Communication 328/06 – Front for the Liberation of the State of Cabinda v Republic of Angola

40th Ordinary Session: **Commissioner Mumba Malila**
41st Ordinary Session: Commissioner Mumba Malila
42nd Ordinary Session: Commissioner Mumba Malila
43rd Ordinary Session: Commissioner Mumba Malila
44th Ordinary Session: Commissioner Mumba Malila
45th Ordinary Session: Commissioner Mumba Malila
46th Ordinary Session: Commissioner Mumba Malila
47th Ordinary Session: Commissioner Mumba Malila
48th Ordinary Session: Commissioner Mumba Malila
49th Ordinary Session: Commissioner Mumba Malila
50th Ordinary Session: Commissioner Med Kaggwa
10th Extra-Ordinary Session: Commissioner Med Kaggwa

Summary of the Compliant:

1. On 29 September 2006, the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint from Front for the Liberation of the State of Cabinda - FLEC (the Complainant) on behalf of the people of Cabinda against the Republic of Angola[1] (the Respondent State or Angola) in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The Complainant submits that Cabinda, formerly known as the Portuguese Congo, consists of a territory of approximately 2800 square miles. The Complainant further submits that in 1885 the independent rulers of Cabinda city and its environs entered into a treaty, the Treaty of Simulambuco, with the Government of the Kingdom of Portugal establishing a Protectorate over much of present day Cabinda.

3. In 1975, the Complainant states, the Alvor Conference in Portugal, between the colonial power and UNITA, MPLA, and FNLA declared the annexation of Cabinda by Angola without any Cabindan participation.

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1 Angola ratified the African Charter on 2 March 1990.

4. The Complainant alleges that since 2002, the Respondent State has undertaken a massive military campaign against Cabinda and that when this failed, the former entered into *ad hoc* negotiations with Cabindan factions in an attempt to confuse issues. These negotiations excluded the Chairman of FLEC, Mr. Nzita Tiago - the only universally recognized Cabindan authority – and resulted in a Peace Accord that was contested by both Cabinda and the democratic opposition in Angola, the UNITA.

5. The Complainant further alleges that the Respondent State has also maintained a large military force in Cabinda which has committed numerous documented human rights violations therein.[2] The Complainant claims that in 2006 the Angolan Forces (FAA) committed dozens of human rights and humanitarian violations such as: the bombardment of civilian dwellings in the Mayombe (Piading) region; summary execution of Cabinda patriots in Buco, Zao and beatings and torture of Mpalabanda members in Caio Poba.

6. The Complainant claims that in July 2006 Angola banned the only independent human rights organization in Cabinda, Mpalabnda (Associacao Civica de Cabinda) by a court order, for allegedly inciting violence and hatred, and carrying out political activities rather than being a civil society organization.

7. Furthermore, the Complainant avers that the Angolan Government is exercising economic exploitation of Cabindan resources. They claim that Cabindans have been suffering from high unemployment, lack of educational opportunities, disease and intense poverty since the Angolan Government took over Cabinda's natural resources such as offshore oil, onshore mineral and oil resources.

8. The Complainant further alleges that Angolan Government has economically dominated the Cabindan people by denying them their status as people and by extracting more than ninety *per cent* (90%) of their economic patrimony while returning less than ten *per cent* (10%). In so doing, Angola's Government, the Complainant alleges, has perpetrated neo-colonialism.

[2] The alleged violations include extrajudicial/summary executions, arbitrary arrests and detention, sexual violence, denial of civilians' freedom of movement, torture and other mistreatment.

9. The Complainant also contends that although Cabindans are separate culturally and linguistically from Angola and overwhelmingly identify themselves as 'Cabindans', not Angolans, the Cabindan people have been denied their right to self-determination by Angola.

10. The Complainant submits that despite over 30 years of conflict, Angola has refused a referendum on the issue of Cabindan autonomy, independence or continued occupation by Angola since 1975. The Complainant alleges that Angola does not permit Cabinda to determine its own economic and social development. The Complainant states that all economic decisions are made in Luanda, Angola's capital city and not Cabinda, even though Cabinda has maintained a government in exile since 1963 and has had an active self-defence force and civil administration inside Cabinda since 1975.

Articles alleged to have been violated:

11. The Complainant alleges that the Respondent State has violated Articles 14, 19, 20, 21, 22 and 24 of the African Charter.

