**Communication 355/07 - Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights & INTERIGHTS) v The Arab Republic of Egypt**

**Summary of facts**

**1.** The Complaint was received by the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 8 November 2007 from Mr Hossam Baggat of the Egyptian Initiative for Personal Rights and Sibongile Ndashe of INTERIGHTS (hereinafter referred to as the Complainants) who are representing the victims, Hossam Ezzat and Rania Enayet.

**2.** The Complaint is submitted against the Arab Republic of Egypt (State Party[1] to the African Charter on Human and Peoples' (African Charter) and hereafter referred to as the Respondent State or Egypt).

**3.** The Complainants allege that the victims, Hossam Ezzat and Rania Enayet have been unable to register their Baha'i faith on official documents that must include a citizen's religion. They allege that the birth certificates of their three minor daughters have also been confiscated by security agents.

**4.** The Complainants allege that before the introduction of computer-generated Identity Documents (IDs) and birth certificates in 1995, Baha'is were able to obtain documents listing them as Baha'i, or inserting a dash or the word 'other' for religious affiliation.

**5.** They submit that in April 2004, the victims approached the Immigration and Passports Department of the Ministry of Interior to list their three daughters on Ms Enayet's passport. The Department agreed to add the daughters to their mother's passport only if the applicants' put a dash in front of "religion" on the passport application. This was complied with by the applicants and the passport was received. However, in May 2004, the Civil Status Intelligence Unit in Alexandria summoned Ms Enayet. She went with her husband and met with an officer who told them to change the religion entered on their IDs and on their daughters' birth certificates. Their ID cards were confiscated during the meeting.

**6.** The Complainants further allege that in August 2004, the Lower Egypt Intelligence Department sent a letter to the private school of Ms Enayet's three daughters stating that the religion of the girls had been officially amended. It is submitted that the school principal was instructed to confiscate their birth certificates and submit them to the Ministry of Interior, and was further ordered to accept only

[1] Egypt ratified the African Charter on 20 March 1984.

new certificates that listed their religion as 'Muslim' and not to accept any birth certificates where religion is registered as Baha'i as this would be in violation of public order.

**7.** The Complainants submit that, according to Egypt's Civil Status Law (No.143/1994), every Egyptian upon attaining the age of 16 must obtain a national identification document. They submit that the Respondent State recognises only three religions, what it refers to as the three 'heavenly' or 'revealed' religions, that is; Islam, Christianity and Judaism. Every Egyptian is required to choose from among these three for their identification documents.

**8.** According to the Complainants, this limited choice is indicated in court briefs, and the Ministry of Interior's interpretation of Sharia or Islamic Law. They allege that at least since 2004, an Egyptian citizen has no option to identify him or herself as having a religion or request a religious identification different from the three 'revealed' religions.

**9.** The Complainants submit that this limitation mainly affects the small Baha'i community in Egypt which happens to be the largest and perhaps only unrecognised religious community in Egypt. This has caused Baha'i Egyptians to be unable to obtain necessary documents and consequently faced difficulties in conducting the most basic financial and administrative transactions.

**10.** The Complainants further state that, they filed a law suit before the Court of Administrative Justice against the Minister of Interior and the President of the Civil Status Department (CSD) on 10 June 2004. In the law suit, they asked the Minister and the CSD to issue ID cards to the victims and new birth certificates for the three daughters and requested that their Baha'i faith be recognised on these documents.

**11.** A decision was issued in favour of the Complainants on 4 April 2006 that ordered the CSD to grant their requests. However, on 15 May 2006, the Appeals Inspection Chamber of the Supreme Administrative Court (SAC) declared the Government's appeal admissible against the decision and granted the Government's request to suspend the implementation of the lower court's ruling pending the appeal.

**12.** The Complainants submit that the SAC held a hearing on 2 December 2006 on the merits of the appeal and on 16 December of the same year and it overturned the lower court's decision finding that the state is under no obligation to issue ID cards or birth certificates recognising the Baha'i faith.

**13.** The SAC reasoned in its decision that while freedom of religion was absolute and could not be subject to limitation, the Government could restrict the freedom of

practicing religious rites on the grounds of 'respecting public order and morals.' The Court also ruled that mentioning the Baha'i faith in identity documents violated public order and may therefore be prohibited by the State. The Complainants submit that neither the Government lawyers nor the Court provided evidence to support this claim. They further submit that the decision by the SAC is final and cannot be appealed before any other court.

**Articles alleged to have been violated**

**14.** The Complainants allege the violation of Articles 2, 3 and 8 of the African Charter.

**PROCEDURE**

**15.** The Secretariat received the Communication by letter of 7 November 2007.

**16.** By letter of 8 November 2007, the Secretariat acknowledged receipt of the Communication and stated that the Commission would be seized of it at its 42nd Ordinary Session that took place from 15 to28 November 2007, in Brazzaville, Republic of Congo.

**17.** At its 42nd Ordinary Session, held from 15-28 November 2007, the African Commission considered the Communication and decided to be seized thereof.

**18.** By letter and Note Verbale of 19 December 2007, the Secretariat informed the parties that the Communication was seized and requested them to forward their arguments on Admissibility within three (3) months from the date of this notification.

**19.** By letter and Note Verbale of 19 March 2008, the Secretariat reminded the parties to forward their arguments on Admissibility.

**20.** On 8 April 2008, the Secretariat received the arguments on Admissibility from both parties.

**21.** By letter and Note Verbale dated 9 April 2008, the Secretariat acknowledged receipt of the parties' submissions on Admissibility and forwarded to the Complainants the submissions of the Respondent State and invited the former to send its observations on the submissions, if any.

**22.** The Secretariat sent the Arabic submission from the Respondent State for translation.

**23.** At its 43rd Ordinary Session held in Ezulwini, Swaziland from 7-22 May 2008, the Commission decided to defer the decision on Admissibility to the 44th Ordinary Session due to time constraint.

**24.** By letter and Note Verbale dated 17 June 2008, the Secretariat informed the parties of the Commission's decision to defer the matter to its 44th Ordinary Session and the reason thereof.

**25.** By letter dated 22 October 2008, the Secretariat reminded the Complainants to forward their observations, if any, on the Respondent State's submissions on Admissibility.

**26.** On the 44th Ordinary Session held from 10-24 November 2008, in Abuja, Nigeria, the Commission decided to defer its decision on Admissibility to the 45th Ordinary Session as the submission of the Government has been sent for translation and to allow the Secretariat prepare a draft decision on Admissibility.

**27.** The Secretariat accordingly informed the parties of the decision of the Commission with the reasons forwarded thereof by letter and Note Verbale dated 11 December 2008 and 16 December 2008.

**28.** By Note Verbale dated 26 March 2009, the Secretariat drew the attention of the State to the fact that the translator was unable to do a thorough translation of the State's submission from Arabic to English because some paragraphs were missing. These paragraphs were highlighted and forwarded to the State and the latter was asked to complete the missing paragraphs.

**29.** By Note Verbale dated 27 April 2009, the Secretariat reminded the State to complete and forward the missing paragraphs.

**30.** On 4 May 2009, the Secretariat received a supplementary submission from the State and informed the Complainants about it together with the problems of translation by a letter dated 5 May 2005. The Secretariat further informed the Complainants that the missing paragraphs have been submitted by the State and sent for translation together with the supplementary submission. By the same letter, the Secretariat notified the Complainants that the Commission could not take a decision on Admissibility on its 45th Ordinary Session and thus will be deferred to its 46th Ordinary Session in November.

**31.** The Secretariat also informed the State of the deferral of the decision of the Commission on Admissibility to the 46th Ordinary Session to be held in November by a Note Verbale dated 8 May 2009.

**32.** At its 45th Ordinary Session held from 13-27 May 2009, in Banjul, The Gambia, the Commission deferred the decision on Admissibility to its 46th Ordinary Session.

**33.** By letter and Note Verbale dated 7 December 2009 the Secretariat informed the Complainants and the Respondent State of the deferment of the decision on Admissibility to the 47th Ordinary Session.

**34.** During its 47th Extraordinary Session held from 12026 May 2010, the Commission adopted a decision declaring the Communication admissible.

**35.** By Note Verbale Ref: **ACHPR/COMM/EGY/355/07/312.10** and Letter Ref: **ACHPR/COMM.355/07/313.10** evenly dated 16 June 2010 the parties were notified about the decision on admissibility and the Respondent State was invited to present its arguments on the merits.

**36.** Consideration of a decision on the merits was deferred during the 48th and 49th Ordinary Sessions pending the parties' submissions on the merits and the parties were respectively notified and reminded to present their submissions.

**37.** During the 50th Ordinary Session, a decision on the merits was further deferred pending parties' submissions on the merits. By Note Verbale Ref: **ACHPR/COMM/355/07/806.11** and Letter Ref: **ACHPR/COMM/355/07/805.11** both dated 9 November 2011 the parties were notified about the deferment and requested to present their arguments on the merits within 60 days of notification.

**38.** The Commission further deferred consideration of a decision on the merits during the 51st Ordinary Session held from 18 April to 2 May 2012 pending submissions from both parties. The parties were notified accordingly by Note Verbale and Letter respectively Ref: **ACHPR/COMM/355/07/436/12** and **ACHPR/COMM/355/07/435/12** dated 21 May 2012, and requested to present their merits submissions.

**39.** On 24 May 2012 the Secretariat received the Complainants' submissions on the merits through e-mail which indicated that the submissions had been sent to the Secretariat earlier on 31 January 2012. The Secretariat acknowledged receipt by Letter Ref: **ACHPR/COMM/355/07/581/12** dated 9 July 2012. By Note Verbale of even date Ref: **ACHPR/COMM/355/07/584/12** the Complainant's merit submissions were transmitted to the Respondent State with a request to the latter to present its observations on the merits within 60 days thereof.

**40.** On 15 October 2012 the Secretariat received a Note **Nº 57/12** from the Respondent State requesting that consideration of the Communication should be postponed till further notice pending the adoption of a new Constitution for the Arab Republic of Egypt.

**41.** The Secretariat acknowledged receipt of the Respondent State's request by Note Verbale Ref: **ACHPR/COMM/355/07/998/12** and notified the Complainants about the request by Letter Ref: **ACHPR/COMM/355/07/999/12** both evenly dated 7 November 2012. The Complainants were also informed that a decision on the merits had been deferred during the 52nd Ordinary Session held from 9 – 22 October 2012 pending submissions from the Respondent State.

