



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3658/2019*, **

<i>Communication submitted by:</i>	Louis d'Or Balekelayi Nyengele, Télésphore Bigabwa Suka, Hermione Bolumbe Bakando, Michel Bongongo Ikoli, Einstein Ebengo Koko, Crispin Kankonde Kankonde, Hervé Katchelewa Amsini, Constant Lomata Kongoli, Josiane Maloba Banze, Rufin Mangbau Mongungu, Pauline Matankumu Wa Boyele, Prince Muhindo Mundenga, Mamie Mujanyi Kalonji, Ivonne Mutombo Wa Ngoy, Philomène Nyabakele Nyamumbay and Charly Wenga Bulambo (represented by counsel, Georges Kapiamba)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Democratic Republic of the Congo
<i>Date of communication:</i>	21 September 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 10 October 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	25 October 2023
<i>Subject matter:</i>	Enforcement of court decisions
<i>Procedural issue:</i>	Lack of cooperation by the State party
<i>Substantive issue:</i>	Right to an effective remedy
<i>Articles of the Covenant:</i>	2 and 14 (1)
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2)

1. The authors of the paper are: Louis d'Or Balekelayi Nyengele, Télésphore Bigabwa Suka, Hermione Bolumbe Bakando, Michel Bongongo Ikoli, Einstein Ebengo Koko, Crispin Kankonde, Hervé Katchelewa Amsini, Constant Lomata Kongoli, Josiane Maloba Banze, Rufin Mangbau Mongungu, Pauline Matankumu Wa Boyele, Prince Muhindo Mundenga,

* Adopted by the Committee at its 139th session (9 October–3 November 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.



Mamie Mujanyi Kalonji, Ivonne Mutombo Wa Ngoy, Philomène Nyabakele Nyamumbay and Charly Wenga Bulambo, all nationals of the Democratic Republic of the Congo. They claim that the State party has violated their rights under articles 2 and 14 (1) of the Covenant. The Optional Protocol entered into force for the State party on 1 February 1977. The authors are represented by counsel.

The facts as presented by the authors

2.1 On 30 December 2018, the Independent National Electoral Commission of the Democratic Republic of the Congo organized presidential, national parliamentary and provincial elections. On 11 January 2019, the Commission published the provisional results of the national parliamentary elections, according to which the authors had not been elected.¹ Consequently, based on the provisions of articles 73 and 74 of Act No. 06/006 of 9 March 2006 on the organization of presidential, parliamentary, provincial, urban, municipal and local elections, the Elections Act, the authors – individually or through their respective political parties or groupings – challenged the results published by the Electoral Commission before the Constitutional Court. At the end of those proceedings, the authors won their case and were validated as elected deputies in their respective constituencies.²

2.2 Under article 168 of the Constitution, Constitutional Court judgments are not subject to appeal and are immediately enforceable. They are binding on public authorities, all administrative and judicial authorities, both civil and military, and private individuals.

2.3 However, on 3 and 4 July 2019, the authors learned through the media that the Constitutional Court had validated the election of other candidates in their place, on the pretext of correcting factual errors. Various political parties had filed claims – against the authors or against the political parties to which they belonged – requesting the correction of factual errors contained in the judgments that had validated the authors' election. After comparing the number of votes officially obtained by each candidate, the Court had invalidated the authors' election. During the proceedings before the Court, the authors and the political parties to which they belong were represented by counsel.

2.4 The Constitutional Court, sitting in first and final instance on electoral disputes, noted that – in accordance with article 168 of the Constitution, article 93 (4) of Organic Act No. 13/026 of 15 October 2013 on the organization and functioning of the Constitutional Court and article 74 *quinquies* (1) of the Elections Act, as amended pursuant to Act No. 11/003 of 25 June 2011 – its judgments are not subject to appeal. It specified, however, that the Court can, at the request of political parties or the Public Prosecutor's Office, and on the basis of article 93 (4) of Organic Act No. 13/026 and article 74 *quinquies* (3) of the Elections Act, as amended pursuant to Act No. 11/003, correct or interpret factual errors, after all parties have been heard.³

2.5 Josiane Maloba Banze was proclaimed by the Constitutional Court in its judgment No. RCE 979/DN of 14 June 2019 to have been elected, and her election was confirmed by a second judgment, issued by the Special Chamber of the Constitutional Court on 3 July 2019.⁴ However, her name does not appear in Constitutional Court judgment No. 1168/DN of 4 July 2019 proclaiming the final results of the parliamentary elections of 30 December 2018 and 31 March 2019. Furthermore, that judgment does not include the names of other authors of the present communication among the elected national deputies. The judgment was handed down following proceedings in which the authors had not been called on in advance to present their defence.