Procedure:

12. The present Communication was received by the Secretariat on 29 September 2006.

13. The Secretariat acknowledged receipt of the Communication to the Complainants by letter of 2 October 2006, informing them that the Communication would be scheduled for consideration by the African Commission at its 40th Ordinary Session held in November 2006 in Banjul, The Gambia.

14. At its 40th Ordinary Session, held from 15 to 29 November 2006, in Banjul, The Gambia, the African Commission decided to be seized of the Communication.

15. On 8 January 2007, the African Commission further received a press statement issued by FLEC on the current struggle for the control of petroleum in Cabinda, alleging continuous violations of the African

Charter by the Angolan Government and other actors for which it is responsible.

16. By a letter dated 8 February 2007 and a Note Verbale dated 28 February 2007, the Secretariat informed the parties of its decision on seizure and requested them to submit their arguments on the Admissibility of the Communication within two months. A copy of the Communication was also sent to the Respondent State.

17. On 25 April 2007, the Secretariat sent a reminder to both parties indicating that the African Commission will examine the Admissibility of the Communication at its 41st Ordinary Session in May 2007 and requested them to submit their arguments on Admissibility latest by 10 May 2007.

18. At its 41st Ordinary Session in May 2007 in Accra, Ghana, the African Commission considered the Communication and decided to defer it to its 42nd Ordinary Session, to be held in November 2007, pending arguments on admissibility from both parties. The parties were notified accordingly on 20 June 2007.

19. On 15 August 2007, the Complainant forwarded a brief with their arguments on Admissibility and an amended document that updates the facts of the Communication.

20. A Note Verbale was sent to the Respondent State on 20 August 2007 requesting the latter to submit its response to the Complainant's submission on Admissibility that was transmitted to it.

21. On 23 August 2007 the Secretariat received a letter dated 1 March 2007 from the Complainant , urging the African Commission to hasten its consideration of the Communication in view of the fact that matters complained thereof were getting worse. The Secretariat acknowledged receipt of this letter on 28 August 2007.

22. During its 42nd Ordinary Session in November 2007, the African Commission considered the Communication and decided to give the Respondent State one last chance to make its submissions on the Admissibility of the Communication. The parties were notified accordingly on 19 December 2007.

23. Letters by the Complainants dated 22 January, 8 September and 26 December 2008 were received by the Secretaria inquiring about the status of the Communication.

24. During its 43rd and 44th Ordinary Sessions, the African Commission deferred the consideration of the Communication pending the submission on Admissibility by the Respondent State, the parties were accordingly informed.

25. On 27 April 2009 the Secretariat sent a reminder to the Respondent State to make its submissions on Admissibility.

26. On 21 July 2009, the African Commission received supplementary information to the Communication by the Complainant.

27. During its 45th and 46th Ordinary Sessions the African Commission considered the Communication and deferred its decision on Admissibility pending the Respondent State's submission on Admissibility

28. On 12 January 2010, the Secretariat received a letter from the Complainant urging the African Commission to take immediate action and to appoint a Special Rapporteur for Cabinda.

29. During its 47th, 48th, 49th and 50th Ordinary Sessions, the African Commission deferred the consideration of the Communication, and the parties were accordingly informed.

The Law on Admissibility

Submission of the Complainant

30. Regarding Article 56 (1) of the African Charter, the Complainant avers that the Communication is submitted by FLEC on behalf of the people of Cabinda.

31. Concerning Article 56 (2) of Charter, the Complainant submits that the Respondent State has violated Articles 14, 19, 20, 21, 22 and 24 of the African Charter. The Complainant further submits that although the

Communication alleges serious violations of the economic and peoples' rights of the people of Cabinda by the Government of Angola, the Complainant does not request the African Commission to take up any matter that would interfere with the sovereignty of Angola or adjudication of Angolan territorial claims in Cabinda. The Complainant states that they are mindful that the African Commission must respect Articles 3(b) and 4(b) of the AU Constitutive Act regarding territorial sovereignty and respecting existing borders.

32. With regards to Article 56 (3) of the African Charter, the Complainants aver that the language used in the Communication is phrased in a neutral legal language and is mindful that despite ongoing hostilities between FLEC and Angola the African Commission is not a forum to fight battles.

33. In relation to Article 56 (4) of the African Charter, the Complainant claims that the Communication is not based exclusively on news disseminated through the mass media, but rather on primary information provided by FLEC and other organizations directly involved in the matter.

34. On the requirement of the exhaustion of local remedies under Article 56 (5) of the African Charter, the Complainant requests the Commission to wave this condition on the basis that exhaustion of domestic remedies is futile and legally impossible for the reasons stated in the paragraphs below.