**42.** During the 13th Extraordinary Session held from 18 to 25 February 2012, the Commission declined the Respondent State's request as at paragraph 40 hereof. Both parties were notified of the Commission's decision respectively by Note Verbale and Letter Refs: **ACHPR/COMM/355/07/183/13** and **ACHPR/COMM/355/07/208/13** evenly dated 1 March 2013. The Respondent State was requested to present its observations on the merits within one month.

**43.** During the 53rd Ordinary Session held from 9 – 23 April 2013 the Commission decided to proceed to consider the Communication with a view to taking a decision on the merits based on the Complainants' submissions, the Respondent State having not presented its observation by that Session. Both parties were informed about the Commission's decision by Note Verbale and Letter Refs: **ACHPR/COMM/355.07/473/13** and **ACHPR/COMM/355.07/472/13** dated 30 April 2013.

**44.** On 30 April 2013 the Secretariat received the Respondent State's merit submission under Note Ref: **PA 203/232/01/PART VII/ (7-MS)** from the Ministry of Foreign Affairs of the Republic of The Gambia. On 9 May 2013 the Secretariat acknowledged receipt and requested the Respondent State to resend the submissions under the latter's letter head.

**45.** On 13 May 2013 the Respondent State retransmitted its merit submissions under Note **No. 67/13**. The Secretariat acknowledged receipt by Note Verbale Ref: **ACHPR/COMM/355/07/648/13** dated 28 May 2013.

**46.** The Respondent State's merit submissions were transmitted to the Complainants by Letter Ref: **ACHPR/COMM/355/07/648/13** dated 28 May 2013.

**47.** On 4 July 2013 the Secretariat received the Complainant Reply to the Respondent State's observations on the merits of the Communication, and

acknowledged receipt thereof on 9 July 2013 by Letter Ref: **ACHPR/COMM/355/07/827/13**.

**48.** During the 54th Ordinary Session held from 22 October to 5 November 2013 the Commission deferred adoption of a decision on the merits due to time constraints and the parties were notified by Note Verbale and Letter Refs: **ACHPR/COMM/355/07/1386/13** and **ACHPR/COMM/355/07/1385/13** dated 21 November 2013.

**49.** The Commission further deferred its decision on the merits during the 55th Ordinary Session held from 28 April to 11 May 2014 and the parties were informed respectively by Note Verbale and Letter Refs: **ACHPR/COMM/355/07/1046/14** and **ACHPR/COMM/355/07/1045/14** evenly dated 5 June 2014.

**50.** On 6 June 2014 the Secretariat received notification that INTERIGHTS, one of the Complainants' Representatives ceased operations at the end of May 2014 and therefore was no longer co-representing the Complainants.

**51.** During the present 16th Extraordinary Session, the Commission considers the Communication and adopts its decision on the merits.

## THE LAW
## ADMISSIBILITY

### Summary of the parties' positions

*A. Complainants' Submissions on Admissibility*

**52.** The Complainants submit that they have satisfied all the conditions for admissibility under Article 56 of the African Charter. They submit that they have been identified and their relevant details provided to the Commission, along with the details of the individuals and organizations representing them.

**53.** They further aver that, the Communication is compatible with the Constitutive Act of the AU and the African Charter for it concerns violations of rights incorporated under the later which has been ratified by the Respondent State.

**54.** Furthermore, the Complainants aver that the Communication is presented in a polite and respectful language, and is based on information provided by the applicants not media reports.

**55.** The Complainants also submit that they have not submitted this Complaint to any other procedure of international investigation or settlement.

**56.** As far as Article 56(5) is concerned, they submit that on 10 June 2004, the Complainants filed a lawsuit before the Court of Administrative Justice against the Minister of Interior and the President of the Ministry of Interior's Civil Status Department (CSD) which is responsible for issuing official identification documents. The lawsuit named the Complainants in their individual capacity and in their capacity as guardians of their daughters.

**57.** The Complainants submit that during the lawsuit, they asked the Minister of Interior and the CSD to issue ID cards to them, new birth certificates for their daughters, and that their Baha'i faith be recognized in those documents which require applicants to mention their religious affiliation.

**58.** The Court of Administrative Justice gave a decision on 4 April 2006, in favour of the plaintiffs and ordered the CSD to grant the documents requested by the Complainants. The Government decided to appeal the decision and on 15 May 2006, the Appeals Inspection Chamber of the Supreme Administrative Court (SAC) declared the Government's appeal admissible. The SAC also granted the Government's request to suspend the implementation of the lower court's ruling before the appeal.

**59.** The Complainants submit that, the SAC further overturned the lower court's decision on 16 December 2006, and found that the State is under no obligation to issue ID cards or birth certificates recognizing the Baha'i faith. They further submit that the Ezzat case is final and cannot be appealed before any other Court within the Respondent State.

**60.** The Complainants further draw the attention of the Commission to the decisions of the Lower Court of Administrative Justice on 29 January 2008 in the cases between *Rauf Hindi Halim v Minister of Interior* and Others and *Hosni Abdel-Massih v Minister of the Interior and Others* which are similar to the issues raised by the Complainants. In those cases, the Lower Court ruled that the Baha'i applicants were able to obtain certificates and identity documents that did not indicate any religious affiliation, but did not find that the identity documents could state their religion as Baha'i.

**61.** The Complainants aver that, firstly, the decision in the cases above should have no bearing on the admissibility of their case because the Commission and other international bodies generally consider the effectiveness of domestic remedy by reference to the state of the national law at the date the violation occurred. They submit that, at the time they applied for identity documents, they were legally required to

state their religion as one of the three 'revealed' religions. They appealed through the Egyptian courts, where they lost their final appeal, and that at the time this complaint was submitted, there was no question that they could receive identity documents without reference to their Baha'i faith.

**62.** Secondly, the decision of the Lower Court is not final and can be appealed to the Supreme Administrative Court, which has already made its position clear in the Complaints' case.

**63.** Lastly, even if the Lower Court's decisions in the aforementioned cases were to be upheld, they would not remedy the violation complained of in this case. This is due to the fact that if the new rulings are upheld, the Baha'is would be able to obtain identity documents, but they still would not allow their ID documents to reflect their religious affiliation. A dash would be put in the section that reflects religious affiliation, while other religions (Islam, Judaism and Christianity) are not limited in the same manner.

**64.** The Complainants refer to **Jawara v The Gambia**, where the Commission stated that when dealing with domestic remedy, 'three major criteria could be deduced….in determining this rule, namely: the remedy must be available, effective and sufficient'.[2] The effectiveness of a remedy is determined by its ability to remedy the rights violated. In this regard, they submit that, to the extent that the *Hindi Halim* and *Hosni Abdel-Massih* cases provide a remedy for Baha'is to have official documents, they do not however provide an effective remedy to the Complainants in this case. They aver that their documents which listed their religious affiliations were confiscated by the State.

**65.** The Complainants submit that, due to the above reasons, they have exhausted all local remedies available to them in Egypt for the purpose of Article 56(5) and that they have submitted the Communication within eleven months after exhausting local remedies pursuant to Article 56(6).

**66.** The Complainants' therefore request the African Commission to declare the Communication Admissible.

*B. Respondent State's Submissions on Admissibility*

**67.** The Respondent State avers that the Administrative Judicial Court at its sitting on 29 January 2008 cancelled the Administrative decision which required the plaintiffs to enter one of the three divine religions recognized in Egypt in their identity cards and granted them the identification cards without filling in the column on religion.

[2] Communication 147/95 - *Jawara v The Gambia* (2000) ACHPR para 30-31.

**68.** The Respondent State further submits that the Egyptian Government has not appealed against such ruling of the Administrative Court, instead the appeal was made by lawyers who intervened in the case.

**69.** In consequence, the Respondent submits, the two Complainants have the right to rely on these provisions with a view to obtaining the identification card and the official documents leaving the religion column vacant.

**70.** For the above reasons, the Respondent State requests the Commission not to admit the Complaint because the subject of the Complaint is now over, for the Complainants have the right to approach the Administrative bodies to get the official documents in accordance with the final judicial decisions passed by the Administrative Judicial Court.

*C. Supplementary submissions of the Respondent State*

**71.** In its supplementary submission, the Respondent State draws the attention of the Commission to the decision of the High Administrative Court which examined the appeal by the Complainants on 16 March 2009 and decided unanimously not to accept it on the grounds that the Egyptian Government had not challenged the aforementioned decision, but instead it was challenged by those who intervened on their own behalf.

**72.** Therefore, according to the Respondent State, the ruling in favour of the Complainants that they should be issued identification cards with the religion column left blank is final and legally binding.

**73.** The Respondent State also makes reference to Decision No. 520 issued on 19 March 2009 by the Ministry of Interior to implement the above final ruling. The Decision amends the executive provision of the Civil Code by adding a third new paragraph to Article 33 which enables all followers of the Baha'i faith and all those in a similar situation to be able to request their previous identification cards and other relevant documents to be corrected in line with the final ruling.

**74.** The above Ministerial Decision, according to the Respondent State, makes reference to the following legal conclusions:

I. the rule on the implementation of the Civil Code Act 143 of 1994 and the administrative ruling in favour of some followers of the Baha'i faith, should be incorporated into the legal texts as they have legitimized this

situation for all those who belong to the same faith, and the administrative bodies should implement them without any recourse to a new ruling on the issue;

II. the amendments allow those in a similar situation to have all their identification and personal documents amended in line with the final ruling;

III. the state is legally bound to implement the final decision of the independent judiciary that meets all international standards of national remedies, and safeguards the freedom of individuals to resort to court and challenge any measures or decisions they consider to be restricting their rights and freedom as guaranteed by the Egyptian Constitution and law.

**75.** Based on the foregoing grounds, the Respondent State requests the Commission to dismiss the Communication as inadmissible as the request of the Complainants has been met by the final ruling in their favor confirmed by the decision of the Ministry of Interior.

**The Commission's Analysis on Admissibility**

**76.** Article 56 of the African Charter provides seven requirements based on which the Commission assesses the Admissibility or otherwise of Communications submitted to it.

**77.** The Commission will accordingly examine each requirement under Article 56 of the Charter to determine whether the present Communication satisfies all the requirements of Admissibility provided under the said Article.

**78.** Article 56(1) of the African Charter provides that Communications should 'indicate their authors even if the latter requests anonymity'. In line with this requirement, the Communication clearly indicates the full names and addresses of the Complainants, including the contact details of their legal representatives. Therefore, this requirement has been complied with.