¹ Decision No. 028/CENI/BUR/19, pursuant to article 71 of Act No. 06/006 of 9 March 2006 on the organization of presidential, parliamentary, provincial, urban, municipal and local elections.

² Judgments issued pursuant to article 81 of Organic Act No. 13/026 of 15 October 2013 on the organization and functioning of the Constitutional Court and article 54 of the Court's rules of procedure.

³ See judgment No. RCE 1156/DN of 3 July 2019 concerning Einstein Ebengo Koko.

⁴ Judgment No. RCE 1150/DN. The Constitutional Court declared inadmissible an application for correction of factual errors filed by a political party against the political party of which Josiane Maloba Banze was a member, on the grounds that the lawyer who signed the application had failed to prove his standing.

2.6 In July 2019, some of the authors⁵ appealed to the Constitutional Court, claiming that the decision was unconstitutional and requesting an interpretation of the “superimposed” judgments. On 27 August 2019, the Court declined jurisdiction, without giving reasons, following proceedings in which the authors had not been called in advance. All the appeals made by the authors and civil society to the competent national authorities for an independent, impartial, credible and exhaustive investigation into the acts of corruption, influence peddling and violation of the Constitution, the law and the principles of a fair trial committed by certain judges of the Court have so far been in vain.

2.7 On 28 August 2019, the Bureau of the National Assembly held a plenary meeting during which the mandates of the deputies who benefited from the “superimposed” judgments were validated. As a result, the authors cannot sit in the National Assembly as national deputies, nor receive their emoluments and other benefits linked to their position. On 18 September 2019, a group of 31 national deputies affected by the “superimposed” judgments – including the authors – filed a political statement with the National Assembly to contest the validation of the other deputies in their place and to denounce the denial of justice.

2.8 The authors point out that, since, pursuant to article 168 of the Constitution, the Constitutional Court’s judgments are final, no further domestic remedies are available. No response has been received to a memorandum on the subject addressed to the President of the Republic. All domestic remedies have thus been exhausted. Four of the authors submitted a complaint to the secretariat of the Inter-Parliamentary Union Committee on the Human Rights of Parliamentarians, which is not an investigative or adjudicative body within the meaning of the Optional Protocol.⁶

The complaint

3.1 The authors allege that the State party has violated articles 2 and 14 (1) of the Covenant. They consider that the State party neither respects nor guarantees their rights under the Covenant without discrimination. The authors argue that they have not had an effective remedy and that the State party has not acted on the Constitutional Court’s decisions proclaiming them as national deputies, nor on the appeals lodged against the Court’s “superimposed” judgments.

3.2 The authors argue that, on the pretext of correcting factual errors, the Constitutional Court subtly re-examined the merits of all the objections, which had already been closed with the handing down of its final, enforceable judgments. In the authors’ view, those judgments are not reasoned and, above all, reveal traces of corruption and influence peddling. They point out that article 93 (4) of Organic Act No. 13/026, like article 35 (4) of the Court’s rules of procedure, does not define the procedure for correcting factual errors. The authors therefore refer to French jurisprudence to explain that a factual error consists of an oversight that affects the letter or expression of the judge’s real thought, and that remedying such an error makes it possible to safeguard the spirit or substance of the judgment, but does not constitute a remedy that would call into question the binding nature of the decision.⁷ Hence, the procedure for correcting a factual error is not intended to rectify the merits of the judgment, i.e. its operative part.

3.3 While, pursuant to article 93 (4) of Organic Act No. 13/026, the Constitutional Court has jurisdiction to interpret its own decisions, it has to be recognized that its action in declaring that it had no jurisdiction to interpret the “superimposed” decisions constituted a denial of justice to the detriment of the authors, as it disregarded their right to have the merits of their application examined. The authors recall, in this connection, that the Committee has

⁵ The names of Télésphore Bigabwa Suka, Michel Bongongo Ikoli, Crispin Kankonde Kankonde, Pauline Matankumu Wa Boyele, Prince Muhindo Mundenga, Mamie Mujanyi Kalonji and Ivonne Mutombo Wa Ngoy do not appear on the application.

