedure code in Benin and by virtue of which the proceedings were brought (against those accused), violate the principles of equality and the right to defense provided for under the provisions of Article 26 of the Constitution of Benin and Article 7-1 © of the African Charter on Human and Peoples' Rights.
5. Que Choisir Benin consequently requests the African Commission to "consider this Communication at one of its future sessions."

PROCEDURE

6. The Secretariat of the African Commission, by letter ref ACHPR/COMM/2 of 11th February 2003 addressed to Que Choisir Benin, acknowledged receipt of the Communication, specifying the reference of the Communication and further informing it that the Communication would be registered on the African Commission's roll for examination on seizure at its 33rd Ordinary Session scheduled from 15 to 19 May 2003 in Niamey, Niger.
7. At the 33rd Session, the African Commission considered the Complaint, decided to be seized of it and deferred consideration on its admissibility to the 34th Ordinary Session of the Commission.
8. The Secretariat of the African Commission, by Note Verbale and letter dated 23rd June informed the parties of the decision on seizure taken by the African Commission with regard to the Communication and requested them to convey, as early as possible, their submissions on admissibility of the Communication.
9. The plaintiff transmitted by electronic mail its submission on the admissibility of the Communication to the Secretariat on the 18th August 2003.
10. The Secretariat of the African Commission, by letter dated 19th September 2003, acknowledged receipt of the plaintiff's letters requesting some documents mentioned but which were absent from the file.
11. The Secretariat of the African Commission, by Note Verbale dated 24th September 2003 transmitted the Complaint's submission and attachments to the Respondent State reminding it that the African Commission still awaited its submission.
12. The African Commission considered the case during its 34th Ordinary Session and deferred consideration on its admissibility to the 35th Session. During the meetings of the 34th Ordinary Session, the Respondent State delivered its submission on the admissibility of the Communication to the Secretariat of the African Commission.
13. The Secretariat of the African Commission, by Note Verbale and letter dated 15th December 2003 informed the Parties of developments on the file, forwarding to the Complainant a copy of the Respondent State's statement of case.
14. The Respondent State was also notified that its delegation to the 34th Session had pledged to provide the African Commission with copies of the Constitution and the Criminal procedure Code of Benin.
15. Following a reminder by Note Verbale dated 05 March 2004, the Ministry of Foreign Affairs of the Republic of the Benin forwarded the above-mentioned documents under cover of a letter dated 19th March 2004 to the Secretariat of the African Commission.
16. The Secretariat of the Commission, by letter dated 12 May 2004 also reminded it to forward its response to the Complainant.

17. During the 35th Ordinary Session which was held in May/June 2004 in Banjul, The Gambia, the African Commission considered the Complaint and heard the delegate from the Respondent State.
18. During the 36th Session, the Commission decided to defer its decision on admissibility to its 3ih Ordinary Session and notified the State accordingly by Note Verbale dated 20th December 2004.
19. The Secretariat also notified the Complainant of the decision taken by Commission at its 36th Session and reminded him, by letter dated 20/12/04, to convey his conclusions on the admissibility of the Communication as early as possible.
20. On the 15th February 2005, the Complainant finally submitted his memorandum on admissibility and a letter acknowledging receipt was sent to him on the 22/03/05. The Complainant's memo was also sent to the Respondent State by Note Verbale dated 22nd March 2005.

LAW

ADMISSIBILITY

21. The African Charter on Human and Peoples' Rights provides under its Article 56 that for Communications covered by the provisions of article 55, to be considered, they should necessarily have exhausted all local remedies, if any unless it is obvious that this procedure is unduly prolonged.
22. In the case at hand, the numerous letters from the Secretariat requesting the Complainant for evidence that the said requirement had been satisfied remained, for a long time, without response. In fact, the Secretariat of the Commission lost contact with the Complainant from October 2003.
23. However, on the 15th February 2005, the Complainant finally re-established contact with the Secretariat and conveyed his memorandum on admissibility through electronic mail. In this memorandum the Complainant contends that the State of Benin has violated two fundamental principles of human rights, namely: the principle of equality of all citizens before the law and in consequence before justice and the principle of the legality of the criminal act.
24. The Complainant recalls that Articles 547,548 and 549 of the Benin Criminal Code which form the basis of the procedure thus submitted before the Supreme Court blatantly violate the Magistrates' right to defense as they eliminate the right to appeal in refusing to allow any appeal against the rulings of the reporting judge acting as examining judge.
25. The Complainant argues that to defend themselves against the abuse of power and arbitrary rulings by the examining judge, the magistrates found no other means than to bring the said Articles before the Constitutional Court which, evidently, are contrary to the provisions of Article 26 of the Benin Constitution which stipulates that "the State

guarantees the equality of all citizens before the law without discrimination of social position” and that of Article 3 of the African Charter on Human and Peoples’ Rights which stipulates:

“1. All individuals enjoy total equality before the law;

2. All persons have right to equal protection by the law”

26. The Complainant contends that the Complaint should be declared admissible by the African Commission in conformity with Article 50 of the African Charter.

27. The Respondent State for its part, argues that the Complaint should be declared inadmissible since the matter at issue is still pending before the Courts in Benin and if need be, the concerned parties shall have the possibility of appealing after the Court of Appeal’s ruling to which the Supreme Court’s judicial chamber had referred the case in April 2003.

28. This argument, posited by the Respondent State in its statement of case of the 13/11/2003, was reaffirmed by its delegate at the hearing granted by the African Commission during its 35th Ordinary Session (May/June 2004).

29. Whilst the Respondent State contends that the Complaint is still pending before the local Courts, the Complainant has not answered the fundamental question which is whether local remedies have been exhausted in this particular case.

30. Since the Complainant has not proven, contrary to the claims of the Respondent State, that the case has been settled by the Benin Courts and that local remedies have been exhausted, the African Commission is compelled to accept the position of the Respondent State which contends that the case is still pending before the local Courts.

31. Whereas the established jurisprudence of the African Commission, which is in conformity with the provisions of Article 56 (5) of the African Charter, requires that the Communications governed by Article 55 of the said Charter can only be examined after local remedies, if they exist, are exhausted, “unless it is clear to the Commission that the recourse to these remedies is unduly prolonged”.

32. Such a position which is also contained in the established precedents of other human rights institutions is based on the principle that the Respondent State should first of all have the means of rectifying, through its own means and within the framework of its own national legal system, the alleged violation by future Complainants.

33. On these grounds, the African Commission declares the Communication inadmissible for non exhaustion of all