**79.** In terms of Article 56(2), for a Communication to be admissible, it should be compatible with the Charter of the Organization of African Unity (now the Constitutive Act of the Africa Union (AU)) or with the African Charter. Here it should be noted that the word 'or' in this provision should be read conjunctively to mean compatibility with the African Charter, and where applicable, with the Constitutive

Act of the AU, as the latter does not contain rights that need to be respected.[3] In the case at hand, the Complainants' have alleged the violation of Articles 2, 3 and 8 of the African Charter by the Respondent State, which is a State Party to the Charter. The Communication thus reveals a prima facie violation of rights guaranteed in the African Charter, to which the Respondent State is a party. These alleged violations are said to have occurred within the territory of the Respondent State during the period when the Charter was in force in relation to the State concerned. From the above, the African Commission is satisfied that the Communication is compatible with the African Charter and meets the requirement under Article 56 sub paragraph 2.

**80.** It is further provided under Article 56(3) of the African Charter that for Communications to be considered by the African Commission, they must not be written in a 'disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity'. The reading of the present Communication clearly shows that it is written in a polite and respectful manner. No complaint has also been made by the Respondent State in this regard. For these reasons, the Commission is of the opinion that the Complaint is written as per the requirements of Article 56(3) of the African Charter.

**81.** Another Admissibility requirement stipulated under Article 56(4) is that the Communication should not be based solely on news disseminated by the media. The facts of the case divulge that the Compliant is based on the personal experiences and testimonies of the Complainants, which the State has not challenged. Accordingly, the Commission holds that the Compliant is in compliance with the requirements of Article 56(4) of the African Charter.

**82.** With respect to the requirement of exhaustion of local remedies, Article 56(5) of the African Charter requires the Complainants to exhaust all local remedies before filing the Complaint 'unless it is obvious that this procedure is unduly prolonged'.

**83.** The Complainants in the present Communication state that the decision of the Court of Administrative Justice on 4 April 2006 ordering the CSD to issue ID cards and new birth certificates which clearly recognize their religious affiliation as Baha'i was appealed by the Government before the SAC. The SAC admitted the appeal and later decided on 16 December 2006 to overturn the lower Court's decision and further found that the State is under no obligation to issue ID cards or birth certificates recognizing the Baha'i faith. This decision of SAC, the Complainants assert, is final and cannot be appealed before any other Court. Consequently, they argue that they have exhausted all local remedies.

[3] Frans Vijoen, International Human Rights Law in Africa (2007) pp. 331-332.

**84.** The question of the finality of the decision of the SAC is not contested by the Respondent State. The latter's submissions rather focus on how the decisions given by the Administrative Judicial Court on 29 January 2008 and subsequent decisions made by the Ministry of Interior to amend the relevant law, can remedy the issues raised by the Complainants. Based on this fact the Respondent State argues that the Complaint should not be admitted as the subject of the Complaint is now over.

**85.** In this regard as the jurisprudence of international human rights adjudicatory bodies including that of the Commission show, when some facts/claims are uncontested by the State concerned, the decision on the facts should be decided as provided by the Complainant.[4]

**86.** In the present Communication, since the finality and non-appealability of the decisions of the SAC or the procedure followed by the Complainants has never been challenged by the Respondent State, the Commission takes the facts provided by the Complainant as given and hence rules that the SAC's decision in the Ezzat case is final and cannot be appealed before any other court in the Respondent State.

**87.** Therefore, the Commission finds that all the local remedies available at the time were exhausted by the Complainants and hence the Complaint is in line with Article 56(5) of the Charter.

**88.** The argument raised by the Respondent State as to whether the later developments (that is the 29 January 2008 decision of the Administrative Judicial Court and the subsequent decisions by the Ministry of Interior to amend the relevant law) have effectively remedied the complaint raised by the Complainants has been duly noted by the Commission. However, the Commission would like to underscore that the local remedies that any Complainant is required to exhaust under Article 56(5) of the Charter are only the ones that were available, effective and sufficient in the State concerned by the time the alleged violation(s) occurred.

**89.** In the case at hand, as indicated above, the Complainants have exhausted all the local remedies that were available at the time and thus have met the requirements under Article 56(5). So, at this stage further looking into whether the later developments have remedied the present complaint or not would jump the gun to the Merits of the case. Accordingly, the Commission will deal with the issue at the appropriate stage and in the next few paragraphs the Commission continues to considering the compliance or otherwise of the remaining two requirements of Admissibility under Article 56 of the Charter.

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[4] Communications 25/89,47/90,56/91,89/93 joined - *Free Legal Assistance Group and Others v Zaire* (2000) para 40 and *Zegveld and Others v Eritrea* (2003) para 46.

**90.** Article 56(6) provides that Communications should be submitted "within a reasonable period from the time local remedies have been exhausted or from the date the Commission is seized of the matter". The Complaint in this case was submitted within 11 months after the exhaustion of local remedies which the Commission considers it to be reasonable. The Respondent State has also not contested the Admissibility of the Complaint based on this requirement. Accordingly, the Commission rules that the requirement under Article 56(6) is fulfilled.

**91.** Lastly, Article 56(7) of the African Charter requires the Complaint not to be one settled before any international organs. The Complainant has submitted that the Complaint has never been submitted before any other international organ for settlement, and this claim goes unchallenged by the Respondent State. Thus, the Commission is of the view that the requirement under this provision is complied with.

**Decision of the Commission on Admissibility**

**92.** In view of the above, the African Commission on Human and Peoples' Rights declares this Communication Admissible.[5]

**MERITS**

**Summary of parties' submissions**

***A. Complainants' Submissions***

*(i) Alleged violation of Article 1 of the Charter*

**93.** Article 1 of the Charter provides that State Parties "… *shall recognise* the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative and other measures to give effect to them." Complainants cite ***Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*** (***SERAC Case***) (2001) ACHPR[6] in which the Commission expounds that the general obligations under Article 1 the Charter give rise to the positive duties to protect, promote, and fulfil; and the negative duty to respect the rights under the Charter. They submit that this Communication concerns the negative duty to respect, which obligates states to refrain from taking measures (including adopting and applying legislation) which unjustifiably curtail or prevent individuals from enjoying the rights and freedoms.[7]

[5] 47th Ordinary Session, 12 – 26 May, 2010
[6] Communication 155/96 - ***Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*** (***SERAC Case***) (2001) ACHPR
[7] *Ibid*, para. 45

**94.** The Complainants contend that the Respondent State adopted and implemented measures which are inconsistent with the victims' rights **(i)** not to be discriminated against on the basis of their religion, and (**ii**) to freedom of religion. The impugned measures are: **(a)** confiscation of the victims' IDs, **(b)** requiring that their daughters' religious identity in their birth certificates be amended to "Muslim", **(c)** ordering the school attended by the victims' three daughters not to accept IDs bearing "Baha'i" as their religious. The Complainants submit that these measures constitute failure to recognise the victims' above rights, and consequently amount to violation of Article 1 of the Charter.

*(ii) Alleged violation of Article 2 of the Charter*

**95.** The Complainants contend that Article 2 of the Charter guarantees the principle of non-discrimination whose primacy and prohibition are affirmed in the Charter, the Commission's jurisprudence, and entrenched in international human rights law generally.[8]

**96.** Regarding the meaning of 'discrimination', the Complainants rely on the HRC Committee General Comment No. 18 in which the term is interpreted "to imply any distinction, exclusion, restriction or preference which is used on any grounds such as … religion, …and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all the rights and freedoms." They also refer to the case of *Carlos Garcia Saccone v Argentina* in which the Inter-American Commission on Human Rights interpreted the term 'unequal treatment' as

> "the denial of a right to someone which is accorded to others; diminishing the right to someone while fully granting it to others; imposition of a duty on some which is not imposed on others; the imposition of a duty on some which is imposed less strenuously on others."[9]

**97.** Regarding 'prohibited discrimination,' the Complainants invite the Commission to draw inspiration from the European Court of Human Rights (ECtHR) which propounds that prohibited discrimination is constituted by **(a)** a differential treatment of persons in analogous or relevantly similar situations, which **(b)** has no objective and reasonable justification.

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[8] The Complainants cite Communication 211/98 – *Legal Resources Foundation v Zambia* (2001) ACHPR para. 63; Communication 245/02 – *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) ACHPR para.169; and provisions of various international and regional international human rights instruments which provide for equality and non-discrimination to illustrate the primacy of equality and non-discrimination in the enjoyment of rights and freedoms by all. The Commission does not consider it necessary to reproduce all the provisions for the present purposes.

[9] *Carlos Garcia Saccone v Argentina*, Case 11.671, Report Nº 8/98, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 193 (1997).

**98.** Thus, to make out a *prima facie* case of discrimination, a complainant must identify the group that is treated differently and show how the treatment complained of and that of the other identified group are comparable. In turn, the Respondent State bears a heavier burden of proving that the difference in treatment is objective and reasonably justified in that it pursues a legitimate goal or goals and the means employed are proportionate to that goal.[10]

**99.** The Complainants contend that the victims were treated differently based on their religious affiliation when the Respondent State: **(a)** confiscated their identity cards and their daughters' birth certificates; **(b)** prohibited them from indicating "Baha'i" on their IDs; and **(c)** instructed their daughters' school not to accept IDs that indicated "Baha'i" as their religion. They submit that this differential treatment is incompatible with Article 2 of the Charter.

*(iii) Alleged Violation of the Article 8 of the Charter*

**100.** Article 8 of the Charter guarantees the "freedom of conscience, the profession and free practice of religion." It further provides that "no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." The Complainants submit that freedom of religion comprises of two aspects: (a) the freedom to hold or not hold a religious belief, which is exercised in the individual's *forum internum*, and cannot be limited; and (b) the freedom to manifest or practice one's religion in the *forum externum*, which can be limited on grounds of law and order. They contend that Article 8 of the Charter is broad enough to encompass all religions regardless of whether the State recognises them or not.

**101.** The Complainants contend that by recognising only the three heavenly religions to the exclusion of all other religions or religious beliefs, the Respondent State is in breach of the undertaking to recognise the victims' freedom of religion which is guaranteed under the Charter.