⁶ *Mambu v. Democratic Republic of the Congo* (CCPR/C/118/D/2465/2014), para. 8.2.

⁷ French court of cassation, plenary assembly, 1 April 1994, *Recueil Dalloz 1994*, p. 293, conclusions of Mr. Jèol, *Revue trimestrielle de droit civil 1994*, p. 681, comments by Mr. Perrot.

already ruled that the right to be tried by an independent and impartial tribunal is an absolute right that is not subject to any exception.⁸

Lack of cooperation from the State party

4. On 10 October 2019, 4 April 2022, 8 June 2022, 9 September 2022, 30 November 2022 and 31 January 2023, the Committee requested the State party to submit its observations on the admissibility and merits of the communication. The Committee regrets that the State party has failed to respond to any of these requests and to provide any information with regard to the admissibility or the merits of the authors' allegations. It recalls that article 4 (2) of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them and to make available to the Committee all the information at their disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are sufficiently substantiated.

Issues and proceedings before the Committee

Committee's consideration of admissibility

5.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

5.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.⁹

5.3 Regarding the exhaustion of domestic remedies, the Committee recalls its jurisprudence to the effect that, for the purposes of article 5 (2) (b) of the Optional Protocol, the author of a communication must make use of all administrative or judicial avenues that offer a reasonable prospect of redress.¹⁰ The Committee notes the authors' argument that, under article 168 of the Constitution, Constitutional Court judgments are not subject to appeal. It also notes that the State party has not contested the admissibility of any of the claims submitted. Accordingly, the Committee finds that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

5.4 The Committee notes that the authors have also claimed a separate violation of their rights under article 2 of the Covenant. Recalling its jurisprudence according to which the provisions of article 2 lay down general obligations for States parties and cannot, by themselves, give rise to a separate claim under the Optional Protocol, as they can be invoked only in conjunction with other substantive articles of the Covenant,¹¹ the Committee considers the authors' claims under article 2 of the Covenant, invoked separately, to be inadmissible under article 3 of the Optional Protocol.¹²

5.5 The Committee takes note of the authors' claim that their right of access to a court under article 14 (1) of the Covenant has been violated, since the Constitutional Court has declined jurisdiction to hear the authors' appeals against its own decisions. The Committee refers to its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, in which it clarified that the right to equal access to a court, set out in article 14 (1) of the Covenant, refers to access to first instance procedures and does not

⁸ Human Rights Committee, *González del Río v. Peru*, communication No. 263/1987, para. 5.2.

⁹ The Committee has already stated that the Inter-Parliamentary Union is not an intergovernmental organization and that its bodies are not intended to establish whether or not a State has fulfilled its obligations under an international human rights instrument to which that State has acceded, in this case the Covenant and its Optional Protocol, see *Mambu v. Democratic Republic of the Congo*, para. 8.2.

¹⁰ *Colomarco Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

¹¹ *Ch.H.O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.4; *H.E.A.K. v. Denmark* (CCPR/C/114/D/2343/2014), para. 7.4; *Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8; *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5; and *Peirano Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4.

¹² *Souaiene and Souaiene v. Algeria* (CCPR/C/128/D/3082/2017), para. 7.5.

address the issue of the right to appeal or other remedies.¹³ It thus concludes that this part of the communication is insufficiently substantiated for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

5.6 In addition, the Committee notes that the authors – with the exception of Josiane Maloba Banze – allege a violation of their right to a fair trial under article 14 (1) of the Covenant on account of the State party’s failure to fulfil its duty to guarantee them access to a court, since the Constitutional Court has not given effect to its decisions proclaiming them deputies. The Court is said to have changed the wording of its decisions, which are irrevocable and enforceable under the Constitution, on the pretext of correcting factual errors. The authors claim that the Court re-examined the merits of all the objections, even though its judgments were final, and they explain this by the corruption and influence peddling going on within the constitutional justice system.