35. The Complainant submits that Cabinda and Angola are in a state of armed conflict with casualties on both sides continuing with recent military action at M'Pumbo Chionzo by FLEC against the FAA. The Complainant avers that the process of taking the matter to tribunals in Angola would be futile or impossible and would subject them (the Complainant) to arbitrary arrest, detention, or execution as terrorists.

36. The Complainant also submits that Mpalabanda was the only independent organization that was still functioning in Angolan-Cabinda which could have presented their grievances before Angolan courts. However, the Complainant avers, the banning of this organization and the subsequent signing of the accords with the self-appointed Bento Bembe in August 2006 means that dissent by

Cabindan organizations espousing self-determination will not be tolerated by the Angolan courts. This is because, according to them, since the Bento Bembe accord has "officially" closed the matter, Cabindans must accept "amnesty" under the accord or face arrest or execution as terrorists.

37. The Complainant further submits that since the so-called Peace Accord of 30 August 2006, Angolan troops with the active assistance of General Bento Bembe have gone across the borders to attack Cabindan refugees and FLEC forces. The Complainant therefore has no legal standing under Angolan law and its representatives would face arrest and possible execution under Angolan national security laws.

38. The Complainant submits that popular demonstrations against Bento Bembe were broken up with live ammunition fired on the crowd by Angolan forces and that the FLEC-FAC forces and their supporters who have not surrendered to Angola and Bembe have been declared as "terrorists." In this regard, the Complainant contends that because they are opposed to the "Angola-Bento Bembe" Accord, the principal members of FLEC are outside Angolan jurisdiction, and thus the requirement of Article 56 (5) of the African Charter should be waived, because they would neither be able to litigate the case in Angola, nor would an Angolan court or tribunal entertain these allegations.

39. As to Article 56 (6) of the African Charter, the Complainants aver that the Communication has been submitted in a timely manner.

40. Lastly, the Complainant submits that the Communication complies with the requirement of Article 56 (7) of the African Charter. They aver that the Communication does not deal with cases which have been settled by the Respondent State.

41. The Complainant further explains that the August 2006 Memorandum of Understanding for Peace and Reconciliation in Cabinda between Angola and the Cabinda Forum for Dialogue (FCD) purports to be a lawful agreement settling the matter of Cabinda in finality. However, the Complainant submits that both Bembe and FCD have been disowned by the historic leadership of FLEC.

42. The Complainant also submits that Bembe and FCD's alleged legitimacy as Cabindan representatives springs from Bembe's previous association with FLEC. FLEC however has never ratified the August 2006 agreement and instead rejects it in its entirety. The Complainant also points out that the people of Cabinda were never consulted and that at best the agreement is between Bembe, his personal militia and Angola and cannot be considered a universal settlement.

Respondent State's submission on Admissibility

43. The Respondent State has not made any submissions on Admissibility despite several reminders that have been sent by the Secretariat. The African Commission will therefore proceed to decide on Admissibility based on the submissions of the Complainant.

The African Commission's Analysis on Admissibility

44. Article 56 of the African Charter lists seven Admissibility requirements that have to be cumulatively fulfilled for a Communication to be declared Admissible. In the present case, while the Complainant has clearly stated its arguments as to why the Communication meets each of the seven requirements stipulated under Article 56, the Respondent State has not made any submission to contest or refute those claims.

45. From the time when the African Commission was seized with the Communication during its 40th Ordinary Session in November 2006 to date, ten (10) reminders were sent to the Respondent State requesting the latter to submit its arguments on Admissibility to no avail.[3]

46. Under such circumstances, as the jurisprudence of the African Commission dictates in the case of the *Institute for Human Rights and Development in Africa v. Republic of Angola*[4] "in the face of the state's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure." In the same decision, the African Commission re-affirmed its position by

[3] Notes Verbale were sent to the Republic of Angola on 28 February 2007, 10 May 2007, 20 August 2007, 19 December 2007, 25 March 2009, 27 April 2009, 23 June 2010, 30 September 2010, 7 December 2010 and 11 August 2011.

[4] Communication 292/04 - Institute for Human Rights and Development in Africa v. Republic of Angola, para. 34

ruling that "… it would proceed to consider Communications on the basis of the submission of the Complainants and information at its disposal, even if the State fails to submit."[5]

47. In the case at hand, the Complainant submits that the Communication complies with all the seven requirements of Article 56 of the African Charter, except the one relating to the exhaustion of local remedies under Article 56 (5), for which the Complainant asks for waiver.