**102.** Further, the Complainants contend that the measures complained of engage the external manifestation of victims' freedom of religion. Specifically, they aver that by preventing the victims from identifying themselves as "Baha'i" in official documents, the Respondent State prevents them from manifesting their religious beliefs. The Complainants also submit that instructing the school attended by the victims' two children not to accept birth certificates unless they bore "Muslim" as religious identity

[10] *Abdulaziz, Cabales and Balkandali v The United Kingdom* (1985) ECtHR, (Application Nos. 9214/80, 9473/81 and 9474/81) para.72. Complainants cite further authorities from the Inter-American Court of Human Rights which is inspired by the jurisprudence of the European Court of Human Rights.

is tantamount to coercion to change religion. They submit that these measures constitute violation of Article 8 of the Charter.

*(iv) Remedies*

**103.** The Complainants state that the subsequent changes in domestic law allowing Baha'is to obtain IDs with the religion column left blank do not fully address the victim's complaint. In particular, they are still unable to indicate "Baha'i" as their religious identity on official documents. Accordingly, the Complainant seek the following reliefs on behalf of the victims:-

(i) A finding that the Respondent State's conduct amounts to violation of Articles 1, 2 and 8 of the Charter.

(ii) That the Respondent State should take immediate steps to recognise the religion of the victims and other similarly placed individuals, including on all official documents.

(iii) Compensation.

***B. Respondent State's Submissions on the merits***

**104.** The Respondent State avers that it adheres to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the Charter. Comparatively Article 18(1) of the ICCPR guarantees that everyone shall have the right to freedom of thought, conscience and religion; and Article 8 of the Charter provides that "freedom of conscience, the profession and free practice of religion shall be guaranteed". It submits that these guarantees entail that freedom to adopt a religion or faith is absolute and everyone has the right to embrace any religion irrespective of the stance of the State or the opinion of others. The guarantees also protect the freedom to express or practice one's faith or religion.

**105.** However, Article 29 of the UDHR, Article 18(3) of the ICCPR and the second part of Article 8 of the Charter all permit limitations as prescribed by law for the purpose of protecting, public safety, order, health or morals and the fundamental rights and freedoms of others.

**106.** At the domestic level, Article 46 of the 1971 Constitution provided that "freedom of faith and free exercise of religious rites are guaranteed and are indivisible." Its Supreme Constitutional Court's (SCC) interpretation of this provision is consistent with provisions of the UDHR, ICCPR and the Charter, which the Court applies at the domestic level subject to the reservations made by the Arab Republic of Egypt. The SCC holds that freedom to embrace religious belief cannot be restricted and

is inseparable from the freedom to practice or exercise such belief which can be restricted for purposes of maintaining public order, moral values, and protecting the rights and freedoms of others. The SCC adopted this interpretation in a 1996 judgment delivered in *Case No 8*. Article 43 of its new Constitution (2012) also guarantees freedom of religion and faith in accordance with the international instruments to which it adheres subject to its reservations and the permissible limitations.

**107.** Issues of personal status of its citizens on the other hand are governed by specific laws relating to the three recognised divine religions. These specific laws together constitute part of the public order based on Islamic Sharia which is the predominant source of laws. Adherents of any of the three divine religions are free to approach the courts to enforce their personal law, and in case of conflict among the three specific laws, the Islamic Sharia applies as the default public order in accordance with Article 2 of the Constitution.

**108.** It is in light of the public order as dictated by Islamic Sharia that reservations have been entered concerning Article 18 of the ICCPR and Article 8 of the Charter. The reservations subject these provisions to the dictates of Islamic Sharia. Part of Islamic Sharia is the consensus of scholars which recognises the three divine religions. Whereas successive Egyptian Constitutions have recognised and protected freedom of religion generally, it is only the three divine religions that have been recognised by the state and their practice is protected. These are the religions which are recorded in official documents. Other religions including Baha'i are not recognised by the State and cannot be recorded in official documents.

**109.** Accordingly, based on the reservations and the requirements of Islamic Sharia, the Supreme Administrative Court decided in the victims' own *Application No. 24044/58* that "Baha'i" cannot be recorded as religious identity on civil status documents or any other official documents issued by the State or its agencies.

**110.** However, there were further law suits dealt with by domestic court subsequent to the submission of the present Communication. In those suits adherents of the Baha'i faith sought the annulment of an administrative decision refusing to issue them with identity cards with the religion column left blank instead of compelling them to choose from the three officially recognised religions. The High Administrative Court annulled the impugned decision and directed that Baha'is should be issued with identity documents with the religion column left blank or indicating a dash. An appeal by third parties was dismissed, and the decision of the Administrative Court was upheld.

**111.** The decision of the Administrative Court was fully implemented. Principally, the Civil Status Law was amended to the effect that all adherents of Baha'i religion

should be issued with identity documents with the religion column left blank. Administrative authorities have complied with these amendments without further recourse to courts.

**112.** From the developments stated above, the Respondent State submits that to the extent that Baha'i adherents can now be issued with identity documents with the religion column left blank, and taking into account the reservations to Article 8 of the Charter, the complaint about difficulty or impossibility of obtaining IDs has been resolved domestically. It has accordingly become a non-issue and must be dismissed.

**113.** On the other hand, to the extent that the word "Baha'i" cannot be recorded on IDs, the Respondent State invokes its reservation to Article 8 of the Charter. The particular reservation is to the effect that Article 8 of the Charter on freedom of religion shall be implemented in accordance with Islamic Sharia. It states further that in accordance with the consensus of Islamic scholars which is part of Islamic Sharia, "Baha'ism" is not a divinely revealed religion and therefore the State is under no obligation to recognise it, or record it in official documents such as IDs and birth certificates.

**114.** Lastly, the Respondent State challenges the prayer for compensation for non-exhaustion of local remedies. It states that domestic law and courts provide for compensation for criminal, civil and administrative wrongs and the victim proves damage suffered. When the victims approached domestic courts, they did not submit any claim for compensation for damage caused to them. There is no law preventing them from submitting such a claim. The claim for compensation should therefore not be admitted for non-compliance with the requirement to exhaust local remedies in terms of Article 56(5) of the Charter.

### *C. Complainants' Reply to Respondent State's merit submissions*

*(i) Reservation to the Charter cannot defy its object and purpose*

**115.** Complainants state that a reservation to a treaty cannot defy the object and purpose of the treaty, and that it may not be general, but must refer to a particular provision and indicate its scope in precise terms.[11] Complainants contend that the Respondent State's reservation is general and does not clearly indicate its scope. It is also clear that the Respondent State interprets the reservation to permit discriminatory acts such as imposing Sharia on non-Muslims in personal status disputes and, as in the present case, to refuse to issue IDs to persons of non-Abrahamic faiths. They submit

[11] Referring to Article 19(c) of the Vienna Convention on the Law of Treaties (VCLT) 1969, and General Comment No 24 on "Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant", Human Rights Committee (HRC) (GC No. 24) (1994) para. 19

that in these respects the reservation is incompatible with the object and purpose of the Charter and cannot absolve it from international responsibility.

**116.** Moreover Respondent State has not entered any reservation to Article 2 of the Charter. In its submissions on the merits, it has not offered any justification for the discriminatory treatment exacted on the victims, and therefore should be found in violation of that provision.

*(ii) Alleged violation of freedom of religion*

**117.** The Complainants contend that the present case concerns the freedom to hold a religious belief or faith within the *forum internum*. It does not concern the external manifestation and practice of religion which may be subject to restrictions. They submit that manifestation or practice of religion must be limited to the individual's voluntary acts.

**118.** By contrast, the Respondent State compels the Complainants and all Egyptian citizens to declare their religious affiliation on official documents. Complying with a compulsory requirement of the State should do not amount to manifestation or practice as they are at the behest of the State, and not vluntary. Accordingly, the issue is not whether the Bahá'ís should enjoy unrestricted freedom to manifest or practice their religion. Rather, it is whether Baha'is should enjoy unrestricted freedom in upholding their religion when the State forces them to declare it. They submit that freedom of religion within the *forum internum* should mean that when individuals are compelled to declare their religion, they must be permitted to declare the religion they truly adhere to.

**119.** The Complainants refer to HRC General Comment No 22 in which the HRC states that "no one can be compelled to reveal his thoughts or adherence to a religion or belief", and that such freedom is "protected unconditionally". They submit that by compelling citizens to identify their religious affiliation on official documents, the Respondent State violates this principle which protects freedom of religion within the individual's *forum internum*. Additionally, if it is deemed necessary for individuals to declare their religious affiliations, then they must be unconditionally permitted to declare the religion they truly hold.

**120.** Alternatively, the Complainants submit that the Respondent State's restrictions on Article 8 are not in accordance with the permitted limitations based on law and order as they negate the essence of freedom of religion. Further, they observe that the Respondent State does not provide any logical explanation of how recording "Baha'i" on official documents harms public order. The Complainants state that for a number

of years Baha'is were permitted to document their religion on official documents. The Respondent State does not demonstrate that this disrupted public order.

*(iii) On the effect of intervening changes to the domestic law*

**121.** Complainants contend that the amendment to domestic law that came in the pendency of this communication before the Commission has not addressed the victims' grievance. They state that the victims do not seek to have the religion column in official documents left blank or filled with a hyphen. Rather, they seek to have their religion recognised by being expressly indicated on official documents.

**122.** Further, the legal changes do not resolve the issue of discrimination against the Baha'is. Despite the legal changes allowing Baha'is to obtain official documents with the religion column left blank, the practice as at the date submitting the reply was that Baha'is have to prove that their parents were listed Baha'i for them to be issued with an official document bearing a hyphen in the religion column. This is a significant obstacle as it is rare that Baha'is' parent have documents identifying them as such. Moreover after the year 2000 most of them were forced to bare one of the three recognised religions as their religious identity on official documents.

**123.** Additionally, even with the new legal developments, Baha'is cannot document their marriages in official documents as their marriage certificates are not recognised by the State. They are also still unable to make Powers of Attorney before authorities as basic information including religious affiliation needs to be available. Despite the changes to the law, government agencies refuse to conduct such transaction for Baha'is because of unavailability of information on their religious affiliation. In light of these challenges, the intervening changes to the law are still discriminatory and merely calculated to protect the recognised religions from being infiltrated by other non-recognised religions such as Baha'i.