5.7 The Committee notes that, initially, the Constitutional Court validated the authors’ election as deputies in their respective constituencies. Then, in the course of a procedure to correct factual errors, with the exception of the case of Josiane Maloba Banze, the Court found that the number of votes obtained by the authors was lower than that obtained by other candidates, with the consequence that the Court modified its own decisions, invalidating the election of the authors in favour of other candidates. The Committee notes that the procedure for correcting factual errors is provided for by law and that the political parties which the authors represented during the elections were involved in the correction procedure, where they were represented by counsel, who did not demonstrate that the figures alleged by the parties who requested the correction procedure were incorrect. In the Committee’s view, the political parties to which the authors belong could, during the correction procedure, have demonstrated – with supporting figures – the number of votes obtained by the authors, since the Constitutional Court based its decisions to make corrections on the official figures which had been published and of which the authors were thus certainly aware. The Committee also notes that the allegations of corruption and influence peddling within the Constitutional Court aimed at diverting the procedure for the correction of factual errors are unsubstantiated.

5.8 The Committee refers to its jurisprudence, recalling that it is for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.¹⁴ In the present case, and despite the lack of cooperation from the State party, the Committee observes that the information and documents available to it do not allow it to conclude that the proceedings before the Constitutional Court were vitiated by irregularities or that the procedure for correcting factual errors was used for purposes other than to correct the number of votes to reflect the official statistics. The Committee thus considers that the authors’ allegations under article 14 of the Covenant, of arbitrariness, denial of justice and lack of impartiality on the part of the Constitutional Court, are not sufficiently substantiated and therefore declares them inadmissible under article 2 of the Optional Protocol.

5.9 Lastly, the Committee notes that, in the case of Josiane Maloba Banze, the Constitutional Court judgment that had proclaimed her to have been elected was not amended as part of a procedure to correct factual errors. The Committee therefore considers that Josiane Maloba Banze has sufficiently substantiated, for purposes of admissibility, her claim of a violation of article 14 (1) of the Covenant on account of the non-execution of the Constitutional Court’s judgment of 14 June 2019, and proceeds to its consideration on the merits.

¹³ Human Rights Committee, general comment No. 32 (2007), para. 12.

¹⁴ See, in particular, *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.10; *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6. See also Human Rights Committee general comment No. 32 (2007), para. 26.

Consideration on the merits

6.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

6.2 The Committee notes that the State party has not responded to Josiane Maloba Banze's allegations and recalls its jurisprudence to the effect that the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information.¹⁵

6.3 The Committee notes that, in the case of Josiane Maloba Banze, a procedural defect – lack of proof of capacity on the part of the lawyer signing the petition – prevented the Constitutional Court from ruling on the request for the correction of factual error submitted by another political party on behalf of its electoral candidate. Consequently, the original decision proclaiming Josiane Maloba Banze to have been elected remains unchanged and is enforceable. However, her name does not appear in the Constitutional Court's judgment of 4 July 2019, proclaiming the final results of the legislative elections. No explanation was provided in this regard by the State party. The Committee notes that the consequence of this omission is the non-execution of the decision in which the Constitutional Court confirmed the election of Josiane Maloba Banze.

6.4 The Committee recalls that the right of access to a court, provided for in article 14 (1) of the Covenant, would remain illusory if a final and binding judicial decision remained inoperative to the detriment of a party.¹⁶ In the absence of any information from the State party refuting these allegations, the Committee concludes that, in failing to implement the Constitutional Court's decision in favour of Josiane Maloba Banze, the State party has violated the rights guaranteed to Josiane Maloba Banze under article 14 (1) of the Covenant.

7. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of article 14 (1) of the Covenant with regard to Josiane Maloba Banze.

8. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide Josiane Maloba Banze with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is required to: (a) fully implement Constitutional Court judgment No. RCE 979/DN of 14 June 2019, if that is materially possible; and (b) provide the author Josiane Maloba Banze with adequate compensation for the material and non-material damage she has suffered. The State party is also under an obligation to take steps to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

¹⁵ See, inter alia, and *Berzig v. Algeria* (CCPR/C/103/D/1781/2008), para. 8.3; and *El Abani v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.4.

¹⁶ *Chakupewa et al. v. Democratic Republic of the Congo* (CCPR/C/131/D/2835/2016), para. 6.3; and *Murodov v. Tajikistan* (CCPR/C/124/D/2826/2016 and CCPR/C/124/D/2826/2016/Corr.1), para. 7.2. See also European Court of Human Rights, *Hornsby v. Greece*, application No. 18357/91, Judgment, 19 March 1997, para. 40.