48. Accordingly, in the absence of any submissions from the Respondent State to the contrary, the African Commission is convinced that all the requirements under Article 56, except Article 56(5) are met, and proceeds to consider the legitimacy of the request for waiver based on Article 56(5) of the Charter and relevant jurisprudence.

49. Article 56 (5) of the African Charter provides that Communications should be "sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." This requirement is based on the principle that "the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual."[6]

50. The Commission has however stressed that the requirement of the exhaustion of local remedies "does not mean that complainants are required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective."[7] The jurisprudence of the Commission, in determining compliance with this requirement, laid down "[t]hree major criteria…that is: the local remedy must be *available, effective and sufficient*."[8]

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5 Ibid. The cases cited in this case are: Communication 155/96 Social and Economic Rights Action Center, Center for Economic and Social Rights v. Federal Republic of Nigeria, and 159/96 Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Republic of Angola.

6 Communication 71/92 - Rencontre Africaine pour la Defence des Droits de l'Homme v. Zambia

7 *Ibid*.

8 See Jawara v The Gambia para 33, Communication 300/05 – SERAC and Socio Economic Rights and Accountability Project v. Nigeria, para. 45

51. The initial burden is on the Complainant to prove that they have met the requirement set in Article 56 (5), thereafter the burden shifts to the Respondent State if it contests the allegations of the former, declaring that there is further available and effective remedy.

52. In the present case, the Complainant avers that they have no legal standing under Angolan law and its representatives would face arrest and possible execution under Angolan national security laws if they try to pursue legal remedies in Angola, adding that members of FLEC are considered terrorists in Angolan territory and hence any attempt to take the case before Angolan courts would be futile, if not impossible, and would subject the Complainant to arbitrary arrest, detention or execution as terrorists.

53. The Complainants also contend that the only independent human rights organization in Cabinda, Mpalabanda, that could have taken their case before a court of law was banned on 20 July 2006 for allegedly inciting violence and hatred, and being involved in political activities. Furthermore, the Complainants argue that the principal members of FLEC (the Complainant) are outside Angolan jurisdiction, thus they request for the waiver of the requirement of exhaustion of local remedies.

54. These claims, which are not contested by the Respondent State, show the apparent existence of fear of persecution on the side of the Complainant.

55. In a number of cases the African Commission has used the standard of constructive exhaustion of local remedies to provide an exception to the rule. Fear of persecution is one of the exceptions used to waive the requirement of exhaustion of local remedies. In *Sir Dawda K Jawara v The Gambia*[9] the African Commission reasoned that "the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of generalized fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him".

[9] Jawara v The Gambia, para. 35

56. In *Rights International v Nigeria*[10] and *John D Ouoko v Kenya*[11], the African Commission reasoned that the existence of apparent fear of persecution on the side of the victims to return to their countries to exhaust local remedies would make the remedies not available to such persons and hence were exempted from the requirement.

57. Similarly, in the present case, the fact that the Complainant has no legal standing before Angolan courts, that most of its members live abroad and are considered terrorists by the Government, leads to the conclusion that the chances of the Complainant exhausting legal remedies have been practically rendered impossible by fear of prosecution. Moreover, the hostility of the Government towards people who raise issues related to Cabinda have made the domestic remedies practically inaccessible and unavailable.[12]

58. Therefore, the African Commission holds that local remedies were not available to the Complainant and hence rules that the Communication is in line with the requirement under Article 56(5) of the African Charter.

Decision of the African Commission on Admissibility

1. In view of the above, the African Commission on Human and Peoples' Rights decides:

    i. To declare this Communication Admissible in accordance with Article 56 of the African Charter;

    ii. To give notice of this decision to the parties and adjourn the consideration of the Communication for the parties to make their submissions on the Merits; and

    iii. To notify the Complainant to forward its submissions on the Merits within 60 days of notification pursuant to Rule 108(1) of the Rules of Procedure.

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10 Communication 215/98 – Rights International v Nigeria

11 Communication 232/99 – John d Ouoko v Kenya

12 According to the Complainants, since the Bento Bembe accord has "officially" closed the matter, Cabindans must accept "amnesty" under the accord or face arrest or execution as terrorists. This is taken as a fact since it is not contested by the Respondent State.

Done in Banjul, The Gambia, at the 10th Extraordinary Session of the African Commission held from 12 to 16 December 2011