**The Commission's Analysis on the Merits**

**124.** A violation of a right or freedom guaranteed under international law entails breach by the State of obligations that it has undertaken under international law with respect to those rights or freedoms. A state breaches an international obligation when its conduct or conduct attributable it in the form of action or omission is not in conformity or is inconsistent with what is expected of it by the obligation in question.[12]

[12] Draft articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility) ILC, adopted 2001, Art. 12

It is therefore important to establish the alleged conduct of the State with sufficient certainty and identify the concomitant obligations which such conduct implicates.[13]

**125.** The facts as initially submitted by the Complainants are neither complex nor in dispute. "Baha'i", the victims' religion is not recognised as such by the Respondent State. Only Islam, Judaism, and Christianity are recognised as religions. The law governing civil status data requires everyone to indicate his or her religion on official documents such as birth certificates and national identification documents. Because Baha'i is not recognised as a religion, the 'relevant State agencies could not record it on official documents or for purposes of issuing such documents. Initially, they could not also leave the column for religion blank. As a result, to be issued with official documents, Baha'is *were* required to indicate one of the three recognised religions. Baha'is found this obnoxious and had/have difficulties obtaining official documents or conducting basic transactions which require data on one's religion to be recorded. As will be noted below, during the period this Communication has been pending before the Commission there have been some changes in domestic law which have to an extent impacted these facts and consequently the focus of the complaint.

**126.** Regarding obligations undertaken by the Respondent State under the Charter, Article 1 of the Charter is critical. It provides in the material parts that State Parties to the Charter "*shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them*." Article 1 of the Charter embodies the overarching obligations undertaken by State Parties to the Charter. The Commission has expounded that the general obligations under Article 1 of the Charter generate the obligations: to respect, protect, promote and fulfil the rights and freedoms.[14]

**127.** These obligations are affiliated to each right and freedom guaranteed under the Charter. It follows that violation of any right or freedom under the Charter entails a breach of any or several of these obligations, and in turn entails a breach of Article 1 of the Charter. In this regard, a breach of Article 1 is a material and inextricable part of any established violation of every right or freedom under the Charter.[15] It is accordingly unnecessary to consider violation of Article 1 of the Charter independent of the rights or freedoms, or indeed at all, where alleged violation of such rights or freedoms is also due to be considered. For this reason, the alleged violation of Article

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[13] Communication 155/96 – *Social Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (SERAC Case)* (2001) ACHPR para. 43

[14] *Id*, para. 44

[15] Communications 147/95-149/96 - *Sir Dawda K. Jawara v Gambia* (2000) ACHPR para. 46; Communication 279/03-296/05 - *Sudan Human Rights Organisation &Centre on Housing Rights and Evictions (COHRE) v Sudan* (2010) ACHPR, para 227; Communication 368/09 - *Abdel Hadi, Ali Radi & Others v Sudan* (2013) ACHPR para.91, 92

1 of the Charter will not be considered separately from the alleged violation of Article 2 and 8 of the Charter.[16]

**128.** Regarding the substantive rights and freedoms alleged to have been violated, the Commission notes that religion is pivotal. It seems natural therefore to consider the alleged violation of Article 8 of the Charter first.

*Alleged violation of Article 8 of the Charter*

**129.** Article 8 of the Charter guarantees the "freedom of conscience, *the profession* and *free practice* of religion". The operative guarantees are thus twofold: the ***freedom to profess*** a religion and the ***freedom to practice*** religion.[17]

**130.** Whereas the term 'profession of religion' may mean an open declaration or affirmation of one's religion, which is an outward act, in the context of Article 8 of the Charter it is to be interpreted as denoting the act of adopting, having, maintaining or holding a religion.[18] Thus the *freedom to profess* a religion entails the freedom to adopt, have, maintain, or hold a religion. In addition to these positive freedoms, the freedom to profession a religion implicitly includes the negative freedom not to profess any religion. It also includes the freedom to recant or denounce a religion one holds at any time.

**131.** These core aspects of freedom of religion are exercised in the innermost faculties of a human being - the *forum internum* which includes the conscience. Whereas Article 18 of the Charter provides for the possibility of restricting "*these freedoms*" on grounds of law and order, the Commission considers that the core freedoms within one's *forum*

[16] Curiously, whereas the initially the Complainants alleged the violation of Articles 2,3 and 8 of the Charter (see para 14 above), they make no reference to Article 3 of the Charter in their merits submissions, and only focus on Article 2 and 8. In considering Article 2 however, the Commission will have regard to Article 3 as the two concern the same values and rights.

[17] Comparatively, this twofold formulation of freedom of religion is the same under Article 9 of the European Convention on Human Rights (ECHR) which provides in the material parts that "Everyone has the right to *freedom of thought, conscience and religion*; [which] includes ***freedom to change his religion or belief*** and ***freedom***, … , ***to manifest his religion or belief***, …"; Article 12(1) of the American Convention on Human Rights (ACHR) which states that "Everyone has the right to *freedom of conscience and of religion*, [which] includes ***freedom to maintain or to change one's religion or beliefs***, and ***freedom to profess or disseminate one's religion or belief…"***;** Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) which provides that "Everyone shall have the right to *freedom of thought conscience and religion*, [which] shall include ***freedom to have or to adopt a religion or belief of his choice***, and ***freedom***, … , ***to manifest his religion or belief*** …"; Article 18 of the Universal Declaration on Human Rights (UDHR) which declares that "Everyone has the right to *freedom of thought, conscience and religion*; [which] includes ***freedom to change his religion or belief***, and ***freedom***, … , ***to manifest his religion or belief*** …" The Commission therefore draws inspiration from jurisprudence that expounds this dichotomous interpretation of freedom of religion under these comparable instruments.

[18] To hold otherwise would render the second limb of the freedom (free practice) redundant as it also appertains to the outward manifestation of religion.

*internum* to adopt or not adopt, have, hold or maintain or indeed recant or denounce a religion cannot, by their very absolute nature, be subject to restriction. Article 18 must be read to guarantee the core freedoms within the *forum internum* unconditionally. In this regard, any measure that invades the individual's *forum internum* and overrides the individual's volition to adopt or not adopt, to have/hold, to maintain or to recant or denounce a religion is absolutely prohibited. Coercion or duress in particular is such a measure. Thus, any coercion to adopt; to hold or maintain, or to recant; or to prevent someone from adopting a religion of their choice is unequivocally prohibited.[19] The primary duty of States parties to the Charter is to respect these core freedoms by desisting from adopting and applying any measures that would invade the individual's *forum internum* and override his or her volition.

**132.** On the other hand, the ***freedom to practice*** one's religion entails all outward manifestations or observance of religious faith or belief, privately or in community with others. An act of practice or manifestation of a religion is one that in the adherent's perception is required or prescribed by the precepts of the religion that form part of the belief freely held in the *forum internum.* In contrast with the aspect of freedom of religion reserved to the *forum internum*, the freedom to practice one's religion is exercised in the *forum externum.* Owing to the inevitable interaction with the rights of others and the general interests of community, the State may adopt and apply measures which restrict the free practice of religion with a view to maintain legitimate law and order. The limitation according to law and order permitted under Article 8 of the Charter must be read to apply only to the freedom to practice one's religion.

**133.** The Complainants initially advanced the case that the measures complained of implicate the external manifestation of religion.[20] In their initial submissions, the Complainants make only a fleeting reference to coercion to change religion.[21] However, even this ephemeral reference is not made to advance the case that the impugned measures engage the aspect of freedom of religion reserved to the *forum internum*. It is mentioned as part of the case that the conduct complained of constitutes a violation of the freedom of Baha'is to manifestation their religion. The upshot of a case based on freedom of religion within the *forum externum* is that such freedom is subject to law and order, which necessitates a limitations analysis.

**134.** However, in their rejoinder to the Respondent State's submissions, the Complainants shift the basi of the case and contend that the measures complained of engage the Baha'is' freedom of religion reserved to the *forum internum* which cannot

[19] The Commission is inspired in this interpretation by Article 18(2) of the ICCPR which singles out the "freedom to have or to adopt a religion or belief of his choice" and absolutely prohibits coercion that would impair these freedoms of religion reserved to the *forum internum*.
[20] See paras. 101 - 102 above
[21] See para. 102 above

be restricted pursuant to law and order and therefore is not subject to a limitations analysis.[22] They emphatically deny that the case concerns freedom to manifest religion. The argument is that the free practice of religion is limited to voluntary manifestation of religion as opposed to involuntary compliance with requirements of the State. They specifically implore the Commission to "deal with the violation in question as a violation of the unrestricted freedom of thought, conscience and religion, and not to delve into the analysis of whether the state's limitations are in accordance with law and order."

**135.** Notably, when the Respondent State presented its observations on the merits, it was clearly responding to the case that the conduct complained of implicates the freedom of religion reserved to the *forum externum*. Procedurally, the Complainant's rejoinder under Rule 108(2) of the Rules of Procedure should not raise new issues or refocus the case in such a way that the demands of fair hearing necessitate that the Respondent State should provide further observations on the new issues or new arguments. In turn, this would unnecessarily escalate the rounds of submissions from the parties and impact the efficient and speedy adjudication of complaints.

**136.** However, in the present case the Commission considers that the Respondent State provides enough material in its submissions on which the Commission can determine the matter despite the Complainants' shift. In this regard, the Commission will consider the specific state conduct complained of and determine whether it engages the freedom of religion reserved to the *forum internum* or that reserved to the *forum externum*. The Commission will not be constrained by the Complainants' submission that this case concerns only the freedom of religion within the *forum internum*.

**137.** Regarding the measures complained of, the Complainants' argument as re-formulated in the rejoinder is that the requirements to disclose religious identity and to falsely identify with one of the three recognised religions, under pain of not being issued with such crucial documents if one does not comply, entail that the victims and Baha'is generally were coerced to disclose religious affiliation and further, to falsely declare adherence to a religion they do not actually hold. They also submit that the refusal to accept birth certificates unless they bore "Muslim" as the religion of the bearer amounted to coercion to change religion.

**138.** Undoubtedly, a requirement to disclose one's religious affiliations or risk not being issued with critical documents such as an ID with all the adverse consequences in one's civil life amounts to coercion on the fair assumption that individuals do not

[22] See para. 117 above

just go about volunteering their religious identity.[23] Similarly, the requirement to falsely declare allegiance on official documents to a religion one does not adhere to affronts the individual's conscience. Moreover, bearing an ID or birth certificate which falsely identifies the holder as an adherent of a recognised religion meant that at each instance Bahá'ís were required to produce such IDs by state or private entities, they falsely self-identify as an adherent of the indicated religion. Compelling an individual to declare and perpetually bear a false identity also undoubtedly affronts the individual's conscience, the *forum internum*. To the extent, the compulsion to disclose one's religion coupled with the compulsory requirement to indicate and bear a false religious identity on IDs, birth certificates and similar official documents infringes the *forum internum*. In this regard, the Respondent State breached its duty to respect the individual's *forum internum* when it failed to desist from adopting and applying the legal measures complained of. In this respect, the internal aspect of freedom of religion under Article 8 of the Charter was violated.

**139.** However, the Commission does not consider the instruction to the school attended by the victims' children by itself, or coupled with the compulsion to disclose religion and to falsely identify with a recognised religion to amount to coercion *to change religion*. On the available material, it is clear that Bahá'ís had to indicate one of the recognised religions as a convenience arrangement to facilitate the computerised process for issuing IDs and other official documents to Bahá'ís. There is nothing more to suggest that the object of these measures was to necessarily compel Bahá'ís to denounce their religion within their *forum internum* and adopt Islam as their religion, which would violate the core absolute freedom of religion within the *forum internum*.

**140.** On the contrary as subsequent developments would show, the State amended the *Civil Registry Act No 143/1994* to permit Bahá'ís to obtained official documents without indicating any other religion as ordered by the domestic court. This suggests that the State's objective was really the non-appearance of "Bahá'í" on official documents as opposed to having Baha'is denounce their religion and adopt Islam. More importantly, the amendment to the law created an exemption from disclosing one's religion, and consequently from indicating and bearing a false identity. By that amendment, Bahá'ís do not have to declare any religion or bear a false identity. The Commission considers that where a compulsory scheme that engages the individual's *forum internum* permits genuine exemptions, the individual has the freedom to opt out of the scheme and exercise the exemption. The opt out practically takes away the compulsion and the scheme does not violate the individual's conscience or *forum internum*.

[23] It is an assumption because in some circumstances individuals may actually wish to have their religion recorded in public documents for various reasons. The case of *Sofianopoulos and other v Greece* (2002-X) ECtHR (Application Nos. 1977/02, 1988/02 and 1997/02) concerned individuals voluntary and unsolicited demand to have their religion recorded on their IDs.

**141.** The Commission is inspired in this regard by the views of the defunct European Human Rights Commission. In *Reformed Church of X. v. The Netherlands* (1962) E. Comm. HR (App. No. 1497/62) a pastor of the church objected to the compulsory pension scheme under the *Old Age Pensions Act* of The Netherlands because it was in conflict with the imperative prescriptions of the bible by which old people like him are supposed to be provided for by members of the church. He claimed that compulsory pension contributions contravened this biblical prescription which forms part of his religious faith. The Act provided for an exemption for conscientious objectors not to make direct contributions to the scheme.[24] The European Commission on Human Rights found that there had been no violation of freedom of religion in light of the exemption.[25]

**142.** Similarly in the present case, the exemption introduced by the amendment to the *Civil Registry Act No 143/1994* eliminated the coercion which constituted violation of freedom of conscience and religion. Thus, whereas the impugned measures were violative of Article 8 of the Charter, there is as from the time of the amendment no more violation of the freedom of conscience and religion reserved to the *forum internum* on the basis of compulsion to disclose religion or to bear false religious identity.

**143.** The foregoing analysis on freedom of religion within the *forum internum* has proceeded without paying any regard to the Respondent State's submissions concerning its reservation to the Charter and the imperative of public order. The Commission does not consider that those two points are applicable to the freedom of religion within the *forum internum*, particularly the core freedoms within that forum. Indeed the Respondent State confirms as much in its submissions when it states its domestic law including judicial pronouncements accentuating that the core freedoms of religion within the *forum internum* are absolute. The Commission accordingly considers that the reservation to Article 8 of the Charter and the imperatives of public order are only applicable with respect to the freedom to practice or manifest religion. Specifically, this relates to the issue of recording 'Bahá'í' in official documents.

**144.** The Respondent State's refuses to recognise and acknowledge the Bahá'í religion by recording it in its official documents. It is apparent that the refusal to record Bahá'í in official documents is part of a broader policy not to recognise Bahá'í as religion pursuant to the consensus of Islamic scholars which forms part of Islamic sharia. The Complainants' initially contended that the refusal to record Baha'i in

[24] Parliament made provisions for this exemption because it was aware of the position of the church on compulsory pension contributions.
[25] The case was later followed in the case of *X. v. The Netherlands* (1965) E. Comm. HR (App. No. 2065/63), *E.&G.R. v. Austria* (1984) E. Comm. HR (App. No. 9781/82) (right of election to leave church to avoid compulsory obligation to pay church tax)

official documents amounts to preventing Baha'is from manifesting their religion. In this sense, recording "Baha'i" on official documents is considered an act of manifesting the Baha'i faith. In their rejoinder, the Complainants resile from this argument on the argument that manifestation of religion cannot be at the behest of the State through its laws.

**145.** The Commission considers that the refusal to recognise the Bahá'í religion generally, and the refusal to recognise it by recording it in official documents implicates the freedom to practice religion in the *forum externum*. However, the basis for such a connection between recognition and manifestation cannot be what was advanced by the Complainants in their initial submissions. The Commission agrees with the Complainants that practice of religion cannot be at the behest of a requirement external to the individual's *forum internum* such as State law. Manifestation of religion appertains to acts or ommissions which in the perception and internal religious convictions of the adherent are required by the precepts of his or her faith as held in the *forum internum*. The outward manifestation proceeds from and is dictated by the belief or faith held internally.

**146.** Recording one's religion on official documents is not act dictated by religious convictions deeply held in the *forum internum*. It is an external requirement of State law. It is therefore not an act of manifestation of religion. Moreover, the European Court of Human Rights held in *Sofianopoulos and other v Greece*,[26] that an identity card or similar official documents cannot be regard as a means or medium for adherents of any religion to manifest their religion. It can hardly be said that in requiring individuals to record there religion on official documents, the Respondent State intends to provide a medium for the practice or manifestation of religion. Conversely, the refusal to record "Bahá'í" cannot amount to a denial to manifest one's religion.

**147.** An important distinction must be drawn between the relevance of State recognition or acknowledgement to the freedom to adopt or hold a given religion on the one hand, and the freedom to manifest or practice the religion. Even though the State may not recognise or acknowledge a given religion, individuals are still at liberty within their *forum internum* to embrace and hold such a religion. State recognition or acknowledgement of the religion is immaterial for these purposes. By contrast, State recognition or at least mere acknowledgement of the existence of a given religion is necessary for the State to *respect* and *protect* the free manifestation or practice of such religion by its adherents.

**148.** In turn, the refusal to recognise or acknowledge a religion implicates its free practice as the State may not *respect* acts of manifestation of the religion, or indeed

[26] *Sofianopoulos and other v Greece*, n 22 above

*protect* the free practice of the religion from third parties. The Respondent State's refusal to recognise "Baha'i" generally as a religion or in official documents specifically must be considered in light of its implications for the free practice or manifestation of the Bahái religion. The State's refusal to recognise or acknowledge a given religion and the possible consequent refusal to respect or protect its manifestation would constitute breaches of the duties to respect and protect and in turn, constitute violation of the freedom to practice one's religion. However, the State would be held internationally responsible only if it is has undertaken these obligations under international law. It is in this vein that the Respondent State invokes its reservation to Article 8 of the Charter and the imperative of public order. The reservation is invoked to exclude the obligation to recognise the Baha'i religion.

**149.** The Commission notes the Complainants' arguments in the rejoinder contesting the compatibility of the reservation in question and the imperative of public order. These matters merits detailed consideration. In matters of this nature, the Commission reckons the importance of appropriate characterisation of an instrument of ratification. As the International Law Commission notes in the Guidelines on Reservations to Treaties, it is only once a particular instrument of ratification has been characterised as a reservation that one can decide on the appropriate legal regime for assessing its validity, legal scope, and determine its effects.[27]

**150.** A reservation as understood under international law means "***a unilateral statement***, however phrased or named, made ***by a State***, when signing, ratifying, accepting, approving or acceding to a treaty, ***whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State***."[28] The intention of the State Party[29] authoring such an instrument of ratification is to exclude or modify, the legal effect of the provisions to which the reservation applies.

**151.** In the present case, the Respondent State's instrument of ratification of the Charter declares in the relevant parts that:-

> ***Having accepted*** all the provisions of the African Charter on Human and Peoples' Rights *with the approval of the People's Assembly* and ***with***

[27] International Law Commission (ILC), Guidelines on Reservations to Treaties, (ILC Guidelines on Reservations) (2011) p.329

[28] VCLT, Art. 2(1)(d), emphasis supplied

[29] Guideline 1.3.1 of the *ILC Guideline on Reservations* states that to determine "… whether a unilateral statement formulated by a State in respect of a treaty is a reservation, the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers." See similar emphasis on intention of the State by the International Court of Justice (ICJ) in *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* (1951) ICJ p. 9; GC No. 24, para. 3; *Belilos v. Switzerland* (1988) ECtHR, (Application no. 10328/83) para. 48

***<u>the reservation</u> that article 8 … be implemented in accordance with the Islamic Law;***

We hereby declare acceptance and ratification of the said Charter.[30]

**152.** Even though the content of the Islamic law is not provided, it is clear that the intension of the Respondent State in authoring the above instrument of ratification is to modify the legal effects of the guarantees of Article 8 of the Charter by taming its scope to dictates of Islamic law. In other words, whatever the scope and legal effects of the guarantee under Article 8 of the Charter, such guarantees shall be implemented within the confines of Islamic Law. This effectively modifies the scope of Article 8 of the Charter, or indeed excludes the legal effects of the guarantees under that provision. Taken together with the term "reservation" employed in the instrument of ratification itself, the Commission concludes that the instrument of ratification is indeed a reservation.

**153.** The Complainants submission is that the Respondent State should not be permitted to rely on the reservation because it defies the object and purpose of the Charter, it is general in that it does refer to a particular provision and indicate its scope in precise terms. They also contend that it produces discriminatory effects against religious minorities. Whereas Complainants opine that it is not necessary to determine the validity of the reservation, the Commission considers that the Complainant's submission amounts to challenging the validity of the reservation. Indeed it is not possible to deny the Respondent State the benefit of the reservation as suggested by the Complainants unless its validity and the extent to which it excludes or modifies the effect of Article 8 of the Charter are determined.

**154.** For that purpose, it pertinent to underscore that the Commission has the competence, in accordance with its mandate, to assess and pronounce its views on the validity of a reservation to the Charter. A valid reservation to a treaty forms part of the terms of the treaty with respect to the authoring State and other states parties which have not registered repudiatory objections to the reservation. The Commission's functional competence to interpret and consider the validity of a reservation is inherent in the Commission's very function of interpreting and applying the Charter to ensure the protection of the rights and freedoms.[31]

**155.** Further, the Commission notes that the Respondent State has not had the opportunity to make observations on the validity of its reservation to the Charter in

[30] Arab Republic of Egypt, Instrument of Ratification, appended to the Charter, available at <http://www.achpr.org/instruments/achpr/> (accessed 1 July, 2014), emphasis supplied
[31] Article 45(3) of the Charter mandates the Commission to interpret the Charter.

response to the Complainants' challenge which only comes in the rejoinder.[32] Regardless, the Commission considers the information available to be sufficient for purposes of determining the validity of the reservations.

**156.** Article 19 of the VCLT generally constitutes the regime for determining the validity and so, the permissibility of reservations to treaties. For the present purposes, and in the absence of a provision in the Charter relating to the formulation of reservations, it is Article 19(c) of the VCLT that is applicable. Article 19(c) of the VCLT is permissive in that a State may formulate a reservation unless the reservation is incompatible with the object and purpose of the treaty. The term "object and purpose" is not defined under the VCLT. No guidance is provided under the VCLT itself for determining the object and purpose of a treaty, or indeed the consequences of a determination that a reservation is incompatible with the object and purpose of the treaty.

**157.** In the present Communication, Complainants contend that the Respondent State's reservation is not permissible for two reasons. Firstly, the reservation is general, lacks details of the Sharia law and does not indicate its scope in precise terms.[33] Secondly, it is incompatible with the object and purpose of the Charter in that the Respondent State interprets it to permit discriminatory acts such as imposing Sharia on non-Muslims in personal status disputes and to refuse to issue IDs to persons of non-Abrahamic faiths.

**158.** The generality of a reservation does not *ipso jure* entail its incompatibility with the object and purpose of the Charter. Rather, the generality entails that the reservation is indeterminately broad in scope. This poses two problems. Firstly, the extent to which such reservation, if otherwise permissible, modifies or excludes the effect of a treaty or any of its provisions cannot be assessed and determined on the terms of the reservation. Secondly, the generality makes it difficult if not impossible to evaluate its compatibility with the object and purpose of the treaty, where the latter has been established.

**159.** The reservation under consideration is specifically directed at Article 8 of the Charter. In this respect, it is not general in its reference to the Charter. However, the details of the Islamic Law (a pervasive source of law) or indeed a summary thereof are

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[32] In their initial submissions the Complainants only referred to the reservation to Article 18 of the ICCPR and the views of the HRC on the same. They did not make any reference to the reservation to the Charter and advance arguments on its validity. It is only in the re-joinder that the Complainants turn on the validity of the reservation to Article 8 of the Charter in particular.

[33] Complainants cite the HRC's concern that Arab Republic of Egypt's reservation to the ICCPR is general and ambiguous, and the recommendation that the state should either clarify it or withdraw it altogether: HRC, *UN Human Rights Committee: Concluding Observations: Egypt*, 28 November 2002, CCPR/CO/76/EGY

not provided. The scope and meaning of the reservation cannot be determined in this regard. To this latter extent and this extent only, the reservation is, on its terms, general in its reference to the domestic law (Islamic law).

**160.** However, as noted above and unlike the position under the European Convention on Human Rights(ECHR),[34] this generality does not *ipso jure* mean that the reservation is incompatible with the object and purpose of the Charter, or indeed that it is impermissible.[35] The generality simply poses the difficulty of evaluating the compatibility of the reservation with the object and purpose of the Charter. As suggested by the ILC, this type of difficult necessitates a reservations dialogue. The Commission will treat the occasion of this communication as a reservations dialogue, and give due consideration to the submissions of the Respondent State concerning the content of the Islamic Law and the purpose or intention for formulating the reservation to Article 8 of the Charter.

**161.** It is stated that under Islamic law in Egypt, "Baha'i" cannot be recognised as a religion. The Islamic law in question is the consensus of Islamic scholars which is to the effect that Baha'i is not a "revealed or heavenly" religion as is believed to the case with Islam, Christianity and Judaism which are recognised by the State. The consensus of Islamic Scholars forms part of the Islamic law of the Respondent State. With these details, it becomes clear that the reservation was authored to exclude the obligation to recognise religions other than Islam, Christianity, and Judaism in any form for purposes of implementing Article 8 of the Charter. These details in turn make it possible to evaluate the compatibility of the reservation with the object and purpose of the Charter.

[34] Article 57 of the ECHR expressly stipulates the consequence of the generality of a reservation: reservations of a general character shall not be permitted. By contrast, this is not the case under the VCLT which applies as the default regime in the absence of a specific regime under the Charter.

[35] Guideline 3.1.5.2 of the International Law Commission's Guidelines on Reservations states the rule regarding general and vague reservations not in terms of the consequences of the generality or vagueness, but to underscore that reservations must be couched in terms that make it possible to evaluate their compatibility with the object and purpose of the treaty. In concluding its commentary of the rule as *lex ferenda*, the ILC states that "it would seem difficult, *a priori*, to maintain that they [vague and general reservations] are invalid *ipso jure*: the main criticism that can be levelled against them is that they make it impossible to assess whether or not they satisfy the conditions for permissibility. For that reason, they should lend themselves particularly well to a "reservations dialogue"." The reservations dialogue is the ILC's innovative proposal for dealing with general and vague reservations. The suggestion is that a vague or general reservations should be put to dialogue between the authoring State and other State Parties, or indeed the monitoring body, e.g. during the state reporting mechanism.

**162.** For this purpose, it is necessary to identify the object and purpose of the Charter, a complex task given that the Charter provides for multiple interdependent rights, freedoms and obligations to multiple objects and purposes.[36]

**163.** The International Law Commission offers apt guidance for determining the object and purpose of a treaty such as the Charter when it states that "… a fairly general approach is required: it is not a question of "dissecting" the treaty in minute detail and examining its provisions one by one, but of extracting the "essence", the overall "mission" of the treaty".[37] Using this approach, the Commission considers that the object and purpose of the Charter is the protection and promotion of human and peoples' rights.

**164.** Whether a given reservation is incompatible with this object and purpose of a treaty is easier claimed than substantiated. For one thing, it does not necessarily mean that every reservation that impairs the protection and promotion of a single or a few rights would be incompatible *per se*. The Commission is further inspired by the guidance of the ILC that "a reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty."[38] An essential element may be a norm, a right or an obligation which interpreted in context is essential to the general tenour of the treaty, and whose exclusion or modification would compromise the treaty's *raison d'être*.[39]

**165.** In the present case, the Respondent State's reservation affects not just a single right (freedom of religion, Article 8 of the Charter), but even so one aspect of that right: the freedom to manifest religions other than those recognised by the State. Further, the object of the treaty is clearly not the freedom of religion alone, and the general or overall purpose of the Charter as a whole is certainly not the protection of freedom of religion. However profound and fundamental freedom of religion may in itself be regarded, it certainly does not constitute or embody the general *raison d'être* of the Charter. It is unlike the general and cross-cutting guarantee under Article 2 of the Charter which concerns the enjoyment of all the rights and freedoms recognised and guaranteed under the Charter. Article 2 of the Charter embodies a typical norm that is essential and necessary to the general tenor of the Charter as it concerns the enjoyment of all the Charter rights. This is not the case with the freedom to practice religion (an

[36] It is unlike treaties which focus on one or few rights, freedoms, principle, or subject of fundamental importance. Examples include treaties on genocide, discrimination, and torture. The object and purpose of such treaties can easily be deciphered.
[37] ILC Guidelines on Reservations, n 21 above, Guideline 3.1.5 para. 2 of the commentary, p. 352
[38] Id, Guideline 3.1.5
[39] Id, para 14(i) of the commentary on Guideline 3.1.5

aspect of the freedom of religion) which is circumscribed by the Respondent State's reservation.

**166.** For these reasons, the Commission is disinclined to find the Respondent State's reservation to Article 8 of the Charter to be incompatible with the object and purpose of the Charter. The Commission will accordingly proceed on the basis that the reservation is compatible with the object and purpose of the Charter, and therefore is permissible on the terms stated above.

**167.** The upshot of the reservation is that the Respondent State has excluded the obligation generally concomitant to freedom of religion to recognise religions other than Islam, Judaism and Christianity for purpose of respecting and according protection for the free practice or manifestation of such other religions. It follows that the refusal to recognise "Baha'i" by indicating it in official documents does not and cannot expose the Respondent State to international responsibility for breach of an obligation under Article 8 of the Charter. With this result it is unnecessary to consider the imperative of public order.

***Alleged violation of Articles 2 and 3 of the Charter***

**168.** Concerning Article 2 of the Charter, which must invariably be read together with Article 3 on equality, it is important to note that in their initial submissions, the Complainants pinpointed three aspects of the Respondent State's conduct. They submitted that the victims were treated differently when the Respondent State's agencies (i) confiscated the victims' identity cards and their daughters' birth certificates; (ii) refused to allow the victims to indicate their religion on official documents; and (iii) instructed the school attended by the victims' daughters not to accept birth certificates bearing "Bahá'í".[40]

**169.** In their rejoinder, the Complainants introduce new elements as part of the basis of the complaint of discrimination. Firstly, they state that as at December 2013 when they submitted their rejoinder, the practice was that Bahá'ís have to provide official documents proving that their parents were listed as Bahá'í for them to be issued with official documents with the religions column left blank. Secondly, Bahá'ís cannot also document their marriages in official documents because the Respondent State does not recognise their religion. Thirdly, they cannot make powers of attorney before authorities because basic information including religious affiliation is not available since their IDs contain no information on religion.

[40] See above paragraph 99

**170.** The first and third new allegations are in sharp contrast to what the Respondent States narrates to be the practice following the amendments to the Civil Status Act. The Respondent State avers that administrative authorities have complied with the amendments (permitting issuance of documents with the religion column left blank) without further recourse to court proceedings. Consequent upon this factual contradiction between the parties, a factual issue arises for determination.

**171.** Factual issues are resolved by evidence. The burden to produce evidence in support of an alleged fact lies with the party asserting the fact, as a general principle. This principle is not absolute. As the International Court of Justice (ICJ) stated in *Guinea v Democratic Republic of the Congo* (2010) AHRLR 3 (ICJ 2010),

> the determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute…: it varies according to type of facts which it is necessary to establish for the purpose of the decision of the case."
>
> In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.[41]

**172.** It is necessary to establish, as a matter of fact, the first and third newly alleged facts proffered by the Complainants in their rejoinder for purposes of deciding on the claim of discrimination based on those facts. In that regard, the Complainants do not indicated that the actual victims in the present case were required to produce documents evidencing that their parents were listed as Bahá'í, or indeed that they were refused facilitation to make powers of attorney. The Complainants simply assert it as a prevailing occurrence. One would expect that for them to assert as much, they must have come across some Bahá'í adherents who had those experiences, who could have

[41] Guinea v Democratic Republic of the Congo (2010) AHRLR 3 (ICJ 2010), para. 54-55. See similar statement of the HRC in Communication 1085/2002 - *Louisa Bousroual (on behalf of Salah Saker) v Algeria* (2006) HRC para. 9.4

possibly attested to such experiences. Alternatively, one would expect that the Complainants came across some authentic report documenting such experiences by the Bahá'í. The very nature of the allegation they make about the administrative practices presupposes that one has some evidence that is indicative of a practice that is prevalent.

**173.** The Complainants have not offered any evidence symptomatic of the alleged practice. Neither do they assert that it was impossible to obtain such evidence and produce it to the Commission. Moreover, the Respondent State has had no opportunity to respond with facts and evidence regarding these two new allegations. In the circumstances, the Commission is unable to consider (for purpose of the claim of discrimination) the alleged practice of requiring applicants for documents to produce official documentation listing their parents as Bahá'í or indeed the alleged refusal to facilitate the making of powers of attorney.

**174.** On the other hand, by contrast, the issue of refusal to document Bahá'í marriages appears to be corroborated by the Respondent State. The Respondent State affirms that issues of personal status are governed by personal law. It recognised three personal laws based on the three recognised religions. It is clear that because the Respondent State does not recognise Bahá'í as a religion, it does not also recognise personal law based on the Bahá'í faith. Where personal law based on Christianity or Judaism is not applicable, Islamic Sharia applies as a default legal regime. Moreover, because it does not recognise Bahá'í as a religion, it cannot document or recognise marriages that are contracted based on the Bahá'í faith. There does not appear to be any neutral legal regime that governs personal matters such as contracting or dissolution of marriages. Having been so corroborated, the allegation of refusal to document marriages will be considered in respect of the claim of discrimination together with the allegations advanced by the Complainant in their initial submissions on the merits.

**175.** Further, among the initial basis for the complaint of discrimination is the fact that the Respondent State refuses to permit Bahá'ís to indicate their religion in official documents while it permits adherents of the recognised religions to do so. The Complainants contend that this is differential treatment and amounts to discrimination. This can be disposed of briefly. Article 2 of the Charter guarantees the enjoyment of the rights and freedoms under the Charter without discrimination. The indication of one's religion on official documents does not constitute exercise of any right or freedom under the Charter, including in particular the practice of religion. The official documents still serve their purposes when religion is not indicated on them. The insistence on official documents bearing "Bahá'í" appears to be for the political purpose of securing recognition by the State, an obligation the Respondent State has

excluded by its reservation. On these premises, the Commission will not also consider the refusal to indicate Bahá'í as part of the claim of discrimination.

**176.** Regarding the remaining grounds, it is clear that the Respondent State's agencies initially used to refuse to issue Bahá'ís with IDs and similar document because they adhere to a religion that it does not recognise and could not be accepted in the computerised system of recording civil status data. The confiscation of the victims' IDs and birth certificates was also because these documents either bore 'Bahá'í" as their religion or did not have any information on the religion column. The same applies to the instruction not to accept birth certificates which bore Bahá'í as the religion of the bearer. These measures were exacted on Bahá'ís because of their religion, which the Respondent State does not recognise.

**177.** It is apparent that one's religion is irrelevant for purposes of whether they should be issued with official identification documents. This is partly the reason the domestic courts and the ensuing amendment to the law were able to dispense with the requirement to indicate religion for one to be issued official documents. It follows that the refusal to issue, and the confiscation of the victims' official documents simply because they adhere to the Bahá'í faith together with the legal provision which required without exception that religion must be indicated were unreasonable. These measures were also disproportionate in the circumstances. The measures also pursued no legitimate aim other than perpetrating the political stance of the Respondent State not to recognise Bahá'í as a religion. It was possible, as later developments demonstrated, to issue official documents without having to record 'Bahá'í' in official records. In these respects, the refusal to issue and the confiscation of Bahá'ís' documents was discriminatory and in breach of the obligation to respect the Bahá'ís' right to access and possess official documents, and therefore a violation of Article 2 as read together with Article 3 of the Charter

**178.** However, the Commission considers that this issue was redressed at the domestic level by the court's decision followed by amendments to the relevant law which permits Bahá'ís to obtain official documents with the religion column left blank. Indeed it is no longer the case of the victims herein, or Bahá'ís in general that they can not obtain official identification document at all. The violation was accordingly remedied so far as concerned the law as applied by the initial computerised system of recording civil data.

**179.** Regarding the refusal to recognise and document the Bahá'ís' marriages, it is important to highlight that the Respondent State does not indicate whether there is a law neutral of religious source to govern relations such as marriages for persons under its jurisdiction who do not adhere to any religion or religions other than those recognised, and therefore who do not identity with the personal law based on the

recognised religions. On the contrary, the Respondent State affirms that it applies Islamic Sharia as a default legal regime. The Commission has had occasion to pronounce that "it is fundamentally unjust that religious laws should be applied against non-adherents of the religion."[42]

**180.** Despite the non-recognition of the Bahá'í faith, the personal law based on it, and marriages contracted based on such law, the Respondent State still has a duty to ensure to Bahá'ís the enjoyment of the right to equal protection of their marriages under a law that is neutral of any religion. Equal protection of the law entails, in respect of marriage, that if marriages of adherents of recognised religions are documented officially and afforded legal processes for redressing issues that arise with respect to those marriages; similar protection must be accorded to Bahá'ís and other persons who do not subscribe to any recognised personal law. The State must for this purpose adopt and maintain a neutral civil law that provides for the formal recognition and documentation of such marriages.

**181.** It follows that the refusal to provide such a legal regime, while affording it to adherents of the recognised religions is discriminatory. This differential treatment is unreasonable in that it is possible to provide for neutral recognition and documentation of marriages of those that do not subscribe to the recognised personal laws. In this respect, the failure to provide for a neutral legal regime for the recognition and documentation of Bahá'í marriages, coupled with the refusal to document such marriages amounts to unlawful discrimination. The Respondent State also violates Article 2 as read together with Article 3 of the Charter in this respect.

**182.** It is trite that where there is a violation there must be, not just a remedy, but an effective remedy. A remedy is considered effective if it is capable of redressing the wrong suffered.[43] Regarding the difficulties to obtain official identification documents, the court judgment and the ensuing amendment to the civil status law constitute partial remedy. Additionally, the complainants seek compensation. The State submits that the Complainants neither indicated this particular remedy during the admissibility stage of the Communication nor in fact sought it at domestic level. As such, it neither had the chance to address the propriety of such a claim during the admissibility stage, nor the initial opportunity at domestic level through its judicial processes.

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[42] Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* (1999) ACHPR para. 73

[43] Communication 275/03 - *Article 19 v Eritrea* (2007) ACHPR para. 46; Communication 146/96 – *Jawara v The Gambia* (2000) ACHPR; and Communication 307/05 – Chinhamo v Zimbabwe (2007) ACHPR.

The Commission considers that range and type of ultimate remedies depends on the nature of the violations established and the prejudice suffered by the Complainant. The Commission is not bound by the strict rules of pleadings that may be applicable at domestic level, such as that specific remedies must be pleaded. The Commission mandate to protect rights entils that the Commission can adopt any remedy it considers effective in the sense that it adequately redresses the prejudice suffered by the victim.

**183.** In the present case, where as the amendment to the law redressed the difficulties of obtaining official identification documents, it only did so as from the date of the amendment. The prejudice suffered by the victims as a result of difficulties prior to the amendment are not addressed by this subsequent change in law. In absence of any other remedy that can redress this prior prejudice, the Commission considers that monetary compensation is due. Such compensation is at large: it cannot be ascertained by a mathematical calculation. It is a matter of impression on the part of the Commission. In the circumstances of the present case, the Commission considers that a lump sum award of US$15,000.00 (United States Dollars Ten Thousand) for all the victims cited in the present case to be adequate compensation.

**184.** Regarding the refusal to document Bahá'í marriages which also constitute violation of Articles 2 and 3 of the Charter, the appropriate remedy should yield the official recognition and documentation of Bahá'í marriages using a legal regime that is neutral of religion since the Respondent State does not recognise Bahá'í as a religion and source of personal law. In this regard, the Respondent State should take necessary measures that yield this state of affairs. In particular, the Respondent State has to adopt a law which is neutral of religion for purposes of recognising and documenting marriages of persons under its jurisdiction such as the Baha'i in particular) who do not identify with the personal laws that are based on the three recognised religions.

**Decision of the Commission's on the merits**

**185.** In light of the foregoing, the African Commission on Human and Peoples' Rights:

(a) Finds that the Respondent State is in violation of Article 2 as read together with Article 3 both of the Charter;

(b) Finds that the Respondent State is in violation of Artile 8 of the Charter in respect of the freedom of religion reserved to the *forum internum*.

(c) Finds that there is no violation of Article 8 of the Charter in respect of the freedom of religion reserved to the *forum externum* in lieu of the reservation.

(d) Requests the Respondent State to adopt necessary measures for the neutral recognition of marriages of Bahá'ís and other persons under its jurisdiction who do not identify with the personal laws that are based on the three recognised religions;

(e) Requests the Respondent State to provide the victims with the lump sum of US$10,000.00 (Ten Thousand United States Dollars) as compensation for the prejudice they suffered up to the amendment to the domestic civil status law.

(f) Requests the Respondent State to report to the Commission within 180 days on the measures it intends to adopt for the above purpose;

**Done in Banjul, The Gambia, this 17th day of February, 2016 during the 19th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 16 – 25 February 2016.**